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Legal Philosophy in the Twentieth Century: The Civil Law World

edited by
Enrico Pattaro
and
Corrado Roversi

Tome 1
Language Areas

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Tome 1: Language Areas

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Niente è fatto finché tutto non è fatto.

Nothing is done until everything is done.

(Pietro Nenni, *Diari*, 25 July 1944)

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GENERAL EDITOR'S PREFACE

In 1995, a world congress for the philosophy of law was held in Bologna, and it turned out to be very successful. Attending the event were more than 700 participants, and among the speakers were Norberto Bobbio, Ronald Dworkin, Jürgen Habermas, and Amartya Sen. A good deal of meeting and greeting took place on that occasion—much of it fleeting, to be sure, but important to me nonetheless—and an interesting encounter was that with Hendrik Van Leusen, who approached me on behalf of the publishing house Kluwer and asked me what Kluwer could do so that I might turn over to it a journal I had founded in 1987 under the title *Ratio Juris: An International Journal of Jurisprudence and Philosophy of Law*. I replied that the bond sealed with the Oxonian publisher Basil Blackwell was as strong as ever: For no reason, therefore, was I going to break up it. So Mr. Van Leusen asked me whether by any chance there was any other project I might have been contemplating in the philosophy of law which Kluwer could be interested in. I answered that I would have given that proposition some thought, but in fact some thinking had already been going on in my mind, with an idea I had already put on the drawing board, though I hadn't proposed it to any publisher yet: It was a project for a multivolume treatise of legal philosophy containing both a theoretical part and a historical one, and it was this project that after the congress I submitted to Hendrik Van Leusen. It drew serious interest from Kluwer. A number of meetings ensued, among them with Alexander Schimmelpenninck. And thus began the *Treatise* adventure, in which I involved several scholars, especially Michael Lobban, Fred D. Miller Jr., Aleksander Peczenik, Gerald J. Postema, Patrick Riley, Hubert Rottleuthner, and Roger A. Shiner: We met quite a number of times (holding seminars as well as dedicated meetings), and these scholars would go on to become the authors and editors of several of the volumes that make up the *Treatise*. It was a rewarding intellectual experience that I fondly go back to now that the *Treatise* has come to completion, after a demanding ten-year endeavour that has led to twelve volumes.

In 2005, Corrado Roversi was the assistant editor of Volume 1 of the *Treatise*, which I authored. Now we are coeditors of the present Volume 12, which concludes the *Treatise*.

Corrado Roversi has since 2005 established a scholarly reputation in Italy and abroad for his fine work in legal ontology. As coeditor of Volume 12, he has coordinated not only the editorial team in Bologna but also the sixty-three authors who from every part of the world have taken part in its realization.

And the two tomes of Volume 12 would not have seen the light of day had it not been for the work he devoted to it.

So thank you Corrado, and welcome among us. I am quite happy to devote to you these very words that Norberto Bobbio so graciously wrote to me in 1966.

Enrico Pattaro

PREFACE BY THE EDITORS OF VOLUME 12

With this Volume 12 (published in two tomes), this *Treatise of Legal Philosophy and General Jurisprudence* reaches completion.

The first five volumes are devoted to theoretical problems: Volume 1, by Enrico Pattaro, thrashes out the crucial problem of the distinction between the law and the right, taking a few historical detours of considerable length along the way; Volume 2, by Hubert Rottleuthner, takes on the problem of the foundations of law; Volume 3, by Roger A. Shiner, addresses that of the sources of law; Volume 4, by Aleksander Peczenik, that of legal doctrine as a source of law and as mode of knowing the law; and Volume 5, by Giovanni Sartor, turns to legal reasoning within the context of a cognitive approach to law.

The next seven volumes are instead historical and have been framed in light of a broad distinction between the philosophy of law done by philosophers, on the one hand, and that done by jurists, on the other.[1] Volumes 6 and 10 are devoted to the philosophers' philosophy of law: Volume 6, edited by Fred D. Miller, Jr., and Carrie-Ann Biondi, discusses the philosophers' philosophy of law from the ancient Greeks to the Scholastics, and Volume 10, by Patrick Riley, covers the philosophers' philosophy of law from the 17th century to our days. Volume 7, edited by Andrea Padovani and Peter G. Stein, looks at the jurists' philosophy of law (as we have termed it) from Rome to the 17th century.

With the 17th century, and in particular with the advent of the modern school of natural law, the picture grows more complex. Next to the philosophers' philosophy of law (the kind found in Aristotle, Saint Augustine, Kant, and Hegel, for example) and the jurists' philosophy of law (like that of Ulpian, Accursius, Domat, and Gény), we set the *legal* philosophers' philosophy of law, or what might be called philosophy of law par excellence. In fact, prior to the modern era there was no distinct discipline that could be called legal philosophy. It was only in the modern age that thinkers began to view themselves as legal philosophers, and for a long time the consensus was that the philosophy of law par excellence was the rationalist school of natural law, which is traditionally made to begin with Grotius (1583–1645), and which was developed in the 17th century and firmed up in its Enlightenment form in the 18th century: It is this school that produced the first philosophy of law to have been considered the first classic instance of what we are here calling the legal philosophers' philosophy of law. The second classic example of a legal philosophers'

[1] The distinction between the philosophers' philosophy of law and the jurists' philosophy of law is by Norberto Bobbio.

philosophy of law in the history of legal thought was, ironically, German legal positivism, which proclaimed the end of the legal philosophers' philosophy of law as embodied in the rationalist natural law theory of the 17th and 18th centuries and replaced it with the *allgemeine Rechtslehre*, that is, with the general doctrine, or theory, of law.

Of course, the threefold distinction among the philosophers' philosophy of law, the jurists' philosophy of law, and the legal philosophers' philosophy of law only expresses broad groupings across all historical volumes and involves a good deal of simplification.[2]

Volume 8 of this *Treatise*, by Michael Lobban, surveys the philosophy of law in the common law world from 1600 to 1900, discussing not only the jurists' philosophy of law but also the legal philosophers' philosophy of law (as we have termed it). In Volume 9—edited by Damiano Canale, Paolo Grossi, and Hasso Hofmann, and devoted to legal philosophy in the civil law world from 1600 to 1900—the reader will find some chapters mostly concerned with the jurists' philosophy of law and others mostly concerned with the legal philosophers' philosophy of law. Volume 11, by Gerald Postema, and the present Volume 12 are both devoted to the philosophy of law in the 20th century, the former covering the common law world and the latter, in two tomes, the civil law world.

* * *

The reason for the imbalance between Volumes 11 and 12 of the *Treatise*, the latter being much longer that the former, is that, unlike the civil law world, the common law world *is* in effect a single world as concerns legal philosophy in the countries taken into account—a single broad context comprising a range of countries that all speak the same language, English, and share the same background culture, in such a way that even the debate in legal philosophy in this world can be considered internally borderless. The civil law world, by contrast, cannot be described as unitary. In fact, far from forming a cohesive mass across time and space, the civil law countries taken into account (those of continental Europe and Latin America) rather look like a patchwork of fragments that over the course of the 20th century cannot even be said to make up something like a single mosaic. Especially as concerns the civil law countries of continental Europe, the 20th century has been a "short" one, as Eric Hobsbawm has described it, considering that its shaping moments spanned from 1914 to 1991: An extremely complex and chaotic century, in that these countries have been a theatre of two world wars and home to terrible dictatorships which, over and above that, have sponsored their own philosophies, not to mention that the

[2] Further details on the organization of this *Treatise* can be found in Volume 6, pp. XVI–XVII, and Volume 9, pp. XV–XVII.

same countries have in the same period been welded together and dismembered, and then reassembled and broken up again.

The civil law countries we are treating in this volume are thirty-one, considering the map after the dissolution of the USSR: Argentina, Austria, Belgium, Brazil, Bulgaria, Chile, Colombia, Croatia, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Italy, Mexico, the Netherlands, Norway, Peru, Poland, Portugal, Romania, Russia, Serbia, Slovakia, Slovenia, Spain, Sweden, Uruguay, and Venezuela. What is more, these civil law countries do not all share a single language: The languages spoken in them are twenty. For these reasons, while it has been possible for Volume 11, on legal philosophy in the common law world, to be entrusted to a single author—someone who, needless to say, had to be possessed of great mastery and learning, and for this we turned to Gerald Postema—a treatment of legal philosophy in the civil law world proved to be an endeavour for which we instead had to rely on the expertise of a wide range of contributors, both to achieve completeness and to reflect the language and culture distinctive to each of the countries considered.

The contributors to this volume are sixty-three. It should be borne in mind, in this respect, that under the *Treatise* rules, all contributors had to be native speakers of the languages spoken in the countries they were writing about, or at least they had to be so proficient in those languages as to be able to master the works in their original language. And, after all, English, the lingua franca chosen for the *Treatise*, is not spoken in any of the civil law countries here considered.[3] Moreover, these countries are marked not only by linguistic differences but also by significant cultural ones, some of them contingent on whether or not the philosophy of law itself figures as an academic subject at university. For this reason we have thought it best to give all contributors the greatest freedom and responsibility in selecting the thinkers they would discuss, as well as their number, and also in framing an approach to the legal philosophy they would canvass and the amount they would cover in the countries assigned to them (a task that also meant providing the bibliography with English translations of each of the foreign titles cited in the text). Also, although in several cases we have worked closely with the authors on the English in which their manuscripts were written, so as to make the language as clear as possible, responsibility for the English translations ultimately rests with the authors themselves.

We initially considered the idea of presenting 20th-century legal philosophy in civil law countries in a crosswise fashion, as it were, that is, by orientation of thought. This idea turned out to be impracticable, however, because that would have required, for each current, either a single author capable of proficiently handling its complex development across many different civil law

[3] A different matter is, of course, Scotland. By the same token, it bears recalling that this *Treatise* does not include the Asian and African countries within its purview.

countries or a working group proper, a team of specialists who could work seamlessly together toward that same result. The first strategy turned out to be impossible, and the second one too, or at least it proved to be very difficult. For that reason we ultimately decided to organize the discussion by country, presenting for each of them the entire history of its legal philosophy, with all of the currents of thought that have had a role in it over the course of the 20th century. The outcome of this work, organized geographically, so to speak, is laid out in the first tome of the volume. In order to offset this choice, we also decided to bring out a second tome that in a monographic fashion, beyond the geographical boundaries and fragmentation of the civil law world, would present the three main currents of thought in legal philosophy, namely, natural law theory, legal positivism, and legal realism, along with a theme in legal philosophy that has turned out to be central in the 20th century (particularly in its second half), namely, legal reasoning, ranging from the application of hermeneutics and logic to law to the other significant developments in the theory of legal argumentation.

* * *

German thought in the second half of the 19th and the first half of the 20th century is the source of most of the philosophies developed in the civil law countries under consideration. In that crucible some ambitious speculative philosophical projects were forged, pursuing which thinkers of great prestige and erudition limned out their visions in bold concepts, engaging with one another in the common horizon of philosophy of the spirit, within which these thinkers each sought in their own way to arrive at definitive truths. We are mainly thinking here of neo-Kantianism, neo-Hegelianism, and phenomenology, in its different inflections. So, too, in the same German-speaking countries, in the first half of the 20th century, there also flourished logical empiricism or neoempiricism (pursued in Vienna and Berlin), psychoanalysis, and the logistic normativism pursued in Brno and Vienna. So-called Nazi philosophy has rightly been condemned in the court of history.

Owing to the outsize importance the philosophical developments in German-speaking countries have had in the civil law world, the first part in the first tome of Volume 12 has been given over precisely to German-language legal philosophy (ten chapters overall). We then followed a geographical criterion, looking as well to bring out some cultural contiguities, so the second part of the same tome treats the philosophy of law in the southern European countries and in France. The third part covers the countries of eastern Europe and the fourth those of northern Europe. Finally, we devoted the fifth part to the legal philosophy of the Latin American countries.

It was important for us in this project to cover as much ground as possible. For this reason we have chosen to cast a wide net, gathering all the information

we could from the various recesses of this scattered and fragmentary world, rather than following an already scripted "story" or path, precisely because no such unitary path exists. In this way we hope to have done the best service possible to scholars interested in the historical development of legal philosophy in the civil law countries of Europe and Latin America. Some difficult choices had to be made in deciding whom to include and whom to exclude, and in the end we came up with this criterion: We would only include thinkers who can be described as legal philosophers or legal theorists in a strict sense (at least as concerns a significant part of their work). For this reason, we have decided not to discuss cross-cutting figures, an example being Michel Foucault. In this respect, Volume 12 certainly hews to the same line as Volume 11 (this can be appreciated by looking at Gerald Postema's preface to that volume).

* * *

A great deal of effort has gone into the design and realization of the two tomes making up this Volume 12 of the *Treatise*, and there are many people we would like to thank for the precious help they have offered. They include Carla Faralli, director of CIRSFID (the Interdepartmental Centre for Research in the History, Sociology, and Philosophy of Law and in Computer Science and Law, based at the University of Bologna), who in that role has always encouraged and supported our work; Neil Olivier of Springer, for his help and patience in taking the project through its various stages, starting from the preliminary discussions we had in 2007 at the congress held that year in Cracow by the International Association for Legal and Social Philosophy (IVR); Gerald Postema, who as associate editor of the *Treatise* has contributed his outstanding scholarship; Sandra Tugnoli, without whose help Enrico Pattaro would not have been able to keep working from home; Antonino Rotolo, who as assistant editor of the *Treatise* has offered his experience in making several crucial editorial choices; Erica Calardo, Francesca Faenza, Migle Laukyte, and Nicoletta Bersier, who have served as assistant editors for this volume and without whom it simply would not have seen the light of day; and our English editor, Filippo Valente, for helping to make much of the text more readable (Chapter 10 of Tome 1 has been copyedited by Alexa Nieschlag). Finally, our gratitude goes to all the authors who agreed to contribute to this project, and who have continued to work closely with us over the years.

Enrico Pattaro
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Part One

The German-Speaking Countries

PREMISE

by Agostino Carrino and Hasso Hofmann

The year 1945 not only carries political symbolic significance in regard to the clash between Western democracies and some totalitarian states—for that was the year in which the Nazi regime fell in Germany—but also marks a watershed in the cultural history of 20th-century Europe, separating two clearly distinguished eras: The first of these was what might be called the era of ideologies, after which there came a progressive disenchantment with totalizing narratives, a process that—at the end of the short 20th century, as Eric Hobsbawm has called it—eventuated in the demise of ideologies, giving place to the so-called post-ideological age.

This distinction offers a useful interpretive tool, and it also explains why our reconstruction and exposition of German-language legal philosophy looks quite uneven between the first and the second part, the first covering the authors and theories from 1900 and 1945, the second the authors and theories after 1945.

Indeed, legal philosophy is a genuine expression of a nation's cultural mood, and as such it also reflects its socio-political reality. One can thus appreciate why legal thought in Germany and Austria from 1900 to 1945 should have wound up absorbing and making manifest its underlying reality, and with it the conflicting ideologies—as well as the competing *Weltanschauungen*, or worldviews, when they existed—that can be seen at work in the broadly "cultural" positions taken.

Until 1945, Europe, and in particular Germany, was a theatre of conflicts the nature of which was precisely ideological. These conflicts manifested themselves through a multiplicity of positions, schools, and thinkers, but it has proved impossible to cover them exhaustively in the first part of our exposition, despite the many pages devoted to them, because the scientific thought and legal philosophy produced in that period makes up a unique landscape in European history, owing to the sheer number of conceptions, attitudes, and nuances. A case in point is neo-Kantianism: Only superficially can this movement be divided into two camps—the Marburg and Baden schools (with Cohen, Natorp, and Cassirer, on the one hand, and Rickert, Windelband, and Lask, on the other)—since neo-Kantians in legal philosophy were a motley lot, and they often staked out opposite positions. But the same goes for neo-Hegelianism—whose "official" embodiment in Binder and Larenz was preceded by a variety of singular proto-neo-Hegelian trends (witness Kohler and Berolzheimer)—not to mention legal phenomenology, with its various flavours; the Vienna school of law, where Kelsen's critical positivism lives alongside Verdross's natural-law theory; the conflicting types of

Marxism; and, finally, the different forms of irrationalism, decisionism, and institutionalism.

That explains why the two parts of the exposition are so lopsided, the first (spanning from Chapter 1 to 9) being much longer than the second (developed in Chapter 10): They reflect the difference between the era of clashing worldviews and the subsequent era marked by historico-cultural transformations that can be described as somehow evolutive and not easy to pin down in any definite manner. Indeed, after 1945, the problem of legal philosophy was framed on the basis of different paradigms and perspectives: In the rebirth of natural-law theory, the problem was how to arrive at the ontological foundation of law; in language analysis, it was to "purify" law of its metaphysical nonsense; on the hermeneutical approach, it was to investigate law as a bearer of meaning; and, finally, there emerged the problem of investigating law as a tool for transforming society or as a phenomenon in a process of universalization. These are all currents of thought that after 1945 came in *succession*, rather than standing in direct contrast to one another, as had been happening until 1945, when they were engaged in an ideological struggle for political power. (One need only think here of the "struggle for Weimar" driving the various methodological controversies of the 1920s.)

The point, to be sure, is not to judge which of the two eras is preferable. But it will be noted that, for all the virtues of the post-ideological world—its having secured peace and greater wealth and tranquillity, for example—it has not managed to recreate the multiformity, richness, and polemical zest of legal philosophy from Stammler to Larenz. For this reason, too, the discussion devoted to legal philosophy in the second half of the 20th century is more linear, for it can reconstruct an evolution of attitudes and perspectives that form a sequence, and not just in a temporal sense, either.

It also bears mentioning, however, that while the greater theoretical linearity of post-war philosophy—from natural-law theory to the theory of topics, from the analysis of language to the theory of rights—has made it possible to offer a shorter reconstruction, the first part of the exposition, though quite longer, has significantly had to leave out some important authors, from Moór to Baumgarten and Marck. For this we ask for the reader's forgiveness.

Introduction

PHILOSOPHY OF LAW AND CONCEPTIONS OF THE WORLD

by Agostino Carrino

The fundamental question that was being asked among jurists at the dawn of the 20th century in Europe, especially in Germany, was the following: "Is philosophical speculation on law legitimate?" Or, stated otherwise: "Is the philosophy of law possible?" At the close of a century in which history lay at the centre of academic interest, the predominant form of legal positivism seemed to still be denying this possibility, the idea that it was possible to rationally discuss questions of knowledge, being, and values: "At the law schools," Luis Recaséns Siches observed, "a proper phobia set in against the study of the theory of knowledge or of metaphysics, against any endeavour that was not concerned with positive law, whether currently or historically in force. Nothing was recognized as scientific outside the consideration of social facts, of what came from present or past experience. Anything departing from that was qualified by jurists as sterile or as brazen charlatanism" (Recasens Siches 1928, 4; my translation).[1] This, however, was a form of legal positivism in decline, which not incidentally would soon thereafter be displaced by the so-called critical positivism of Hans Kelsen.

However, whatever the origin may be, the parameters of the problem that emerged in German legal consciousness were still those of the relation between the is (*Sein*) and the ought (*Sollen*), between fact and value, and so between reality and idea, accompanied by a whole series of oppositions that follow logically and develop on different levels. This is exemplified in the oppositions between nature and culture (Rickert), nature and spirit (Dilthey), *Kultur* and *Zivilisation* (Spengler), and society and community (Tönnies).

Nineteenth-century positivism "solved" this problem simply by effacing one of the two terms, essentially the *Sollen*, thus limiting every possible discourse to the empirical datum, to the reality of things, whether the discourse is one of naturalism or historicism. The philosophy of law was thereby denied as a legitimate undertaking, and was immediately identified with the deprecated natural law theory.[2] Neither Savigny's historical school nor Hegel's idealism,

[1] A typical representative of this conception of legal thought was Karl Bergbohm (1973).

[2] "Legal science is a positive science of law and therefore it has to begin with what is existent, not with the ought: this was the fundamental creed of this epoch. All the law is positive law, law which changes in history: therefore also all the legal concepts are relative and conditioned: this was its second dominating creed" (Wielikowski 1914, 11; my translation). See also Hohenhauer 1928–1929.

with their internal dialectic, were to be accorded a distinctively philosophical role; philosophy in general, and the philosophy of law in particular, were subordinated to the primacy of the empirical and positive sciences. In the decoupling of reason and history, what remained was only a history without reason, inasmuch as reason, the *Sollen*, became just a pale and impotent product of thought, devoid of any effect. The empirical, the phenomenon, fell within the exclusive purview of the theoretical. The birth of legal philosophy would take on the peculiar meaning of a leap beyond the idea that philosophy represents a world superseded by the West's civil and scientific evolution.

Until Emil Lask's *Rechtsphilosophie* (1905), German legal literature had in the main committed itself to either empiricism or historicism, both of which had become restrictive, even though they had taken different inflections, in the form of a general empirical theory (Bergbohm, Bierling, Merkel), in the form of legal psychology (Zitelmann, Wundt) and in the form of ethnological jurisprudence (Bachofen, Post, Leist), and also as shallow sociologism (Schäffle, Gumplowicz). As Luis Recaséns Siches observed, these trends "corresponded with the concerns that legal philosophy gave rise to in that epoch, seeking to replace that discipline with writings of a purely historical, empirical, and deductive cast" (Recaséns Siches 1928, 4; my translation). While this was a development within the academic arena, these forms of legal writing were explicit reflections of tendencies inherent in the spirit of the time, grappling with a now-radical crisis in values, a crisis affecting the traditional categories that had formed the European consciousness. Emblematic in this regard was Friedrich Nietzsche's particular form of aphoristic thought. Nietzsche was the decisive author in this phase of European culture, an author whose thought has not always been grasped in its depth and substantive structure, and who has indeed very often been misconstrued or misused. At any rate, the slow rebirth of legal philosophy, and indeed of philosophy tout court, in the second half of the 19th century, became, in many respects, an epoch-making event, to the extent that it was bound up with the solutions that culture in general would forge (or would try to forge) in response to this experience of crisis in Europe and the West. It is this experience which, in the adoption of distinct and opposing vocations, positions, and worldviews, led to an internal fragmentation of philosophy. In this way, even the positivist tendency did not vanish but reemerged in new forms in the work of the neo-Kantian jurists (I am thinking of Radbruch), and then in the so-called critical positivism of the *reine Rechtslehre* and in the sociology of law, itself essentially understood as a type of legal philosophy. Nor can we underplay the philosophical fragmentation that emerged from the question of method (*Methodenstreit*), a question that would give rise to a number of theories of the state politically oriented in different and often opposite directions. Hence, the criticism of the neo-Kantian legal-philosophical currents articulated by neo-Hegelianism, on the one hand, and by phenomenology, on the other, also became a clash of *Weltanschauungen*. The enduring effect of this

interconnection remains evident in contemporary German legal philosophy precisely on account of the link it managed to establish and maintain with political values, with the fundamentally political and moral choices and decisions that humans in modernity are called on to make. It is always possible to interpret a legal-philosophical current as the expression of a position taken in the actual world. Even those doctrines, like Kelsen's "pure" theory of law, that would like to establish an apolitical, value-neutral science, purporting, in this manner, to follow Max Weber's orientation, are nonetheless the expression of a particular political and moral choice made between conflicting worldviews.

In fact, Kelsen's "pure" system is to be set in contrast to the "impure" ones of his antagonists—from Erich Kaufmann to Smend and Schmitt, from Heller to Triepel, von Ferneck, and many others,[3] especially the sociologists of law: Kornfeld,[4] Ehrlich, and Kantorowicz—and yet it is through this very comparison that the pure theory of law and the state clearly reveals its ideological foundation, a neoliberal one at the time of his *Hauptprobleme*,[5] and a social-democratic one during the first Austrian republic (especially under the influence of Karl Renner, among others).

What emerges in the rebirth of legal philosophy—a rebirth sparked by *Rechtsphilosophie* (1905), this little gem by Emil Lask—is the realization that without a worldview there can be no legal or political thought, that our choice among conflicting values is part and parcel of modern historical time, a necessary consequence.

It is precisely the different worldviews that determine the parameters of the problem of choosing a method in legal science, a problem that can be reframed in terms of a basic dilemma: Is it the method that determines the object of scientific knowledge, or is it the object that conditions and determines the method of science? Or, stated otherwise: Can there be a single method in the sciences of the spirit (and so also in jurisprudence), or is it necessary to rely on a plurality of methods in order to grasp the object in its concrete reality? The problem of the method thus emerged as *the* central problem in the theoretical debate in Mittel-European culture in the decades straddling the 19th and 20th centuries: Can there be a science of the spirit endowed with

[3] On some of the critics of the pure theory of law, see Korb 2010.

[4] For a comparison of Kornfeld's sociology of law with Kelsen's first *opus magnum*, see the interesting considerations that Rudolf von Laun makes in his book review of that work by Kelsen (Laun 1911); see also Kornfeld 1912a.

[5] Writes Kelsen: "Since the results of my investigations coincide here with many results of the old liberal theory of the state, I could never gainsay anyone who should see in my work a symptom of that neoliberalism which in recent times seems to be everywhere on the rise" (my translation). The German original: "Da sich dabei meine Resultate mit manchen der älteren liberalen Staatstheorie berühren, so möchte ich mich auch keineswegs dagegen verwahren, wenn man etwa in meiner Arbeit ein Symptom jenes Neoliberalismus erblicken sollte, der sich in jüngster Zeit allenthalben vorzubereiten scheint" (Kelsen 1911, XI, n. 5).

the same "objective" power of knowledge as that afforded by the natural sciences? This is a question in response to which the reaction against the uncritical positivism of the 19th century offered substantially different answers: Hans Kelsen sought to elevate jurisprudence to the rank of an authentic science, championing the idea of a method proper to law, namely, the formal, normative, logicizing method. By contrast, those who subscribed to the neo-Kantianism of Windelband, Rickert, and Lask, as well as those who instead advocated a return to metaphysics in matters of law and politics (as in the example of Erich Kaufmann),[6] underscored the urgent need for a method originating in concrete life, in social and historical reality, rather than in the abstract exigencies of formal reason. This debate was rooted in express and discrepant worldviews, each of which ultimately entailed a moral choice, and for this reason, they remained irreconcilable. This is clearly apparent in the problem of the relation between the individual and society: For Kant—who was the point of departure for this philosophical rebirth—society is a derived entity arising out of an agreement made among individuals, and it is therefore without its own foundation. Society is always to be understood, logically, as dependent on individuals considered in their plurality. The social contract is the necessary limitation that individual reason imposes on itself collectively in order to prevent the pursuit of individual interest from entailing the possibility of individual annihilation. The logical *prius* in Kant always rests with the individual. However, in the late 19th and early 20th centuries, European intellectual culture, and in particular the German-speaking one, emphatically posed the problem of the legitimacy of an investigation into society as an autonomous object of reflection. (The question whether society was still to be conceived in an individualistic sense or as a "community" was another problem still.)

This irreconcilability among worldviews now gave rise to a question: Should we operate *within* the contrast or should we go *beyond* it? The problem at this point became strictly philosophical: Relativism or absolutism? Authors such as Hans Kelsen and Gustav Radbruch were avowedly relativist: Both of them were, after all, mindful of Max Weber's teaching. And no doubt relativism—especially to the extent that it operates as the theoretical form of political pluralism—cannot but serve as the point of departure for any reflection on the world and on life, and so on that part of life and experience which is law. It is my conviction, then, that relativism forms the necessary background to contemporary philosophy: as its point of departure, certainly, but *not as its point of arrival*. The modern consciousness is certainly that of one who doubts, but action presupposes a choice, and every choice presupposes a conviction: It thereby entails a decision, and that takes us outside the realm of doubt, and so of relativism, even though doubt and relativism cannot fail to come back immediately after each decision, if we are to maintain philosophy's critical outlook.

[6] See E. Kaufmann 1960 and Lepsius 1994, 334ff.

The debate that in the German-speaking world in the early decades of the 20th century involved thought in general, but especially legal-political thought, remains of contemporary relevance, for we are still engaged in this discussion, even though relativism seems to have been supplanted by a more marked nihilism, by what is called a philosophy of the "postmodern." This is precisely the point where the properly philosophical task of thought comes into play, in that thought is entrusted with rising above the deceptive contingency of the moment and bringing to light possibilities the ordinary eye cannot see; the clash among worldviews has not been exhausted but has only fallen into a slumber, for there is no historical time that can escape the moment of decision and the morally driven taking of positions, and this also holds for the sceptical and disenchanted time of the "postmodern."

Neo-Kantianism can be given credit for having brought philosophy back to the forefront of the debate on knowledge; by the same token, it has the merit of having raised, in one way or another, the problem of the concrete contents of social experience (and so also of the experience of the law), but it also has the demerit of having been unable, on the basis of its own methodological preconditions, of satisfying the quest to understand such contents, that is, to give them a foundation grounded in knowledge and rationality.

The problem of method would thus move to the centre of the philosophical debate. The process was, in truth, initiated by Lask (1905), but it continued with Adolf Reinach and Gerhardt Husserl, with Julius Binder's criticism of Stammler's "social idealism" (Binder 1915), and later with Erich Kaufmann's critique of neo-Kantian philosophy of law and with the return to a Hegelianism no longer conceived as the mere form of positivism (as it still was by Josef Kohler) but as a substantive legal-philosophical position that turns on its head the relation between logic and matter, form and content, *ought* and *is*, with outcomes which sometimes turned out to be philosophically reasonable (with the neo-Hegelianism advanced by Kaufmann, Binder, and Larenz) or which proved to be dialectically original (as in the concrete conception of the legal system developed by Carl Schmitt, with a significant appropriation of Hegel). These approaches were also accompanied by the rapid rise, especially in the late 1920s and early 1930s, of a legal irrationalism proper which discards the dialectic between the primacy of form versus that of matter, and which in its place ushers in the primacy of mere intuition, of a worldview as an instinctual choice, along with the primacy of will and, in politics, as we know, of free will understood as the exercise of discretionary power. In this sense, neo-Hegelianism positioned itself not only as an alternative to neo-Kantianism but also as a companion to it—at first a concealed one, then a manifest one, and finally a dialectic opposite—always breathing new life into the problem of matter and content vis-à-vis form and logic.

It was Julius Binder who, following Lask, emphasized the abiding lack of originality in the philosophy of law at the beginning of the 20th century, while also indicating that the methodological movement itself was bound to force

the philosophy of law to rethink itself beyond just heeding its methodological "impulse." "And in point of fact," as Binder remarked in 1926, "if Lask were to report today on the current state of legal philosophy, he would certainly find that from the turn of the century onward the discipline has gone through a positive change, for it has abandoned its original unsystematic condition and dogmatic rigidity and has managed not to be consumed by idealistic reminiscences, fully consciously rising to its methodological task and growing into a theory of the science of the state" (Binder 1926b; my translation).

For Binder and the other Hegelians, as well as for the phenomenologists, the great merit of neo-Kantianism is that of having disposed of the various nonphilosophical currents that had been dominant in Europe in the second half of the 19th century: positivism, empiricism, naturalism, historicism, and psychologism. Philosophy neither is nor can be the overarching unitary form of various specialist forms of knowledge: It can only be knowledge in itself, that is, a logico-transcendental critique of knowledge. And yet, as Binder also emphasized, while to "separate the objects of knowledge into form and matter, into intellect and sensibility, into a logico-conditioning element and a conditioned nonlogical one can be hailed as an achievement," it is just as true that this separation placed a dangerous limitation on the concept and tasks of philosophy. Philosophy became a doctrine of formal conditions, of the validity of the presuppositions underpinning the single sciences, and it thus renounced its claim to what it once had been, namely, a science of actual contents (ibid.). Not every system of law was changeful, perpetually in becoming. And so, already in the late 19th century, when natural law theory purported to find a material content of law and of legal norms that would forever be valid, Bierling responded by laying the basis for what he would describe as a theory of legal principles, a theory distinct from the philosophy of law understood as framed by the complex of problems "that reveal the place and the meaning that pertain to the law within the overall order of the world" (Bierling 1975, 13; my translation). The point of the theory of legal principles was not to derive legal content by working from reason, from human nature: Its task was exclusively to grasp in a logically unitary way the necessary conditions for any possible system of law, and to contrapose to the empirical legal sciences the conditions so obtained, understood as formal legal concepts (ibid., 1–16). So the effort, as early as the end of the 19th century, was to arrive at a concept of law that does not amount to a mere abstraction from legal facts but has a logical valence of its own: Much earlier than Kelsen, and indeed Stammler, the quest was on for a "pure" concept of law. To this end it proved necessary to abandon the domain of empirical inquiry, the historical given, and move into that of logical theory; we can see this, for example, in W. Schuppe (1883, 349) and then in Bergbohm,[7] who drew

[7] Writes Bergbohm (1973, 73): "Only one conceptual definition can be the right one, encompassing all the real laws of all times; in fact, the formal concept of law is only one" (my trans-

more directly on Bierling; indeed, Bierling marks "a turning point in the history of legal philosophy," a turning point on the path toward Stammler and then toward Hans Kelsen's "pure theory of law."

Hence, in conclusion, if we abstract from the more specific positions taken by the single authors who have contributed to the philosophy of law in the German-speaking world, this philosophy becomes clear evidence of a clash of concepts. This clash is to be understood as a clash among different conceptions of life and of the world, this with its necessary corollary, namely, that even scientific concepts are mutable: These concepts need to change in accordance with perspective from which the central cultural problems arising in each different epoch are thematized. In this regard, Rickert and Weber were more perceptive than others in holding that science advances by actively relinquishing its old paradigms,[8] and this encompasses the cultural sciences, including history, of course, but also the science of law. Both forms of science, as even Kelsen would indicate, concern themselves with values—but with values that can be either objective or subjective, with remarkably different consequences depending on whether objectivity is ascribed to individual values or to values proper to the collectivity, to the "social" dimension. Value was understood by Windelband as individual in nature (in conformity with the subjectivist revolution of Christianity); however, science was still underpinned by the need to seek objectivity. This was the source from which would emerge the various currents of German legal philosophy in the first half of the 20th century. From this source, some currents were led to accentuate individuality over objectivity; others, in contrast, were led to assert collectivity over subjectivity, in a rich and fruitful dialectical crucible involving schools, theories, and personalities that constitute the unique and unrepeatable character of this philosophy of law in the intellectual history of contemporary Europe.

lation). The German original: "Nur eine Begriffsbestimmung kann die richtige, alle wirklichen Rechte aller Zeiten und Völker umschließende sein, denn der formelle Rechtsbegriff ist selber nur einer."

[8] "Conceptual schemes in the cultural sciences have their moments of youth, maturity, and decline, their phases of dawn, day, and dusk" (Oakes 1988, 37).

Chapter 1

THE REBIRTH OF LEGAL PHILOSOPHY WITHIN THE FRAME OF NEO-KANTIANISM

by Agostino Carrino

1.1. Neo-Kantianism of the Baden School as a Philosophy of Values: Windelband, Rickert, and Lask

The neo-Kantianism of the Baden School, the so-called "philosophy of values," was largely influential in legal philosophy. This school did not confine itself to offering a logical explanation of the way thought proceeds, nor did it seek to posit moral rules derived from reason. As von Rintelen has observed, "its chief endeavor was to pervade the whole of cultural life, and it is [...] indebted to Kant's 'practical reason'" (Rintelen 1970, 21). The reality forming the object of thought (rather than just the reality *produced* by thought) does not result from any logicizing activity, for it can be observed to contain alogical, irrational elements, so that we have to do here, properly speaking, with a philosophy of culture.

The school's founder, Wilhelm Windelband (1848–1915), could not content himself with interpreting Kant: He wanted to go beyond Kant. Doing so meant applying the transcendental method not just to the world of nature but to that of culture. In this way, however, the Kantian method proved to be no longer adequate. The best-known work by Heinrich Rickert (1863–1936), a pupil of Windelband, is devoted to just this question, illustrating the "limits" (*Grenzen*) of the method of the natural sciences, whose concepts cannot explain, for example, the moral imperative of justice or the meaning and value of cultural creations in art, religion, and poetry, where what counts is the individuality of creation, not the generalization of a law of nature. The method of scientific positivism is only suited to the reality of nature, where the concepts we work with are general: It cannot work where the core element lies instead in the individuality of the real, and where this real, unlike the real of the natural world, carries some meaning. If we consider the real from the standpoint of what is general, it becomes nature, whereas if we consider it "with regard to the particular and the individual" (Rickert 1962, 133),[1] it becomes history. However, in Rickert (whose position, not incidentally, is in any event neo-Kantian) Dilthey's "sciences of the spirit" (*Geisteswissenschaften*) become "sciences of culture," for we are not looking at an ontological distinction, as in Dil-

[1] The German original: "Die Wirklichkeit wird Natur, wenn wir sie betrachten mit Rücksicht auf das Allgemeine, sie wird Geschichte, wenn wir sie betrachten mit Rücksicht auf das Besondere und Individuelle" (Rickert 1915, 55).

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they, but at a methodological one: The sciences of culture are sciences whose object is a "senseful" reality. The "spirit" of Dilthey's *Geisteswissenschaften* appeared too ambiguous to Rickert, bordering on the psychologistic approaches concealed in the term *spirit*.

Reality is only one and is something empirical: It becomes "culture" if brought into relation to value. This at once explains the criticism the neo-Kantianism of the Baden school would receive from Hans Kelsen, for whom law is not in the least empirical but is purely normative, a concept (the normative) that in Rickert's philosophy is, once again, always homologous with that of value, which cannot in itself form an object of scientific knowledge, except insofar as a value "attaches" to something empirical, including to the phenomenon we call law. Whereas naturalistic knowledge must be generalizing, and its concepts as general as possible, our knowledge of culture (of that real to which a value "attaches") must avail itself of "individualizing" concepts, because in the world of culture the more a concept is abstract, the farther it will be from reality. Obviously, the value relation must be clearly distinguished from evaluation: "However, individualizing representation can be called *scientific* only if it is governed by *general* or cultural values. Where these generally accepted values are not present, objects possess scientific significance solely as exemplifications of specific or generic types" (Rickert 1915, 130; my translation).[2]

It is toward the value of truth that practical activity must steer, but the relation between truth and practice would not find a uniform interpretation, especially as concerns Rickert and Emil Lask. Indeed, for Rickert truth has its source in logical thought, whereas in Lask value inheres in practice itself: This imparts a relativity to practice, a relativity that brings Lask into connection with Nietzsche, in contrast to neo-Kantianism, which on the whole belongs

> to that direction of German philosophy which, in reaction to Nietzsche, sharply rejects the relativization, transformation and variability of the values of life. The goal of these (neo-Kantian) philosophers is to establish philosophical truths and norms which possess the character of unconditionality and universal validity; for according to them, only when this is achieved philosophy can be called a science. (Rintelen 1970, 25)

In this sense, Rickert can be distinguished both from Lask and from Windelband, in that Lask's focus was on universal validity, whereas Windelband was better equipped to understand the meaning of the individuality of cultural phenomena, distinguishing the nomothetic method, proper to the natural sciences, from the ideographic method, proper to the cultural sciences as sciences concerned with individuality.

[2] The German original: "Wissenschaftlich aber kann die individualisierende Darstellung nur genannt werden, wenn es allgemeine Werte oder Kulturwerte sind, die sie leiten. Wo diese allgemeinen Werten fehlen, haben die Objekte nur als Gattungsexemplare eine wissenschaftliche Bedeutung."

Emil Lask (1875–1915)—"the keenest of the neo-Kantians" (Lukács 1967, 323; my translation)—was the first who, with his call for concreteness ("Drang nach Konkretion": Lukács 1918, 350) grasped the function that conceptions of the world and practical-personal decision play even in logic (Bloch 1968, 154), in such a way that his thought, even though it proceeds from Windelband's and Rickert's philosophy of values, can comfortably be situated among the currents of life philosophy that flourished at the turn of the century. Among the thinkers who stimulated Lask's philosophizing, S. Marck (1929, 39) mentions three: Dilthey, Bergson, and Simmel.

In philosophy, Lask anticipated Nicolai Hartmann's ontology (and not just that, if we consider his influence on Heidegger: see Demmerling 1992, 241ff.), for example, and on Lukács (Rosshoff 1975), and in legal philosophy Lask anticipated conceptions such as Georges Gurvitch's and Gustav Radbruch's (Carrino 1983, 108ff., 137ff.). This set Lask in contrast to the general positions advanced by Rickert, whose "Pathos der Pathoslosigkeit"—as Rickert himself called it, making it a distinctive trait of all great philosophers (Rickert 1921, 155)—could thus be interpreted by Hans Welzel, for example, as a expression of absolute value-neutrality, and hence as an expression of the late-liberal mode of thinking, geared toward a neutral-agnostic foundation of the idea of the state (Welzel 1935, 52–3). As Welzel wrote, "the idea of a method that determines the object, an idea that became a dogma in late-liberal science, especially of criminal law, is nothing but an emanation of the scientistic attitude that substitutes 'methodologically formed' concepts for the ontic element" (ibid., 50; my translation).[3] This conception, however, is distinctive to Cohen's neo-Kantianism and can hardly be ascribed *in toto* to Rickert's philosophy or to southwest German neo-Kantianism in general.

Lask's philosophy, marked by a basic Platonic and Neoplatonic bent, cannot be made to fall squarely within neo-Kantianism, whether it be the Baden or the Marburg variety. There is a basic doubleness with which his philosophy is imbued, for on the one hand he tends toward "things themselves," in accordance with an ontologically oriented mode of thought, while on the other hand he cannot do without the gnosiological positions of a mode of thought at once aprioristic and to some extent subjectivistic. For Rickert (at least until 1909–1910) the alogical element rests with givenness, as such undifferentiated, which only by logical form can be constituted in its particularity; for Lask, by contrast, the primary element in the relation between form and material (he

[3] Here, too, we must recall the judgment expressed in E. Kaufmann 1921, 244: "The theory of knowledge without a concept of the truth, psychology without the soul, the science of law without the idea of law, *Gesinnungsethik* without morality, the science of the spirit without any feeling for the concrete world of the moral feelings: These are the children of this time. [...] Neo-Kantianism thus unwittingly turned into the contrary of what it wanted to be: The immediate precursor of that *Spengler-Stimmung* that has no confidence in itself, of the most recent disease of the people's soul robbed of all metaphysics of the mind" (my translation).

calls this element "autarchic": Sommerhäuser 1965, 104ff.) is to be found in material. In this way, Lask restored the rightful claims of history over against those of reason, but this without ever neglecting the inescapable presence of categorial forms, that is, of reason, in the process of knowledge. Lask's logic retains the concept of value found in Rickert's neo-Kantianism, but only to the extent that value is thought contemporaneously with a practical behaviour of the acting subject, and so with a position taken, a choice made between conflicting values, a concrete decision.

Lask's conception of irrationality assumes a significant role in his thought. The irrational—that which is totally devoid of validity and meaning—is identified in the first place with the material element of our knowledge of being, with the sensible and intuitive, with the *prote ule* ("original matter"): "Nothing do we know about nature other than that therein lies what is devoid of meaning, what is isolated and dead" (Lask 1923–1924, 263; my translation). In the second place, from a theoretical point of view, the irrational is identified with the alogical or nontheoretical. Finally, the irrational is content without form, the "logically naked:" Logical nudity—an essential part of which lies precisely in the multiplicity of human beings—"points to a situation or, more precisely, to the lack of any situation in which something bears a relation to logical form" (Lask 1911, 74; my translation). Logical nudity thus constitutes the absence of any relation to logical form; this means that the formal logical moment is exclusively tasked with a "clarifying mission" with respect to the condition of logical nudity, because "the distance between form and content remains insurmountable" (ibid., 75; my translation).

1.2. The Neo-Kantianism of the Marburg School: Cohen, Natorp, Cassirer

The neo-Kantian current which originated with Hermann Cohen (1842–1918), and in which we also find Paul Natorp and Ernst Cassirer, is the one whose influence on legal philosophy was greater, both for the better—having influenced the best-known legal philosopher of the 20th century, Hans Kelsen—and for the worse, having sparked bitter criticism for its formalism and abstractness. Indeed, what for this philosophical current lies at the centre of reflection is the question of method. Philosophy essentially amounts to methodology, so much so that Natorp styled himself a "pan-methodist": "Philosophy," he said, "is method, nothing but method." It is method that determines the object of philosophy, and mathematical method, in particular, stands as the clearest symbol of scientificity as such.

The neo-Kantianism that developed out of Marburg squarely upends the usual way of looking at the world, just as it overturns the philosophy of experience propounded by someone like Dilthey. Indeed, what for this current comes first is not the world of concrete experience but that of thought. The Marburg circle represented in this sense the opposite of every form of realism:

It is reality that "must" adapt to thought, rather than ideas to reality. Marburg neo-Kantianism thus carries to an extreme the tendency proper to idealist philosophy, for which everything depends on (or "must" depend on) the logical characteristics of the method by which knowledge is attained.

Cohen is certainly the most significant exponent of the neo-Kantian movement, and there is no doubt that in the then-current antiphilosophical climate of triumphant positivism his philosophy constituted an attempt to redeem philosophical reflection as an autonomous activity which can be valued in its own right: As Dussort has observed, his work "advanced the cause of philosophy at a time when the very idea of philosophy seemed to have been all but disqualified" (Dussort 1963, 23; my translation). To be sure, some have sought to reduce Cohen's work to a "return to Kant,"[4] or even to a Kantian philological exegesis, pure and simple, and some still view it that way, but certainly his philosophical attempt goes well beyond that, all the more so if we consider Cassirer's 1922 remark that modern logic has remained, like that of Plato, "a logic of scientific knowledge, and in particular a logic of the mathematical science of nature. Hermann Cohen has the lasting merit of having been the first to surefootedly point out this line of development, and to have held it up to the brighter light of historical and systematic knowledge" (Cassirer 1983, 4; my translation). And very recently some have unhesitatingly laid out their heartfelt belief that in neo-Kantianism, and especially in Cohen's approach to it, "lies the most significant expression of western European thought," to the extent that its underlying idea, the idea of humanity, constitutes "the irrefutable and undeniable truth that finds its realization in epistemology, ethics, and aesthetics" (Kluback 1987, VII).

Unlike Kant, whose concept of knowledge rested on a synthesis between the intellect and sensibility, between categorial forms and content deriving from our experience of the physical world, Cohen took knowledge to be synonymous with the idea of primevalness, or of the origin in a formal-mathematical sense: "Thought is thinking of the origin" (Cohen 1977, 36; my translation).

The problem of the origin or wellspring—the *Ursprung*—draws us right into the core problem of Cohen's philosophy. If thought is the origin, then it must be the "foundation," the *only* possible foundation:

> Nothing at the origin can be given. The principle is the foundation in a strictly literal sense. The foundation must necessarily become the origin. If thought should discover being anywhere other than in the origin, this being can really have no foundation other than that which thought is capable of giving it. Only as the origin's thought does pure thought become real. (Ibid.; my translation)

Being is for Cohen the being of thought, and consequently thought, as the thought of being, is "the thought of knowledge" (ibid., 15; my translation).

[4] On the multiple "returns to Kant," see Dussort 1963, 29–59.

The purity which Cohen speaks of—and which, along with Husserl, exerted much influence on certain legal philosophers, and in particular on a jurist like Hans Kelsen—is none other than the absolute formalism of mathematics, that is, the formalism of an autonomous legality (Winter 1980, 191). And it is paradoxically this concept of *Reinheit* that makes Cohen's idealism a "true realism" (Lewkowitz 1974, 119; my translation),[5] which constitutes the logic of pure knowledge as the "system's foundation" (Cohen 1977, 601; my translation),[6] as "a transcendental methodology of the mathematical science of nature" (Winter 1980, 191; my translation).

The presupposition of philosophy is found by Cohen to lie in the *Faktum* of science, understood as the science of nature, a science whose organ is mathematics.

For Cohen, "things" themselves are a mere "prejudice" by comparison with the originalness of thought and its "mode of knowledge":

> Purity [...] seeks to clarify not things but our scientific knowledge. Only in this way can things themselves be ascertained. Things are only *apparently* given: It is only purity that brings them into the daylight; only in the early-morning light of the problem and the theme do things appear as given. (Cohen 1981, 93; my translation)

Cohen carried on Kant's work by searching for the value and gist of criticism and locating it in the idea of system. In fact, in the age of positivism, with the accompanying centrality and expansiveness of science, to take up the whole range of problems associated with Kant was, for Cohen, to turn to the problem of science, the problem of a unitary scientific method (Klein 1976, 25ff.). Science, method, unity, and system: These are some of the fundamental and inspiring concepts that inform the whole of Cohen's work, whose cornerstone lies in the principle under which "substance" is resolved into a functional "relation," into sheer dynamicity, continuous action.

1.3. Rudolf Stammler's Social Idealism

Rudolf Stammler (1856–1938) was certainly in his time, in the late 19th century and the early part of the 20th century, the most debated and controversial legal philosopher before Kelsen (Somló, 1917, 45, n. 2). He was the first to bring Kantian transcendentalism to bear on legal philosophy (not without feeling in certain respects the influence of historical materialism, even as this current's economistic monocausality needed to be superseded). His thought can be defined as social idealism, to the extent that he postulated the existence of

[5] On the religious meaning of the concept of *Reinheit* (purity) in Cohen, see Löwith 1987, 329.

[6] Writes Cohen: "The system's unity requires a central point in the foundation of logic. This methodological centre lies in the idea of hypothesis, an idea I have developed into judgment and logic of the origin" (ibid.; my translation).

natural rights having variable content. This social ideal is the idea of "a community of human beings who freely want" (Stammler 1926, 141; my translation), a community in which we each share the objectively right or legitimate (*berechtigten*) purposes of others; it is what regulates our being socially bound to one another and our cooperative action, and if we are subject to the law we must necessarily acquiesce in such regulation to the extent that we each decide free of any subjective basis of action. This social idealism of Stammler's is a form of natural law, and what makes it so—despite its being undoubtedly quite modernized when compared with classic natural law or with the Enlightenment's rational natural law—is that natural law always figures as that legal content which can orient the matter found perpetually in process of becoming in social life, in the "economy," aligning such matter with the community's ultimate purpose, and so with social life in agreement with the laws. But what does the "justness" of a positive legal norm depend on? Stammler believes it depends on our ability to critically assess and decide which positive legal norms, in any set of empirically given conditions, actually serve the ultimate purposes recognized to be generally valid for social life. *Contra* Bergbohm, on the hunt for natural law in every nook and cranny of legal science, Stammler refused to get caught up in the purely semantic debate on what law "actually" is and whether this name ought to be reserved for positive law: "This debate can reasonably only be about the question of whether next to the law positively in force there can also be an evaluation (*Erwägung*) concerning law as it ought to be and toward which positive law should orient itself as an admissible and possible avenue" (Stammler 1896, 172ff.; my translation). Accompanying empirical law on every cultural level is thus an ideal of how such law ought to be, and this ideal—always in flux— advances closer and closer before the legislator, pressing the claim that is needs to be realized. Stammler no longer conceives reason and history as set in eternal contraposition to each other, in a struggle to achieve exclusive dominance to the exclusion of everything else, but as two factors both worthy of being considered and defended. Reason becomes form; history becomes content; or, more to the point, reason becomes the form of norms, and history their factual content.

Natural law does not stand in opposition to positive law but rather enters into a relation of possibility with it; it is not a suprahistorical law but a claim arising out of society, a claim by virtue of which the legislator becomes one entrusted with answering the people's needs in every phase of their cultural evolution. The criterion of natural law may be relative and historically conditioned, to be sure, but it is a formal criterion nonetheless, insofar as justice is for Stammler the outcome of a logical operation that must harmoniously coordinate the various elements which make up the life of the law. As Stammler comments:

> We are not after a *perfect* legal content, nor, in any way, are we after an *ideal* law. Far be it from us to lay down a system of unconditionally just legal provisions sitting next to or on top of the law

that conditionally transforms itself. The *pure* theory of law we want to lay out is by and large exclusively concerned neither with the particularities of a legal content nor with legal norms or legal institutes filled with some content, but *with the universally valid type and mode of legal thought*. (Stammler 1911, 33; my translation)[7]

We can see why Kelsen should have made out Stammler to be a precursor of the pure theory of law, an expression that, after all, turns up in Stammler's 1911 *Theorie der Rechtswissenschaft* (Theory of legal science) before it prominently figures in Kelsen's work. Still, even in Stammler, the criterion's historicity paved the way for an opening to the need for a material discourse on law and justice. This form of natural law thus escapes *ab origine* the traditional criticisms levelled at natural law: It does so inasmuch as this criterion is relative, historical; or rather, it is the criterion of reason itself which dwells in history and in the becoming, and which accordingly does not make any pretence to absoluteness but rather dialectically confronts the legislator so that the norms of positive law may as far as possible answer and correspond to the historical needs of the "economy." Methodologically, Stammler's Kantianism clearly reveals itself to be in essence wholly individualistic as concerns its concept of a community, a concept that does not stand in contradiction to individual morality but rather, in some way, *issues* from it, to the extent that, as Wielikowski observed at the time, society is conceived by Stammler as "something derived or secondary, an emanation" (Wielikowski 1914, 72; my translation): The primary logical givenness rests with the individual, and only out of the relationships among individuals does something like a "society" arise. On close inspection, the humanity that Kant speaks of always comes down to the abstract value of the human person—a historically decisive value, to be sure, but abstract nonetheless, in the final analysis. Stammler drives to extremes Kant's possible "communitarianism" and his "idea of community," an idea whose dominant factor, as Lask observed, lies in

that same idea on which basis individualistic legal philosophy all through time has invoked the contract, understood as a meeting of the minds among morally autonomous individuals, elevating it to the status of the only principle by which to legitimize social institutions. Stammler emphatically points up the peculiar empirical makeup of what is social, but this peculiarity in no way corresponds to any peculiar makeup of value. (Lask 1905, 285; my translation)

Even if Stammler—contrary to the interpretation that Binder gave to his philosophy of law—pretended to a certain originality with respect to Kantian and

[7] The German original: "Wir suchen nicht nach einem *vollkommenen* Rechtsinhalte und fragen keineswegs nach einem *idealen* Recht. Es liegt uns ferne, ein System von Rechtsbestimmungen, die unbedingt richtig wären, neben oder über dem bedingt gewordenen Rechte aufzustellen. Es handelt sich bei der *reinen* Rechtslehre, die wir ausführen wollen, überhaupt nicht um die Besonderheiten eines Rechtsinhaltes, gar nicht um stofflich gefüllte Rechtsnormen oder Rechtsinstitute, sondern *um die allgemeingültige Art und Weise des juristischen Denkens*."

neo-Kantian currents, laying claim to a purported "Socratism" of his own, there is no denying that his philosophy of law is in many ways neo-Kantian, in certain respects not independent of Paul Natorp's philosophy, and that in any event it, too, along with the legal philosophy of such other jurists as Jellinek, anticipated the methodical "purism" that would soon thereafter be embraced by legal science. Such methodical purism, however, served a broader purpose in Stammler than it would in Kelsen: Whereas Kelsen would construe it as the "purity" of the method that pretends to know the "positive" law, Stammler with fewer contradictions stuck to a view of it as a logical procedure which in any event never departs from the experience of the law itself, and which is tasked with bringing to fruition the relation between natural law and positive law. This was not a prejudicial natural law but a constant aspiration:

> The law is an attempt beholden [*Zwangsversuch*] to what is right [*zum Richtigen*]. This quality is inherent in all the specific norms a legal system will posit: It is a quality inseparably bound up with such a system, despite the fact that it may on occasion be obscured and disavowed, and no matter how many gross mistakes may still linger as to what is right [*Richtige*]. (Stammler 1928a, 154; my translation)

As is widely known, Kant's Copernican revolution consisted in conceiving the object of knowledge not as something "given" to consciousness but as an *a priori* synthesis combining the senses, on the one hand, and forms, or categories, on the other. Now, it is clear how Stammler, as early as in *Wirtschaft und Recht* (The economy and law: Stammler 1896), rested his entire inquiry on the separation of form and matter, a separation which in later works evolved into the distinction between conditioning form and conditioned matter, and which is considered a legacy of Kantian criticism. Indeed, what it is to pose the problem of the formal conditions of any legal knowledge is essentially to translate into legal terms the problem that Kant posed with respect to our knowledge of the science of nature. Even Kelsen, in his 1920 foreword to his *Problem der Souveränität* (The problem of sovereignty), recognized the "great credit" that Stammler deserves for having fruitfully brought Kant's transcendental method to bear on the philosophy of law. Stammler sought to clarify the fundamental law by which social life is underpinned: This he did by outlining the determining categories of the legal world. Indeed, he set out to identify the pure concept of law which precedes *any* concrete experience of the law. This universally valid concept of law was identified by him with the concept of an autonomous, inviolable, binding will. Law is not a phenomenon external to consciousness; nor is it something substantial, a force, a power, a spiritual thing; nor is it a product or part of our will: It is rather will itself in its universal validity, independently of whatever contents are willed (Stammler 1911, 113).

In this way Stammler rooted out the old antiphilosophical conceptions of 19th-century positivism, but in point of fact this pure—i.e., formal or categorial—concept of law cannot really be pure, or only formal: It is rather a univer-

sal empirical concept. And so, even in Stammler, the question "What is law?" is answered by way of an induction. As Julius Binder observed in his criticism of Stammler,

> every act of willing resides in the sphere of the factual: Willing is an empirical fact, a psychological process. It can thus be narrowly or broadly conceptualized, but the concept assigned to it cannot be described as "pure," that is, free from empirical content, which is changeful. This will is thus defined proceeding from such content, but it cannot be thought of as an *a priori* form of any legal content whatsoever, for it, too, is content, and if the concept is accurately determined, it will define some legal content. In a word, if the legal norms of natural law are valid, they are so only as concerns the positive law. (Binder 1915, 34; my translation)

Indeed, what can be observed to happen when the transcendental method is applied to the sciences of the spirit is that we wind up introducing a misunderstanding with portentous consequences in many ways unfortunate: Kantian criticism is limited to the natural sciences, and its application to the social world carries with it the risk of a crass naturalism, a risk whose tentacles even catch hold of Stammler, despite the effort that in *Wirtschaft und Recht* he devoted to fighting naturalism in the social sciences. Legal science is a practical science, however loose this definition may be, and this makes it subject to a "law-likeness" that cannot be other than the law-like behaviour of nature. What matters in the phenomena of the social world is the sense of the givens that present themselves to the intellect, and this is especially true of law and politics, with respect to which there is no proper role for the categories the intellect relies on in gaining a knowledge of nature, for these categories (magnitude, causality, substance, and the like) are limited to the mathematical science of nature. For Stammler there is "form" on the one hand (that is, reason) and matter on the other (that is, history); and form does not change with the different contents, the former being *a priori* and the latter *a posteriori*. And yet it is clear that these contents—which for Stammler are wide-ranging and many, responding to the legal ideals espoused by different nations over time—cannot really be devoid of any influence on form. Still, it must be that we can work out in a different way the relation between formal categories and contents, for it is clear that immutable and suprahistorical forms can take any content subject only to the condition of their having no influence or relevance. But then it was Stammler himself who set out to bring history back into contact with reason. So, if on the one hand his work marks a watershed in the late 19th and early 20th century, introducing a revolution proper in legal philosophy (which in large part sought to fulfil the jurists' dream of elevating law to the status of the foremost social science, dominating all the others), on the other hand, no matter how praiseworthy his attempt may be, it must essentially be considered a failed enterprise: As Max Weber has shown in his criticism of Stammler (Weber 1977) this is due in the first place to Stammler's confusion between facts and values, between *is* and *ought*, a distinction that Stammler failed to main-

tain owing to the spirit that informs his legal methodology, a spirit that can somehow be described as all-embracing. Standing opposite to this analysis was the criticism that Hermann Cohen himself had devoted to Stammler and to the *Theorie des richtigen Rechts* (Theory of just law): In *Ethik des reinen Willens* (Ethics of the pure will) Cohen had faulted Stammler for having *separated* law and morals (Cohen 1904–1907, 214, 72) observing that moral willing and legal willing run on two separate, albeit parallel, tracks in Stammler, to the extent that morality deals with an *inner* willing and law with an *outer* one, with the consequence that morality falls outside the sphere of what is social.

For the reasons discussed, Stammler's philosophy of law is essentially a wavering philosophy, and it is not incidental in this regard that whereas Cohen's neo-Kantianism would be branded by National Socialism as Jewish, Stammler's philosophy of law would become an object of criticism, but never with a view to disqualifying it altogether. Karl Larenz, for example, would judge it "a precursor of a German legal philosophy" (Larenz 1938a, 269; my translation). Likewise, C. A. Emge, in the obituary he devoted to Stammler in 1938, noted that Stammler had taken part in a conference in the presence of Dr. Frank, minister of justice under Hitler (Emge 1938, 335). And E. B. von Oppen would comment that Stammler's *Lehre vom richtigen Rechts*, so unsparingly criticized by Cohen, could be interpreted as consistent with the worldview of National Socialism (Oppen 1935–1936, 271ff.).

1.4. Emil Lask's Philosophy of Law

Despite the recognized importance of Emil Lask's (1875–1915) *Rechtsphilosophie* (Philosophy of law), the text is essentially ambiguous. Indeed, it can be read as a reflection on the legal problems that had come to the fore with Windelband's *Wertphilosophie*, especially as concerns the problem of method; but it can equally be read against the backdrop of Edmund Husserl's *Logische Untersuchungen*, Ferdinand Tönnies's sociology, Simmel's relativism, and Hermann Cohen's social ethics; and certainly it can also be read through Lask's effort to elaborate a philosophical system of his own that would move beyond Kant, from which it follows that the text can also be read in light of Lask's later writings on philosophical logic (dating to 1911 and 1912) and his posthumous fragments edited 1923 by Eugen Herrige. *Rechtsphilosophie*, written for a *Festschrift* devoted to Kuno Fischer, the historian of philosophy, is the only text that Lask ever devoted to problems in legal philosophy, and yet it exerted a remarkable influence on the German jurists and theorists of the early 20th century, notably on Gustav Radbruch, but also more broadly on the exponents of the very antiformalist movement that followed the predominance of the neo-Kantian schools. It is significant in this regard that in his harsh *Kritik der neukantischen Rechtsphilosophie* (Critique of neo-Kantian legal philosophy) of 1921, Erich Kaufmann was firm in sparing Lask from

the charge of having jumped on the formalist bandwagon of legal neo-Kantianism. In *Rechtsphilosophie*, Lask proposes to analyze the method of legal philosophy and legal science, meaning that he sought to identify the place these disciplines occupy within the broader frame of the cultural sciences, understood on the model of Rickert's and Windelband's neo-Kantianism as sciences concerned with bringing cultural realities into relation with values in accordance with a method that would also distinguish Max Weber's interpretive sociology.

The critical theory of values, which makes up the basic framework of Lask's thought, conceives empirical reality as a single type of reality, thus making a clear departure from the natural law approach. Values are supraempirical with respect to this single reality: They do not inhere in it, nor can they be deduced from it, in the manner of the historicist method, but are derived from a purely intellectual operation on reality. And because the intellect can operate only through categories, it follows that the typical values, that is, the different "types of values," turn out to be a fundamental question for the philosophy of law.

As a theory of typical values, the philosophy of law makes possible two modes of operating on formal value: Either absolute values can be systematized without stepping outside the realm of values or, as happens in politics, we can take the concrete realizations of individual value into account by drawing a distinction between the value of the person (personalism, connected with the liberal worldview) and the value of the community (transpersonalism, connected with the socialist worldview), a distinction taken up and developed in particular by Gustav Radbruch.

Apart from legal philosophy in the strict sense, as a method for analyzing the *value* of law, legal science (a discipline somehow subordinate to legal philosophy) takes on the cast of a cultural science, the upshot of the theoretical relation between reality and meaning. (The object of legal science so conceived, as a cultural science, is the same as that of legal philosophy, except that in this case it does not bear an immediate relation to values.) In a broad sense, legal science can approach law from two standpoints, looking at it as either a "living social process," a real cultural factor, or as a complex of mere ideal meanings investigated through the lens of their dogmatic content. The first approach leads to a social *theory of law*, the second to legal science, which despite its specialist character likewise pursues the task of bringing the content of legal norms into relation with cultural meanings of value and purpose. "The law in a social sense exerts validity as a real cultural factor; the law in a juridical sense is valid as a complex of purely valid meanings" (Lask 1905, 302; my translation).

In this sense, Lask's position proved influential on teleologically and antiformalistically oriented criminal legal science (Baratta 1963) especially in the matter of value, of legal goods, of the aims of protection in criminal law, and of

the necessary relation between a norm's formal abstractness and the legal system's teleological concreteness. As the study of legal meanings, legal science is not only concerned with the systematic connections obtaining among the contents of legal norms—the object of a dogmatics of law—but is also engaged in working out on a theoretical plane the relations that hold between legal meanings and the law's prelegal substratum, between abstract forms and the concrete realities of culture and of everyday life within a community (with its specific constructions of value and form), between scientific and prescientific conceptualization (logic is not extraneous to the object, to the external world, but somehow resides *within* matter itself, within the object).[8] Reason lies not only in the world of the categories but also in the historical world, thus making each givenness the content of a form that in turn becomes the content of another categorial form. By comparison with extreme formalist views, Lask's *Rechtsphilosophie* can be said to have struck a middle ground and offered an opening to the new conceptions of legal philosophy that would emerge in the 20th century. To be sure, his philosophy of law did find itself attuned to a "normativist" line of thought whose clearest expression in this phase was Hermann Cohen's social philosophy, but in no way can it be ascribed to any radical formalist tendency, such as Kelsen's. Indeed, for Lask the teleological element cannot be expunged from legal science, and it is precisely this moment that reveals the impossibility of reducing the objectivity of law to an interlacing of pure logico-formal relations independent of history.

For Lask, inherent in law itself is a "conceptualizing spirit," a logical moment of high technical perfection. Laws, provisions, and rulings are for him mere "clues" to what the law is, which engages in the reality outside itself by devising concepts so complete that science can distinguish itself from it only "to the extent that it presents itself as the simple outgrowth of the formative process originating with the law" (Lask 1905, 316; my translation). Clearly, this logical element never comes in a pure form but always "interlocks with the practical element" (ibid.; my translation). Now, it is precisely this relation between the logical element and life, between law and life, that imposes some clearly defined limits on any extension of logical formalism, and these limits can be known only by maintaining a constant connection between methodology and epistemology, and so only if the concept of reality worked out within the theory of knowledge becomes the fixed point "exclusively starting from which the single strata of conceptualization—overlapping strata, one might say—can univocally be evaluated according to the different distances that separate them from their common basis in reality" (ibid.; my translation).

[8] "Unlike the empiricists, Lask held that logic is necessary for access to the external world, but unlike the rationalists he held that logic could serve as such a path only if it were itself located in the external world. Logic could never coincide with consciousness" (Motzkin 1989, 178; my translation).

Lask's legal philosophy, revolving around the idea of "objective value," presupposes a close connection between law and politcs. Lask does not abandon the value of Kantian personalism but considers it necessarily projected in the direction of social value. This idea evinces the presence of a clear legal-political Hegelianism in Lask's thought. It is no accident that the problem of concrete value appears to him to have been "the central problem of Hegel's system" (ibid., 287; my translation).

1.5. Ethics and the Science of Law in Hermann Cohen

In Cohen's logic, a significant role in "translating" theoretical thought into practical thought is played by the concept of totality, or *Allheit*. In fact, it appears to Cohen that, instead of *overcoming* moral relativism, the concept of *Gemeinschaft* actually *grounds* such relativism, insofar as, in his view, it is precisely "on the basis of this concept" that the community expresses a "relativity" (Cohen 1904–1907, 227; my translation). The community represents a mere majority, as against the *Genossenschaft* (Lewkowitz 1974, 123–25) to which instead the positive meaning of the *Allheit* does correspond. The idea that embedded in the community is something "absolute" (Cohen 1904–1907, 227) is for Cohen simply an illusion, perhaps influenced by religious tradition (Martinetti 1972, 164, 166, 175).

Cohen's "totality" can thus be distinguished from Tönnies's *Gemeinschaft* by virtue of its making no reference at all to any content or to anything "out there" in the natural world. "As an independent unit," Lask observed, Cohen's totality "detaches itself from its discrete real basis, which splits up into sensible individualities." Indeed, "in a thoroughly Hegelian manner," Cohen goes so far as to consider how all particularities ought to be subjected to the "state's coercive unity" (Lask 1923, 304; my translation). Hebraism's legalistic influence comes through in the deeply moral sense with which Cohen imbues the law: "It is in the laws," Lask comments, "that the moral actions of the state itself become complete, and the laws, in their sanctity and absolute universality, must be valid as irreplaceable concepts guiding the self-consciousness of pure willing. The law's formalism becomes in Cohen a symptom of its absolute adherence to values, of its purity, of its apriorism" (ibid., 304; my translation). Cohen's ethics can be construed as a fairly robust attempt to methodologically turn teleologically oriented legal science on its head by outlining a pure legal method, free from any psychological or sociological commixture. The principled separation between the is and the ought, between natural causality and ideal normativity (Cohen 1904–1907, 12ff., 27ff.) was intended to make possible a purely normative consideration of law, a scientific knowledge of norms independent of the overall process through which they are in effect issued, applied, and systematically connected (Wielikowski 1914, 124).

The law is a semi-closed system of formal meanings of values, a system admitting of no reference to any factual vital realities. Jurisprudence can in this sense be described as "the mathematics of the sciences of the spirit" (Cohen 1904–1907, 66; my translation)[9] the model on which to rest the objectivity of moral values. The central task of ethics is to discover the concept of man in its individuality. This concept, then, cannot be psychological or even anthropological, for these other concepts pertain to the individual and not to the universal. Nor can it be a sociological concept, for this is no more than the sum total of all individualities. Having ruled out sociology, psychology, and anthropology, Cohen turns to the science of law in the effort to capture this concept of man in its universality, and more specifically he turns to the construction that jurisprudence makes of the legal person by seizing on a purely formal concept of will.[10]

Indeed, the concept of a legal person means that this will of plural persons "does not become binding as a fragmented will," for "in this will, and in it alone, the pure unity of the will, and hence the legal concept of a person, attains its exact validity" (Cohen 1904–1907, 230; my translation). But it is not just through the concept of a legal person that Cohen builds his science founded on a "science" of law, on the *Faktum* of legal science. In this discipline he also finds a whole series of methodological approaches and insights that become fundamental to his construction of pure moral value. Therein he finds, in particular, the concept of juristic action (*Rechtshandlung*) and, specifically, the unity of juristic action. At several places (ibid., 63–78, 175), Cohen can be found to so understand the deep ("tiefgreifende") (Wielikowski 1914, 126) meaning the concept of juristic action has for an ethics of pure will. This concept of unity is what makes it so that ethics should contain "no objects or things; only action constitutes here the problem of content and of the object" (Cohen 1904–1907, 177, my translation; cf. Figal 1987, 173).

The idea of the state, understood as *Allheit*, constitutes the "apotheosis" of the unity of totality (Cohen 1904–1907, 212);[11] compared to every historically given and describable state, the state which lies in the rule of law stands as an idea "acting as 'a moral concept that guides self-consciousness'" (Figal 1987, 175; my translation). With Cohen, the law no longer appears as a system of concepts and of representations of given things or realities; the law becomes a

[9] "The science of law is analogous to mathematics. It can be defined as the mathematics of the spiritual (or human) sciences, and above all as the mathematics of ethics" (Cohen, 1904–1907, 66; my translation).

[10] On the concept of a legal person in Cohen, see Cohen 1904–1907, 212–40.

[11] As Cohen writes, "there can be no individual in an ethical sense without juridical communion" (Cohen 1904–1907, 214; my translation). "But the highest legal order is given by the state, which is none other than the complex of the norms that regulate relations among individuals in their totality (*Allheit*). The idea of the state is ascribed to a single entity that acts juridically as an ethical individual, that is, an entity whose lawmaking is driven by the guiding concept of a 'totalitarian' corporative political constitution" (Winter 1980, 327; my translation).

system of absolutely new entities, of new value-meanings that are neither realities nor abstractions. Ethics stands to legal science as logic does to mathematics and to the science of nature. Just as logic finds the presupposition of the natural sciences in pure knowledge, so ethics finds the presupposition of legal science in the concept of a pure will: "Ethics must find its completion in the philosophy of law" (Cohen 1904–1907, 227; my translation). "Ethics can be mastered only through legal science, in which it is rooted (ibid., 229) insofar as the material of legal science is the peculiar object of ethics" (ibid., 132; my translation). Action is to be construed as the carrying out of a will that only in legal science is considered to be neither a natural fact nor a psychological one (ibid., 105). Pure will does not depend on an object external to it: It is will in itself, constituting the *subject* behind pure will no less than it *constitutes* its object (ibid., 261). The concept of a moral subject is bodied forth in the concept of a legal person, and the concept of self-consciousness in the state takes shape as a "unity between the willing subject and the willed object" (ibid., 245; my translation). The pure will is concretized in its acts, and the state concretizes its self-consciousness in legislation: The state's will reveals itself in the laws, through which it is known. The state's self-consciousness is consequently concretized and developed in the laws, which stand as its actions. The pure willing of morals, a will that "has become objective by virtue of its being embodied in the state, is understood by Cohen to consist in the is of the ought" (Hohenhauer 1928, 315; my translation).

That, essentially, is the transcendental method which would also attract another Jewish liberal formed by Enlightenment ideals, namely, Kelsen, though the method distinguishes itself from the Kantian model by virtue of its calling into question Kant's dualism between sensibility and the intellect. For Cohen—and this would later become a key point in Kelsen's theory—universal, valid knowledge can be had only if the object of knowledge is determined by thought itself, by the transcendental method, or only if it arises out of thought in accordance with its own functions: "To find it legitimate or possible to give thought something which has not arisen out of thought itself is to fall into error, an error nurtured by the prejudice inherent in the word *given*" (Cohen 1977, 81; my translation). Cohen was attempting a systematic justification of the thesis that a continuity exists between the logical world and the moral one,[12] this for the purpose of treating ethics in a scientific fashion. But the attempt essentially came to nothing, for two reasons, the first being that there simply is no rigorously scientific treatment of ethics, and the second that, once we align ourselves with Kant in considering ethics a new kind of reality (the *is*

[12] Formally, Lübbe (1958, 338) observes, "Cohen grounds his practical philosophy in a precise analogy to his theoretical philosophy: Just as the latter proceeds from the *Faktum* of the exact natural sciences, so the former proceeds from the *Faktum* of the science of the spirit and of the state, so as to discover in this science the principles and basic categories of ethico-political life in society" (my translation).

of the ought), we will be hard put to it to explain how two specifically different realities (the logical world and the moral one) can be subjected to the same scientific method. Cohen attempted to extend the principles and method of theoretical reason to the sphere of moral freedom, but he neglected to consider that every cultural phenomenon—and so also the legal phenomenon—lies in an entirely peculiar tract of experience, for it belongs not with the experience of the physical world but with the world of freedom: "Our experience of the law is indubitably a form of practical experience, and it is therefore a mistake to apply to it the principles of theoretical reason, which are only valid for theoretical experience" (Opocher 1965, 88; my translation). The task of the pure will, therefore, can only be thought of as endless. In other words, Cohen's *Sollen* is a moral duty, not a legal one, and it cannot really be "positive." The justice that legally regulated action connects to finds its source not in a determinate political will but in religion, and specifically in Jewish religion and theology. The idea of justice as understood by Cohen "is theological and transcends the sphere of law even if conceived starting from this sphere" (Figal 1987, 182; my translation).

1.6. Ethics and Law in Paul Natorp (*by Federico Lijoi*)

Paul Natorp (1854–1924) can be grouped with Cohen and Cassirer among the main exponents of Marburg neo-Kantianism.[13] Natorp's objective was to reformulate the rigid contraposition between rational forms of thought and their becoming outwardly concrete in life, such that the rational and the irrational "do not coincide in any absolute way: They neither remain rigidly extraneous to each other nor resolve themselves into each other but both live only in eternal compenetration" (Natorp 1923, 182; my translation).[14] The unlimited and ongoing process innerving the constitution of objectivity is described by Natorp as a tension between a subjective pole (individuality, concreteness) and an objective one (legality, form), where the two endpoints operate as *correlates* and can be defined as "the inbound and outbound direction of the one process through which consciousness develops" (Natorp 1912, 70; my translation).[15]

This very "korrelativer Monismus" (correlative monism: ibid., 152) by which the method is underpinned represents the theoretical substrate on which Natorp rests his arguments in *Recht und Sittlichkeit* (Law and morality: Natorp 1913) an article he wrote in 1913 to settle the regrettable controversy that had arisen between Hermann Cohen and Rudolf Stammler.[16]

[13] On this point, see Holzhey 1986, 1–39, 308–36, and Cassirer 1925, 273–98.

[14] This is a point clearly made as well in Cassirer 1925, 290.

[15] On this point, see also Holzhey 1986, 334.

[16] On the personal consequences of the dispute, see Holzhey 1986, 36, 48, and C. Müller 1994, 12ff.

The occasion for the dispute came when Stammler, in his 1911 *Theorie der Rechtswissenschaft* (Theory of legal science), addressed the relation between law and morals with a view to setting out a *difference* between them (Stammler 1911). In reality, the academic squabble between the two philosophers had been smouldering for several years. Indeed, Cohen had praised the first edition of *Wirtschaft und Recht* (The economy and law: Stammler 1896)—where law was defined as the "Form des sozialen Lebens" (the form assumed by social life) and social life was explicitly recognized as enjoying a logical primacy over abstraction, embodied by the individual considered as an isolate (ibid., 125ff., 83ff.; my translation)—but then, when Stammler's *Lehre von dem richtigen Rechte* (The doctrine of just law: Stammler 1926) came out in 1902, Cohen gave the work a sound drubbing. The main reason for this falling out between the two scholars lay in Stammler's attempt to find in positive law not only the criterion of the law's logical coherence but also that of its justice (ibid., 50; Winter 1980, 21–4). In *Ethik des reinen Willens* (Ethics of the pure will: Cohen 1904–1907), Cohen would comment that "there is absolutely no legitimate basis for the idea [...] of aligning the law with justice without unequivocally seeking and laying the foundation for such justice in ethics" (Cohen 1904–1907, 214; my translation).[17] Indeed, because ethics proceeds from the scientific fact of legal science (ibid., 67, 299, 647) it cannot exist except as will concretized into law (into *action*), and so it is only in a context of intersubjective regulation that ethics can exist. The target of Cohen's objection was Kant's distinction between morals as the *internal* sphere of the moral law (*Gesinnungsethik*) and law as the *external* sphere of coercion, a critique clearly modelled after Hegel's idea of the morality of the state (Winter 1980, 26, 231; Holzhey 1986, 321–2). Only in the moral totality (*Allheit*) represented by the state's legal personality can the individual find full moral accomplishment. The distance between Cohen and Stammler was finally sealed in *Theorie der Rechtswissenschaft*, where Stammler sought to found a philosophy of law in the manner of a "reine Rechtslehre" (Stammler 1911, 3), that is, a philosophy no longer tied to any *Sozialphilosophie*, and Cohen took this to unequivocally signify a further separation between legal science and ethics (C. Müller 1994, 140–3, 152–4; Wielikowski 1914, 26ff.). Evidence of this lay, for example, in the fact that Stammler's theory of the *Rechtsidee* (the idea of law) was entirely derived from the concept of science as a coherent system unifying the multiplicity given in experience ("Idee der Harmonie") (Stammler 1911, 441) while there was nothing specifically ethical about it.

What Natorp sought to do in *Recht und Sittlichkeit*, then, was to mediate, or find some middle ground, between Cohen's monism and Stammler's dual-

[17] In Stammler 1911 and 1928b, 188 n. 6, Cohen's criticism would be described as a mere "*Mißverständnis*" (misunderstanding). On this point, see also the exchange between Natorp and Stammler, now in Holzhey 1986, 91, 107, 110.

ism (Natorp 1913, 21). Law and morals, in Natorp's view, do not constitute two distinct forms of legality but correspond to a "Zweiseitigkeit der Betrachtung" (to two sides of the same consideration: ibid., 12). The distinction between the autonomy of morals and the heteronomy of law, however, does not entail a reciprocal *indifference* between the two forms of obligation; this distinction, on the contrary, is seen as the condition on account of which their domains overlap (ibid., 15).[18] The crux of the controversy, in other words, lay in the fact that, for Natorp, neither Cohen nor Stammler had adequately understood the nature of the *formale Unterscheidung*, or formal distinction, between the method of legal science and that of ethics. The former method does away with the individual point of view by diluting it into the *Gesamtheit* (or totality) of consociation (ibid., 35, 54);[19] the second method, at fault for having yielded to the "point of view of mere classification" (ibid., 52; my translation), instead unjustifiably distinguishes the external sphere (law) from the internal one (morality) (ibid., 39). Indeed, for Natorp, "intention and action can be decoupled and set in contraposition only in the sense that legal evaluation in the first place judges *action*, and only in relation to action does it judge intention, whereas moral evaluation in the first place assays *intention*, and only in relation to intention does it judge action" (ibid., 53; my translation). There emerges, then, the image of the *Zentrum* and the *Peripherie* (the centre and the periphery), "the inbound and the outbound direction," expressing that "correlative monism" that informs Natorp's mediation (ibid., 21, 54–5, 68). Rigorously expressed in *Recht und Sittlichkeit*, then, is the need to understand that the legal method and the ethical are indispensable moments of a synthetic relationship, two complementary approaches to a unified legal philosophy.[20]

1.7. Ernst Cassirer and Natural Law

Ernst Cassirer (1874–1945) contributed in important ways to German legal philosophy with his influential 1910 book *Substanzbegriff und Funktionsbegriff* (Cassirer 1910; translated as *Substance and Function*: Cassirer 1923), after which time he proceeds along peculiar paths, on the one hand taking up the history of philosophy, and on the other attempting a philosophical reconstruc-

[18] This is a point clearly made by Cassirer: "They are not in any way reducible to each other; rather, precisely by virtue of that essential distinction they find themselves in a correlation so close that neither would be comprehensible without the other" (Cassirer 1925, 283; my translation).

[19] On the relation between the individual and the community, see also Natorp 1909, 124.

[20] Natorp's essay also discusses other aspects of the debate between Cohen and Stammler, among which the criticism that Natorp himself (Natorp 1913, 26–8, 30–1) directs at Cohen, accusing him of having logicized ethics, thus doing away with the historicity of law, along with the basic correlation between the categorial and the historical method (the former making a *constitutive* use of categories, the latter a *regulative* one). On this and other matters, see C. Müller 1994, 160–78.

tion of myth and of symbolic forms. His last work, posthumously published in the United States in 1945, would accordingly be devoted to the "myth of the state."

But Cassirer has also given us an important reflection on the meaning of natural law in the cultural history of the West, and it is on this reflection that I should like to focus here for its significance. The occasion for it was a conference held in 1932 at Hamburg's *Juristische Gesellschaft*, where Cassirer delivered a lecture under the title *Vom Wesen und Werden des Naturrechts* (On the being and becoming of natural law: Cassirer 1932–1934). Cassirer had just published his seminal book *Die Philosophie der Aufklärung* (The philosophy of the Enlightenment: Cassirer 1932), and in the lecture he proceeded from an idea he took from Leibniz, but which had been anticipated by Grotius and would then be taken up, after Cassirer, by neo-Kantian philosophers of law like Kelsen: The idea was that of a close relation between jurisprudence and logic, between law and mathematics. Wrote Leibniz:

> The science of law is part of those sciences that depend not on experience but on definitions, not on facts but on purely logical demonstrations; it thus belongs to those sciences that concern themselves not so much with matters of fact as with matters of validity. (Mollat 1893, 22; my translation)

But is that really how things stand? Is it really possible to conceive a law which does not live in the concreteness of human experience, and which accordingly will not countenance any "befouling" admixture, so to speak, with the contradictions of life? To what extent is justice possible as a dimension of existence? Cassirer also asks himself:

> What use can we make of the claimed self-evidence of certain initial legal propositions, what use is the deductive procedure and rigorous demonstration of the other, derived norms, if none of these purely formal determinations is ever certain to find empirical material to which to apply and in which to be realized? (Cassirer 1932–1934, 2; my translation).

Indeed, as a deep and insightful historian of modern philosophical thought, Cassirer subtly grasped the specificity of an analogy, that between mathematics and law, an analogy to be understood as a *pars pro toto*, in the sense that mathematics serves here a specific function, that of reason as a whole. "This sort of metaphor was recurrent in the 17th and 18th centuries, during which time mathematics was always regarded as the 'pride of human reason' and so as its prototype" (ibid., 6; my translation). In the manner of Hermann Cohen, Cassirer set up the problem of the origin as the authentic problem of natural law in the 17th and 18th centuries: "The intent was to bring to light the original source from which positive legal sentences come and from which they continuously receive new nourishment" (ibid., 7; my translation). Human reason is from this point of view productive, precisely because the origin of law lies in reason and cannot be found anywhere but in reason. There are universally

valid norms analogous to those of mathematics in the sense that reason lies at the origin of both the impulse toward knowledge and the impulse toward orderly life organized on the basis of justice.

To the extent that law finds its foundation in reason and in the exigencies of reason, Cassirer declares himself to be not so much a champion of natural law as a close observer of the fact that even in the world of the positive law, of the state's enacted laws, not only is there recourse to natural law, that is, to the unwritten laws, but such recourse is even intensified during the years he is writing. Cassirer points out in this regard some of the work done by Erich Kaufmann and Gerhard Anschütz: In the latter half of the 1920s, in what was then only the latest "revival" of natural law, they underscored, among other things, that the idea of natural law as an awareness of a higher system superior to the written laws was "something eternal and inevitable."[21]

Natural law, however, is not understood by Cassirer as an expression of abstract reason. Quite the contrary: For one thing, he underscores the anthropological peculiarity of humans as subjects of law, that is, as the only animals capable of making promises (the reference is to Nietzsche);[22] and, for another thing, as a historian of philosophy, he throws into relief how those who advocated natural law in the 17th and 18th centuries were never mere theoreticians of mathematical or legal formulas but were men engaged in the moral and political struggles of their time. As Cassirer writes, natural law theory "has in no phase of its development amounted only to extraneous speculation, far-removed from the world: It has never just been abstract theory" (Cassirer 1932–1934, 20; my translation). So, for example, for Grotius "there is no break between theory and practice, between life and doctrine. He wants to teach that which he has lived and live that which he has taught" (ibid., 19; my translation).

For Cassirer, natural law does not express an otherworldly claim, but on the contrary springs from the needs of humans as beings historically determined on the basis of what reason demands. The mathematicization of law—an endeavour that Kelsen, for example, was devoting himself to precisely in that stretch of time—is none other than a way to assert the claims of rationality: It certainly cannot be understood as a translation of abstract formulas into

[21] That is from Kaufmann's speech at a conference the German constitutionalists held in Münster in 1926 on Article 109 of the Weimar Constitution: "We generally fail to appreciate," Kaufmann writes, "how little our legal decisions, even in codified areas of the law, are based on written legal norms expressly formulated by the legislator. The bulk of these decisions, quite often those that determine the final outcome, are ones we draw not from written legal norms but directly from principles of justice that in each area of the law are determined by current ideas of legitimacy espoused by the community in which we live [...]. The state does not make law; it enacts statutes: The state and the statutes are both subordinate to the law" (quoted in Cassirer 1932–1934, 24; my translation). On Erich Kaufmann's philosophy of law, see Section 5.1 in this tome.

[22] Writes Cassirer: "In the ability to rise to the pure idea of law and of legal obligation, as well as in the ability to honour a previous commitment, therefore lies the true origin and the foundation of any specifically human community" (Cassirer 1932–1934, 18; my translation).

concrete forms.[23] Specifically, natural law seeks to counteract the irrationality of arbitrary will, be it that of God or that of the Leviathan state. As Aristotle had taught, it is not possible, in matters of morals and law, to reach the certainty of mathematics and geometric axioms.

The reference made to the natural law theorists of the 17th and 18th centuries is not, of course, just a side note. The point, rather, was to highlight the distinctly political meaning of philosophical stances, and that precisely at a time when democracy appeared to be under threat. In contrast to legal formalism, reaffirmed by authors like Kelsen, natural law thus proved valuable as an ally in a political struggle, for it gave access to a world, the world of supralegal legitimacy, that can open our eyes to the values and norms of justice present in the empirical world. Cassirer's essay on natural law in this sense bears a connection to other articles he wrote in defence of republican democracy (Cassirer 1929). Even though Cassirer was not a legal philosopher by profession, his philosophy, with its shift away from gnosiology and its increasing concern with issues relating to culture and symbolic forms, can be ascribed to that strand of neo-Kantianism which offered itself as a philosophy of culture and whose highest exponent was Gustav Radbruch.

This, in certain respects, appears to be borne out in the posthumously published work of 1945, where Cassirer casts his lot with logico-rational thought, but does so recognizing the constant presence of myth in the affairs of the political world: "It is beyond the power of philosophy to destroy the political myths." Cassirer comments in his conclusions: "A myth is in a sense invulnerable. It is something that surpasses the capabilities of philosophy. In a certain sense, myth is invulnerable. It is impervious to rational arguments; it cannot be refuted by syllogisms. But philosophy can do us another important service. It can make us understand the adversary" (Cassirer 1946, 296).

1.8. Law and Worldviews: Gustav Radbruch's Three-Dimensional Conception of Law

Gustav Radbruch (1878–1949), drawing on Lask's *Rechtsphilosophie*, conceives legal philosophy as an endeavour devoted to "the consideration of the value of law." "Legal philosophy is concerned not with the law in force but with the law that ought to be in force, not with positive law but with just law, not with the law but with the value, meaning, and purpose of law, that is, with justice" (Radbruch 1993, 22; my translation).[24] A value judgment, however,

[23] "Indeed, mathematics and law, regardless of any distinction between them and of the distance between their thematic areas, are manifestations of a single fundamental force testifying to the autonomy and spontaneity of the spirit" (Cassirer 1932–1934, 14; my translation).

[24] The German original: "Und die Rechtsphilosophie insbesondere handelt nicht von dem Rechte, das gilt, sondern von demjenigen, welches gelten sollte, nicht vom positiven, sondern

cannot be a judgment concerned with knowledge in the classic sense: A value judgment is in the first place a personal declaration of faith, which makes Radbruch's legal philosophy declaredly sceptical and relativistic. Radbruch rejects natural law as that conception that purports to "find in human reason legal norms ready for use, which norms, owing to their universally human source, would then have to claim to be everywhere valid in the same way at all times" (ibid., 23; my translation). Radbruch also rejects legal positivism as "indifferent to values" (ibid., 31; my translation), but in its place he offers up a conception of law still based on positive law, or rather, on legalistic law, on the distinction between is and ought, embracing a conception whose attitude to values remains essentially relativistic. He rejects the positions espoused by the free law movement centred around the judge's discretion (a freedom of decision constrained within limits), arguing that the judge is instead "bound by a professional obligation to bring to bear the law's will to be valid; judges ought therefore to sacrifice their legal sentiment to the law's coercive system; they should only ask what is the applicable law, never whether such law is also just" (Radbruch 1987, 315; my translation).[25]

Radbruch's relativism seeks to have legal philosophy contribute to determining the contents of just law as historically determined in a given political community:

> The method expounded here is called relativism because it takes up the task of determining the justness of all value judgments only in relation to a determinate supreme value judgment, only within the framework of a determinate conception of value and of the world, but the method is not concerned with determining the justice of this supreme value judgment itself, of this conception of the world and of values. Such relativism, however, belongs to theoretical reason, not to practical reason. It means that we renounce any attempt at a scientific foundation on which to rest the taking of definitive positions—not that we renounce the taking of positions as such. (Ibid., 235; my translation)[26]

Legal philosophy is thus a tool designed to train politically engaged subjects to advance proposals having valid content. Legal philosophy does not directly choose among competing worldviews but lays the groundwork for each per-

vom richtigen Rechte, nicht vom Recht, sondern vom Wert, vom Sinn, vom Zweck des Rechts—von der Gerechtigkeit."

[25] The German original: "Für den Richter ist es Berufspflicht, den Geltungswillen des Gesetzes zur Geltung zu bringen, das eigene Rechtsgefühl dem autoritativen Rechtsbefehl zu opfern, nur zu fragen was Rechtens ist, und niemals, ob es auch gerecht sei."

[26] The German original: "Die hier dargelegte Methode nennt sich Relativismus, weil sie die Richtigkeit jedes Werturteils nur in Beziehung zu einem bestimmten obersten Werturteil, nur im Rahmen einer bestimmten Wert- und Weltanschauung, nicht aber die Richtigkeit dieses Werturteils, dieser Wert- und Weltanschauung selbst festzustellen sich zur Aufgabe macht. Der Relativismus gehört aber der theoretischen, nicht der praktischen Vernunft an. Er bedeutet Verzicht auf die wissenschaftliche Begründung letzter Stellungnahmen, nicht Verzicht auf die Stellungnahme selbst." See also Radbruch 1990.

son's choice. For this reason, as much as legal philosophy may be relativist, it is built upon concepts that constitute true knowledge and not just a declaration of faith. Radbruch recognizes that, while values are many, their meaning can be known, but when it comes to choosing between conflicting values and worldviews, the decision comes down to a personal choice: It is subjective.

What is law for Radbruch? To begin with, he rejects the inductive method for arriving at a definition of law. To identify the law by working from individual legal phenomena (such as theft, homicide, and usucaption), Radbruch writes, is to already possess the concept of law, which therefore proves to be an *a priori* concept rather than a derived one. The *a priori* is not a temporal relationship but a logical one. Certainly, the *a priori* concept of law can be identified only starting from experience, but it cannot be founded and justified on that basis.

> If we ascribe the *a priori* to the concept of law, we must thereby set up a transcendental logical or gnosiological relation between the concept of law and the individual legal phenomena. Indeed, the law does not become such by virtue of the possibility for the single legal phenomena to make their way into it [*ihm einordnen*]; on the contrary, the single legal phenomena are such because encompassed by the concept of law. (Radbruch 1993, 49; my translation)[27]

Law does not belong to the realm of nature, or to that of values, or to that of religion. It rather falls within the realm of culture:

> The concept of law, for its part, does not indicate any structure of value, because just law and unjust law both fall within that concept. [...] Law is whatever has been set up with a legal purpose, but there is no need for it to actually achieve that purpose. [...] Law is the successful attempt, but also the failed attempt, to be just (*richtiges*) law: Law is the formation of being that serves as a substrate or theatre for legal value, for the idea of law. [...] The concept of law is rigorously separated from the concept of just law, and yet only through this latter concept can the concept of law be achieved. (Ibid., 54; my translation)

The object of legal science is for Radbruch an imperative will and not, as in Kelsen, a normative duty: Legal science is for him a cultural science, not a normative one, a science in which values stand in contraposition to one another, with the consequence that the value judgment with which (positive) law can be criticized will always be a relative judgment. And so we can well understand how, from the *Grundzüge* (Radbruch 1993) onward, Radbruch should equate legal philosophy with a political doctrine of parties, and how he himself should have come to be a prominent figure in the political life of the Weimar Republic, taking a stand in favour of social democracy.

[27] The German original: "[...] wenn wir dem Rechtsbegriff Apriorität zusprechen es soll damit vielmehr ein transzendentallogisches, erkenntnistheoretisches Verhältnis des Rechtsbegriffs zu den einzelnen Rechtserscheinungen gekennzeichnet werden, daß der Rechtsbegriff eben nicht ein gewöhnlicher Allgemeinbegriff ist. Denn das Recht ist nicht deshalb Recht, weil die einzelnen Rechtserscheinungen sich ihm einordnen lassen, vielmehr sind umgekehrt die Rechtserscheinungen nur deshalb 'Rechts'erscheinungen, weil der Begriff des Rechts sie umfaßt."

We can also understand why authors influenced by Kelsen, and Kelsen himself, should have criticized Radbruch's legal philosophy as a theory akin to the politics of law rather than being an outright philosophy of law. The problem lies in the question of value: Must value—even when considered as the method of the "value relation"—have no traffic with the law and with its scientific study, or should it be drawn into the fold of the law? For Radbruch value lies within law. Legal philosophy is for Radbruch a science of experience, a science concerned with the question of value in law.

Halfway between the realm of the *Sollen* and that of the *Sein*, which must be kept distinct, lies the "third" realm of culture, a reality connected with values, and so a cultural fact onto which the value of justice is projected. But for Radbruch law is not just the stage on which the drama of justice is played out; the law, on his political conception of law, is also a tool serving a range of purposes sorted into three classes: they may be individual or collective, or they may be devoted to the completion of work. Decision determines the individual's position in the arena of legal philosophy as well as in that of politics, such that we can envision three conceptions each of which combines a conception of law, one of politics, and one of life. We thus get individualism (centred around individual freedom), supraindividualism (recognizing the primacy of the nation or the centrality of power), and transpersonalism (built on the idea of culture), the last of which being the one that Radbruch puts forward as his own. Marking out the individualist conception (classic liberalism) is the contract; the supraindividual one, organicism; and the cultural one, the edifice, in the sense that the members of society are engaged in a common effort to build their own culture.

Radbruch's legal philosophy owes a big debt to his political conception. Indeed, the primacy he ascribes to the "social" element, where transpersonalist culture thrives, shapes the conception he develops to account for the state's legal form. Radbruch's socialism is a liberal socialism, on which the formal guarantees of the rule of law (of the *Rechtsstaat*) are valid both for the bourgeoise and the working class: "Only legal formalism can protect the oppressed class from the arbitrary acts of a legislative and a judicial function controlled by its class antagonist" (Radbruch 1929, 480; my translation).[28] As has been commented (Poscher 2000, 195), this is another reason why Radbruch does not concern himself with judging "eternal" law, deemed unknowable, but only judges the law in force.

It is form that endows the certainty of law with substance. Indeed, form is not just an element in the liberal and bourgeois vision of the law but is the third element in Radbruch's conception of law as the manifestation of the *Sollen*, along with the element of justice as equality and that of purpose. In this

[28] This is a position close to that of the "Austro-Marxist" Karl Renner: cf. Section 7.2.1 in this tome.

way, law takes on a social dimension, one that also depends on the transformations which take place in the socioeconomic structure. Radbruch thus supersedes Marxist socialism, specifically by restoring the form impressed by the state, conceived not as an enemy of the working class but, on the contrary, as a tool of liberation, as Lassalle had previously claimed in the 19th century *contra* Marx.

Indeed, what best characterizes Radbruch's thought is the following remark: "All the great political transformations have been preceded or accompanied by the philosophy of law. At the outset there was the philosophy of law; at the end, revolution" (Radbruch 1987, 233; my translation).[29] It is indeed difficult to understand (or even criticize) Radbruch's legal philosophy without bearing clearly in mind the link he sets up between the problem of legal philosophy at large and the political conception of the world, a conception to which he in fact ascribes a primacy. As has been observed, Radbruch's legal philosophical doctrine of political parties is "not an analysis of the role that political parties play in democracy; rather, the parties are for him in the first place the sociologically understandable materialization of his legal philosophical system of the conceptions of justice" (Poscher 2000, 195, n. 147; my translation). Radbruch thinks in legal philosophical terms, conjuring up a legal philosophy relativized to the political parties, to a "qualitative" conception on which the ideas for which the parties act as a conduit emerge in the political dialectic even by means of the interests behind those ideas. As much as this may appear paradoxical to those who understand philosophy as an enterprise solely concerned with the quest for the truth, what we are looking at is, on the contrary, a way of "doing philosophy" fully cognizant of the limits that any human undertaking comes up against, including in the quest for truth. In politics, however, if pluralistic democracy is valuable, equally worthy, indeed necessary, is the quest for political unity and the attainment of a unified political will with which the state must act in grappling with the big issues of great consequence. Where this approach comes up short (an approach that separates Radbruch from the theories of democracy developed by authors like Kelsen and Richard Thoma) is in the fact that Radbruch's relativistic "legal philosophical" account of the state remains such throughout the course of his theoretical investigations, from beginning to end. His legal philosophy always translates into the idea of the "rule of political parties," one that ultimately imperils democracy itself and its founding value of the ongoing quest for truth.

[29] The German original: "Alle großen politischen Wandlungen waren von der Rechtsphilosophie vorbereitet oder begleitet. Am Anfang stand die Rechtsphilosophie, am Ende die Revolution."

1.9. Sovereignty and Legal Consciousness in Leonard Nelson's Legal Philosophy

Leonard Nelson (1882–1927)—perhaps popularly known for having been among the first authors to use the term *nihilism* in law, in his criticism of Julius Binder (Nelson 1917, 179ff.)—made interesting contributions to the philosophy of law, but only by derivation from his philosophical thought, with its focus on logic, mathematics, and ethics (and some echoes in pedagogy). Not incidentally, Kelsen thought that Nelson's greatest achievement, specifically in his book on international law titled *Die Rechtswissenschaft ohne Recht* (Legal science without law: Nelson 1917), consisted in "holding legal science up to the mirror of philosophy, that is, the mirror of pure knowledge" (Kelsen 1920a, 189; my translation).

Leonard Nelson's legal philosophy can be described as a neo-Kantianism moderately bent toward natural law. Nelson understands there to be meta-legal criteria of justice that not only influence lawmaking but must also be taken into account by the judge and jurist in interpreting the rules of positive law. These criteria are neither absolute nor objective, for they depend on our "intuition" of what is just and what is unjust—and as much as this intuition may be subjective, it cannot but guide both our action and our evaluation of others. It is in particular the individual's level of education and cultural background that, in Nelson's view, determines the degree of "justness" ascribable to the criteria by which we evaluate the existent: "The justness of a legal decision," Nelson writes, "depends on the judger's education [*Bildung*]" (Nelson 1913, 19; my translation).

For Nelson, law is "natural" in the sense of its being necessary. Humans do not live in a state of nature, but always in a civil or juridical state corresponding to their nature. In self-determination and "self-making" lies the objective that humans pursue as rational beings, and their rationality makes them beings necessarily oriented toward the juridical state, in that they have a "right" to their self-determination. The law presupposes a "basic norm," one whose content can change but whose form cannot: Nelson calls this norm the *Rechtsgesetz* (juridical rule), describing it as the law that secures for everyone an equal right to accomplish the task of the individual's self-determination.

Positive law thus appears not to stand in opposition to "natural law" but to be *functional* to it. For this reason the latter is no less necessary than the former, and so likewise necessary is the force of the state as that body which is to guarantee the application of the positive law. The law is not something that can be discussed; it is a fact: It can be studied and analyzed but never challenged or confuted. In this sense, legal science turns out to be a sociology of law, in that positive law is historically conditioned and so appears as something relative. For Nelson, from an historical point of view, the fundamental concept is not so much that of unconditional freedom as that of equality.

The state understood as a legal institution becomes the fundamental tool with which to body forth the basic legal norm, the "juridical law." Public officials must be adequately cultured and knowledgeable, because only education can guarantee that their will is not arbitrarily exercised but is instead directed toward achieving the juridical purpose of self-determination. For Nelson, law is not valid unless it is *recognized* as being valid, but this recognition cannot be empirical. It must instead be predicated as something objective, as it were: It must be inferred from a balance struck among the interests at play; law is recognized as being valid only if it serves the purpose of self-determination. Those who interpret the law can therefore in a sense be said to become arbiters of the objectivity of the law's recognition as valid law, and it will be for them to decide whether the law's *de facto* condition is a *de jure* condition proper.

Nelson faces the same problem here that comes up with every neo-Kantian philosopher, namely: Once we assume a distinction between a norm and its content, in what way can a point of contact be found? How can form and content be reconciled? In Stammler, this reconciliation had failed by reason of the very premises of his thought, even though he did try to find some mediation between form and content; in Nelson, the same error is repeated. In upholding the necessity of the positive law, of the state, and of coercive force, he justified these elements on an empirical basis, by adducing the realistic necessity to which the moral idealist must yield (Eicher 1953, 133ff.): He certainly did not deduce these things in a necessary way from neo-Kantian logical premises. The state as conceived by Nelson is an entity that must necessarily limit individual liberty so as to guarantee the juridical condition of self-determination (and in this respect his outlook is Kantian indeed), and this necessity—as evident as it is empirical—affects the very formality which frames his conception of law. The state is not the system of norms it is in Kelsen but is an actual power-wielding organization: As such it devotes itself to certain concrete tasks and to a final purpose, which is to enable individuals to attain greater consciousness. One could even speak here of an ethical state, understood as a state subject to the rule of law, one that must perfect itself under the guiding principle of the sovereignty of law itself, although this is a conception that had been anticipated by the Dutch jurist Hugo Krabbe.

The sovereignty of law entails in Nelson a nonempirical idea of law, because sovereignty is understood by him not as the highest *power* (the powers that be) but as the highest *authority*. As authority, sovereign law is law that is valid because endowed with authority, which is what makes it sovereign. Nelson believes that our effort should be to understand the role the concrete powers of government play in achieving the purpose of the individual's self-determination, which powers are not in the least negative but have a dignity of their own insofar as they form a coercive organization geared toward the fulfilment of the supreme duty, that of making it possible for every individual to pursue their "authentic interest," consisting in self-education. This concept of

education in a higher sense—a Platonic sense, might I say—clearly leads him to imagine a state governed by the "savants," for only in this way will it be possible to avoid the slippery slope toward an arbitrary power, that is a power by people not enough educated—however much this is a risk that Nelson seems to in any event accept as a "realistic" possibility (Nelson 1932).

The sovereignty of law entails a rejection of the classic concept of sovereignty, thereby also entailing a conception of international law, a conception grounded on the one hand in our legal consciousness, magnified from the sphere of the state to that of the international community, and on the other in a coercive organization of the law even on an international level. In reality, the question of legal consciousness, not to be confused with a psychological theory of law such as Sturm's (1910),[30] forms the fulcrum of the legal philosophy developed by Nelson, who borrowed the concept into law by drawing on Fries's work, which Nelson himself had contributed to rediscovering, especially as concerns Fries's mathematical logic. In law, however, one can clearly appreciate the risk of falling into a utopian conception of the reality of law and the state (and that goes double for international law). And, indeed, Nelson's legal philosophy cannot in the least be said to have resisted the lure of such utopian detours, mounting on top of Kant's construction much more than Kant would have recognized as his own. Not incidentally, the coercive element necessarily finds its way back into Nelson's construction unaccompanied by the limits and guarantees meant to ensure that we can exercise our liberties in concrete terms: We have thus landed a long ways from a universal duty of self-determination and self-education. Indeed, when it comes to committing to a political vision, Nelson rejects democracy and invokes a "Führer" capable of enforcing the law: "Nelson thus falls into open contradiction by postulating the fundamental tenet of equal freedom as the supreme rule to be followed in personal conduct as well as in the organization of society, only to deny this postulate in deciding how this ideal ought to be politically imposed" (Meyer 1994, 314; my translation).

Nelson's legal philosophy falls squarely within the natural law tradition: The synthetic principle underpinning his material doctrine of law—the principle under which justice *is* law—makes his whole system a pure form of natural law (however moderate it may be), in that Nelson in effect grounds law in ethics and metaphysics, deducing it therefrom, that is, from something that in any event lies *beyond* law. Legal science thus winds up being itself a derived science, as part of another science, such as ethics. In this way we can understand why Nelson, despite some good insights, never occupied more than a marginal place

[30] On Sturm, see Wielikowski 1914, 103ff., discussing as well other authors who can in some way be described as Kantian, but who have nonetheless placed the psychological element at the foundation of law. Among them are Berolzheimer (1904–1907) and Kuhlenbeck (1907) and especially the Russian theorist Petrażycki (1907b). On Petrażycki see Section 16.2 in this tome and Chapter 18 in Tome 2 of this volume.

as a legal philosopher in the neo-Kantian debate of the period, mainly concerned with the bases on which to make possible an authentic *science* of law.

1.10. Fritz Münch's and Max Ernst Mayer's Philosophy of Culture

1.10.1. The Philosophy of Culture

Among the most significant aspects of neo-Kantian philosophy of law is its distinction between the *concept* and the *idea* of law, the first coping with a scientifical problem of legal knowledge (*Rechtswissenschaft*), the latter with the problem of justice (*Rechtsphilosophie*), a distinction that would make it possible for some neo-Kantian jurists to shift emphasis to the idea of law, thus paving the way for legal idealism and in particular for neo-Hegelianism, this in a fairly linear way, even though it was a complex passage involving several interlocking components.

But even working within the framework of neo-Kantianism and its distinction between the idea and the concept of law, some jurists underscore that to define the concept of law, however fundamental the concept may be, is to *limit* the law, insofar as the law is never just a conceptual abstraction but is also part of the social reality. An endeavour to lay out the formal structure of the legal system would necessarily still leave room for a different sort of inquiry, not a conceptual one but a sociology of law exposed to the risk of falling captive to a method proper to the natural sciences. The outcome was a contraposition between dogmatic jurisprudence and the social theory of law. As Müller-Eisert observed, this "ultimately led, in legal methodology, to those conflicts which in the general theory of science arose out of the separation of the sciences into the natural sciences, on the one hand, and the spiritual sciences, on the other" (Müller-Eisert 1917, 3; my translation).

The pressing need to grasp the "totality" of the legal phenomenon appeared to pose a conundrum for anyone boxed into either of the two modes in which to consider the law, namely, the conceptual mode and the empirical one. The idea that this conflict could be solved, so as to encompass the legal phenomenon in its full complexity, appeared feasible to some if the problem was attacked by viewing the law as part of the cultural world: This meant working out a legal philosophy as a philosophy of culture, on an understanding of this latter philosophy as a platform for moving beyond the opposition between the natural and the spiritual sciences. Clearly, the source to look to for inspiration in this endeavour was Heinrich Rickert, the author of a famous book on the natural sciences and the cultural sciences (Rickert 1915; see also 1907).

Nature, as is known, comprises all that is independent of value, whereas culture does just the opposite, for it bears a relation to values. A philosophy of law framed as a philosophy of culture must accordingly presuppose, at one and the same time, a universally valid system of values and a concept of law

capable of accounting for the meaning the empirical sciences of law ascribe to that concept. We can go back to Müller-Eisert here, who frames the idea as follows: "The philosophy of law seeks to [...] establish a connection between, on the one hand, the different general moments contained in the empirical concept of law and, on the other, the universal problems relative to the question of values and of conceptions of the world" (Müller-Eisert 1917, 8; my translation). The philosophy of law certainly presupposes the value inherent in a single individual, but only insofar as each such individual exists not in isolation but as a being networked with others. It would thus be a mistake to equate culture with the community, a concept which at that very time was just beginning to flourish as a sociological construct: Culture is rather to be understood as the complex of relations and interactions among individuals, and its point is not to enable some to exercise power over others but to bring into existence a power that everyone can share in as an inherently valuable and meaningful being set in a "totality" that itself is inherently valuable and meaningful.

The philosophy of law is concerned with law as an absolute value, but underlying this value, and acting as a material substrate, is the effective *reality* of law, forming the object of the empirical science of law. This effective reality is something the philosophy of law cannot neglect. Indeed, its task is precisely to foster a general appreciation of the empirical reality of law. But this means that the philosophy of law takes for its object of study *both* the absolute value inherent in the law *and* its empirical substrate such as it concretely unfolds in the differentiation of humanity into groups, each of them espousing a variety of values (moral, religious, linguistic, and so forth)—each of them, in other words, embodying a specific historically determined culture.

In each of these groups, be it a tribe, a clan, or a state in the modern sense, it is possible to neglect single individuals and their psychical movements, but then the individuals themselves, as components of a culture that makes the idea of value understandable and concrete, needs a series of moments that dynamically construct the group's unity and makes everyone aware of their individual role within the group. The determination of this relational unity of individuals within the group is a function of law, which therefore acts not only as a cultural phenomenon but also as a basic condition failing which no people or nation could have a culture. In this sense, empirically existing law contains value elements of its own, closely bound up with the practical realization of law itself. Every legal system—in fulfilling its function of unifying the group (within a nation, a city, or a nation-state)—is always grounded in a predominant, foundational value which determines the cultural type distinctive to that specific legal order. Law thus necessarily acts as a cultural force, and in this sense can be an object of inquiry that would typically fall within the scope of a cultural science, but without this ever entailing that it cannot form an object of inquiry for a natural science, too, precisely because coexisting in the law are elements of a "spiritual" nature alongside elements of an empirical one.

This moving beyond the old paradigm also entails that science and politics, however much distinct, nonetheless come to find themselves in a relation of mutual influence. And certainly this means that science can have an influence on politics, this to the extent that politics, in a given culture, sets about the task of realizing those values that philosophy has singled out and determined to be absolute. It is a practical task that we are dealing with, for it consists in modifying and correcting a nation's concrete juridical structure: "What the philosophical consideration [of law] singles out as valuable, politics postulates for the concrete present" (ibid., 37; my translation).

Making the law a cultural phenomenon also serves the function, among others, of justifying the philosophy of law as a discipline we must necessarily turn to if we are to gain knowledge of the cultural purposes of law. Law in this way acquires a clear sense as an institution at once positive and normative, in this latter mode of existence serving to criticize the existent. Gysin observed that the cultural philosophy of law, which is grounded in neo-Kantianism, "founds law as a means to the ends of culture. The cultural philosophy of law considers the law through the unity given by a cultural nexus of purpose" (Gysin 1929, 16; my translation). But I would not agree with the next thing Gysin says, namely, that "the idea [*Gedanke*] of law is simply absorbed into the unity of the idea [*Gedanke*] of culture" (ibid.; my translation). The problem here is that Gysin, in taking a critical stance to the cultural philosophy of law, fails to grasp the broader political substance of the philosophy of culture, for he confines himself to drawing a distinction between law, grounded in obligatoriness, and the community as a complex of values tied to the individual. Indeed, Gysin seems not to appreciate that law and culture (the latter understood in its complexity as a phenomenon at once moral, economic, artistic, and so forth) both exist not *in vacuo* but in connection with certain worldviews. Indeed, whereas value is individual, and so cannot be an object of legal obligation, each worldview understands culture as a complex phenomenon, and here, contrary to what Gysin thinks, there is no reason why law should necessarily be "subordinated" to culture, in the sense of its being "derived" from culture (just as culture isn't necessarily "derived" from law). Gysin comments that juridical value cannot be the basis on which law is founded; but in reality the effort in the philosophy of culture is not to found the law on some value but to grasp law in its historicity as shaped by the prevalent worldviews. Writes Gysin:

> Indeed, the essence of the principle of law lies in the fact that law cannot be derived from values, but also in the fact that law, under this principle, is none other than a *relation among values* in the human community. Law does not itself *create* cultural values but does give them an ordering as the supreme law of human coexistence. The law, proceeding from the principle of the predominant value, ponders on this basis how to divide the spheres within which individuals engage in social interaction and interdependence; in this way the respect these spheres compel is raised to the status of an obligation, and the law thus qualifies them as *juridical* spheres. (Ibid., 46)

The problem here is that no exponent of the philosophy of culture ever claimed that the law *creates* cultural values or that law and culture coalesce into any "unity."[31] Rather, the philosophy of culture can ultimately be analyzed as an approach concerned not so much with morals as with the method of law, on the one hand, and politics, on the other. As a philosophy of worldviews, the philosophy of culture takes a historicist approach. And this can easily appreciated from the works of its two most outspoken exponents, namely, Fritz Münch (1890–1970) and Max Ernst Mayer (1875–1923).

1.10.2. Fritz Münch

Münch's thought forms part of the larger neo-Kantian philosophy of values, a philosophy envisioning the world of culture as a world in which values are invoked of necessity because essential to culture itself. However, the values ascribed to facts are themselves historical, being gradually fashioned by accretion through a deeper and deeper gaining of historical consciousness.

The law is for Münch a preeminently cultural phenomenon, by which he means that its definition is predicated on the idea of law, understood not as an immutable entity but as the historically wrought outgrowth of the aspirations, efforts, and aims of those who participate in the sphere we call culture. What culture depends on the degree to which the historical consciousness has matured and is therefore always changing. It is clearly a relativistic conception that underpins Münch's thought, but at the same time he also tries to temper this relativism by identifying a shared telos in our actions as agents, which actions may be historically conditioned but are nonetheless driven by an objective system of absolute values.

For Münch the problem of the relation between law and culture covers a wide range of related and indeed coinciding problems, such as the relation between law and justice, law and power, the person and the populace, and the individual and the community, as well as the problem of the meaning of the concepts of reason, humanity, civilization, nation, and race, among others.

The concept of culture, as was previously observed, is closely bound up with that of history: "Culture, in its most pregnant sense, along with everything it encompasses, is a social forming into shape, and more to the point a historical one. It is impossible—without peering into the 'essence' of history, from a view affording at least some degree of comprehensiveness—to get to

[31] The German original: "So muss es sich denn alle Kultur der menschlichen Gemeinschaft gefallen lassen, dass sie einem Kulturrecht und einer Rechtskultur unterworfen wird. Nur in der Verwirklichung dieses Kulturrechts können die Anforderungen des Kulturgewissens und des Rechtsgewissens zur Einheit von Recht und Kultur vereinigt werden, zu jener Einheit, in der man die höchste Sozialidee, das Ziel der menschlichen Gesellschaft, den diesseitigen Zweck ihrer Geschichte erblicken kann."

the 'essence' of culture" (Münch 1918, 3; my translation). History is to be understood here as historical *action*, not as historical "happening": Only through a consciousness of action gauged to measuring criteria is culture possible. And these criteria against which to measure action are the ideas that regulate action, which cannot just be concerned with the present but must also look to tradition. Culture in this sense configures itself as a "traditional forming into shape bearing a connection to ideas [*ideenbezogene Traditionsgestaltung*]" (ibid., 7; my translation), the place where the concrete ideal holds together a community's past and future, whereas culture statically construed only refers to a given society in the present moment.

The view of culture underpinning Münch's approach looks like an idea of organization and order, an ideal project needing to be politically structured. Münch believes that ideas do not actualize on their own, and for this reason a close link is needed between the populace (the masses), on the one hand, and the ruler (the Führer), on the other. "The ruler and the populace cannot do without each other: The populace without a ruler is blind to values; a ruler without the people is powerless" (ibid., 12; my translation).[32] But this should not be taken to mean that the populace is for Münch an autonomous entity, for it is made of individuals, who alone can be holders and bearers of the ideas which thrive in the culture, and it is to individuals that law refers as a cultural organization or institution.

So the law is or strives to be "an ordering of community life in its mutual relations" (ibid., 15; my translation), distinguishing itself from those normative phenomena that have to do with the interiority of individuals (with their ethicalness, morals, religion, and so on). Law is a phenomenon predicated on power, and what genetically matters is not the ideality of law but its positivity, namely, its being able to exert force. But the moment power as such brings its own force to bear, it becomes law, and in carrying out its external regulative activity, it turns from a phenomenon predicated on power into a phenomenon predicated on values.

Culture is reason concretized into historically given institutions, and law is thus necessarily governed by its own logic. This is not a formal abstract logic, however, but a conceptual one "managed," as it were, by theoretical jurists. Law thus forms part of a broader system, at once differentiated and harmonious, in that none of its parts can overpower the others: "The overall idea of culture, however, cannot be an idea whereby the logic of one sphere of sense seizes hold of another, but can only be an idea designating a harmonious synthesis of the different spheres into a unitary system of ideas where the process of cultural differentiation finds its ideal point of convergence" (ibid., 38; my translation).

[32] Cf. ibid, 14: "The material principles of the constitution of culture are ideas; their enactors are men of ideas."

This notion of cultural unity is central to Münch's philosophy of law, for he uses it to found the difference among the single, historically and nationally determined cultural units. The distinguishing feature of the philosophy of culture lies in its proceeding not from the abstract but from the concrete, not from the universal but from the individual. A consciousness of the national culture does not entail that no value is to be ascribed to the consciousness of humanity, but this latter consciousness is a result of there being a consciousness of the unity of the national community.

The makeup of law is *teleologically* dependent on the sense of culture in general. For this reason the philosophy of culture rejects legal positivism as a misconceived attempt to found law on law itself: If the positing of law entails a relation with a community's unitary cultural dimension, that is, with the concrete purposes this community sets out for itself, the law cannot be devoid of moral import. The idea of law is a value in itself, but this idea is "a member of the system of ideas and must therefore place its own logic at the service of culture as a whole" (ibid., 14; my translation). There is no such thing as free law (see Münch 1914) or natural law, but neither can there be a "cultural law" as such, existing apart from the complex of ideas that make up a culture. A law or a ruling can be described as equitable (fair) only if it corresponds to the concrete sense of the cultural area to be regulated, and only if it looks to the unity of culture. Law must exist through a matching relation between form and content, between the idea and its material.

Not that Münch fails to appreciate the possibility and the fact of contradiction between historically conditioned values and those which find themselves ordered into a system, but history is for him the path leading from culture to reason, and therein is revealed the Hegelian vocation of the philosophy of culture, for which reason this philosophy can be viewed as marking the passage from neo-Kantianism to neo-Hegelianism.

1.10.3. Max Ernst Mayer's Philosophy of Law

Max Ernst Mayer deserves mention in the theory and philosophy of law essentially as the author of two works (apart from some writings he devoted to the subject of criminal law), namely, *Rechtsnormen und Kulturnormen* (Legal norms and cultural norms: M. E. Mayer 1903, also translated into Spanish and published in Chile in 2000) and *Rechtsphilosophie* (Legal philosophy: M. E. Mayer 1922).

Mayer's philosophy of law contains elements of both neo-Kantianism (and in fact his early works were written under the guidance of authors with neo-Kantian leanings) and neo-Hegelianism, though he does develop both currents in his own peculiar way.

In *Rechtsnormen und Kulturnormen* he frames the philosophy of law as a branch of philosophy, which in turn is understood by him as driven by two

main lines of inquiry, aimed on the one hand at finding the ultimate foundation—in light of the distinction between reality and value (metaphysics)—and on the other at determining the ultimate values (ethics).

In his second book, the philosophy of law is accordingly and explicitly set up as the study of the concept and the idea of law. The concept of law must inevitably be framed by appealing to reality such as it is causally determined, since the law is bound up with concrete human experience and so with the world of cause and effect, which is something apart from the world of values and of evaluation concerned with objects (whether real or ideal). Apperceptions and meanings thus come into focus as the aspects of the reality of law that a philosopher of law is called on to investigate. In this sense, Mayer understands himself as carrying Hegel's philosophy forward: "The whole of reality," he writes, "is either spirit or reason—Hegel's doctrine is idealism. Thinking and being are identical—Hegel's doctrine is the philosophy of identity. [...] Since logic is now the doctrine of concepts, the evolution of concepts coincides with the whole of reality" (M. E. Mayer 1922, 12; my translation).

Mayer seems not to realize, however, that the identity so stipulated between thought and being precludes him from philosophically conceiving reality and value as two distinct, albeit connected, worlds—as is called for under the distinction he himself set forth at the outset. It is therefore in an uncritical fashion that Mayer takes up Hegelianism, climbing aboard the bandwagon of popular platitude in his understanding of Hegel: What is real is rational; what is rational is real (ibid., 90). At a time when it was the norm to keep the *Sein* separate from the *Sollen*, Mayer appears to miss that law must be an object of evaluation, however much no longer an evaluation made from the perspective of natural law. If reality and value coincided, then positive law would be inherently just, and Mayer's original distinction between reality and value would shed its objective or critical import in a philosophical analysis of law.

Mayer appears to hover between two opposite worldviews, the Hegelian one and the neo-Kantian one, but as Julius Moór observed, "a dualistic mode of consideration conforming to the neo-Kantian conception cannot be reconciled with a Hegelian philosophy of identity" (Moór 1923–1924, 93; my translation).

Law is for Mayer a set of norms backed by a threat of sanction, and so the law is understood by him to presuppose the state as a power capable of enforcing those sanctions. Legal norms strictly understood are accordingly the norms posited by the state—"the law in a strict sense presupposes a state and in the final analysis is guaranteed by force" (M. E. Mayer 1922, 53; my translation)—but Mayer cannot distinguish the one from the other (legal norms from the force by which they are guaranteed), and for this reason he ends up saying that the state is in itself the legal system already.

In Mayer's view, law consists of norms coupled with action, values coupled with causality. Norms therefore always turn into action, and actions always

presuppose norms, and so the Hegelian identity always comes back with every one of Mayer's distinctions. By recognizing the *Sein* and the *Sollen* as being interlaced, Mayer's Hegelian philosophy might have offered an answer to Kelsen's logistic normativism, were it not that Mayer fails to work out the antinomies in which he finds himself entangled.

The same goes for his theory of values. He starts out from the distinction between absolute and relative values, and on this basis undertakes to ground a "critically relativistic" theory distinct from Gustav Radbruch's sceptical relativism (M. E. Mayer 1922, 70ff.), but even here he does no more than set out a dependence of values on a people's culture as a historically determined outcome. Mayer believes there to exist beyond history, and so beyond the relativity of values, a supreme value that he locates in the idea of humanity itself: "The idea of humanity," he writes, "outstrips relative validities, giving rise to a supra-relative validity" (ibid., 69; my translation)[33] a validity that drives the evolution of culture. At the core of this idea lies the need to "regard every man as a man" (ibid., 31; my translation).[34] "Humanity teaches and calls for the idea of man in himself" (ibid., 88; my translation), and in fact humanity, in Mayer's view, should be regarded not as a legal "ideal" but rather as the idea of law itself (ibid., 89). And in this way—relying on the idea of humanity—he believes he can also resolve the antinomy between personalism and transpersonalism.

This approach, not free of contradiction, leads to a metaphysics of law, and indeed to a *Christian* metaphysics of law: "It was the doctrine of morality and religion, and Christianity in particular, that posited humanity as the aim of the ethical will" (ibid., 92; my translation).

[33] The German original: "Die Idee der Humanität wächst über relative Geltungen hinaus, also in überrelative Geltung hinein."

[34] The German original: "Ihr Wesen ist, jeden Menschen als Menschen gelten zu lassen."

Chapter 2

LOGISTIC NORMATIVISM: THE *WIENER RECHTSTHEORETISCHE SCHULE*

by Agostino Carrino

2.1. Precursors of the Pure Theory of Law: František Weyr

2.1.1. Introductory Remarks

As much as František (Franz) Weyr (1879–1951) may be widely acknowledged to be an exponent of the *reine Rechtslehre* (the Czech version of it, known as the *Brünner Schule*),[1] an early article he wrote in 1908—three years before Kelsen's *Hauptprobleme der Staatsrechtslehre*—can easily be described as setting out in outline some of the fundamental legal-philosophical positions of what in the 1910s and 1920s would come to be known as the budding Austrian school of law, the school responsible for most widely known form of "pure theory of law." Weyr specifically founded the Brünn school of jurisprudence, which was cast in the same mould as the school in Vienna, in that they both looked to the philosophy of Kant, drawing from it the dualism of is and ought, of knowing and willing, and extracting on that basis the consequence that the law needs to be analysed *structurally*, not functionally. The exponents of this school of thought wrote in both Czech and German, and for a deeper understanding of it one can turn to two of those exponents who rose to prominence in the latter half of the 20th century, namely, Vladimir Kubeš and Ota Weinberger. Here we will of course confine ourselves to Weyr's legal-philosophical positions and will distil them from his German writings, but these form an adequate enough basis on which to characterize his thought. Also worthy of note are the considerations Weyr made on the question of nationality and the minorities, but that discussion would cause us to drift off-topic and so will not be taken up.

2.1.2. The Law as a Unitary System

What makes Weyr a precursor of Kelsen's pure theory of law is in the first place his endeavour to seek out the foundation of the legal system as a unitary system. The idea of a unitary legal system is precisely the subject of Weyr's first significant article, his 1908 *Zum Problem eines einheitlichen Rechtssys-*

[1] On Weyr and the other thinkers in this school, especially Karel Engliš and Jaroslav Kallab, see Kubeš 1980, 9–32, and Weinberger 1980a, 33–49; cf. Kubeš 1978, 137–49. Cf. also Section 18.3.1 in this tome.

E. Pattaro, C. Roversi (eds.), *A Treatise of Legal Philosophy and General Jurisprudence*,
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tems (On the problem of a unified legal system: Weyr 1908b). The essence of Weyr's critical method lies in something that Kelsen would later also take up, namely, the attempt to expose and move beyond the pseudo-dualisms of traditional legal science, this proceeding from a recognition that jurists need to cast off the sense of inferiority they are seized by when their method of inquiry is brought into comparison with the scientific method of the natural sciences.

At the heart of Weyr's article lies his criticism of the dualism between *subjektives Recht* and *objektives Recht* (right and law), whose origin he traces to the historical development that brought about the "transformation of the idea of the state" (ibid., 536; my translation), a transformation on account of which the original meta-juridical dualism morphed into a juridical one. Whether this and other dualisms can be resolved, says Weyr, depends on the method the jurists use in their research: It depends on their ability to reject bad methods from the outset, for these methods have caused legal science to unravel, first at the hands of the medieval glossators, then the natural lawyers, then the historicists, and finally the sociologists (see Wyer 1931, 372–3). However, it was still an open question for Weyr whether jurisprudence was to be made into a science proper by "borrowing" the (causal) method of the natural sciences, as was being advocated at the time by jurists like Max von Seydel (1873)[2] and as would subsequently also be urged in different ways, at least through a criticism of Kelsen and Weyr himself, by a range of legal sociologists who included Karl Georg Wurzel,[3] Ignatz Kornfeld, and Eugen Ehrlich.[4] In fact, the problem for Weyr was precisely that of figuring out what the proper method of legal science was supposed to be. This, he thought, "despite its apparent simplicity," was up there among "the most intractable fundamental problems of scientific knowledge" (Weyr 1908b, 542; my translation).

In *prefiguring* Kelsen, this 1908 article also prefigured the need to move *away* from Kelsen, to the extent that, in Weyr's view, legal science depends for its normativity not only on its method but also on its subject matter: "Every scientific method," Weyr comments, "depends on the nature of its object, and nothing is more difficult than to clearly identify and delimit what a given science is to have as its object" (ibid., 542; my translation). In this "precritical" phase, Weyr was still not as rigid as Kelsen would be, but in truth Weyr was never bound to go too far in that direction to begin with, despite his meth-

[2] On Seydel, see M. Becker 2009.

[3] Karl Georg Wurzel is a forgotten sociologist today, but in the early 20th century he was influential even in the United States, where he was translated and quoted (see J. Frank 1970, 245ff.). His main work of sociology, *Die Sozialdynamik des Rechts* (The social dynamics of law) dates to 1924 and came out in a second edition edited by Günther Winkler along with the 1904 book, *Das juristische Denken* (Legal thought: Wurzel 1991a). On Wurzel see Section 3.4 in this tome.

[4] On. Kornfeld and Ehrlich, see Sections 3.2 and 3.3 in this tome.

odological concerns. This is probably due in part to the different "mode" of critical idealism he espoused by comparison with Kelsen: Whereas the decisive influence on Kelsen, at least in an initial phase, seemed to be that of Kant as filtered through Hermann Cohen, the essential inspiration for Weyr was the philosophy of Arthur Schopenhauer.

Weyr was well aware that the sciences bear a kinship relation by virtue of some understreams (some more subterranean than others) and that a jurist cannot refrain from also taking a sociological or a psychological interest in the law. Even so, he was also quite clear that it is fundamentally important to identify a specific method for jurisprudence different from the methods in use in the other sciences. If I am to get to the essence of the state as my specific object of study, I certainly will not go about my research in the manner of a geologist studying the strata of the earth's crust. But then, what *is* the method of legal science? Weyr appears to assert the need for a "pure science of law" understood as a "science of abstract norms and concepts."

2.1.3. Validity and Causality

The distinction is very clear to Weyr between propositions of validity, distinctive to legal science, and those of the natural sciences: the former are concerned with matters of propositional truth, which in the case of mathematics involve unquestionable truths, this in contrast to the propositions of legal science, which are not amenable to demonstration in the manner of mathematical theorems.

> If, therefore, I take the concept of sovereignty and define it (with Jellinek) as a juridical person's exclusive capacity for self-determination, I am thereby presenting a legal construction whose "justness" [*Richtigkeit*] I cannot properly demonstrate (as I could, say, the Pythagorean theorem), for no such construction can be false in the same sense in which the proposition "2 + 2 = 5" can be shown to be false. (Weyr 1908b, 545; my translation)

What distinguishes Weyr from Kelsen here is that sovereignty is understood by Weyr as something we can ascribe to more than one concept, whereas Kelsen understands it as something which can only represent the positivity of the legal system.

Legal science, however, is also conceived by Weyr as a "constructive" science. Is that to be understood in the sense of the logical method used, for example, by Hermann Cohen, the leading exponent of the Marburg neo-Kantian school? Is law "constructed" or "constituted" by the corresponding method, according to the view Kelsen would later espouse, at least in his European period? This much is suggested by Rosin in his account of the way Weyr understands the cooperatives recognized under German law (*Genossenschaften*): It was Weyr's argument, in this regard, that the jurist "does not walk into the workshop to find two objects [*Gegenstände*] fully realized, typical and con-

crete, sitting there on the workbench, but rather creates [*schafft*] or constructs [*konstruiert*] the two types through a free conceptual construction" (ibid., 549; my translation). Jurists, for Weyr, are therefore free to create their own objects of scientific consideration, exactly as in Kelsen, but whereas Weyr takes this to mean that there can be more than one "constructed" object, so long as they each express a unitary conception of law as a unitary system, Kelsen understands law as invariably and exclusively consisting in that which the only possible legal science (a normative science) constructs in its process toward knowledge. In truth, even Kelsen, like Weyr before him, thought that the legal system constructed and constituted by the legal scientist depends on the scientific observer, and in particular on that observer's *personality* (says Weyr) or on the *kind* of scientific observer involved (in Kelsen's conception): In this way one observer, driven by an imperialist outlook, constructs a universal legal system centred on his own state, whereas another, espousing a pacifist worldview, constructs a universal system centred on the idea of a *civitas maxima*.

Even in Weyr (and so before Kelsen) the state is never something having physical existence amenable to direct observation but is rather an artificial expression (*Kunstausdruck*) signifying "a series of jural and social relationships" (Weyr 1908b, 551; my translation). Nothing exists for a jurist except what jurists themselves have conceptually "constructed." The jurist's method is not and cannot be an inductive method: "Jurists have nothing before them that they can inductively study or analyze" (ibid., 552–3; my translation). As Kelsen would later comment, a jurist is concerned with juridical forms, just as a painter is concerned with aesthetic form and not with brushes and palettes. From this tenet follows the criticism that in the same article Weyr directs at all those jurists who have in various ways upheld the division of law into "private law" and "public law" (the latter clearly to be understood in the sense of the *öffentliches Recht* rather than in that of the *Staatsrecht*), a charge laid against a whole range of theorists, from those who defended an organicist conception of the state (most notably Otto von Gierke and Hugo Preuss) to Julius Stahl, Rosin, Otto Mayer, Jellinek, and Bernatzik, not to speak of authors like Bornhak and especially Gumplowicz, the latter of whom denies the juridical nature of the state, on the view of the state as an entirely sociological phenomenon, and so an object of study falling within the exclusive domain of a sociological science, and in this sense they are taken to task for behaving like professors of theology teaching atheism or teachers of mathematics denying the Pythagorean theorem (ibid., 567).

2.1.4. The Autonomy of Legal Science

That Weyr's 1908 article anticipated the conception Kelsen would expound in his first major work, the 1911 *Hauptprobleme*, can be appreciated from Weyr's discussion of that work in a 1914 article titled *Über zwei Hauptpunkte*

der Kelsenschen Staatsrechtslehre (On two main points of Kelsen's theory of public law: Weyr 1974a). Here Weyr underscores Kelsen's effort to identify the autonomy of jurisprudence and the jurist as a distinct type whose work is independent of the sociologist's, the psychologist's, the politician's, and so forth—a point he would reiterate in a 1931 contribution to the *Festschrift Kelsen* (Weyr 1931b). Jurisprudence is made to rest on foundations of its own, recognizing the need for it to have its own method of knowledge, and for jurists not to shunt this method aside once they appreciate its specificity. Therein lies, in Weyr's assessment, the greatest achievement of Kelsen's *Hauptprobleme*, characterized by Weyr as no less than a "Critique of Juridical Reason." A thing, be it real or ideal, can be an object of consideration from several points of view, but once I commit to a given point of view (Weyr makes the example of the unity of an apple considered from a mathematical point of view), I cannot hope to expand my knowledge from that point of view by bringing a different point of view to bear on the same object (an apple considered from an economic point of view), for in that case I would end up not with a deeper knowledge of the object but with an intellectual and cognitive confusion. That, according to Weyr, is the predicament of many jurists who set out to gain an "enriched" knowledge of law by resorting to sociology and to its methods: What they achieve in that way is not a keener understanding of their object of study but a confusion between two sorts of knowledge, the moment they invoke the primacy of "content" and of the laws of evolution. Writes Weyr:

> For a true jurist—by which term I mean someone having a specifically juridical mode of thinking, coupled with a corresponding métier—the sociological deductions of the current legal sociologists cannot be worthwhile in any other sense than that which the deductions of the earlier natural-law theorists can be found to have. (Weyr 1974a, 461; my translation)

And so Kelsen's approach strikes him as an "unerhörtes Novum" (an unprecedented novelty: ibid., 460), that is, as an absolute novelty in the landscape of legal science, clearing away all those unfounded ambitions to get jurisprudence to do more than it can and ought to achieve. For legal science does not concern itself with particular purposes or with so-called laws of evolution.

2.1.5. Public Law and Private Law

Weyr underscores how—as concerns what is perhaps the greatest breakthrough of Kelsen's thought, namely, its having resolved all pseudo-dualisms, and in particular that between "public" and private law[5]—he had previously

[5] "There is no legal basis for drawing a distinction between so-called public law and so-called private law; only from a historical and psychological point of view can the distinction be explained, but there is no longer any justification for it today" (Weyr 1974a, 461; my translation).

himself laid the groundwork for finding a way out of that entanglement. More to the point, Weyr underscores the conservative nature of that distinction, a distinction that retains an "absolutistic element" in framing the relation between public power—a power above the law—and those subject to that power. The *whole* of the law is grounded in the state: The law is all *Staatsrecht*. "Indeed, this mysterious conceit of 'public' law is designed in the first place to retain certain elements of force [*Gewaltfaktor*] that can be brought to bear on other subjects under the law" (ibid., 464; my translation).

Weyr's rejection of the dualism between public and private law is closely bound up with his upholding the view of the exclusivity and unity of the legal method,[6] a feature by virtue of which the object of legal concepts can only be an ideal object, and so a unitary legal system with "noetic boundaries" (ibid., 465; my translation) overstepping which would lead to a methodological eclecticism that would cause us to lose sight of the very object of legal science, namely, the law as the abstraction and basis on which legal rights and obligations can be ascribed to individuals. It follows that concepts must themselves be "constructed" in such a way that through a *tertium comparationis*—a benchmark against which to compare different concepts (here those of public law and private law)—the dualisms between these concepts can be traced to the unity of a properly scientific concept (the law of the state as *the whole of the law*: Weyr 1974c). Weyr draws a distinction between "ancient" philosophy of law, solely concerned with the contents of law, and the "new" philosophy of law, which instead approaches its object scientifically and therefore sets itself up as a formal philosophy of law, capable of moving beyond all pseudo-dualisms by emplacing them into the unity of the legal system and of its formal (and hence general) concept as reconstructed by the *reine Rechtslehre* (ibid., 553). "Thus, for example, it will first of all be necessary to find the universal concept of law (understood as the object of legal knowledge), and only then will it be possible to inquire whether there can be found within this concept any 'differences' on which basis to distinguish subconcepts" (ibid., 554; my translation). The differences internal to law are for Weyr only "relative," in that

> a ruling, an administrative act, and a private contract each appear as a "legal norm," just like a law or an enacted measure, or like any other expression of a legal duty, relatively more general (and hence more abstract) than such a duty, and whose status as a legal norm is beyond doubt even from the standpoint of traditional legal scholarship. (Ibid.; my translation)

[6] "In any event, the similarity or dissimilarity between different systems of domestic law can be large or small, but they always find a logical and necessary counterpart in the unity of method that alone can make possible a scientific knowledge of any system of law, whichever it may be" (Weyr 1927–1928, 215–6; my translation). The French original: "En tout cas, la diversité ou la ressemblance des différents droits nationaux puissant-elles être grandes ou petites, toujours est-il qu'elles trouvent une contre-partie logique et nécessaire dans l'unité de la méthode qui, seule, rend possible une connaissance scientifique de n'importe quel système de droit."

And from that standpoint, Weyr argues, we have to recognize that a judge's ruling, a law enacted by a parliament, an administrative act, and a contract all enjoy the same legal status, in that they all count as norms. The *tertium comparationis* that in this process should make it possible to move beyond the dualisms lies in the concept of the creation of law (*Normsetzung*). The overarching concept, however, is not empty, as the theorists of the "living law" would have it, but is more general and comprehensive than the concepts it comprises: It is so as the concept of law is to court procedure, as court procedure is to German statutory law, and so on.

2.1.6. The Hierarchical Structure of the Legal System and the "Metanormative"

Likewise, this normative method can solve the contrast, only an apparent one, between general laws and particular laws, between abstract law and concrete norms (an individual administrative act or a judge's ruling). This much, says Weyr, has been shown by the hierarchical conception of the legal system developed by Adolf Merkl (1836–1896), to which Weyr devotes a reconstructive article (Weyr 1927–1928) where Merkl's normativist method is traced to Weyr's own previous work, positing the concept of the state's law as the means through which to work out the contrast between *subjektives Recht* and *objektives Recht* (rights and law). There is no qualitative difference between a ruling, an act of Parliament, an administrative act, and a private contract:

> What has prevented traditional legal scholarship from appreciating this analogy is its understanding of a private contract as an act in the law that in combination with a norm (for example, a prescription in the civil law) gives rise to an obligation or right [*subjektives Recht*]. (Ibid., 222; my translation)

Among the precursors of Merkl's *Stufenbaulehre* mentioned by Weyr are O. Bülow, A. Haenel, and, clearly, Bierling, but Weyr also mentions himself, taking credit for having seen before Merkl the hierarchical structure of the legal system (ibid., 223).[7] Merkl's hierarchical structure, however, overturns the normativist approach of Kelsen's *Hauptprobleme* by opening the unitary legal system to the "metanormative":

> Just as the most immanent science of nature (physics) shows an unremitting propensity for metaphysical problems, so even the most positivistic theory of law shows a propensity for the metanormative. This propensity can be observed in the pure theory of law in the overall shift from its original purely *static* point of view (where the central problem is *Quid juris?*) to a dynamic point of view, from which even the flux of norms in becoming—their arising, changing, and lapsing—can form an object of legal knowledge and thus be normatively conceived, which may not be the case *all* the time, to be sure, but for the most part it is. (Weyr 1931b, 371; my translation)

[7] Weyr refers to page 13 of his book on the foundations of legal philosophy that he had written in 1929 in Czech, *Zaklady filosofie právní* (Foundations of legal philosophy: Weyr 1980a, 113).

And what is this becoming of norms—the changing course of the legal system, of *particular* legal systems: the Czech system, the Austrian, the French—if not the application of norms in the concreteness of the social? Now, since a norm, "valid" though it may be, is meant to be effective, that is, concretely applied, the enforcement of a norm, as Weyr comments, is realized through a "process of the external world," and the question *Quid juris?* cannot be answered on purely normative grounds, so much so that Weyr—rejecting Kelsen's conception of primary norms as norms backed by sanctions—even tries to build the concept of obligation itself into the legal system: "The concept of enforcement, then, only lives on the outskirts of a normative-immanent consideration if the content of the norm to be enforced (i.e., an obligation) at the same time entails the creation of a new norm, namely, a secondary norm" (Weinberger 1980a, 40; my translation). But the need for a norm to be enforced or made concrete in the hierarchical and dynamic system represented by a legal order (for example, the need to pay back a loan) means that "the tension between the world such as it is and the world as it ought to be, as judged in light of a certain norm, has been dissolved" (Weyr 1980c, 145; my translation).

2.1.7. Sein *and* Sollen

That the separation between the *Sein* and the *Sollen* can entail an undue isolation of jurisprudence, and even a de facto weakening of its explicative power, has been underscored by several authors, so much so that Weyr himself is keen to assert the relativity of the monistic method. This is regarded by him as the only method capable of conferring a scientific status on jurisprudence, by placing jurisprudence on the same level with the natural sciences, despite the objections raised not only by natural scientists but also by jurists themselves, many of whom envisioned a content of jurisprudential laws as absolute and timeless as that of the natural sciences. But the challenge for Weyr was to have *two* sciences with equal dignity, bearing in mind that, while legal norms, as *artificial* entities, are changeable and do not last forever, that should not affect their quality, namely, their validity (*Geltung*).

If the two sciences are to adhere to Kant's method and to a critical idealism accepting the unknowability of the "thing in itself," they must both presuppose a basic methodological premises: the *is* for the natural sciences, the *ought* for the normative ones. But in reality, Weyr argues, the *is* is not extraneous to the normative sciences, either, in that both are underpinned by the is understood as the "givenness" (*Gegebensein*) of its object of knowledge. On the other hand, Weyr comments, this givenness of the object of knowledge "is problematic for natural and normative science alike, and so it certainly won't be possible on this basis to assert the primacy of one over the other" (Weyr 1974b, 539; my translation). But Weyr was also a good enough practical jurist to appreciate that the dualism propounded in the theory of method must

in some way be tempered by the jurist's concrete experience. This, as we saw, is especially true where the normative method lets go of the idea of a static method and turns to the dynamicity incident to the production of law. It is no accident that Weyr's previously mentioned article on the *Stufenbau* has a passage revealing that this precursor of Kelsen, whom Kelsen undoubtedly held in great esteem, nonetheless did not refrain from drawing different, if not divergent, conclusions from those of Kelsen. Let us therefore look at this passage in its entirety:

> If we take into account that the normative mode of consideration, despite its independence from the causal method of the natural sciences, logically requires and presupposes this point of view as a methodological or noetic integration (or opposition)—for only in this way can we arrive at Kant's well-known noetic dualism—and if we take into account that this dualism necessarily presupposes a certain divergence of content between the existing world and the world of duty (the *Sollen*) (for if they corresponded in every single respect, duty would lose its typical meaning), then we would be looking at the idea that the enforcement or fulfilment of a norm would normatively at the same time entail its extinction, except that in this case the norm would be extinguished not by its creators (as by issuing other norms in derogation of the existing one) but by those who are subject to it. [...] If the enforcement or fulfilment of a norm can be construed as its extinction, it would mean that the contents of the existing world of the is find themselves in greater proximity to those of the world of the ought, and specifically this would happen in the manner in which, according to the norm's fulfilment (enforcement), the existing world appears as it must appear in the sense of the fulfilled norm. (Weyr 1980c, 145–6; my translation)

The world of law is therefore a world of procedures, of processes through which what is becomes what ought to be. Weyr makes this into a distinctive feature of the legal system, failing to see that even the natural world is a world of processes. He should therefore have paid greater attention to the role of the will as an element characteristic of legal procedures and specifically of normative production by a norm-crafter (*Normerzeuger*). Not that he completely overlooks to do this, but he confines himself to marking the difference between the world of natural causes and that of norm-making through the will of a legislator, setting up a hierarchy between the level of normative production and that of normative fulfilment, in turn set up on two levels: that of mere decision as distinguished from that of knowledge or judgment.

Weyr in this way goes back to defending Kelsen. He does so in responding to a critical comment on the pure theory of law put forward by W. Jöckel (Weyr 1931a, 458ff.). Weyr in certain respects formalizes the pure theory of law even more emphatically in responding to Jöckel's criticism of Kelsen: What sense could there be to criticizing mathematics on the ground that it concerns itself with numbers rather than with concrete quantities, without considering that these quantities are identified by those very numbers understood as general and abstract entities. We certainly cannot replace the exact science of mathematics with the natural sciences just because the former does not describe any specific contents: this circle, that triangle, and so on. In the

same way, there is no way, proceeding from "the thesis of the pure theory of law as a formal (i.e., exact) science of legal form, to have any experience of the content of concrete legal systems" (Weyr 1931b, 374; my translation).

2.1.8. Teleology

As we take into account the similarities between Weyr and Kelsen, however, we should not forget that Weyr does not confine himself to setting the normative sciences in contraposition to the causal sciences, for in the normative sciences he introduces a *teleological* aspect, which Kelsen, in his *Hauptprobleme*, understands to be just another part of the causal conception. Whereas for Weyr a norm is not an expression of logic, for Kelsen, at least in his European period, legal normativity inevitably contains a logicistic element that marks the specificity of legal science. As much as Weyr may underscore the need for a distinctly legal method, as well as for a distinct method of legal conceptualization, it is still the case that whereas for Kelsen there is no law outside legal science—and so the concept of a legal norm is equated with that of a normative legal science that "produces," "constitutes," or creates its object as a logically coherent entity—for Weyr the standpoint of the knowing subject is different from that of the object to be known: The two are "correlative" (ibid., 370) entities, to be sure, but for that very reason they cannot be the same thing; indeed, there is an essential distinction between them.

On closer inspection, Weyr's philosophy of law reveals, aside from the analogies just considered, greater theoretical flexibility when compared with Kelsen's philosophy of law, that is, greater attention paid to the life of the law as experienced by jurists and lawyers on a practical level. Weyr thus draws a distinction between norms and imperatives, while recognizing that in practice a norm can act, and does act, as an imperative having the *motivating* power to *causally* move individuals to action (Weyr 1980b, 58). And indeed the legal philosophy advanced by Weyr and by other exponents of this school never fails to pay close attention to the law in practice, especially as concerns the civil law and, with Weyr, administrative law as well. Precisely in discussing Merkl's account of the legal system's stepwise structure, Weyr defends this thesis by applying his *tertium comparationis* criterion: If lawmaking, administration, and judicature find themselves on the same plane, it is because this *tertium comparationis* is none other than "the quality common to these three functions and to their results; they are all norm-creating activities, and norms are their uniform product" (Weyr 1927–1928, 225; my translation). The problem is how to conceive administration as a norm-creating function (like the legislative and judicial functions). Not incidentally, when it comes to the hierarchy of norms, Weyr is prompted to clarify this concept by reference to those who produce norms, and so by reference to their will, thus framing the question not in terms of primary and secondary norms themselves (the former more

general, like the statutes; the latter more specific, like court rulings and administrative acts) but by speaking of the *Normerzeuger*, meaning the *producers* of primary and secondary norms (the legislator in the first case, the judge in the second) (Weyr 1980c, 139ff.).

2.1.9. The Practice and Theory of Law

Although Weyr, like Merkl and so also Kelsen, holds that a concrete norm is contained in a general one, he understands such a concrete norm to be so contained only in a "latent state," by which is meant that in order for a norm to become real, there always needs to be a concrete authority that will carry the general norm into execution: a judge or an administrative official (Weyr 1927–1928, 227). This interest in the concrete that distinguishes Weyr's philosophy of law is certainly reflected in the essay he wrote on the occasion marking Kelsen's fiftieth birthday, where he turns to the relation between the pure theory of law and administrative law. But even in the earlier article previously discussed, offering a criticism of the dualism between public and private law, Weyr's rejection of this dualism is never divorced from an appreciation that practice will follow its course even independently of theoretical speculation, and that the distinction between public and private law exists as a matter of fact, as evidenced in the different ways in which jurists in practice behave in taking into account the status of organizations, business entities, persons, and so on. The whole of our current government apparatus, Weyr comments, "is completely based on the dualist principle" (Weyr 1908b, 574; my translation). At the same time, Weyr envisions for legal science the task of showing to those who deal with the law on a practical level, and in particular to the legislators, that for reasons at once scientific and practical, modern law under the rule of law needs to move beyond that dualism, and where law and administrative justice are concerned, this move makes it necessary to confer on the citizen bringing a lawsuit against an administrative agency an equal status with the state itself, or at least that is a move making it necessary to part with the idea of the state as an entity more valuable than the citizen (the classic view of the "surplus value" of the state vis-à-vis the citizen). A legal dispute in administrative law is no different from one in civil law. The idea that a difference might exist is claimed by Weyr to be ultimately in large part "rooted in psychology" (ibid., 577; my translation). Nor, in closing, does Weyr shy away from sharing some political reflections on the modern welfare state grounded in the rule of law, a state where the bifurcation between private and public law appears to have lost its raison d'être in a legal system increasingly moving toward a unitary makeup, precisely for reasons in part political, and this too is a point where Weyr parts ways with Kelsen. Not incidentally, law does not, for Weyr, "dissolve" into the state, but the state is a normative entity from which legal norms issue:

> By *legal norm* is meant all those norms whose normative subject we consider to be the unitary subject we call the state. The set of these norms—whose cohesive element lies in the identity of this normative entity—is a unitary system of norms, namely, the legal system. (Weyr 1980a, 41; my translation)

So, if on the one hand Weyr, in his article on administrative law and the pure theory of law, reiterates the meta-legality of many theses, arguing that administrative jurists are among those jurists with the greatest exposure to the non-normative, non-legal justification of norms, on the other hand he does not appear to reduce the state directly to the legal system, with respect to which the state is both "maker" (of the norms making up the legal system) and "owner." To claim that the state "makes" law means logically to envision a distinction between law and the state, a distinction that Kelsen, by contrast, would account to be illogical, on the view that the state is none other than the personification of the legal system.

At the same time, however, Weyr underscores that the rule of law entails a series of legal relationships among legal persons excluding the idea of the state as inherently more valuable than (or as having a "surplus value" over) its "partners," who in the eyes of the kind of the administrative law then in force were deemed mere "subjects." These considerations are only apparently political, for as Weyr conceives them, they are internal to the scientific enterprise of jurisprudence. Indeed, the normative sciences are understood by Weyr to have the same scientific standing as the natural sciences (Weyr 1974b, 541), this to the extent that their "constructive method" is "legal in the proper sense of the term" (Weyr 1908b, 580; my translation). More than that, the relation between a norm's validity (*Geltung*) and its efficaciousness (enforceability) is much closer in Weyr than in Kelsen, not only in Kelsen's 1911 *Hauptprobleme* but also in his subsequent writings, which in Weyr's estimation reflect the influence of Sander and Merkl and were thus more cognizant of the socio-empirical nature of law:

> The knowing subject in the normative sphere (the human intellect) choosing among countless legal systems (legal orders) will typically choose as objects of knowledge those whose representations are as a rule effective as motivations acting on the human intellect or, in other words, those that present a "useful scheme by which to interpret and evaluate human beings. (Ibid., 541; my translation)

Validity is for Weyr a meta-normative construct, in the sense that the givenness of a valid norm or of validity "transcends" the method of knowledge proper to legal science, just as in Kant the givenness of the object of the method proper to the empirical sciences transcends that method.

2.1.10. On the Concept of Sovereignty

Perhaps nowhere are the differences and similarities between the Brünn school and the Vienna school of "pure" legal science more subtle than in the

concept of sovereignty: Kelsen uncompromisingly rejects the concept of sovereignty and seeks to undo its "dogma," but Weyr is less categorical. For on the one hand he agrees with Kelsen that sovereignty is not something we can ascribe to a real power, whether it be the state itself or the power of the state, but on the other hand sovereignty does not simply resolve itself into an ideology or something to be rooted out. Sovereignty for Weyr does exist, and it lies in the sovereignty of the legal system itself, a view that seems closer to Hugo Krabbe's than to that of Kelsen, who is known for the claim that sovereignty must be "radically removed" (Kelsen 1920a, 320). Of course, this sovereignty envisioned by Weyr is a formal concept:

> The understanding of the concept of sovereignty being presented here is of course fundamentally different from the customary ways of understanding the same concept: The concept does not contain "power" as a characteristic, and so does not contain the concepts of supreme and unlimited power, either, but simply expresses a formal principle of normative knowledge. This concept is an abstraction similar to that of a "normative subject," which likewise does not represent an element of the external world, and so no qualities may be ascribed to it that can only partake of reality (as is the case, for example, with power, that is, physical efficaciousness). (Weyr 1980d, 61–2; my translation)

But if sovereignty is a formal concept and a quality of the legal order, it cannot take up any content whatsoever, for among its contents there must necessarily also be a specific one: that which makes it possible for the order to set forth "the conditions under which a norm figures as an element of the normative system" (ibid., 60, my translation). Now, because this feature characterizes heteronomous systems, and the legal system is such a system, this necessarily means that the unity of the legal system presupposes a content (a content of its norms) that establishes the legality of norms, namely, their belonging to the legal system. So, as much as the law may be a system of abstract and formal norms, these norms presuppose some content that regulates the life of the legal system.

Now, it is true that for Weyr the formal criterion served the purpose of reducing each legal system to unity, and that this applies not only to "composite" systems (such as a federal state) but also to unitary ones. But as a quality of the legal system, sovereignty is also understood by him as a concept at once static and dynamic. The latter aspect comes through if we consider a legal system in its concrete existence: A legal system so considered can only be dynamic, by virtue of its regulating its own change. But then, precisely in this way, despite the reiterated normativity of the system, the law winds up embodying voluntaristic elements (the will ascribable to one agent or another) that pull the world of pure *Sollen* back into the reality of being, the *Sein*. Whether we are dealing with a composite (federal) system or a unitary one, the system will always have to have unity in order to be valid, that is, all of its parts (the states forming a federation, but also all the other bodies having secondary normative

competence, such as the municipalities and the ministries) need to be reducible to a single legal person, which in this case would be the central state. But this reduction to unity and, vice versa, the delegation of competences from the centre to the periphery, always implies a decision-making moment somewhere down the line, and so a plurality of agents. This plurality of agents, despite Weyr's normative formalism, always comes with a string of sociopolitical characteristics, in that the norm produced by the normative agent delegated by the sovereign legal order is part of the class (*Tatbestand*) "to which the legal order ascribes the birth of legal obligations, in just the same way as the birth, death, or killing of a man are classes of acts from which certain obligations spring on the basis of the legal system" (ibid., 66; my translation). What counts as scientifically relevant is, for Weyr, the legal order as a unitary system, but equally relevant are all the normatively subjective agents (*Normsubjekte*) absent which there would be no production of norms. And so, considering that sovereignty is itself hierarchically ordered, at every level of partial sovereignty there operate agents who produce norms.

The foregoing interpretation of Weyr's philosophy of law highlights a possibility that Weyr himself was aware of, so much so that on the same page he takes care to point out that his theory is to be set against those views which confuse the legal concepts (the legally relevant classes of acts and facts) with the legal order itself, in that the component entities forming the legal order are found to have some sort of superordination to other legal persons. But this very egalitarian concern—this liberal defence of the equal standing of private citizens vis-à-vis the government bodies tasked with making administrative law[8]—is a double-edged sword, for on the one hand it does bespeak the liberal cast of Weyr's political philosophy, but on the other it acts as just another reminder of the antinomy inherent in a normativist philosophy of law that fails to be such all the way through (an objection that with equal force applies to Kelsen's own pure theory of law). Not incidentally, as was previously pointed out, the later Weyr was very much drawn to a "triadic" theory of law, that of Karel Engliš (1880–1961), who espoused a threefold approach to the knowledge of law based on the three criteria of causality, normativity, and teleology.

[8] "Administrative acts are considered a type of unilateral 'legal transaction,' which this theory [criticized by Weyr] sees as an autonomous source of rights and legal obligations. In a theory so conceived a confusion is made between the legal order and its legal concepts (*Tatbestande*)—with which the legal order as the only source of the whole of law, that is, as the source of rights, connects the birth of 'legal relations'—and in this way the whole systematic makeup of the legal order is destroyed. Indeed, to make one example, it would be impossible on that theory to speak of the unity of the legal system—understood as the unity of the whole of law—because the law is to be found in a whole series of legal concepts, such as those of contract, birth, death, bureaucratic decision, and the like" (Weyr 1980d, 67; my translation).

2.2. Precursors of the Pure Theory of Law: Hugo Krabbe (*by Giuliana Stella*)

Hugo Krabbe (1857–1936) gained widespread recognition and a devout following in his day, this owing to his innovative approach and to the originality of his works, which fit squarely into the broad contemporary landscape of German-language jurisprudence, but which pay equal attention to, and draw inspiration from, the thinkers who were paving the way for the great epistemological turn of the late 19th century: It is this new paradigm that would eventuate in the so-called Pure theory of law developed by Kelsen, a thinker that Krabbe is in fact considered to have anticipated. Krabbe's theory carries import in legal philosophy and public law alike, since his writings belong in an area of study, the theory of the state (*Staatslehre*), that at the time was considered a fundamental subject of law: These writings are specifically devoted to the relation between law and the state.

As we will see, Krabbe's ideas were seminal for the legal disciplines, and for the General theory of law (*Allgemeine Rechtslehre*) in particular, and three are the main works in which these ideas are expounded. The first of these (Krabbe 1906) frontally took on the question of the sovereignty of law: It was published in Dutch and immediately translated into German under the title *Die Lehre der Rechtssouveränität* (The theory of legal sovereignty: Krabbe 1906). According to Krabbe's own account, this work found its natural development, about a decade later, in his second important book, which in German is titled *Die moderne Staatsidee* (The modern idea of the state: Krabbe 1919). In the preface to the second edition—an expanded edition published directly in German in 1919—Krabbe informs us that the main body of the work consists of the book published under the same title in 1915, and substantially completed before the start of World War I. The 1919 work adds to the 1915 edition by bringing in a 1917 essay titled *Het Rechtsgezag*. This enrichment makes the 1919 German edition of *Die moderne Staatsidee* the core of Krabbe's legal speculation and scholarly production. It was Krabbe himself, after all, who pointed out that, whereas in his first major work, the 1906 *Die Lehre der Rechtssouveränität*, he was mainly concerned with criticizing the theory of the state's sovereignty on its merits, this second work instead sought to explain in the positive the principles framing the opposite theory, that of the sovereignty of law, and thus sought to flesh out the modern idea of the state. There is also a more concise, but no less coherent, version of this theory in which he offers a historical and speculative reconstruction of the modern idea of the state: It was published in French in 1926 (Krabbe 1926), and the basis for it is a course he taught at The Hague Academy of International Law. It, too, testifies to the wide currency enjoyed by Krabbe's theory. And finally there is the 1930 *Kritische Darstellung der Staatslehre* (Critical presentation of the doctrine of the state: Krabbe 1930), in which the conception expounded in the preceding works is bolstered by way of further theoretical backing and historical reconstruction.

As the titles of Krabbe's works indicate, and as a deeper analysis of their content makes even clearer, the central concern of his research is to move beyond an obsolete understanding of the state by laying out a conception that replaces the idea of dominion (*Herrschaft*) with that of law. However, it would be remiss not to point out the role played in the first half of the 20th century by the developing idea of international law, for this idea also plays a role in situating Krabbe's theory. These very theoretical interests are, after all, the ones we also find in the theorist who did more than anyone else to shape the legal landscape of the 20th century, namely, Hans Kelsen, and as was previously mentioned, it is precisely in Krabbe that Kelsen finds an important precursor. Very early on in Kelsen's production we find the very themes that Krabbe had previously turned to, specifically those revolving around the whole question of the nexus between law and the state and between municipal and international law—in a word, the question of sovereignty.

It bears pointing out in this connection that in 1920, after the publication of Krabbe's first two major works, Kelsen came out with a book that clearly identified the problem of sovereignty in its very title, *Das Problem der Souveränität und die Theorie des Völkerrechts* (The problem of sovereignty and the theory of international law: Kelsen 1920a), while the subtitle, qualifying the work as a *Beitrag zu einer reinen Rechtslehre*, a "contribution to a pure theory of law," and so as an essential stepping stone on the way to Kelsen's complete theoretical project, bespeaks Kelsen's complete affinity with Krabbe in establishing the importance of the close relation between a certain conception of international law and the idea of sovereignty.

If Krabbe is not widely recognized today, that is precisely because his theory found itself "enfolded into" into that of Kelsen, who in superseding Krabbe's theory and expanding it so as to adjust it to his own conception, wound up consigning it to oblivion. Krabbe is reckoned among Kelsen's so-called precursors, and once Kelsen came into his own as a character much more prolific and enterprising than the comparatively tempered, moderate professor from the University of Leiden,[9] Krabbe wound up being sidelined, despite the critical acclaim he had initially received. One need only consider in this regard the negligible role, if that, which Krabbe has in the work of Schmitt and Koellreutter,[10] not to mention that even in the French-speaking area, where his work also gained notoriety early on, his innovative theory of sovereignty would soon be overshadowed by Léon Duguit's more fully devel-

[9] Krabbe was professor of *Staatsrecht* (public law) at the University of Groningen and Leiden. He also served as president of the Netherlandish Society of Legal Philosophy, founded in 1919 and based in Leiden.

[10] There is a short but interesting passage on Krabbe in Schmitt 1922. Krabbe is conspicuously absent in Koellreutter 1933, where the reader will instead find discussions of Kelsen and Heller.

oped theory,[11] similar to the ones advanced by Krabbe and Kelsen, but certainly more up to date and closer to the kind of discourse engaged in by the jurists, especially those who took a sociological interest in law.

Krabbe's method consists in the first place in situating the idea of the state in a historical context. This is an idea he came to by reconstructing the main stages in the discipline devoted to its study, the *Staatslehre*, and coupling this development to a concept viewed as having primacy, that of sovereignty. He specifically traces out the history of the "modern" idea of the state, setting out to find the origin of this idea and pin down the moment of its birth. This idea thoroughly rejects an interpretation of sovereignty as simply related to the state, since to a modern state belongs a sovereignty understood as the sovereignty of law.

The turning point in the history of the idea of the state from the Greeks to modernity is located by Krabbe in the 16th century, when Thomas More set out the view that culture, not power, ought to be the aim of the state (the latter aim having been conceived from the outset as consubstantial with the state). In More's *Utopia* there emerges the idea that the state can organize society on the basis of an ideal model. But it is with Grotius that we find an appreciation of law as having a role that prefigures the idea of the sovereignty of law. There is indeed in his theory the primacy of a *coetus perfectus*, the bearer of sovereignty. And, finally, it is in Rousseau's philosophy that Krabbe sees the birth of the modern idea of the state as an entity bound up with the law. Krabbe is thinking here of Rousseau's concept of the general will and of the "impersonal" power of law. But he wonders what might have been the nature of the law Rousseau had in mind; and seeing that Rousseau, and even more so Grotius, still reasoned in terms of the natural law, he instead assigned that role to the positive law, arguing that by positing the sovereignty of natural law we would have advanced only partway toward the authentically modern idea of the state: Sovereignty belongs not to "natural" but to positive law. It is the sovereignty of *positive* law, then, which lies at the core of Krabbe's theory.

The historical process just outlined would eventually lead to the *Rechtsstaat*—the German rendering of the rule-of-law state—but since law never ceases to improve itself, Krabbe considers this to be only one of several evolutionary stages. And indeed Krabbe notes that in Kant, himself among the pioneers of the rule-of-law state, the law and the state still give place to a dualism. We have to wait until Stahl before we are shown the way to their identification.

[11] Duguit denied both the personality and the sovereignty of the state, in so doing looking to Kelsen, despite the different working assumptions from which the two authors start and the different conclusions they arrive at. But Duguit also pursued (without laying too much emphasis on) Krabbe's idea of the primacy of law over the state, regarded by Duguit as no more than an instrument.

The sovereignty of law therefore appears in Krabbe as the outgrowth of a long journey that began with the birth of the state: At the outset, the state had to be identified with a power, and specifically with a *personalized* power, but it then became a force through a succession of "depersonalizing" stages, and only in this way would it be possible to achieve an objectivization of power, and so a modern sovereignty, namely, the sovereignty of law. This is where international law takes on a preeminent role, for just as the state based on the monarch's power gave way to the state based on the power of the legal system—where no one, not even the monarch, is above the law—in the same way the individual legal order, like a river opening into the sea, opens into the international, or *inter gentes*, legal order, or, as Krabbe liked to call this cultural legal project, a supranational order, that is, an order lying beyond the nation.

We should now be in a position to appreciate not only the sense in which the Dutch jurist Krabbe is considered a precursor of Kelsen, but also the extent to which Kelsen's criticisms of Krabbe were founded. Kelsen's theory of sovereignty is expounded in his previously mentioned treatise of 1920, *Das Problem der Souveränität*, where Kelsen recognizes Krabbe's work as a "masterly critique of the German theory of public law" (Kelsen 1920a, 23; my translation), and he even adopts many of his predecessor's positions, but he winds up rejecting the theory even so. Its main error lies in its allegedly personifying the state, in its reifying the state as a person "in flesh and blood." But the truth is that Krabbe sets up an alternative between the law's personal power and its impersonal power, and as concerns personal power, he never reaches the point of "reifying" the state. Instead, he appropriately speaks of concrete men, such as a king, or a "college of men," stating that this is only a stage through which historically given societies go, a stage where material sovereignty based on authority gradually gives way to spiritual sovereignty based on law. Kelsen thus sets up a straw man, criticising a position that Krabbe never put forward.

In fact, on reading Krabbe's 1906 work, one can only come away startled by the points of overlap between the two jurists. Apart from the use of the expression "pure theory," there are more-substantive questions treating which Kelsen would later take a view strikingly similar to that of Krabbe: the idea that private citizens and the state stand on an equal footing, the nondistinction between public and private law (Krabbe 1906, 37),[12] and the rejection of the dogma of the will as a source of law. The will, however, is replaced by Krabbe with what he calls the "legal sentiment," a rather peculiar component of his theory of sovereignty, and here we do have a position quite unlike anything Kelsen might have taken up.[13] In terms that Kelsen would later adopt,

[12] Kelsen (1920a, 126ff.) recognized Krabbe as having anticipated his rejection of the dualism between public and private law.

[13] The question of legal "sentiment" or "consciousness" would deserve a closer investigation

Krabbe (1906, 43; cf. Kelsen 1911, 268ff.; 1913–1914, 53ff.) denies that the state enjoys any "surplus value" (*Mehrwert*), and he instead makes the case for a distinction between the stage where power rests with personal law and the stage where it is impersonal law that gains preeminence: This, he argues, comes about through the evolution of the human spirit—or, stated otherwise, in terms that Kelsen's epistemological framework inherits from Ernst Cassirer (Kelsen 1981, chap. 4)—it is something we witness in the passage from substance to function, from concrete to abstract. Anticipating Kelsen's normativism, Krabbe puts forward an argument as follows:

> The theory of the state's sovereignty rests on the idea that power is rooted in a personal right to rule. The theory of the sovereignty of law rests on the idea of an impersonal power, the power distinctive to norms precisely insofar as they are legal norms. The latter theory is the outgrowth of a superior culture and presupposes a capacity for abstract thinking. (Krabbe 1906, 47; my translation)

And in the same vein: "Law, meaning positive law, amenable to coercive enforcement, as the case may be, [...] appears before us as a set of norms" (ibid., 151; my translation). Precisely in the shift from the power wielded by a person to the power inherent in norms Krabbe locates the great revolution of modernity: "If we now ask which great thought [...] has come out victorious, we can answer that a *spiritual power* has taken the place of a *personal power*. We no longer live under the rule of persons but under the rule of norms, of these spiritual forces" (Krabbe 1919, 9; my translation).

The two authors diverge, on the other hand, when it comes to offering an actual definition of the rule-of-law state, the *Rechtsstaat*. Indeed, Krabbe held that the sovereignty of law describes this as a specific kind of state, the historically given entity which is the constitutional state, and thinks it possible to proceed on this very basis in moving by degrees beyond the dualism between the state and the law; Kelsen, by contrast, posited from the outset an absolute identity between law and the state, such that any kind of state is ipso facto a rule-of-law state. To this end—and, as Schmitt commented,[14] proceeding on an overtly ideological basis—Kelsen sets out to "blot out" sovereignty *tout court* (cf. Kelsen 1920a, 320). Perhaps this is where the comparison between the two

because it connects to Krabbe's idea that the achievement of a mature legal civilization is inevitably bound up with the cultural growth of men, who in his view have accordingly progressed through several historical stages of legal consciousness. That is how an initial prevailing idea of sovereignty tied to power, or empire, morphed into an increasingly expanded idea of supranational sovereignty not bounded by any given territory. It is therefore not possible, in light of this development, to account for Krabbe's theory by setting it in contrast to legal positivism, a view he instead always defended.

[14] Kelsen's rejection of the concept of sovereignty is denounced by Schmitt as none other than the outcome of the liberal ideology critical of the state. This is an outlook that according to Schmitt (1922, 29) Kelsen shares with Krabbe.

authors shows Krabbe to be the more practical-minded and empirical jurist,[15] with a sense for the historical datum,[16] a choice that Kelsen, in pursuit of a supposed "universality" of the concepts of legal science (ibid., 26), most resolutely criticizes.

In addition, Krabbe, looking to specifically clinch the link between legality and civilization, cannot countenance the idea that there is any sovereignty of law to be found in a theocratic organization of power: Such sovereignty can only be found where the development of culture has given rise to a proper consciousness,[17] one through which we come to recognize the direct obligatoriness deriving from what is no longer tied to any concrete personality but instead is binding precisely in virtue of its impersonality. The rule of law in Krabbe is tantamount to the impersonality of law, or, better yet, to the direct obligatoriness owed to the law's impersonality, but where *impersonality* means not "abstract" but "the impersonal legal order." This impersonality therefore does not rule out that the law, like the state when it exercised absolute sovereignty, bears a connection to power:[18] What happened, quite simply, is that power shifted from one holder to another. The power of the state and that of law are not fictive but real. If we observe them in their historical development, we will see that they initially coexisted, and then this phase ushered in a second one where the law and the state gained equal standing, once a model was identified corresponding precisely to the rule-of-law state.

Krabbe analysed the concrete legal structures of some European countries, through the eyes of a positivist jurist as well as through those of a legal philosopher, drawing the consequence that a substantive difference had devel-

[15] Specifically, it is Krabbe's intent to argue for his theory of sovereignty by connecting it to a discussion on the question of validity and obligation. See Krabbe 1919, 75.

[16] As evidence of that claim, one might recall the important role that Krabbe recognizes for the historical school of law.

[17] Law lives in the legal consciousness, and that view is closely bound up with the idea of the sovereignty of law: It is the legal consciousness of individuals and of peoples that confers vigour and force on the law—described by Krabbe (1926, 574) as the "new prince"—and on the multiple forms through which law manifests itself, including those of the federal state and the federation of states and, in descending order, of the county, the municipality, and so on. This is where Schmitt's interpretation comes in, which in Krabbe's consciousness approach sees a reiteration of H. Preuss and O. von Gierke's doctrine of the corporative state (see Schmitt 1922, 31). Also centred on the consonance between Krabbe's doctrine and that of Preuss and on the incongruence of Krabbe's doctrine with that of Kelsen is the interpretation of Krabbe offered by Hennis (2003, 24–8).

[18] The impersonality of power—which Krabbe defends tooth and nail, having first outlined its historical development—is a view that attracts Schmitt's firmest criticism, on the reasoning that the "anti-personalist" approach neglects law's indispensable logical decision-making moment, which in Schmitt's view cannot be resolved into a content-based deductivism: "Every concrete legal decision," says Schmitt, "contains a moment of indifference to content, in that a legal conclusion cannot be fully deduced from its premises, and yet the need for a decision remains an inherently determinative moment" (Schmitt 1922, 36; my translation).

oped between two situations: On the one hand was a complete *Gewaltseinheit*, which had grown to maturity in Great Britain, the Netherlands, and France, and on the other was an outworn model based on a dualism of powers and still present in Germany (Krabbe 1906, 68). The shift from personal to impersonal power is inherent in the evolution of civilization, and the historically decisive moment along the path so reconstructed came with the Glorious Revolution of 1689, starting from which the impersonal power of law gradually gained ground on the personal power of the king,[19] in a process driven by an awareness of the risk the state poses to liberty (cf. Krabbe 1919, 27).

The resolving monism Krabbe offers in response to the problem of the relation between law and the state is used by him to also solve the contradiction inherent in those conceptions that do not rule out the possibility of there being multiple "political entities" to which the principle of sovereignty applies, even though this principle is by definition absolute and exclusive. Under the monist theory—which by convention is attributed to Kelsen,[20] but which was first set out by Krabbe (ibid., 308)—the state's law merges with international law. Then, too, it is significant that Kelsen should again draw on Krabbe in criticizing the theory of the social contract as the foundation for the legitimacy of the people's sovereignty,[21] for this is a theory Krabbe specifically rejected as too indistinct, in that it cannot be identified with the personal power of command-giving, but neither can it be identified with the law's impersonal power (cf. Krabbe 1906, 149). The essential point, for Krabbe, is that there can be sovereignty even without a concrete subjectivity: without a person or body collegiate. This theory of the sovereignty of law carries clear political implications, for it ties in with the idea of the universality of the international legal order rooted in Wolff's ideal of the *civitas maxima*. The theory, in other words, comes with a political project which consists in designing a "supranational" order, an order which governs a community encompassing several states, and which for this reason is held up as more valuable than national law.

[19] "Since the 1689 revolution [...] there persists the attempt to eliminate personal power and make completely dominant the exclusive power that Parliament could have expressed by virtue of its being an organ of law. By accomplishing that objective, law acquired impersonal validity, and it can be said of England that it realized the doctrine of the sovereignty of law" (Krabbe 1906, 67; my translation).

[20] Like Kelsen, Krabbe also sees in the evolution of international law the makings of a "universal state." Nussbaum writes that "Krabbe does not just subscribe to the monistic theory—he even argues for the supremacy of international law, which he terms 'supranational law' and characterizes as having something of a messianic streak" (Nussbaum 1960, 309; my translation).

[21] Krabbe (1919, 45), in his own turn, would later look to Kelsen's *Hauptprobleme der Staatsrechtslehre* to find further backing for the view contrary to the social contract and to the theory of recognition (by the people) as the foundation for the legitimacy of law.

2.3. Hans Kelsen's Normativist Logicism (from 1911 to 1934)

2.3.1. Substance and Function in Kelsen's Philosophy of Law

The concept of function expresses the particularity of modern times in a special way which distinguishes modernity from premodern times. Which is to say that modernity is marked by its lack of any "centre." Where everything is a function, a relation, everything is interconnected, in the sense that *everything* is a centre, and so *nothing* is. Premodern times, for example, are without exception acquainted with the "sovereign" in a personal sense.

With the breakup of the medieval *Respublica Christiana*, this figure is replaced by a new one, that of the modern sovereign, of Hobbes's "mortal God." This figure in truth contains the germ of a process of self-dissolution that gradually leads to a loss of legitimacy, to the disappearance of the sovereign as a person in flesh and blood, to the advent (at first) of the fiction of the state as a person in a legal-dogmatic sense, and finally to the melting of this person into the universal sovereignty of the impersonal and abstract norm. It was Hans Kelsen's (1888–1973) legal philosophy that grasped this process of transfiguration from concrete to formal sovereignty.[22] This happened in what in my view stands as Kelsen's most significant work, *Das Problem der Souveränität* (The problem of sovereignty: Kelsen 1920a) whereas the classic systematization of this development is set down on an epistemological level, as is known, in Ernst Cassirer's 1910 *Substanzbegriff und Funktionsbegriff* (The concept of substance and the concept of function: Cassirer 1910), an essential text in understanding the history of modern philosophy, and also, where we are concerned, in explaining the *reine Rechtslehre* as a legal philosophy suited to the theoretical developments of modernity and of his new model of pluralist society (see Carrino 1998 and van Ooyen 2003, 2010).

The opposition between the concept of substance and that of function plays a key role in the effort by which Kelsen, throughout his theoretical production, goes about criticizing the various forms of ideology, so much so that his thought often appears to morph, and in fact does morph, into a proper anti-ideological ideology. In no author more than in Kelsen (see Topitsch 1964, 19ff.) do we find such a strenuous criticism of ideology and of the "ideological" imagery par excellence, that of religion: He closely parses the "canonical" texts of ideologism, from the straightforwardly religious ones to the politico-metaphysical ones, all of them dismantled because devoid of any coherence, guilty as charged before the tribunal of the logico-deductive rigour of scientific criticism (see Kelsen 2011).

This proper *jeu de massacre* naturally takes on different inflections at different places, and it cannot always hit the mark, owing in part to a preconceived intellectual mindset hostile to the symbolic discourse proper to religion and metaphysics (a hidebound mindset still savouring of 19th-century positiv-

[22] On Kelsen, see also Sections 8.3 and 8.4 in Tome 2 of this volume.

ism, despite Kelsen's description of his own approach as "*critical* positivism"). And as it turns out, it is in some of Kelsen's lesser-known texts that this criticism appears at its best. To be sure, these texts may not be the canonical ones that define Kelsen at his most familiar, but they are nonetheless essential, in my view, in laying the groundwork for an understanding of his theoretico-political project, by which is meant his turning the law to ethico-political ends. An example is to be found in *The Soul and the Law*, a 1936 article published in French (Kelsen 1936) and translated into English in the *Review of Religion* (Kelsen 1937), an article that anticipates the better-known *Society and Nature* (Kelsen 1943). Here the concept of the soul emblematically fills the role of the concept of substance and signifies everything that falls within the range of mythology, archaism, magic, primitive totemism, and the like, whereas the concept of law stands for form, in the sense of what is relational, referring to the logical interlacing of functional propositions of a scientific cast, scientific because hypothetical and probabilistic. "The soul" and "the law" are thus to be read as "substance *versus* function," or again as "magic *versus* science," along with other like contrasts, all of which must be read as stages in a process where every last theological vestige is to be effaced from life, and above all from science: from science in general, and specifically, as far as Kelsen is concerned, from political and legal science.

If we are to understand Kelsen's theoretical project—which indirectly is also his political project—we will have to take into account the question of how Kelsen goes about overcoming the dualist theology of good versus bad, of "true being" versus appearance. For it is around this central problem that Kelsen builds all his arguments: This is the backdrop against which we are to view all his works, the focal point being the criticism that Kelsen devotes to Plato, and we can see this reflected in Kelsen's criticism of human faith in the immortality of the soul, in the existence of something independent from the natural individual and from the complexes which make up the individual's psychophysical interrelatedness. Kelsen's arguments, in other words, are aimed at what scientific criticism identifies as a simple hypostatized "double" of the individual. Someone reading Kelsen's studies on Plato, a philosopher who accompanied Kelsen basically throughout his life (Kelsen 1985), cannot help but notice that Kelsen always goes back to the question of the soul and its immortality—and so, mind you, the question of the soul which metaphysics speaks of—a litmus test he uses to determine all ideological-metaphysical and archaic conceptions of life. The question of the soul served as a starting point from which to work in developing other questions, the ones more closely connected to the pure theory of law, especially when it comes to the doctrine of the "double truth," criticized as irreconcilable with the modern, scientific vision of the world and of life. The question of the "soul" and that of the "double truth"[23] interlock to

[23] The psyche as a "double" of the person had previously been investigated by Rhode (1925,

make up the supporting structure of Kelsen's opposition to ideology, indeed of *all* ideologies. His criticism even targets what he calls the "superstition" deeply rooted in the human psyche, and tied to atavistic impulses of fear and survival, and hence bound up with a matter as primal as anyone may possess.

In this sense, Kelsen was not taking aim at an ideological superfetation or accretion, a historically settled "superstructural" belief; he was rather concerned to debunk a lingering magical vision of life that survives in each person, a vision that in reality amounts to a social ideology: "Faith in the soul is in the first place an ideology of retribution, and as such a tool of justice" (Kelsen 1985, 248; my translation). In Plato, as well as in general, this faith is connected with the problem of good and evil, with ethics (ibid., 272, 280) and with the need for justice, something that in a conversation with Günther Winkler in the early 1960s he described as the "opium of the people." We are thus dealing with the fantasies of single human beings who continue to imagine their immortal "souls," something against which, in a sort of "initiation to modern science," Kelsen sets his own profoundly laic and secular vision of life. It is not religion as the opium of the people that Kelsen criticises, but the individual as an "opium buyer," who fails to see the only possible truth in the universe, the veridicality that (in a Kantian manner) the new science *produces*. The term *soul* effects a hypostatization beneath which are concealed political postulates: It is the germ that spawns all illusory beliefs, such as that in the existence of God or in justice. "In Plato, the primacy of justice over truth, of ethics over our knowledge of reality, is deeply connected with his doctrine of the double truth. If it is the good that "brings forth the truth," then only the good can be true, and so the good must necessarily also be true" (ibid., 204; my translation). In metaphysics we proceed not from the process for gaining knowledge of the truth but from an abstract emotive postulate, from a subjective need, even though we cannot avoid shifting toward that level of reality and concreteness which, from a scientifically correct perspective, ought to be the point of departure and of arrival.

For Kelsen, for example, the problem of justice is simply a misconceived problem, for it concerns individual convictions and the rules of the individual's *autonomous* action, not the *heteronomous* structure of law. Law and justice are problems that fall under two different headings, the former being a matter of social technique and the latter a matter of individual morality. "The eternal question of justice," Kelsen writes, "seems to be one of these genuine problems whose solution does not consist in a correct answer but in correcting the question; that is to say, in substituting for one question another, allegedly a more precise one. The resigned wisdom: man can never find the truth but may learn to ask better questions, holds for the problem of justice more than for any other one" (Kelsen 1947, 390).

7). Kelsen (1985, 10) in any event also highlights how in Plato, next to the purely ethical concept of the soul there sometimes appears a naturalistic-psychological concept.

The presupposition behind this framing of the problem lies in an assumption of value relativism, a theme developing which Kelsen certainly bears Max Weber in mind. If we had to choose between liberty and equality, for example, there would be no way for us to rationally decide which of these two values is objectively superior to the other, for any such decision would depend on each person's internal psychical motivations. Any attempt on our part to justify a choice among subjective values by invoking an objectively valid rule of justice will amount to no more than the expression of a psychical need. Justice is "an irrational ideal," "a euphemistic paraphrase of the painful fact that justice is an ideal inaccessible to rational cognition" (ibid., 397). Even so, it is a historically demonstrated symptomatic fact that whenever an ideal of justice comes into contact with social reality, it undergoes a peculiar metamorphosis that turns it into an ideal of peace, which too may not amount to justice, but at least it amounts of a *species* of justice. Positive law is in effect "a social order the purpose of which is to guarantee peace among the individuals subject to that order" (ibid., 397–8) an order that transforms the ideal of an *extra nos* absolute justice into the inherently relative justice proper to legality, to a compliance with positive legal norms: "It is 'just' for a legal rule to be actually applied in all cases where, according to its content, this rule should be applied. It is 'unjust' for it to be applied in one case and not in another similar case" (ibid., 398).

So if we were to construe Kelsen's theory of law and the state as a neutral, unqualifiedly agnostic theory—even in the phase where this theory moved closest to the empirical currents (in Kelsen's American period)—this would mean that as a matter of principle we have deprived ourselves of a full understanding of that theory, deliberately choosing not to take into account its complex and multiform ideal valence. Such a misconstrual is a risk attendant on our neglecting to fully consider that the *reine Rechtslehre*'s neo-Kantian foundation can be used as a sort of toolkit for moral evaluation; and it is also a risk we incur by failing to grasp the logical necessity to historically revisit Kelsen's theory, in that we have taken Kelsen too seriously, so to speak, when he describes his endeavour and purposes as purely scientific, descriptive, and non-evaluative; or we have sought at all costs to make his theory into a *solely* ideological depiction of this or that political conception (as a rule, and not incidentally, a *liberal* conception). This twofold error has prevented us from grasping the profound meaning of Kelsen's project, its strong historico-theoretical relevance, almost as if to suggest that a theory's historical situatedness or its (indirectly) moral import somehow acts to undermine its theoretical value.

The pure theory of law is a relativistic theory, to be sure, but it does not resolve itself into an absolute scepsis. Kelsen's relativism is itself relative, in that it presupposes an all-embracing value, that of tolerance. In Kelsen, tolerance is not an exclusively political value but rather functions as the necessary condition for any attempt at political liberation: It is the trait that binds science as the process of self-determination of reason with politics as the process through

which to found a universal order of peace and rationalize human existence. Tolerance thus means rationalization and, consequently, formalism. And so, Kelsen's highly disparaged and criticized formalism is not so "empty," after all, as this formalism itself pretends to be: On the contrary, precisely on account of its "emptiness," it is charged with material meanings and with the potential for political projects. Coming to the forefront *in* and *through* this formalism is the global project that secularized modern humanity has for a rationalistic foundation of society so as to be free from all metaphysical, transcendent assumptions. In Kelsen's pure theory of law (which must be construed not only as a general theory of law, a theory of the state, but also as a legal and political philosophy), we find in certain respects the most coherent place for an earthbound rationalization of vital processes. Kelsen figures as the knight spearheading the effort to blot out all mythological, metaphysical, and mystical residues; he symbolizes the horror of all that is elementary, irrational, and "primitive."

In secularization, on the one hand, and in the bursting onto the European scene (and especially onto the Mittel-European scene) of a Jewish spirit fully suspicious of all that is not pure spirit, or interiority, or an awareness of pain and defectiveness, on the other, we have two hermeneutical lenses through which to read the recent history of Europe that show themselves to be especially fruitful in working toward an understanding of Kelsen, who certainly did have a part in that history. His theory—which it would be a mistake to regard as just legal or political, for it is also a moral philosophy—thus lends itself to a critical and cognizant understanding of the complex spiritual coordinates of the time of crisis and of the devaluation of all values (*Entwertung aller Werte*), presenting itself as a critical scientific and speculative self-reflection, a radical one capable of rising to the challenge posed by the dissolution of any organic communitarian bond in the traditional sense and by the emerging concern with the *value* of what is normative, of that which *ought to be*.

The basic elements of Kelsen's conceptual toolkit—order (system), norm, duty, and spirit (in the Freudian sense of the term)—are not neutral concepts, purely and naively formal in the sense of a technico-scientific categorial apparatus indifferent to the deep motivations, conscious or otherwise, of those who use them. The ambiguity of Kelsen's project—which all told builds a model for a legal-political order designed to promote a certain kind of politics and of law—is owed to this terminological ambivalence, which invokes layers of much deeper meaningfulness than that of the general theoretical conceptual apparatus. Kelsen was a full participant in the spiritual turmoil that marked the great Vienna of the early 20th century and in the crisis of the Mittel-European world—a world importantly shaped by the Jewish intelligentsia—and there is no doubt that his cultural roots hark back to a legacy that can only be understood by virtue of his being tied to the Jewish community (by a bond that only grew stronger the more it was rejected), and it is quite significant that this community was "founded" *ab origine* on the lack of any foundation,

on the destiny of nomadism and of exile (it is only in 1906 that Kelsen "converted" to Christianity, for reasons of expediency). These roots

> reached back to the archaic-religious conception of the law understood as the transcendence of the Word over deeds, that is, over human vicissitudes and the convulsions of history; the transcendence of rules over history; of form over facts; of the ought over the mobility, instability, and insecurity that distinguishes the conflictual and contradictory reality of the is; [...] the transcendence of order over disorder. (Frosini 1988b, 52; my translation)

Only on this hermeneutical foundation, and from this perspective, is it possible to grasp the authentic meaning of the view that equates God with nature and the state with pure normativity, with a functional relation, with formal-legalistic abstractness. The desubstantivization of the state that Kelsen effects by making the state into a legal form that comes back together only in the universal totality of the *civitas maxima* is a move whose meaning can be grasped only as an attempt to rationalize the basic existential question facing modern humanity deprived of the "gift of meaning," the question of how to overcome the sense of guilt and remove it, with the accompanying anxiety, leading the world from chaos to the cosmos. Anxiety provides the essential key for the hermeneutics of modern culture, but anxiety is itself a religious, theological concept. In rabbinic culture (cf. Rubenstein 1968), for example, anxiety is the original productive sign of religious practices, of symbolic rites, and of knowledge. And it is not incidental that anxiety should at the same time constitute the core of Freud's psychoanalytic theory—the last chapter in the comments to the Talmud, as Kafka characterized that theory—and Kelsen not only kept up personal relations with Freud but also adopted important elements of his theory (Losano 1981).

The rejection of any organic substantive conception was taking on a strong political flavour in a reactionary sense at that time, but the thrust of this rejection in Kelsen lay in his attempt to radically dismantle all mythological thought by seizing on the tools made available by the rationalistic and formalistic critique of knowledge, as well as on the advances made in anthropology, ethnology, and especially psychoanalysis. Freud's effort was to trace the vestiges of mythological thought in modern man, and in a similar vein Kelsen saw this thought as a brake on the emancipative movement of the spiritual sciences, where hypostatization—coupled with an insufficiently autonomous role recognized for the notion of function understood as constitutive of the dignity of the modern scientific enterprise—continues to hamstring humans in their endeavour to free themselves from the primitivism of miracles, as well as from the metaphysical character of their hypostatizing and substantivizing "full of mystery" (Kelsen 1920b, 424; my translation)—irrational and logically tenuous like Hegel's objective spirit (Kelsen 1922a, 133) (even though, as we will see, Kelsen would end up drawing on Hegel's critique of subjectivism)—and from the communistic millenarianism propounded by Marx, Engels, and Lenin (Kelsen 1920b, 424).

Kelsen's theory of law as a system that coerces human behaviour lays its foundation on an atomistic conception of society as an entity that only exists through its psychophysical singularities, which alone represent social reality, the matter-of-fact basis of sociological causal knowledge. The normative-functional conception of the state is possible only against the background of a specific conception of the world and of life that has interiorized the dematerialization of all supraindividual figures, first among which that of God. One can appreciate, from this perspective, why Kelsen should have regarded Freud's work as "invaluable." True, Kelsen judged this work to be only "preliminary" in moving toward the definitive abatement of "metaphysical dualism," but Freud's psychological analysis did nonetheless appear to him to have dissolved the archaic metaphysical dualism of the double truth, having resolved the "hypostatizations—armed with all the magic of centuries-old words: *God*, *society*, *state*—into individual psychological elements" (Kelsen 1922a, 134; my translation).[24]

The doctrine of the double truth entails a double morality: an empirical one and an authentic, metaphysical one coinciding with true being. But we must be careful here, for even at this early stage Kelsen's critique of metaphysics in pursuit of a despiritualizing realism begins to reveal his basic project. And far from assuming a sceptical cast, this project is deeply morally committed. Kelsen's peculiarity and originality consist precisely in his effort to promote a peaceful coexistence—just, good, moral—through a critique aimed at every ideology of justice, goodness, and the like. And so, while Kelsen does demythologize absolute values in such a way as to come to a relativistic view, this is nonetheless a *moral* view,[25] and in fact he proceeds in an attempt to ground morality itself—a "weak" morality, so to speak—in the truth of modern science.

Programmatically ruling out as a matter of principle any hypostatization that should duplicate the object of scientific knowledge—an object conceived as a single, unitary entity—Kelsen *from the start* relativizes absolute values into

[24] Just as in Freud's view the psychological premise of communism "is an untenable illusion," in that by abolishing private property "we deprive the human love of aggression of one of its instruments, certainly a strong one, though certainly not the strongest one (Freud 1930, 83–4), so Kelsen argues that "faith in the possibility of a tight-knit community [...] rests either on ignorance of human nature or on faith in the possibility of a radical change. *Man*—this is the material out of which even the house of a future social arrangement ought to be built (Kelsen 1965a, 93).

[25] It has been observed that Kelsen—and with him other early relativists like Radbruch—proceeds "from the view that it is impossible to determine which of various moral conceptions is superior to or better than the others [...] to the conclusion that we would do well to respect all opinions, and should thus realize freedom, democracy, and toleration." So both Kelsen and the others "arrive at an outcome essentially [...] contrary to the subjectivist premises of their thought, for they wind up in effect positing some values as superior to others, and these higher values—those of freedom and toleration—are ones that can be characterized precisely as [...] objective and absolute" (Cattaneo 1962, 43; my translation).

relative values: The state is in the first place desubstantivized, "formalized," and resolved into the pure relations of the legal norm, and justice is reduced to the positive law. The modern theory of the state appears to him to be still imbued with metaphysical dualism, seized by the idea of soul or that of substance: It is thus still caught in the grip of that "mythological conception of the world" that "'behind' the multiple sensible manifestations of nature conjures up a multiplicity of deities imagined to be the causes of natural phenomena" (Kelsen 1981, 9; my translation). The state is not a "substance" apart from the law—much less a substance *superior* to the law (as the organicist authoritarian currents and theories of law would have it)—but is rather "the expression of the systematic unity of law" (ibid., 12; my translation) an "ideal creation" (ibid., 14; my translation) of knowing thought.

When we work with two different systems (God as distinguished from the world, the state as distinguished from law, justice as distinguished from law), the one and the other hypostatizing different expressions of the same reality, and so when we work on the basis of a double truth, it means we are working with the mental reservation that if the rules of law should get in the way of special interests, then we can invoke *the other* system, *the other* "truth," so as to advance those interests and impose them:

> We can thus resort to the metalegal system and hold up as valid an "act of the state" that no legal norm would allow us to relate to the unity of the legal system, an act which "lies outside the law," and which is therefore legally void, a personal arbitrary act, or even a crime for which a punishment is provided. In a sense, then, this act can be ascribed not to the subject who materially carried it out but to a subject conceived of as standing "behind" this person, and so to a systematic unity. The system of the "state," which when the occasion arises stands in for the inconvenient system of the "law," comes onto the scene under the name of "politics." (Ibid.; my translation)

Of course, Kelsen's criticism of ideology can hold up only on condition of holding on to a basic presupposition behind every one of his arguments, the idea that not only is there a science of nature whose assertions are true, but also that this science of nature constitutes a value. This presupposition cannot be demonstrated, to be sure, but neither can the contrary assumption, that is, we cannot demonstrate natural science to be a nonvalue (this, among other reasons, because it clearly is not). In Kelsen, all values are thus made to stand on the same plane: The value of positive law cannot substantially be distinguished from that of justice, or the value of morality from that of logic. Where value is concerned, we always find ourselves operating within the sphere of validity (*Geltung*) as distinguished from that of being. That law and justice or logic and morals are different things from stones and stars, from the passions and the instincts, appears to Kelsen to be a self-evident proposition. But how to distinguish the value of law from the value closest to it, that of justice, considering that we do, after all, have to distinguish the two? Kelsen is not a crass positivist. Quite the contrary, he is a critical one, especially in his

European period: He is a critical idealist in the Kantian sense of the term, where Kantianism is itself two-sided, however, for on the one hand it does not stray too far from a certain positivist conception, but at the same time it takes on an ethical orientation. In this way, values are typified: The value of law is a "type" different from that of justice, just as this latter type of value distinguishes itself from that of logic or that of aesthetics. Values are relativized in virtue of their being placed before one another by thought in its search for knowledge. One might say that the totality of the world of values is broken up into a plurality of typical values that thought can only grasp precisely in their typicality. The criterion for this typicality, however, lies in the exclusivity by which each *type* of value is distinguished: The value of law excludes that of justice, such that we can have a positive science of law—a science of law proper, which only on that account can be considered positive—only to the extent that in analyzing the type "law," we cease to inquire into the value of justice and instead deliberately and as a matter of principle rule out any question about the justice of law, about the law of the law, or about "just" law. In this conscious turning away from classic systematizations, from totalities of thought, from all-embracing accounts lies Kelsen's legal positivism and the very positivity of law, which as such appears as the product of scientific thought, with its penchant for analyzing, dividing, and breaking apart what formerly stood as the universality of things, the totality of the world, including the world of values and their hierarchy.

This analytical method is the functional method, which, however, we cannot inquire into any further. This method appears as the mark, the "stigma," of modern civilization, which in effect has carried through—or rather, *is* carrying through—the project of seizing the world. For Kelsen, the truth of this method is given by its very being here, by its effective potency in its unfolding.

It is clear, then, that Kelsen adheres to a scientistic ideology, however much a refined one. He wants a "science of the spirit," but always on the basis and the presupposition of the sciences of nature, because that is where the functional method (as a method through which "substances" are dissolved) has revealed its capacities and potency. Not incidentally, Cassirer's book is a philosophical analysis of *natural* science, not of the spiritual sciences. Philosophy can thus present itself as the mathematics of the natural sciences, and Kelsen accordingly wants to construct a philosophy of law understood as a mathematics of the legal sciences, that is, of the various areas of positive law, where legal science can be described as pure in the sense that it, too, has dissolved the concept of substance. Whether such a project is at all possible is not a question on which we can enter here, apart from observing that the world of the spirit is something other than the world of nature—it is so precisely for Kelsen, too—such that this attempt to carry the function of mathematics over to the world of nature cannot but give rise to questions, precisely the sorts of questions that should in general come up in an attempt to apply the presuppositions of

Hans Kelsen (1881–1973)

Kant's *Critique of Pure Reason* to the world of liberty. But what matters is that Kelsen did in fact make such attempts, and that he did so specifically with a view to doing science: not so much the kind of science that will answer the intellectual curiosities of the learned as the kind that will liberate humans by making them more aware of the relativity of all things, or rather, of all things apart from the advancement of science itself.

Science and politics, science and the world, science and people are all different things to Kelsen. The world, politics, and humans all belong with the irrational, with that which cannot be formalized, the contradictory. In fact, worse than that, everything here falls under the dominance of the primitive instincts, their originary form lying in religion as a social ideological structure. God and the state thus reveal a singular homogeneity, in that they both act as instrumental depictions serving to harness the instinct toward subjection, an instinct having two contradictory drives, one toward our own subjection and the other toward that of others:

> If we take religion in its historical embodiment, there has never been a believer content to be alone with his God; we have always subjected ourselves to a God so as to subject *others* to this God. And the greater this subordination, the more fanatic our religious self-alienation, the stronger the exaltation of humanity, the more unbounded will be our impulse to dominate others in the name of divinity, the more triumphant will be the victory of this divinity, for it is only through victory that a warrior of faith can identify with his divinity. (Kelsen 2010, 143)

And so theology and legal science, the concept of god and that of the state, do exhibit "a perfect parallelism of logical structure," a parallelism that "manifests itself through an astonishing identity" between two sets of problems and solutions: those set out in taking on the question of the relationship between, on the one hand, God and the world and, on the other, the state and law (Kelsen 1981, 9). It is on this basis that Kelsen dissolves the state into law, just as modern science has dissolved God into nature and its laws.

Religion is the primary social ideology, masquerading—in the etymological sense of the term—the impulse toward dominion: "Irrationalism is the autocracy that seeks to bring under subjection not only thought but also the will of the subjects" (Kelsen 1985, 375; my translation). Religion, the state, the nation "are specific ideologies that rise above the structure of real facts. [...] If the masks come off, the drama loses its authentic sense; if we proceed independently of the masks, we will forgo precisely that specific interpretation exclusively into which things like society and religion resolve themselves!" (Kelsen 2010, 144; my translation). Inevitably, for Kelsen, every metaphysics of justice contains contradictions: Every metaphysical (i.e., religious) doctrine proceeds from the absoluteness of value, only to ultimately find itself compelled to relativize it. Indeed, the objective is always the real, or what is positive, the social world, and so if value is to have any effect in this world, it must lose its absoluteness. We can see this in Plato's metaphysical doctrine, for example,

but also in Aristotle's rationalistic doctrine, where Kelsen points out as "highly characteristic" the fact that Aristotle's attempt "to rationalize the idea of justice as the idea of equality, which originally is an emotional ideal, finally results in replacing the idea of justice by the idea of truth" (Kelsen 1947, 409; my translation).

Kelsen's legal positivism reaches the same conclusion as natural law theory, in both of the main forms taken by this ideology of justice, the metaphysico-religious form (with Plato, as well as with Jesus and especially the Apostle Paul) and the rationalistic one (with Aristotle). Which is to say that in either case, justice is ultimately equated with legality, being located in a compliance with the rules of the state: "Justice is the order of the state" (ibid., 408; my translation). But while natural law ideology is forced to metamorphosize its basic postulates, Kelsen remains from the outset coherent with his postulate of the value of veridicality, so that he does not have to forsake the scientific method in order to press the exigencies of a possible, however relative, justice. Even more relevant than this difference, however, is that, unlike Kelsen's critical legal positivism (or "critical idealism"), the ideology of justice *justifies* existing power: This contrasts with the pure theory of law, which can also *criticize* power.[26] Natural law is almost invariably conservative, acting as a "scientific" legitimation of power; the pure theory is reformist, open to social transformation and to the protection of individual freedoms, an extolment of law as something other than politics, even though it may bear a relation to politics. From this perspective, Kelsen's legal positivism could thus be made to fall within so-called political legal positivism, even more than within the methodological variety of legal positivism.

Law, and modern law in particular, is for Kelsen a value, a value at once political and moral: From a political point of view, the value of law lies in *democracy*, and specifically in democratic pluralism; from an ethical point of view, in *tolerance*. Kelsen's doctrine is positivist in that it rejects as logically incoherent any discourse about justice. But the import of this rejection is not just scientific: It is also moral and political. For Kelsen, the ideology of justice winds up excluding the pluralism of democracy, of a "legal order" that approaches the ideal state,[27] in favour of a hypostatized dualism that beclouds the reality of dominion and the predominance of primitive-archaic and substantialist my-

[26] Writes Kelsen in 1929: "If there is a place where we can operate outside the sphere of power, that place is science. And that holds as well for the science of power, which thus coincides with the pure theory of law and the state" (Kelsen 1929a, 1726; my translation).

[27] Here Kelsen brings in Plato, depicting him as the quintessential exponent of an antidemocratic and metaphysical conception of the state, in this finding himself very much in sympathy with the well-known interpretation of Plato offered by Karl Popper. Indeed, on this view, Plato so despises democracy that he could never bring himself around to the idea "that power in such a state, as in other nonideal states, can be brought even comparatively close to the ideal through a legal system" (Kelsen 1985, 373; my translation).

thology. As Ota Weinberger has observed, Kelsen's relativism does not in the end entail a negation of values but

> is simply a matter of regarding them as decisions, as something that cannot be demonstrated in purely cognitive fashion. Kelsen's pure positivism and his relativist theory of value are not unrealistic and neutral in their pragmatic consequences; they lead, rather, to a critique of ideology, to an understanding of value pluralism, to the postulate of tolerance, to a pluralistic democracy based on the free play of ideas in the self-correcting dialectic of clashing opinions within the field of legal development. They do this, however, without the fiction that in the process we shall simply apprehend "correct" law that has somehow been previously given. (Weinberger 1973, XXV–XXVI)

As Weinberger goes on to say, Kelsen's entire work and attitude are "imbued, therefore, with a high moral tone, in keeping with the modern spirit, which is sustained equally by the idea of democratic freedoms and by creative responsibility and the will to betterment" (ibid.).[28]

2.3.2. The Problem of Legal Science in Kelsen's Pure Theory of Law

2.3.2.1. The Disavowal

Kelsen's scholarly writing spanned from 1905, with a book on Dante Alighieri, to 1968, with an article in reply to Karl Leiminger (Kelsen 1968a). This is quite a long period, and it did make for more than one "conversion," providing several occasions for Kelsen to distance himself from some of the theses framing his own system, a system that must in effect be historicized and contextualized in grasping its meaning, which as we saw is not devoid of a political and even a moral dimension. However, one must disagree with those who depict Kelsen's pure theory of law as a work in progress, linearly evolving along a path of greater and greater perfection, so much so that, despite Kelsen's own interpretation of himself, his theoretical discourse is historically and politically situated. As has been observed by one of his most recent and best commentators, Robert Christian van Ooyen, Kelsen's legal philosophy and theory of the state are to be interpreted as making up a specifically political theory of pluralist democracy, a theory of this society's constitution (Ooyen 2003, 70).[29] We thus have to do with a theory that expresses its own time. Indeed, it expresses the substantial criticalness of its own time, a time marked by deep transformations—social, ideal, cultural, economic, and scientific.

It is precisely the question of science, of the "scientificity" of the propositions by which each discipline expresses its knowledge, that lies at the origin of

[28] See also, at greater length, Carrino 1987.

[29] I should mention, however, that this way of interpreting Kelsen's theory was previously offered in Italian in a book on Kelsen I myself wrote in 1984: See Carrino 1992.

Kelsen's *reine Rechtslehre* (from here on out the RRL). Indeed, it is this question that shapes the features and peculiarities of the RRL, which as we saw is structured around the concept of function (and of relation) as an idea proper to modern science. Kelsen's problem is that of founding jurisprudence as an authentic science having the power of knowledge. It is doubtless a range of methods that Kelsen relies on in outlining the characteristics of this science of law and in determining its limits (in the Kantian sense of what it is that knowledge can do and what it cannot do): He proceeded from the distinction between the is and the ought, still statically conditioned in the work he submitted for his habilitation, *Hauptprobleme der Staatsrechtslehre*; he then drew on Hermann Cohen's neo-Kantian philosophy and subsequently introduced in his system, at that stage still a purely normative one, the dynamic elements—namely, the production of norms (Sander and Merkl)—that would lead to the contradictions and antinomies which beset the pure theory of law as a whole.

The basic tenets of Kelsen's thought, such as he himself presents them in a somehow apodictic way, are as follows.

(*a*) Law is a phenomenon pertaining to the world of the *Sollen*, and it must therefore be clearly distinguished from everything having to do with facts, with what is empirical, the *Sein*.

(*b*) Law is an order of norms resting on a *Grundnorm*, a basic norm which is not positive but is presupposed, a hypothesis of reason in its quest for knowledge.

(*c*) Law as a legal system is hierarchically structured beginning from the basic norm (the *Grundnorm*, also referred to as *Urnorm* in Kelsen's early writings) and ending with the mere application of the judge's rulings on the part of the officials. For Kelsen, law is thus built on the idea of the penalty, revolving around the penalty, so much so that he defines the legal norm as follows: If A, then B ought to (*soll*) follow, where A is an illicit fact and B its normative consequence, namely, the penalty.

(*d*) Kelsen was interested in founding this legal science as an authentically normative science, and to this end, in the early decades of this activity, he stages an all-out attack against natural law theory, and even more so against the sociology of law, the science that was just then emerging with such authors as Kantorowicz and Wurzel, and above all Eugen Ehrlich (see Chapter 3 in this tome).

(*e*) In order to make legal science a science whose object consists in norms—meaning the enacted rules of positive law, in that the RRL seeks a positivist science—Kelsen needed to clear away from his field of vision anything having to do with power, force, and so with the state in its traditional acceptation. To this end he identified the state with law (but not the other way around, mind you—not law with the state). The state is always equated with the rule of law: It is a state made up of norms, the norms of the law. The unity of the state is only a way to represent the unity of the legal system. Only in this system do we find unity and coherence, in contrast to the reality of society,

which is the arena of conflict and contradiction; and a state conceived as an organic or concrete "entity"—the manifestation of power, the expression of this society—is a contradiction in itself, for it would be a place of separation, not of unity. Only the legal system, as a system of norms, can express this unity.

(*f*) The idea of the state as a normative system entails a clear rejection of the classic conception of the sovereignty of the state. Sovereignty is for Kelsen an archaic myth, something that legal science must free itself of. Sovereignty expresses a "substantialist" conception, which Kelsen found to have been eclipsed by the relativist worldview (relativist in a gnosiological sense, but also in a political one). The whole law is a single, unitary entity from the standpoint of knowing reason. This means that Kelsen rejects dualist conceptions of the relationship between domestic and international law. The only possible distinction is that between the primacy of domestic law as against the primacy of international law. But this is understood by Kelsen as a subjective choice dictated by political motivations. Those who uphold the primacy of domestic law (all legal systems in the world are no more than "parts" of a state's internal law) do so pursuing an imperialist programme in politics; those who instead uphold the primacy of international law, of the *civitas maxima*, do so as pacifists. And this choice is in truth anything but "free," in that those who advocate the primacy of the state's internal law thereby also position themselves against modern science and its advances—in effect espousing, as we saw, the idea of substance against the properly scientific idea of function.

(*g*) Kelsen is known as the creator of Europe's first constitutional court, the one set up with the Austrian constitution of 1920, and according to René Marcic (1966, 481ff.) this is where the RRL's authentic sense is to be located. This may be somewhat of a far-fetched interpretation, to be sure, but certainly in the central role played by the judge as a technician lies the fundamental point of the RRL correctly interpreted as a political theory of modern legal democracy.

(*h*) As mentioned at point (*e*) above, law is for Kelsen a single, unitary system. From here we get not only his identification of law and the state but also the supersession of all the traditional "dualisms" of legal dogmatics: those between public and private law, law and rights, legal person and natural person.

Those are the essential ideas, the building blocks, of the RRL. However, we will not take them up individually here, nor could we. I am rather interested in highlighting the RRL's broad presuppositions, those which Kelsen thought should lie at the foundation of a scientific theory of law, but which we will show here to be contradictory. This is discussed with respect to the basic norm in my treatment of Alfred Verdross and with respect to the hierarchical structure of the legal system in my treatment of its essential theorist, Alfred J. Merkl (see Sections 2.4.1 and 2.4.2).

It is useful, in view of the aims we have set out, to take things from a turning point, one that in truth marks a veritable abjuration in Kelsen's thought.

The occasion for it was a conference that took place among jurists in Salzburg in 1962. Here Kelsen gave a presentation published in 1963 under the title *Die Grundlage der Naturrechtslehre* (The foundations of the doctrine of natural-law: Kelsen 1963), with which his RRL officially moved into its last phase, indeed a phase that in certain respects marks a complete reversal from Kelsen's own early statements of his theory. These early statements were still influenced by neo-Kantianism,[30] with the various inflections it took—though it is especially the logicism of Marburg neo-Kantianism (Cohen, Natorp, and Cassirer) that Kelsen took up, giving it a formalistic bent—and this was entirely in keeping with Kelsen's Austrian and European period, with its historico-political as well as conceptual vicissitudes. This was the period that spanned from the doctoral dissertation on Dante's conception of the state and on electoral law, continuing through the habilitation study (Kelsen 1911), and ending with the works he produced in the 1930s and early 1940s.

In the 1963 article—as well as in a number of other ones which followed immediately thereafter and were then worked into the posthumous *Allgemeine Theorie der Normen* of 1979 (see Kelsen 1964, 1968b, 1968c, 1968d) norms are no longer depicted as autonomous and independent. "A norm is a norm," Kelsen once remarked in a debate held in Berkeley with Hart (cf. Postema 2011, Hart 1983), thus clearly situating norms in a world different from, and indeed opposite to, that of the is and of facts,[31] namely, in the world of the ought, the *Sollen*. But now, in 1963, we no longer have such a clear-cut statement of the nature of norms, which appear as no more than a shell for empirical reality: as *the necessary form of a willing will*. The meaning of a norm no longer lies in its being a norm—an expression of the world of the *Sollen* understood as a primitive category, the most fundamental mode of consciousness—but in the fact that with absolute necessity the norm adheres to the underlying act of will, which is an empirical act. The norm is now for Kelsen only the sense ascribable to an act of will directed at the behaviour of others. "There is no duty, that is, no norm, without a will, a will whose sense lies precisely in such duty" (Kelsen 1968b, 1473; my translation). And in this way legal science underwent a transformation with Kelsen at Berkeley: The discipline originated

[30] The commentator who first saw a neo-Kantian element in Kelsen's thought, and in particular in the *Hauptprobleme der Staatsrechtslehre*, was O. Ewald, who saw his work as an effort, "undertaken with rigour and logical energy, to bring transcendentalism to bear on the philosophy of law" (Ewald 1912, 397). On neo-Kantianism see Chapter 1 in this tome. On Kelsen and neo-kantianism see also Chapter 8 in Tome 2 of this volume.

[31] Here Kelsen refers to "the fact that the essence of the whole of law, like that of all norms, lies in the conceptual conflict between is and ought; the fact that law and norms alike would simply be meaningless if they coincided with the is, with actual reality; and so the fact that in knowing the law we must necessarily look at something other than actual reality: We must look at that which actual reality ought to aim for even if it may not do so, and so not at the is but at that in light of which the is must be interpreted and assessed" (Kelsen 1914, 236; my translation).

in Vienna as a purely normative science—a set of logical deductions, an entirely formal enterprise, separate from any consideration of the will of those who issue norms and those who fall subject to them—and then became a science of the sense of will, still officially a "normative" science, but only in the sense of its aiming at a knowledge of that which the is (*Wollen*) means. This conception now prevailed in the later Kelsen along with the parallel and connected conception of the basic norm (or *Grundnorm*) as a "fiction" (Kelsen 1964; my translation)[32] no longer understood as a hypothesis of knowing thought and as the origin of the knowing subject's ability to "gain possession" of the object of knowledge in virtue of the *method* of knowledge. But the point is that this is the exact opposite of the conception which prevailed (however much not exclusively) in the theory Kelsen was carrying forward in the 1910s and 1920s.

The task of jurisprudence in the first phase of Kelsen's thought is solely that of describing legal norms by abstracting from any psychologistic or voluntaristic element. The legal will is not a psychological fact or reality but a figure, a construction of legal thought: an imputation (or *Zurechnung*), which would later, not incidentally, become an ascription (or *Zuschreibung*), but which in any event lies in the nexus resulting from the connection that legal norms effect by linking subjects to external actions. There is neither causality nor teleology in the world of law, but only normativity in the sense of an imputation. The "person" in law is always something entirely distinct from the "person" in the real world, meaning the social world, with the psychological processes we each undergo in society and the real acts we do. *Contra* Zitelmann and Binding, Kelsen seeks to demonstrate that their concept of a "psychological" will always and exclusively refers to what in reality is a *juridical* will, a *purely* juridical will. Law is concerned not with action or with its causes or motives, but with the duty to act in one way or another. Never can the legal proposition through which the state's "will" gains validity be a command or an imperative, because the state's real domination over its "subjects" is something extraneous to the world of law, of norms, of the *Sollen*. In the *Hauptprobleme*, the state still figures as a "legal person," but here Kelsen is already laying the groundwork for his later identification of the state with the norms that make up the

[32] "Befuddling" is how the new concept of the basic norm as a fiction is described by J. Behrend, for whom "this new conception of Kelsen's clearly contradicts the thesis explicitly upheld and reiterated especially in the *Reine Rechtslehre* [...] that the basic norm is a norm presupposed in thought and not a norm resting on a fictitious act of will," a thesis that strikes Behrend as "as much better suited to Kelsen's overall theoretical system" (Behrend 1977, 80–1; my translation). Indeed, what distinguishes the *Reine Rechtslehre* is precisely its clear and unequivocal denial that the transcendental, as a metaphysical or theological mode of speculation, can be a basis on which to derive the validity of law; so from this perspective, if we are to understand the positive law, which the *Reine Rechtslehre* sets out to know, it would be much more coherent to relate that law to the basic norm as a hypothetical presupposition than to move in the opposite direction and seek to explain the validity of the positive law by relating that law to a fictitious act of will used as a logical expedient." Cf. Carrino 2011.

legal order, and so for his definition of the state as a *Rechtsstaat* in a logico-formal sense.

Initially Kelsen proceeded from a neo-Kantian conception driven to extremes, a conception that owes a debt to Hermann Cohen, but also to Simmel and Windelband,[33] and on this conception the method *creates* the object of its investigation: It "produces" this object in thought, and thought structures the object's coherence. Another point of contrast is that for the early Kelsen, legal knowledge creates its object as an object of knowledge, and in this way this object, namely, law, is produced as something necessarily coherent, as a non-contradictory or senseful (*sinnvoll*) order of norms; and so in the early Kelsen, it is a logical impossibility for norms that gives rise to conflict (see Bulygin 1983, 25ff., and Kelsen and Klug 1981). But for the later Kelsen (1963, 120), these very conflicts became nothing short of a frequent reality: "If in obeying or applying each of the two norms, the other one is (possibly or necessarily) violated," then there will be a conflict of norms (Kelsen 1968c, 1438). "A conflict of norms is undesirable, to be sure, but it is nonetheless possible, and it often occurs" (ibid., 1439). And as to the point that concerns us specifically: "Legal science is incompetent to resolve normative conflicts" (ibid., 1443). Although we should not immediately draw from these remarks, as has often been done, the conclusion that the later Kelsen "recognizes the failure of his project to construct a systematic theory of law" (Calsamiglia 1977, 122–3; my translation), there is no doubt that here, in this conversion and "abjuration," new possibilities open up for a deeper interpretation of Kelsen's original project.

The turnabout is explicitly acknowledged in the 1963 article just quoted, specifically as concerns Kelsen's best-known theory, that of the basic norm (or *Grundnorm*) which lies at the basis of the legal system:

> In my earlier writings I have spoken of norms that do not consist in the sense of an act of will. Unfortunately, however, I must now confess that I can no longer uphold this doctrine: I have had to abandon it. It has been anything but easy for me to let go of the doctrine I have defended for decades. There can be no norms that are merely thought, that is, norms that only exist as the sense of an act of *thought*, and not as the sense of an act of *will*. (Kelsen 1963, 119–20; my translation)

[33] The relation between Kelsen and Windelband has not received much study, to be sure, but an influence seems apparent nonetheless, to the extent that Kelsen's idea of the system's logical coherence may owe something to Windelband and to his distinction between logic and empiricism: "Indeed, as a theory of correct thinking," Windelband wrote, logic "must set out some norms for empirical thought, and the meaning, foundation, and original validity of these norms must be absolutely independent of the possibility of human error on the part of individuals whose empirical representations sometimes follow these norms and sometimes violate them" (Windelband 1912, 15). But then Kelsen appears to have interpreted Windelband's neo-Kantian philosophy unilaterally, in that Windelband saw logical forms as structurally connected with the existent despite their independence, whereas Kelsen took the view that thought, in its endeavour to know the law, proceeds independently of the contents of forms in giving these contents a logical ordering within the system.

It also significant, for someone who had hitherto been of neo-Kantian persuasion, to reject (explicitly at this point) the Kantian account of practical reason, an account which Kant is thought to have taken directly from Thomas Aquinas, and which appears to Kelsen as an evident "theological," and hence unscientific, foundation. As Kelsen remarks:

> It is disconcerting to acknowledge this fact, but it is an acknowledgment I have not come to with ease. And if I have reached this point, imposing this recognition on myself, Sirs you can believe me that I have done so only after the most mature reflection, because this in large part contradicts precisely what I myself have maintained for decades. (Ibid., 121; my translation)

The later Kelsen disavowed "in large part" his doctrine such as it had been elaborated and defended for decades, beginning with the *Hauptprobleme* (but only to a certain extent, since in this work law is still *statically* conditioned, and not yet considered as a dynamic system) and continuing until the first edition of the *Reine Rechtslehre* (1934).

But it is significant that Kelsen's position in the 1960s represents a return to a certain neo-Kantianism which, though it proceeded from the distinction between *Sein* and *Sollen*, never stopped short at drawing a line of separation between the two worlds. An example can be found in Rudolf Stammler himself (see Section 1.3 in this tome): A neo-Kantian philosopher whom Kelsen had certainly criticized—albeit also considering him a precursor of the "pure" theory of law—Stammler interpreted the law as a mode of willing, thus envisaging a connection between norms and the will, a connection that appears to be not unlike the one the later Kelsen espoused. Thus, Stammler wrote in his 1911 *Theorie der Rechtswissenschaft:*

> If someone raises a *legal* claim, they are not assuming something to be true, but rather want something; if they issue a legal proposition, they are not stating a fact of experience but are pursuing some ends; and in the case where we are considering the content of a legal order, we see not the physical phenomena of nature but a content of human willing. (Stammler 1911, 69; my translation)

But ends, or willing, are precisely what Kelsen, in this initial phase of the RRL, wants to keep outside and far-removed from the legal phenomenon and from the science of law, a science exclusively understood as "a geometry of the total legal phenomenon" (Kelsen 1911, 93; my translation).

2.3.2.2. The Irrationalism Marking the Second Phase of the RRL

Without a doubt the most significant consequence of Kelsen's abandonment of his former views is his irrationalism (Weinberger 1981a, 36ff.; 1981b, 487ff.; 1986, 187–9), which now takes the place of the old normative logicism aiming at a "logic of *sense*" in the manner of Edmund Husserl (F. Kaufmann 1922a, 240ff.); but no less important is the vanishing of the uncompromising

separation—a logical one, but carrying ontological overtones—between the is and the ought (Kubeš 1980a, 165). "There can be no imperative without an emperor," Kelsen now affirms (Kelsen 1963, 119; my translation). "There can be no norm without an authority that posits norms" (Kelsen 1968d, 1461; my translation).[34] A norm is what authority wants; this is an empirical authority—it certainly cannot be identified with the knowing scientist who in the act of knowing brings the object of knowledge into being as a coherent object, a unitary, noncontradictory, and hence "pure" object—and authority posits norms *insofar as* and *because* it wills them (that is, insofar as and because willing is *being*). The RRL's initial formalistic logicism, which here comes into contact with the realistic and pragmatic mentality of American legal thought, disappears in order to conjure up a freshly minted "pure theory of law," and hence in order to make way for a straightforwardly voluntaristic conception of the problem of law and of our knowledge of the legal phenomenon. The criticism that in the *Hauptprobleme* Kelsen devoted to the dogma of the will and to Jhering now only appears as a faint recollection.

Indeed, in an effort to overcome the obstacle posed by the logical difficulty of a connection between form and content, norms and facts, validity and effectivity, Kelsen now introduces the concept of a "modally indifferent substrate" (Kelsen 1979, 44ff.; my translation), an example being the phrase "shutting the door," understood as the modally neutral propositional content underlying the declarative sentence "The door is shut" and the imperative one "The door must stay shut." But if this concept is to serve the heuristic role envisioned for it, Kelsen must abandon the idea he formerly espoused of an insurmountable opposition between the is and the ought, an opposition that Kelsen initially held up as the "metalogical principle of every dualistic conception of the world" (Kelsen 1968e, 959; my translation). What appears indefensible in the later Kelsen is not the concept of a modally indifferent substrate (Eikema Hommes 1984, 158)[35] but the very cornerstone of the RRL in its classic form: the uncompromising dualism between the *Sein* and the *Sollen*, a dualism that had led Kelsen to positively affirm he was not a monist: "Ich bin kein Monist" (Kelsen 1911, VI). Certainly, this dualism would not only be formally upheld but also historically investigated; even so, it would no longer have the meaning of a separation between two equally "real" worlds, namely, the empirical world of nature, on the one hand, and the world of value, validity, the spirit, on the other: It would only stand as an antimetaphysical statement of principle. For

[34] On the norm as the meaning of an act of will in Kelsen's *Allgemeine Theorie der Normen* (1979), see Weinberger 1981a, 36ff. On Kelsen's posthumously published work, see Kubeš 1980a, 165, in which he sees the endpoint of a "tragic development" that has always brought Kelsen closer to the Uppsala school (Hägerström, Lundstedt, Olivecrona) and to Alf Ross. Cf. Opalek 1980. On the Uppsala School and Ross see Chapters 13 through 16 in Tome 2 of this volume.

[35] Here, in discussing the idea of a "modally indifferent substrate," Achterberg (1984, 450–2) speaks of "bridges" between the is and the ought.

the later Kelsen the separation must be maintained because any attempt to overcome it would mean abandoning "the field of empirical reality, and in particular the field of empirical acts of will," having recourse to a "transcendent, metaphysical field that makes possible a willing which at the same time exists as *thinking*, an ought which at the same time exists as *being*. [...] This is the ascent of man toward God, the ascent of science or philosophy toward theology" (Kelsen 1963, 121; my translation).

In all these articles of the 1960s, jurisprudence certainly remains a science of the spirit, a normative science, and its propositions accordingly present themselves as normative (*Soll-Sätze*) (cf. Vernengo 1986, 99–108) in that they purport to "describe" norms. But the meaning of a norm—a norm is actually *identified* with its meaning: A norm does not "have" a meaning; it *is* meaning—is no longer the meaning that can only be produced by the judgments constitutive of legal science. It is rather the meaning (the norm) that necessarily adheres to the fact, to being, to willing. Meaning is connected to being, to the fact of willing: "A duty must necessarily [*muss*] be the correlate of an act of willing" (Kelsen 1963, 122; my translation). What must (normatively, juridically) be known is no longer the *Sinn*—a norm's meaning as such, its *logical* meaning—but the content of an empirical act of willing, a content that in some way is expressed (Walter 1983, 192).

When the RRL was in its first phase it instead entailed a clear separation among judgments of knowledge: On the one hand are value (ought) judgments (*Sollurteilen*); on the other, empirical judgments (*Seinurteilen*), their classification depending on the orientation or intentionality proper to them. Kelsen drew, among others, on Johann Friedrich Herbart, who in his *Allgemeine Metaphysik* (General metaphysics)—Kelsen writes in his 1916 essay on legal science—"was even more coherent and true to principle than Kant in setting out the opposition between the is and the ought," basing this fundamental dualism on an original reflection," and constituting it "in the full diversity of directions in which the eye can cast its glance" (Kelsen 1968f, 37; my translation). In the logico-formal antagonism between the is and the ought lies the very presupposition of any classification of the sciences, a question that, as is known, was very much debated in Germany in the late 19th and early 20th centuries.

Under this originary formalism of the RRL, in its Austrian phase, the ought gains an autonomous existence: It is not "the ought of the is" (the meaning of an act of will) but "*the is of the ought*," the ideal *is* of an ought (a norm) or value, so much so that, as Kelsen commented, there would be no difference if "instead of speaking of the ought we spoke of a 'pure' [nonempirical] will" (Kelsen 1920a, 9; my translation): Legal knowledge "relates to law as an *exclusive* system, a closed one, as a world unto itself" (ibid., 14, my translation; Kelsen 1925, 105, 123) severed in knowledge from the world of facts, "like an *ideal order*, like a system of norms, and so like an ideality" (Kelsen 1920a, 11; my translation). The object of legal science is never a fact, not even indirect-

ly, but only a complex of pure meanings, such that on these premises Kelsen could even charge the neo-Kantian Emil Lask with failing, in his legal philosophy, to proceed coherently with his own logico-philosophical approach, instead proceeding from an "erroneous conception of legal positivism" (Kelsen 1968f, 73; my translation), a conception on which value somehow lies "alongside" the real, the fact, the is, the will, rather than being constructed in the process of knowledge as a world in itself" (ibid., 67, 74; my translation).[36] This is a criticism of Lask that would recoil upon Kelsen in the attack the latter's pupil Fritz Sander would stage against Kelsen, by resorting precisely to Lask's philosophy.

The pure essence of the ought defines the object, the *only* object, of the science of law, a normative science of meaning understood as something just contemplated in the mind, and in this sense pure, ideal, eidetic. Knowledge produces the meaning of norms, constituting their sense, such that every content, every sociological, political, or psychological reality, as well as every relation established with reality (Larenz 1931, 25), is completely excluded from the normative mode of consideration. Positive law as an "objective," preconceptual givenness, independent from the knowledge-making moment of legal science, law understood as a fact or empirical reality, a product of history and of the social conflict among values, charged with ideal, often ideological meanings, cannot logically play any role in such a conception of legal knowledge. The logical arcanum of that way of doing science is the pure eidetic *Wesensschau* (the intuition of essences),[37] a concept indicating forms which constitute other forms (even if this happens from the start in a way that contradicts Kant's distinction between *reflexio* and constitution: Kant 1963, 267ff.),[38] or categories that impress themselves on other categories, or forms of forms, rather than descriptions or explanations of facts or of acts of will, however much qualified as norms. As Kelsen writes, "although the legal order postulates a human will, it is not *the same thing* as this will, which may be lacking without thereby undermining the existence, i.e., the validity, of the legal order" (Kelsen 1968f, 92; my translation). Kelsen's logical normativism is from this point of view profoundly ahistorical (Carrino 1997, 811–8).

The legal order as a social reality, "as a state or process of social life," is irrelevant to the normative knowledge of law. The "existence" of law thus turns

[36] As G. Hohenhauer rightly pointed out, "the norms of positive law cannot have anything in common with the norm as a Kantian *a priori* construct" (Hohenhauer (1928, 328; my translation). On Lask, see also Section 1.4 in Tome 1 of this volume and Section 1.1.3.2 in Tome 2 of this volume.

[37] On the analogies and differences between the RRL and the phenomenological method developed by F. Kaufmann and Schreier, see Voegelin 1925, 86ff. On the phenomenological approach in general, see Dobretsberger 1927, 246–58; Bobbio 1934b; Stella 1990. Cf. also Chapter 4 in Tome 1 of this volume, Sections 4.4 and 4.5 in particular.

[38] On the problem of the relation between constitutive and reflexive judgments in legal science, see Sander 1923c, 143ff.

out to be an ideal quality: It is pure validity (*Geltung*), never an empirical or historical effectivity. The efficacy of law is so to speak the *proteron pros emas*, not the "objective," or logico-formal, prius. For example, there could be no Pythagorean theorem for us unless there were people *thinking* the same theorem, but its *validity* is independent of any act of thought (such an act functions as the *conditio sine qua non* of validity, not as its *conditio per quam*): Validity "finds its specific foundation [...] in a first axiom. So even the coercive order singled out as the 'state' does not in any way find the foundation of its validity in the reality of volitions and in the actions which have contained that order" (Kelsen 1922b, 93; my translation). The ought is validity (*Geltung*), inherent in which are (objective) value judgments understood as straightforward judgments of knowledge. Kelsen thus ponders the question, "Can a judgment be anything but a value judgment?" (Kelsen 1968f, 78; my translation). The sphere of the ought is the sphere of what is not conditioned by facts (historical, economic, political, religious facts, and the like), and norms understood as the meaning carried by an act of will certainly cannot be taken into consideration by legal science as a science of purely *ideal* meanings. Validity is an idea, a quality of the knowing intellect, and as such is not amenable to empirical verification; legal science is a knowledge of ideal meanings, of pure forms that logically ignore their "content," such as this content is historically determined. The RRL is the pure doctrine of a logically pure object (Kelsen 1922b, 80–1), in that we are dealing with an object "produced" by either of the two basic directions in which the knowing intellect may cast its glance. The RRL thus appears as a form of the law of reason (Holzhey 1984, 100), of the law of *knowing* reason. The first phase in Kelsen's thought stands in opposition to the last one, even though, in reality, each of the phases in the RRL's transformation is replete with contradictions.

2.3.2.3. The Aporias in the RRL

If, as Kant thought, it is in the very essence of critical thought that it should transcend the historical and the factual, substituting the order of facts with that of validity and law; if "law cannot in any way be a phenomenon, for its concept lies instead in the intellect" (Kant 1781, A44; my translation),[39] then there are two unavoidable lines of development for an authentically pure theory of law—i.e., a *critical* theory, and hence a theory "inherent in which is the philosophy of law" (Kelsen 1920a, VI; my translation)[40]—and so also a theory

[39] The German original reads "denn das Recht kann gar nicht erscheinen, sondern sein Begriff liegt im Verstande."

[40] Indeed, Kelsen (1925, VI) has always claimed credit for having brought "the province of legal science [...] closer to the fertile centre of all knowledge, namely, philosophy." On this aspect of Kelsen's doctrine, see Jöckel 1930, 2.

which can take into account the "limits to which positivism in the knowledge of law can be pushed," and which accordingly rejects as a matter of principle the "uncritical dogmatism" whereby a system of positive law is possible "without presuppositions" (ibid., VIII; my translation): On the one hand, a theory so described could not but develop into a form of critical idealism;[41] on the other hand, as was earlier underscored, it was bound to eventuate in a sort of formal or logico-transcendental "natural law theory." (This latter result is something that Kelsen obviously resisted, in his effort to always clarify his theory and positions as positivist, however much within the limits he himself recognized.) Whence the contradictions that accompanied the RRL throughout the arc of its development: too imbued with critical idealism to be purely positivist; but too positivist, on the other hand,[42] to be an authentically critical theory of law (see Martyniak 1937, 188; Kimmel 1961, 298; and Schild 1975, 70ff.).[43] Despite the theses Renato Treves defended in the 1930s in his article on the philosophical foundations of the pure theory of law, this is anything but a unitary theory: It is actually an antinomic theory (Carrino 2011). The philosophical "foundations" on which rests the work of Kelsen, Kant, Cohen, Vaihinger, Mach, and Cassirer, and also, i.e., Windelband and Simmel, make their way into the pure theory without really amalgamating, and so without giving place to a new unity, but rather engendering antinomies even with respect to the distinguishing features of Kelsen's thought, such as the basic norm and the distinction between the is and the ought. As has been rightly observed, "Kelsen's theory of law thus stands in contradiction to its own philosophical principles. Kelsen failed as a jurist to carry out in a rigorous and coherent way the projects he had laid out as a philosopher" (Martyniak 1937, 188; my translation). Critical idealism and positivism are plied together without finding any

[41] Perhaps the first commentator to have underscored Kelsen's constructivist idealism was one of his Viennese teachers, Friedrich Tezner, for whom the construction Kelsen lays out in the *Hauptprobleme* proceeds from the idea of the rule of law, though this is only one of the forms historically taken by the state in general. In this way, Tezner (1912, 338) argues, Kelsen can be said to abandon legal positivism and to wind up in the natural law theory he so despised.

[42] "If Kelsen had stayed true to his method, the RRL would have morphed into the most consummate idealism" (Calsamiglia 1977, 147; my translation). On the "formal natural law" ascribable to Kelsen's doctrine, which "unwittingly" ushers in "his archenemy, making it impossible to temporalize a given normative order," see once more Ross 1929, 260ff. Clearly, this opposition between idealism and positivism harboured within the RRL only concerns a *philosophical* idealism and a *legal* positivism. Even in his epistemological foundations, Kelsen walks a thin line between idealism and positivism: This can be appreciated in his drawing on the method of "purity" and on Hermann Cohen's and Ernst Cassirer's neo-Kantian apriorism, while at the same time looking to (*a*) Mach's *Denkökonomie*—it is Pitamic (1919, 1974) who spotted the *Denkökonomie* in the RRL's philosophical foundations—and to (*b*) Vaihinger's as-if (*Als-ob*) philosophy, both of which certainly stand in contrast to neo-Kantian transcendentalism (cf. Jöckel 1939, 87). On Pitamic, see Pavčnik 2011, 269ff., and Section 20.3.3 in this tome.

[43] As Wielinger (1977, 374) underscores, Kelsen has in any event always been careful to distinguish his own position from traditional philosophical positivism.

unity. Perhaps from a philosophical point of view it would be even better to speak of criticism and pragmatism, two strands that Kelsen failed to combine into a fecund synthesis. It is no accident that in 1930 Alfred Verdross should have invited Kelsen to rid himself of his neo-Kantian baggage so as to arrive at an "objective" (*gegenständliche*) philosophy (Verdross 2010, 1069).

This aporia of the RRL is in truth unsolvable. Even if the nomodynamic principle of the legal system, a principle introduced by Merkl and taken up by Kelsen (1923c, XII–XVI),[44] appears designed to overcome the RRL's contradictions in its passage from a *static* view of the legal system to a *dynamic* one, the moment the "positivity" of law is made to "effectively consist in this dynamic principle," in such a way that "the whole contraposition between natural law and positive law can in a certain sense be cast as a contraposition between a static system of norms and a dynamic one" (Kelsen 1968h, 293; my translation), when it comes time to effect a synthesis through which to make the system coherent, this contraposition in truth can only be worked out as an exercise in witchcraft, resolving itself, here as elsewhere, into a *great mystery*. Indeed, as has been observed by one of Kelsen's keenest commentators, the Hungarian legal philosopher Julius Moór, "a purely normative consideration should not concern itself at all with the problem of the *making* of law, for it should take the view that law cannot be made but only *known*. But in this way the view embraced is that of natural-law theory" (Moór 1931, 68; my translation).[45] Even at that time Fritz Sander, a regrettably forgotten author, had correctly argued that the normative consideration of law was in itself "statically conditioned" (Sander 1923c, 6; my translation). From a logical point of view, the purely normative consideration and tiered construction of the legal system contradict each other: "It is baffling," Moór went on to write, "that Adolf Merkl, who of all the people who defend the purely normative conception, does so even more unilaterally than Kelsen, should have been the first to

[44] There is nonetheless in this text a significant passage where Kelsen argues that "the idea of a meta-legal nature of the production of law," an idea introduced in the 1911 edition, is not "completely wrong": "The error of the *Hauprobleme* only consists in their introducing that idea too early. If the law can normalize its own production, in the sense of its perfecting itself, and if in this self-determination of the process through which the law is produced we want to see an essential characteristic of law, then we certainly cannot overlook that the *logically* primary legal norm cannot itself come under the purview of a higher rule of law by which its production is determined: We cannot overlook that the *basic norm* comes into play as the supreme rule of legal production, the rule that grounds the unity of the overall legal system within which the other norms are set into place. The basic norm must therefore as such be presupposed and not taken as posited in conformity with the law. Its place must, in other words, be seen as a fact that lies outside the legal system" (Kelsen 1923c, XIV–XV; my translation).

[45] As Kühne (1984, 195–6) has observed, if the RRL is understood to observe a static principle, it would have to be described not as a *general* theory of law, but as a theory distinctive to a *specific* legal system: It would have to state what the content of the law "in force" can be. On Moór see also Section 19.3.1 in this tome.

emphatically underscore this necessity for a dynamic consideration of law, a necessity that contradicts the normative consideration itself" (Moór 1931, 80; my translation). Even before Moór, this same observation had been made by S. Marck, that the principle that according to the tiered-construction theory governs the legal system and the application of law "is not of a logical kind but is rather determined by considerations of conformity to the purpose" (Marck 1925, 41; my translation) the system itself is intended to serve. The neo-Hegelian scholar Karl Larenz also made the same point: "This 'tiered-construction theory' can hardly be reconciled with a conception on which law is realized not through acts of will but through acts of knowledge. Therein lies a contradiction with the fundamental ideas underpinning Kelsen's theory of knowledge" (Larenz 1931, 27, my translation; cf. Aufricht 1974, 76–8, and Larenz 1933a, 68–103).

And indeed, it is not hard to appreciate why from a logical point of view it is only a static understanding, and not a dynamic one, that can result from a purely normative knowledge of law, the only kind of knowledge on which basis, as Kelsen would have it, it is possible to build a science of law. To see this, we need only consider that if the positive law is normatively considered, it can only appear as a prepackaged ordering of legal norms ordered within a fixed and self-enclosed system. As Moór observes, "the dogmatic science of law abstracts completely from the causal moment of temporal transformation: This science regards the positive law as having frozen at a given historical moment, *sub specie puncti temporis*, thereby taking a static consideration of the positive law" (Moór 1931, 80; my translation). In a normative sense, if we are to take normativism seriously, law can be considered only as being "immutable from its inception, eternal and timeless" (ibid., 63–4; my translation).[46] Indeed, from a strict and coherently normativist perspective, the legal system can only be *deduced* from a normative knowledge of law, and the perspective, in Kelsen's own words, accordingly presents itself as "a *normative* and *deductive* science of values, in the manner of ethics and logic," thus positioning itself as an "evaluating" science (Kelsen 1915, 839–40). In this way, the RRL's purely formal approach makes jurisprudence a "geometry" of the total legal phenomenon, and legal dogmatics an analogue of mathematics, however much belatedly with respect to the pluralism of non-Euclidean geometries (Walz 1930, 50); but by the same token—a consideration that holds so much the more if we take account of the theory of the basic norm as a foundational and Archimedean point of the normative legal system—the deductivist structure is such that the approach

[46] There is certainly no accident about the pointed irony that comes through in W. Jöckel's comment that "with the aid of Kelsen's basic norm, it would be possible to regard as law in force from the beginning of this century any legal system set decades, even centuries in the past, conceivably going back to Justinian's Roman law or to Hammurabi's Babylonian *Landrecht* or to the legal system of some German statelet" (Jöckel 1930, 117; my translation).

cannot but resolve itself into a transcription of what Leibniz wrote, this time with the coherence proper to a natural-law conception. Writes Leibniz,

> and from every definition one can draw certain consequences, by using the incontestable rules of logic; and this is precisely what one does in building the necessary and demonstrative sciences which depend not at all on facts, but solely on reason, such as logic, metaphysics, arithmetic, geometry, the science of motion, and the science of right as well; which are not at all founded on experiences and facts, and serve rather to give reasons for facts and to control them in advance; *which would* [also] *happen with respect to right, if there were no law in the world*. (Leibniz 1988, 50)

To this must be added that the very theory of the hierarchical construction of the legal system—a construction that moves from the basic norm to the general rules to the judge's rulings to the acts through which such rulings are enforced—has been interpreted as a secularization of politico-theological postulates: It is a proper "irony of fate," W. Krawietz comments, that Kelsen should have introduced this "Trojan horse of natural law" into his legal-positivist system, with "the idea of a hierarchy of laws immanent in every system of law" (Krawietz 1984a, 256, 261; my translation).[47]

When Kelsen was in his first American period, he was instead already clearly inclined toward the neoempirical criterion of demarcation between science and metaphysics. Just as for Moritz Schlick (1938, 93; my translation), for example, "every proposition is meaningful insofar as it is verifiable, asserting only that which can be verified, and nothing else besides,"[48] so for Kelsen the propositions through which the law is known can be ascribed to science, rather than to metaphysics, only to the extent that they refer to "a positive order evidenced by objectively determinable acts" (Kelsen 1945, 13). On this approach, already seeking to be "radically realistic and empirical" (ibid.), normative jurisprudence is no longer set up as a complex of value judgments but as one of "judgments about reality" (Kelsen 1957a, 351ff.; 1957b, 295ff.), and as such, it runs "parallel to the empirical science of nature" as "an analytical description of positive law" (Kelsen 1945, 163), the only possible nonevaluative description of the only possible "value" that can be objectively known insofar as it is amenable to factual verification in empirical experience. Indeed, only because we are dealing with judgments about reality is an experimental verification possible.

In this phase Kelsen can be described as (on the whole) neoempiricist, just as in the period from 1911 to 1935 he can be described as (on the whole) neo-Kantian. For the empirical Kelsen, no judgment of knowledge can be a plain logical judgment about value, because as he himself writes, "value judg-

[47] One who argued for the essentiality of the hierarchical structure of every legal system is A. Merkl (1923, 210).

[48] But it was Reichenbach who had the strongest influence on Kelsen in this period. See Bagolini 1983, 112ff., and 1984, 230ff., arguing that in the RRL imputation is identical with causality.

ments [...] cannot be verified by facts, as can statements about reality" (Kelsen 1957b, 295) and what in this area governs is subjectivism, which builds hypostatized ideal models generally for the sole purpose of serving specific political ideologies: No element of truth can be a basis on which to resolve a conflict among moral judgments. But we also have ought judgments, that is, judgments relative to the world of positive law, and which carry logical force serving as a basis of knowledge: These are the judgments of the science of law, and their status as judgments of knowledge is owed to their being objectively verifiable, as is the case with any other area of the empirical sciences. Kelsen thus abandons the opposition between nature and spirit, underscoring the actual, empirical reality of law.

Clearly, given that background, legal science is no longer legitimized in "producing" its own object, because precisely that which is given in itself must constitute the empirical basis on which scientific assertions can be verified. That in this period Kelsen, unlike what the classic RRL maintained, understands legal science as incapable of producing its own object of knowledge, by constituting this object through its method, thereby excluding every other type of that same object, is something that can easily be gathered from this passage:

> The law may be the object of different sciences; the Pure Theory of Law has never claimed to be the only possible or legitimate science of law. Sociology of law and history of law are others. They, together with the structural analysis of law, are necessary for a complete understanding of the complex phenomenon of law. (Ibid., 294)

One need only read Kelsen's polemic with Ehrlich (or the articles he wrote taking aim at Kantorowicz and even Max Weber) to appreciate the extent to which these positions depart from the ones Kelsen originally held. Unlike what he emphatically argued in the *Allgemeine Staatslehre* (Kelsen 1925, 6–7, 15–20), the RRL no longer stands as the methodological *prius* in any reflection on the law, but is only one of a range of possible sciences of the legal phenomenon, all of them legitimate.

The method of knowledge no longer *determines* the object but "is *determined* by its object" (Kelsen 1953, 143; my translation), which winds up constructing the very concept of law, a concept that now—if it is to give any knowledge of law—must take shape as an abstraction made from facts. Initially, on the contrary, as in the stance taken against Ehrlich, Kelsen adamantly stressed the point not only that "the law is an idea having no perceptible content," thus setting law in contraposition to fact," but also that the concept of law can never be "an abstraction from facts" (Kelsen 1915, 855; my translation). And so for this early Kelsen it would be nothing short of a "contradiction" to espouse a sociological concept of law (or of the state, which Kelsen equates with the law), even as an ancillary concept intended to support the

normative one, because there is no way for us to think the specific legal, normative unit we call "state" unless we exclusively and foundationally commit to a purely legal, purely normative, mode of consideration:

> Only the erroneous opinion that sociology can fundamentally take the same object as normative jurisprudence, namely, law, leads to the idea of an autonomous *sociology of law*. But the *legal norm*, this specific object of legal science, is not cut out for a sociology concerned with being. A sociological concept of law is impossible, no less so than a mathematical concept of the biological process or a moral concept of gravity. (Ibid., 875–6; my translation)

So Kelsen's philosophy of law appears not so much as a philosophy *in progress*—such is the view taken by its staunch supporters (and by Kelsen himself, in a reply to a critical commentary)[49]—as an inherently *contradictory* philosophy. The contradictions of the "pure theory of law" should not be considered from a historical angle exclusively, however, but should also be considered synchronically, because we are dealing with a theory that, despite its dismissal of history in the name of logic and reason, has a specific historical origin that explains its meaning and importance, while also explaining the internal antinomies themselves. The RRL, in other words, is an "Austrian" theory of law, a theory that owes a lot to the composite makeup of the Austro-Hungarian monarchy, torn between a plural society and a unitary legal-political order. Then, too, as Adolf J. Merkl has rightly pointed out, "due consideration has yet to be given to the fact that in large part what prompted the RRL's birth were the historical upheavals of World War I, which set up the conditions under which ephemeral legal forms came to be equated with imperious political exigencies and supreme moral values" (Merkl 1961, 295; my translation).

2.3.2.4. What Is the RRL Good For?

The RRL's inherent, historically determined contradiction springs from an effort to ground jurisprudence as a spiritual science, but relying on means and concepts derived from *natural* science. For although these derived concepts would be interpreted in different ways, the idea of natural science always stood in the background, understood—consciously or otherwise—as an authentic science and model for every kind of inquiry, again in line with the outlook of the time.

The two highest concepts in natural science were formalism and abstractness, analogized to what in modern social science are commodities, and in particular the quintessentially abstract commodity, money. Kelsen now offered to bring these concepts to bear on the theory of law and the state, a theory under-

[49] See Hofmann 1977, 30, commenting that "one is not licensed to expound by theory on the basis of a piece that has become obsolete: This must be done keeping to the second edition of the *Reine Rechtslehre*" (my translation).

stood not as an empirical (historical or sociological) science but as a spiritual one: a spiritual science embedded in a worldview set against all mystical-organicistic or communitarian-concrete visions in the traditional sense.

For this science of the spirit, such as Kelsen sought to found it, the state is the form of social coexistence: It is that "how," that complex of norms or rules that constitute the value, the spiritual makeup of the human world, something that no scientifico-naturalistic conception can grasp: "It has been from the outset a failed enterprise to define the state *materially*, by looking at its content, at the purposes pursued in the form of the state. Indeed, the state is a form of social unity: It is not a content!" (Kelsen 1915, 867; my translation). And against Jhering's teleological conception of law and the state, Kelsen writes in the *Hauptprobleme*:

> Certainly, the law and the legal order have a purpose (such as to set up and maintain the conditions for order and peace). However, the state, as far as this purpose is concerned, comes into play not as a subject but as an object, that is, as a *means*. The state and the legal order are not the means through which to pursue the end which has been singled out; the subjects who pursue that purpose are, however, the single human beings in their *social* community, namely, society (as opposed to their community as a state). That the jurist considers the state and the legal system a "means" is only an expression of the *formal* character of jurisprudence. The concept of a means belongs to the category of form in opposition to that of purpose, which is ascribed to content as a material moment. And that not the state but society should count as the subject of a purpose therefore corresponds to that generally accepted categorization according to which these two concepts, under the heading of the opposition between form and content, are related to that conception on which society appears as a *form* of organization of society. (Kelsen 1911, 208–9; my translation)

And in a polemic against Rickert's (and Weber's) concept of value relation (*Wertbeziehung*), Kelsen underscores the following point:

> Reality and ideality cannot in any way be linked to a single concept, nor can they in any science be understood from the same point of view: Reality results from a mode of consideration essentially unlike that of ideality. A content only presents itself either in the form through which *being* is known or in that through which the ought is known. In the former case a content presents itself as an actual reality; in the latter, as a value. Along the path of completely different ways of seeking knowledge, the given becomes either reality or value. (Kelsen 1968f, 46; my translation, italics added)

We can see here the attempt to unambiguously separate the "spiritual content" from the corresponding psychical acts, the latter understood as moments of the is, and this clearly brings to light the influence exerted on Kelsen's thought by Edmund Husserl's phenomenology and Georg Simmel's methodology, the only thinker who, working from a social-philosophical perspective, managed to avoid confusing form with content, the is with the ought. Indeed, as Kelsen argues, Simmel does not concern himself with the material elements of the social process: "He does not go looking for any law of nature with which to ex-

plain the social process, but only seeks to offer a theory of the *forms* of social relations" (Kelsen 1915, 229; my translation).[50]

In this way, however, the logical, if not logicizing, formalization of the legal phenomenon—a formalization set in motion by Paul Laband[51] and driven to extremes by Kelsen, with his effort to *morally neutralize* the legal system at its highest rungs (see Merkl 1961, 300–1)—took on a specific *political* meaning: The underlying idea, very much in keeping with the overall trend of the modern age, was to "weaken" power as such by giving it a formal-normative rationalization, while at the same time fashioning anew the *aims* of power—which by now had become secularized and "logicized"—so as to reorganize the social world, a world making it possible to body forth the modern ambition to systematize the irrational within a logico-formal framework,[52] and to embrace a radically demythicized form of existence and lifestyles where the spirit (understood as the intellect) commands nature. Kelsen thus rejected the "primitive" conception, which cannot seize the specific reality of "sense" as a social phenomenon, and for which the *specific* forms of spiritual being are nonbeing, a mere appearance, the vestige of a magical conception of existence. As has been commented,

> in essence, Kelsen is just concerned with explaining that there is no unconditional necessity to "exclude" the spheres of sense and of spiritual being from the complex of social reality, that the pretence made by a spiritual being and by a particular "legal reality" can only be understood as the result of a hypothetical judgment in which it is determined that if we are to treat the law as the object of any particular science, then we will have to take up a particular sphere of ought. (H. Mayer 1937, 28; my translation)

[50] In this regard, however, it would be remiss to gloss over the observation that "Kelsen completely overlooks that this is a separation Simmel wants to achieve for *all* the objects of *all* the sciences. This applies to law and religion, and no less to the *science of nature*, so Simmel's reasoning, which for Kelsen is decisive, is not something invoking which Kelsen is thereby authorized to speak of a realm of the spirit as against the realm of nature, for we simply have to do with the separation of psychology from all the other sciences" (Roffenstein 1924–1925, 546; my translation).

[51] Here is how Laband explains the endeavour: "The scientific task of dogmatics applied to a given positive law is to construct legal concepts, to subsume legal maxims under more-general concepts, while also deducing from these concepts the conclusions that derive from them. This [...] is a purely logical activity of thought. For this task there is no other means than logic; logic cannot in any way be replaced in working to accomplish this end; no historical, political, or philosophical consideration […] can have any bearing on the dogmatics of concrete legal material, and all too often considerations of this kind only serve to mask the lack of constructive work" (Laband 1895, vol. 1, X; my translation). Cf. Friedrich 1997, 235ff.

[52] As O. K. Flechtheim has observed, "Kelsen's idea of order, an idea even more formal than Kant's, is intertwined with a logico-formal systematization of the irrational" (Flechtheim 1963, 6; my translation). It is Flechtheim's view that "Kelsen's claim to coherence rests entirely on the essence of our classical logic, which in turn depends on the structure of our thought and language" (ibid., 42; my translation), and for this reason Kelsen appears incapable of adapting to logical structures different from those of the classical tradition.

The RRL's universalism rests on the principle of the unity of reason.[53] It thus

> seeks to subject the spheres of ideality and reality alike. The RRL's universalism is nothing but the legal manifestation of universalism tout court; it is, in other words, the manifestation of a metalegal principle, a principle acting *a priori* in the field of law. (Fraenkel 1937, 294–5)

We can apply here to Kelsen what has been said of Kant (definitely a reference point for Kelsen, however much in several respects a problematic one): "Kant's whole effort has been to replace the state of nature with a legal state in which war will yield to procedure and victory to an adjudicative ruling" (La Croix 1966, 12; my translation).

In this sense, Kelsen's criticism of early liberalism is to be interpreted as an *immanent* criticism, like the criticism a neoliberal would make of historically eclipsed forms of the classical liberal ideal. Kelsen's legal-political liberalism is closely wedded to the criticism—a criticism he wants to be "scientifically" grounded"—of the facticity of law, that is, the criticism of the identification between the state and power (an identification that conceals ideological aims): "The state must be either power or law: It could not be both at the same time. Precisely because the contents of positive legal norms are the outcome of conflicting interests, Kelsen refuses to recognize them as categorical and confines himself to looking for these norms' logical structure" (Kraft-Fuchs 1931, 408; my translation).[54] We will never be able to fully grasp at once the greatness and misery of the RRL if we are unwilling to accept that the scientistic component and the ideological-moral component are one and the same thing in Kelsen. The RRL is a relativistic yet moral theory,[55] this because the two moral values laid at the foundation of the theory are liberty and tolerance. Indeed, the theory stands on the basic premise of the rejection of violence—the ideal espoused by the cultured liberal bourgeoisie—for it is by insulating the legal phenomenon from power (the is, or facticity) that the theory hopes to secure both its own "purity" (or "scientificity") and the possibility of marrying science with political ideology, the former neutral and "nonevaluative," the latter liberal: "The elimination of power from law is done in full theoretical consciousness. Kelsen does want this outcome. Unlike what is the case with other types of positivism, the ideological scientistic component does not resolve itself out into an absolutization of facticity but, on the contrary, into its absolute negation" (Fechner 1969, 107; my translation).

Kelsen thinks he can use the constructivist method of neo-Kantianism, especially that of Hermann Cohen, but he completely overlooks the problems of

[53] Undoubtedly, Kelsen also comes under the spell of current philosophical trends, especially the movement for the unity of science. See Jabloner and Stadler 2001.

[54] On Margit Kraft-Fuchs (1902–1994), a disciple of Kelsen and a critic of Schmitt, see Stolleis 2008.

[55] On the RRL's basic norm as a "moral maxim," see Priester 1984, 228–30.

Cohen's philosophy, which takes a fundamentally ethicist angle, even though it does so through a "pure will"; nor does Kelsen consider that even in the broader ambit of neo-Kantianism the *Sollen* always bears a connection to the is. We should mention in this regard the other main exponent of Marburg neo-Kantianism, Paul Natorp, for whom

> in any assertion of duty there is already inevitably posited an is, this in three respects. In the first place, a duty is asserted only against the background of an is: We form judgments about that which *is* in evaluating whether or not it ought to be, or we form judgments about that which *is not* in evaluating whether or not it ought not to be. In the second place, duty itself expresses the need for an is or a non-is: It therefore to that extent presupposes the sense of the is qua is if it is to be understood. And in the third place, that something ought to be or not be is a judgment made by evaluating its being or not being. (Natorp 1911, 32; my translation)

2.3.2.5. A Pessimistic Anthropology

Kelsen's half century of work on the separation between the is and the ought, on the hierarchical structure of the legal system, on the norm as a hypothetical objective judgment, on the identity of state and law, and on the *Grundnorm* seem to essentially point to the thesis of the relativity of law and the state. Law is for Kelsen a value, but in its content it is a relative value, not an absolute one: It is not *etwas heiliges*, as it had been for Hegel, but only an ideology through which humans undertake to realize particular interests. These interests may be of various kinds, to be sure, but they are always underpinned by a historically and anthropologically unvarying fact: the distinction between those who command and those whose are commanded, between the rulers and the ruled. Kelsen's anthropology is of a fundamentally pessimistic kind: "It is inevitable for there to be a difference between individual will—the point of departure in setting out the necessity for liberty—and the apparatus of the state, which stands as an extraneous will in contraposition to the individual" (Kelsen 1929b, 11; my translation). The very idea of a supersession or an extinction of the state, of all coercive systems, thus takes on "a utopian character": It "ignores the aggressive drive inherent in man" (Kelsen 2000a, 241). Law and the state, in their normative identification, thus function as the specific form that seeks, constitutes, and guarantees social peace in the conflictive social world of facts and in the uneliminable tension among concrete individuals, among their conflicting material interests: "Social reality," Kelsen writes, "does indeed come down to power and command" (Kelsen 1968g, 1759; my translation).

While, on the one hand, this means that for Kelsen law appears to dwell entirely in the world of validity, of the ought, of value, and not in that of facts, of socio-empirical reality, we should not take this to mean, on the other hand, that between the two worlds thus set in contraposition there cannot somewhere be a liaison, a line of communication, or translation tools—all con-

duits without which, it needs be said, it wouldn't even make sense to raise the problem of the law as "positive" law. Behind the positive law lies, for Kelsen, something that goes beyond law, a metalegal element. This element, however, is to be found neither in eternal law nor in some absolute value of material justice, but only in what is ordinarily understood as power, as *Herrschaft und Führerschaft*:

> The problem of natural law is the perennial problem of what lies underneath the positive law. And I fear that those who are still seeking an answer will find neither the absolute truth of a metaphysics nor the absolute justice of natural law. Those who lift that veil without closing their eyes will see the intent, wide-eyed stare of the Gorgon's head of power. (Kelsen 1927, 55; my translation)

What, after all, is that coercion which contradictorily makes its way into the concept of law, if not the primitive fact of power? As has been correctly observed, "a sociological positivism works here as a theory in a complementary role to the Marburg brand of neo-Kantianism, so as to secure a place for the law ahead of other systems of duty" (Meyer-Hesemann 1984, 77; my translation). Although the legal system outlined by Kelsen does constitute a *normative* system grounded in the pure *Sollen*, it also works itself out, under the influence of Merkl's and Sander's theories of law, as a system of qualifications issued by hierarchically arranged organs of power. In other words, the system may set itself up as a pyramid of norms, but it equally does so as a "cascade of powers," of *political* powers. The very the faculty to initiate a coercive process against anyone who should "violate" a "right"—a faculty the legal system recognizes for the subject—is none other than power itself, however partial it may be (just as the person, the subject, is himself or herself a "partial legal system"). As Kelsen writes, "this power of the subject is a political power, a public function par excellence." And so the "specifically 'political' element is none other than the element of coercion" (Kelsen 2000a, 248).

As can be appreciated, the RRL's contradiction is something the theory carries with it in every phase of its evolution. It is known how prominently the concepts of sanction (punishment) and coercion figure in the RRL. Yet these are facts, not values. The central role played by the sanctioning moment is the necessary outcome of an attempt Kelsen makes to overcome the aporias attendant on the Kantian approach to the knowledge of law, an approach that makes it impossible to mark out the legal "ought" within the world of the *Sollen*. Recourse to effectivity—understood both as the *conditio sine qua non* of the legal system's validity and as an ascription of legal validity to the individual norm, in the form of a judicial decision—is supposed to guarantee the knowability of the object we call law, the scientificity of the legal scientist's endeavour to gain knowledge of the law. Yet effectivity, or the fact of power, is never a duty, a value, a norm, a spiritual content but rather an *is*, a fact. This means that Kelsen's realism contradicts his "critical idealism" on a fundamen-

tal point. Indeed, although he may seek to ground jurisprudence as a spiritual science, his attempt turns out to be exclusively based on the methodological tools of natural science. As W. Schild has observed, herein lies the "tragic" element in Kelsen, an element present from the very outset, from his—contradictorily—Kantian phase, for Kelsen fails to do away with natural-law theory without lapsing into a form of legal positivism he himself took exception to as a dogmatics devoid of any presuppositions. Kelsen's criticism of ideology may just prove to be, at bottom, the hideout sought by a disillusioned theorist who sees moving in, closer and closer, the spectre of law as power, as fact. It is a spectre he is after all very much familiar with, one he cannot keep at bay if not in theoretical postulates (still neo-Kantian) that cannot be made to square with his otherwise realist and positivist approach, precisely because—once forced to shut out the authentically philosophical approaches—his ideal of scientificity, of objective knowledge, nudges him closer and closer to facts, to the is, to that reality which the natural sciences know casually and which they really do make into an object of science (by gaining possession of the object): "The greater the element of power," Schild comments, "the more legal science resembles a natural science. The scientificity of the legal scientist's activity, and hence the 'purity' of that activity, depends on how close it comes to power" (Schild 1975, 187). The ideological criticism of this power—something amenable to objective knowledge—is tasked with salvaging the nonevaluative scientificity of the legal scientist, who must refuse to serve the prince. Certainly a commendable aim, but it does nothing to ground science as a science proper, or the law as law.

2.3.2.6. The Basic Norm: Critical Idealism or Critical Positivism?

Julius Moór has underscored that there is only one reason why the RRL does not in the end itself translate into a theory of natural law: It is that, as was previously pointed out, the RRL "cannot adhere to a strictly normative consideration" of law (Moór 1931, 68; my translation). Among the pillars of Kelsen's thought is the idea of the basic norm (*Grundnorm*), a norm that, in Kelsen's own definition of it, is valid "in just the same way as a norm of natural law." But as much as Kelsen may say it is not up to legal science to answer "the eternal quest for justice on the part of humanity," it is doubtless that there is no *lapsus calami* in the contention he offers on the same page with the statement that "critical positivism, which does not need to be more papist than the pope, can itself claim [along with natural-law theory] to have grasped the essence of justice by way of the basic norm, which sets up the positive law as a noncontradictory system, and this is especially true considering that critical positivism, through this basic norm, understands the positive law as a system of peace" (Kelsen 1968h, 295, 343; my translation). And in a later article on the metamorphoses of the idea of justice, he explicitly states that a legal system guar-

antees peace to the extent that, in the unitary world of norms, it leads to compromise and makes it possible to overcome conflicting interests (Kelsen 1947, 397), all claims that, non incidentally, have been found to be "of an evaluative and preceptive nature—neither analytical nor empirico-descriptive" (Bagolini 1968, 404; my translation).

The basic norm—a concept that Kelsen significantly held on to, never wanting to abandon it, however much it may be amenable to different interpretations—in any way does not represent the legal system's foundation of "validity" or that of "effectivity." It rather serves as the foundation of the law's *rational* knowability: Any discussion about the foundation of validity must be limited to the problem of the distinction between the system of natural norms as against that of positive norms. We thus have to equate rationality with sovereignty: It is certainly a discussion which appears not to break beyond the boundaries of a theory of legal knowledge, but which can also be translated into an *ideology*. What it means to equate the system's "logical peace" with sovereignty is that a legal system must be coherent, or rational, and that it can be rational only as a system of peace: Peace and the "rule of law," law and scientific legality, reason and formal democracy are couplets each of which looks to and entails the others in a series of homologies carrying strong politico-ideological meanings. The RRL is not only knowledge but also evaluation and prescription: It is a "jusrationalism," that is, a logical-formal theory of natural law, on the one hand, and a political theory of pluralist democracy, on the other. In this way, as Ebenstein has observed, "the ideal of justice is reduced to that of the unity of the legal system: The logical ideal replaces the moral one. In this transubstantiation of the system's idea of logical peace into the moral peace of society, Kelsen's logicizing of the ideal of justice finds its culmination and conclusion" (Ebenstein 1969, 92; my translation).

The basic norm theorized by the RRL is intended to make comprehensible—as a meaningful, rationally interpretable complex—the legal material that has been posited by enactment. Not incidentally, as Kelsen writes, the judgment whether a state is democratic or autocratic "is a matter exclusively for the knowledge of law" (Kelsen 1923b, 164; my translation). The basic norm is entrusted with grounding a coherent, "meaningful" system (Kelsen 1968h, 295) by way of logical knowledge, with making "unitarily" comprehensible "the material offered by experience" (Kelsen 1968i, 258; my translation). We can understand in light of these remarks how Kelsen, as early as in his *Hauptprobleme*, should have claimed it to be a distinctive feature of jurisprudence that "even a norm brought into existence in a way contrary to law can be a legal norm, or that, in other words, we cannot include the condition of a norm's coming into existence in framing the concept of law" (Kelsen 1911, 411; my translation). Which is to say: We cannot concern ourselves with the irrational fact of power in the rational *Sollen* of law, the "incomprehensible mystery" of how an ought can be destroyed by an is, or how an is can turn into an ought"

(ibid., 314; my translation). The basic norm (which Kelsen also qualifies as original, or primary: *Ursprungsnorm*) serves the function of translating into a purely formal language without content the claims of natural law: It weakens these claims and deprives them of substance, or, in other words, taking up a judgment by the young Lukács, it strips those claims of all content: "Of the tenets of natural law the only one to survive was the ideal of the unbroken continuity of the formal system of law" (Lukács 1971, 108).

It is the basic norm that establishes the legal system as a *possible* system of law while also establishing the difference between the system of natural law and that of positive law. As formally normative and hence logically deduced systems, the last two stand on the same conceptual footing. In this sense the *Grundnorm* functions as the original, rationalistic—i.e., basic or "fundamental"—presupposition, for it serves to make jurists aware of what they do when, "in assuming a conception of their object," "they confine themselves to the positive law" and "reject any notion of a law of nature" (Kelsen 1968i, 254; my translation). That legal practitioners should in their activity confine themselves to the "positive" law means that they only take account of this law in its original, ideal validity, such that what really matters, as far as this basic norm is concerned, is not the question of the source of the content of the positive law, whatever this content may be, but only the question of its possible foundation, which can only be that of reason, because only abstract reason is formal and hence capable of seizing that object as a formal and abstract object and so as an object of science: "This sets legal positivism apart from the theory of natural law" (ibid., 255; my translation). It is therefore clear, however, that this legal positivism is itself only a "natural-law theory devoid of content," but a theory that, as has been observed, the practitioners and technicians who are engaged in working with the law proper particularly appreciate as a "sublimation of dogmatics" (Leoni 1980, 187; my translation).

The distinction between a material theory of natural law and a formal one lies, according to Kelsen, in the fact that the former relates law to a vague and ambiguous concept of justice, a concept determined on the basis of the social groups' contrasting interests, and the latter, by contrast, sees in the law alone a "relative justice" (Kelsen 2000b, 24), albeit in a primary way, or an order of peace, and so a value as a point of equilibrium for social conflicts: "The critique of knowledge, therefore, is not meant to autonomously determine the concept of law, but only tries to hold up law itself as an ultimate value" (Dobretsberger 1931, 7; my translation). With Kelsen, a material theory of natural law geared to the problem of social conflict or the problem of the dominant power (the problem of counteracting or merely justifying such power) is replaced by a legal positivism whose strict boundaries make it into a solely logical and formal, and hence rational, theory of natural law, which precisely for this reason can handle the peculiar dominion of the abstract, of formalism, that marks the age of the bureaucratization and the formal impersonality of

legal power: This formal or "logicizing" theory of natural law no longer requires the legal order to rest on a moral foundation, metahistorical and otherworldly—for in the age of the *Entwertung* any such foundation is bound to appear as no more than a lie—but rather asks that the legal system, the system of positive norms, be "at least devoid of contradictions and feasible" (ibid., 8; my translation). In the final analysis, as Arthur Kaufmann has observed, "Kelsen's *Sollen* is a moral category" (A. Kaufmann 1985, 110; my translation).

2.3.2.7. Formal Logical Natural-Law Theory and Pacifism

The rational theory of natural law, or formal logical natural-law theory: This designation can have any precise meaning only if we understand that the jurist makes the background assumption of order and peace as values. It does not matter that this be a "just peace," for "peace stands as a value" in any event (Bobbio 1955, 48; my translation). Peace and order—the law as an "order for peace"—are in fact "justice" per se,[56] for they counteract the chaos of nature: The law is "a value in itself" (ibid., 151; my translation), for as an ordered system it achieves peace. The jurist normatively presupposes peace in the sense of a moral-political reference point, the meaning of a certain way of understanding the law, as a compromise against the background of conflict, as a means for settling conflicts; the jurist presupposes the search for a state of peace where science can progress and develop in its drive to dominate nature, or that which is extraneous to the spirit and is in becoming—the drive to proceed fully certain of its own autonomy. For the "positivist" Kelsen "order is a concern even more important than the concern with the justice of the legal system, inasmuch as [...] order is a presupposition of a just legal system" (Kriele 1966, 427; my translation). To trace one rule's validity to that of a higher rule is to set up a guarantee with which to guard to some extent against the arbitrary use of power: The law in Kelsen's sense "presupposes at least a value, that of order, of a peaceful, well-ordered society" (Bindschedler 1960, 71–2, 76; my translation).

In this sense the logicizing constructions of Kelsen's legal system wind up looking like projects for new worlds within which to design different such systems, "creations conceived without any regard for the real or received meaning of certain legal concepts," instead conceived "exclusively according to a logical conformity to the purpose." And so, one cannot fail to see in the RRL a logicistic natural-law theory, or even "a cognitivist metaethics producing a self-styled scientific theory of values" (Pattaro 1982; my translation).

The feature of the RRL that makes it like a natural-law theory, in the formal logical sense of the term, comes through clearly in the monism Kelsen upholds

[56] Kelsen asserts that the purpose of every social order, and in particular of the legal order, lies in peace, justice, and law-abidingness, which amounts to peace guaranteed by law (Kelsen 1941, 72).

for the international legal system, conceived as a unitary whole resting on a formal logical foundation (the presupposition for knowing the legal system), and no one can deny here that this characteristic brings the conception within the realm of natural law. Writes Kelsen: "To the extent that this 'natural law' foundation confines itself, as a legal hypothesis, to making a legal system possible among coordinated peoples, a system that perfects itself through the enactment of positive norms filling the system with content, even the legal system of a single state—understood as a sovereign state—cannot be devoid of such a natural-law foundation" (Kelsen 1920a, 252–3; my translation). That is all the more so if we take into account this statement by Felix Ermacora: "Corresponding to Hans Kelsen's critical legal positivism, reaching its apex with the formal basic norm, is a material basic norm Kelsen identifies as consisting in the rule of law and democracy" (Ermacora 1983, 29, my translation; see also H. Dreier 1986, 282ff.; Ooyen 2003, Vinx 2007).

In Kelsen, then, rationalistic science, the typical expression of modern science, is not indifferent to an ideological and moral choice in favour of democracy, understood as democracy in the practical sense of a feasible and hence representative parliamentary democracy: It might even be said that science is in a sense identified with democracy as a form of power based on relativism. Indeed, part of "the vital principle of every democracy" lies in the "freedom of science," such that democracy (formal and representative) no longer appears as a political form among others but as the basic, material norm of the RRL's legal system as a whole, and also as an expression of the knowledge-making instinct, the political form of reason in which we can recognize a certain psychological type—the one built on the modern crisis of the foundations, of the grand metaphysical narrations—with "a strong inclination toward feelings of guilt," and a "comparatively weak sense of self" (Kelsen 1968l, 1930; my translation).

Whether this conception really founds a purely rationalistic society and does not instead configure a project for a new community grounded not in tradition and the roots of being but on abstract thought, on modern scientific reason as a will to power, is a question we need not concern ourselves with here. What instead cannot go unmentioned is a perceptive criticism that Erich Kaufmann made of Kelsen's *Problem der Souveränität*, where the formalistic and rationalistic concept of parliamentary democracy is inflected and concretized by conceiving a *civitas maxima* reminiscent of Christian Wolff, a "universal state as a universal organization" (Kelsen 1920a, 320; my translation). What Kelsen had declared to be the exclusively gnosiological function of the pure ought is thus upended to embrace a concept of universal spatial validity: "This universal spatial validity, which is still above all abstract, then morphs into the concrete totality of the world's universality, or at least it projects itself into the sociological 'reality' of a world organization" (E. Kaufmann 1960, 194; my translation).

2.3.2.8. Kelsen and Hegel

The foregoing observation by Erich Kaufmann is apropos because it enables us to work into a discussion of Kelsen's legal philosophy an objection made against the RRL by legal scholars like Alf Ross, who argues that "if Kelsen's system is to be able to reconstruct its own concept of law, it will have to forsake its critical foundation and instead look for a basis in Hegel's metaphysics" (Ross 1946, 44), in the sense that sociological reality would be forged as a synthesis of reality and validity, is and ought, or, stated otherwise, in the sense that description would also become prescription, and judgments about "the reality of law"—judgments of validity, of *Sollgeltung*—would become value judgments (*Werturteil*), and vice versa. And certainly it seems that only in this way can we understand how the concept of obligatoriness should have collapsed into that of binding force, into a norm's "specific existence," into the objective validity of a legal system thus furnished with a "metaphysical attribute." This legal validity, as has been observed, has always made possible interpretations belonging to a specific tradition in axiological thought, a tradition in which obedience to norms is predicated on a specific quality of norms, namely, their being *objectively valid*.

Indeed, in Kelsen's view the legal system is already in itself a value, logically so, in a way not too distant from Hegel's idealist conception (this convergence may seem quite paradoxical, to be sure, but it has already been observed by Pitamic as far as Fichte, for example, is concerned). As has been observed, it may well be that behind the thesis of the obligatoriness of norms *qua* norms, of norms insofar as they make up a system understood as the normative *primum*, lies "the great shadow of Hegel. Indeed, why should we accept the legal system's obligatoriness, *sic et simpliciter*, [...] if not because, precisely as Hegel thought, the system is the legal form of that living ethical reality which is a people constituted as a state?" (Cotta 1981, 44; my translation). A distinction may be pointed out, however, in that the specifically Hegelian concept of the ethical state is replaced by Kelsen with that abstract scientific reason which through the basic norm becomes a universal state (*civitas maxima*), a unitary legal system of the world, power as law and law as power.

It is in the 1925 *Allgemeine Staatslehre* that this marriage with Hegel assumes some striking forms. Here the primacy of the international order as the *civitas maxima* is grounded in the "spirit of the world" (*Weltgeist*), in "universal reason" (*Weltvernunft*) as contrasted with the "ephemeral and provisional phenomenal forms" given by individuals "who know and want." Individuals are only "emanations" of "supreme universal reason": They are "part of the world's universal spirit," "the fiefdom of the single and sovereign universal *I*" (Kelsen 1925, 131; my translation). And then, again, in 1926 Kelsen writes: "Hegel and his disciples, imperialists of every nationality, are unquestionably representatives of an objectivist or universalist philosophy. But this universal-

ism, as is known, stops at the state. It is in a radically individualist way that these representatives construe the relation between the state (understood as an individual) and humanity" (Kelsen 1926b, 231; my translation). Kelsen thus underscores the contradiction, in Hegelian philosophy, between metaphysical universalism and politico-legal individualism.

A rational knowledge of the legal phenomenon, a science of law, can be achieved only on the basis of an objectivist *Weltanschauung* which grounds the validity of partial legal systems in the "totality" of the single, sovereign *civitas maxima* of the international legal system, and for which the empirical individual, as part of nature, is no more than "mere appearance" (*bloßer Schein*). (Totality so conceived is what Hermann Cohen would call *Allheit*, setting this concept in contrast to the purely organicistic and substantivist concept of the *Gemeinschaft*.)

The subjectivist conception—imperialist in politics—which in contraposition to "the state as a subject sets the rest of the legal world as an object, and which through the theory of recognition dissolves this object as a function of the subject," denies "the world of value, and specifically the rule of law, understood as universal law, that is, as the universal state," and by reducing everything to the world of nature, of facts, of power, it ultimately leads "to a negation of law in general, and so of legal knowledge, of the science of law" (Kelsen 1925, 131–2; my translation). Indeed, this tendency leads to a negation of the very idea of law and "to an affirmation of the viewpoint of mere power."

In this way, with this antirelativistic concretization of Kelsen's theory,[57] the politico-ideological essence of the RRL's method is identified, and it is not incidental that it should even have been possible to describe this as "a sociological theory of law in a normative guise" (R. Dreier 1981c, 225; my translation). The RRL is a political theory of law no less than it is a legal theory of the state, a theory whose arcanum lies in the idea, in the baked-in value of a universal peace (an idea that in the later Kelsen would be replaced by that of *international security*)—the idea of a universal state governed by reason and science, a state that Kelsen wants make rationally, i.e., logically, possible, and hence scientifically knowable, and vice versa. As Kelsen writes:

> The Pure Theory of Law relativizes the State. And by recognizing the state as an intermediate level of the law, the Pure Theory discerns that a continuous sequence of legal structures, gradually merging into one another, leads from the universal legal community of international law, encompassing all states, to the legal communities incorporated into the state. (Kelsen 1992, 124)

The theory in this way "facilitates development that has been stunted by mistaken notion, development in terms of legal policy […]; it may be said that the

[57] It was observed by M. Kraft-Fuchs in this regard that "Kelsen's relativism applies to the content of law but not to its form. Because the pure theory of law is a theory of forms, its results remain resistant to this relativism" (Kraft-Fuchs 1931, 409–10; my translation).

Pure Theory of Law, because it secures the cognitive unity of all law by relativizing the concept of the state, creates a presupposition not without significance for the organisational unity of a centralized system of world law" (ibid., 124–5). Here we have a late-Enlightenment legal utopia that with the tools of the abstract, formal reasoning of modern, relativistic science seeks to eschew the burden of any content-rich, substantivist utopia.

In the identification between state and law, conceiving the state as a normative legal system, lies *the conditio sine qua non* for the rational, legal, and scientific foundation, and so for the real possibility, of the Wolffian *civitas maxima* as a democratic order embodying the "rule of law" (for Kelsen every state is a *Rechtsstaat*). As W. Bauer has observed,

> Kelsen's idealistic cosmopolitanism is an Enlightenment legacy for the realization of the postulate of humanity in a universal community of peace. Universal morality, universal law, and the universal state constitute a unity. In the boldness of the attempt to take up the classic 18th-century idea of harmony in its purest form and transplant it into the 20th century lies Kelsen's skill and his illusion. But as something that rests on a faith in a universal morality, the *civitas maxima* itself forms part of an idea of progress rooted in natural-law theory. (W. Bauer 1968, 113)

As Erich Kaufmann has observed, we are always looking at "the same port through which passes the history of the rationalistic metaphysics of progress, and which elevates pure 'concepts' to the status of metaphysical powerhouses with empirical realities and effects" (E. Kaufmann 1960, 195; my translation).

2.3.2.9. Kelsen's Theory of Law as a Logic of Law

We have thus far considered the outlines of Kelsen's philosophy of law as a scientific methodology of law. What, then, is the law in Kelsen's general theory? According to Kelsen, as we have seen, the jurist is concerned not with facts but with norms: "The law which constitutes the object (or product) of such a legal science could never be 'positive'" (Kelsen 1920a, 89; my translation) in the sense of its belonging with the world of facts. Kelsen thus occupies himself exclusively with legal norms in their *epoché* with respect to their effective reality, and jurisprudence, as a science of the spirit, is never a science of facts but a normative science, not a science of the is but a science of the ought: a science of the value of law or, more to the point, a science concerned with the is of the ought (Kelsen 1922b, 76; 1925, 45).

Like mathematics, jurisprudence is for Kelsen a *formal* science: It develops formal concepts axiomatized and deduced from first principles or formal postulates, such that law is never, in its essence, "anything real" (Kelsen 1968m, 1238, my translation; cf. Carrino 2011). This amounts to driving out of the "specifically legal" field of inquiry all questions relating to the *purpose* of law. Legal concepts are formal categories, and jurisprudence has to do only with "the *form* of a phenomenon." The material content of this phenomenon is to

be investigated and known (to the extent that it can be known) in history, sociology, and psychology (which Kelsen understands as a truly complementary science, serving only to integrate the normative science of law).

Kelsen postulates a purely formal method founded on the specifically legal criterion of imputation (*Zurechnung*), a device that produces and constitutes a peculiar object of its own: "There is, then, no methodological difference between science and law" (Clavreul 1978, 268; my translation), in the sense that, in Kelsen's view, law itself builds its structure on the constitutive rationality of the normative sentence (the *Soll-Satz*), that is, on the truth-producing force of the statements made by those who detain knowledge, a force which can therefore determine what Kelsen accounts to be the two fundamental aspects of law, namely, its *coherence* and its *unity*.

According to an emanatistic logic tracing its roots to Hegel and Cohen alike, the pure normative sentence actually produces, or delivers, the "truth" of individual freedom. Individual freedom therefore does not *precede* individual *Zurechnung* but is rather the result of such imputability. It is not that a person is legally a subject—i.e., someone to whom something may be imputed—because of that person's natural freedom; rather, a person is a "subject" and is free because, and to the extent that, something can be imputed to that person in the unvarying areas of the ideal-typical construction understood as a hypothetical, formal-logical construction. Which is to say that persons are free insofar as they are each themselves a "norm" (and this is where Hold von Ferneck's criticism comes in: von Ferneck 1926; see Section 2.5.3.). In this way norms are addressed not to the *Sein* but to each individual's *Sollen*: "The theory of norms," Kelsen writes, "cannot explain the real phenomena of the life of law. The law is not only incapable of providing such explanations but should not even be in the business of doing so [...], precisely because the theory of norms is concerned with seizing, not the world of the is, of reality, but only a world of duty, of ideality" (Kelsen 1912, 608; my translation).

Because of the stand the RRL takes against any form of psychologism and sociologism, the theory must certainly be defined as a logic of law. The theory was hatched in a time of crisis, and if we now trace its historical origin, looking at the political and cultural conditions under the Danubian monarchy (A. Fuchs 1984; Goller 1997), we cannot fail to see the doctrine's theoretical limitations, and so also its criticality. But in reality every historical time is a time of crisis. And in that respect, as we consider Kelsen's effort to work out a "pure" theory—free from any commixture with what is psychological, sociological, and political, a theory capable of grappling with the needs and conditions of a time of crisis, a time that has always been our *own* time as well—we must come to the conclusion that there is a specific topicality about his theory, not quite as a *science* of law but as a *philosophy* of law, precisely to the extent that the RRL can be valued as a logicistic theory of law, and hence a theory as such needing to be integrated into a broader vision and thus superseded. The RRL's

topicality lies, so to speak, in its being both an end and a beginning. The theory logically shows that the legal system's basic norm cannot be posited through some authority's act of will. As Marcic has commented, the RRL "works itself out as a logic of law; anyone expecting anything more of it would be doing do in vain" (Marcic 1961, 411; my translation).

2.3.2.10. Between Purity and Reality: The Theory of Legal Interpretation in the RRL

No discussion of Kelsen's pure theory of law can be complete without briefly considering the theory of legal interpretation. It is no accident that the problem of interpretation should not have come up in any complete form in Kelsen's theory until the 1930s: One would be hard put to it to find this problem being taken up in any complete form in his earlier writings, and in particular in the *Hauptprobleme*, whose static conception of the law still compelled him to imagine the judge as something of an "automaton,"[58] a mere applier of the general law. Indeed, it was Adolf J. Merkl who forced Kelsen to take up the problem of interpretation, even if as early as the late 1800s this problem—that of the judge's interpretation of norms—had become a contentious, widely debated issue, especially among the legal thinkers of the so-called free law movement (*Freirechtsbewegung*), for whom the judge was deemed to be in a way a *maker* of law, not just a plain "applier" of it.[59] This theory seems to be the one to have had a greater hold on Kelsen himself, who revisited it and brought it into this system under the guise of so-called authentic interpretation.

In traditional legal dogmatics, authentic interpretation is understood to be that which a law's own author gives in clarifying its sense or in pointing out the "correct" interpretation, or both. As a rule, then, the author of an authentic interpretation is the lawmaker, the one who in the modern state is entrusted with *making* the laws. For Kelsen, by contrast, it is never the lawmaker who "authentically" interprets the laws (the lawmaker can only "make" the laws as a subject "authorized" to do so by a higher norm): This is rather a task left to the judge. But what to make of this odd about-face in Kelsen's approach? Let us backtrack a little and have a look at Merkl's article on interpretation:

> As is widely known, practice *does not come to an end* with the interpretation of law. Practice needs a complete individualization of the general norm; interpretation may not always achieve this purpose, but it often reaches a point where different solutions become available, all of them equally possible on the logical plane; this consequently makes necessary a subjective volitional function (as against a merely knowledge-gaining one) that can be guided by sheer discretion no less than by nonlegal reasons, such as opportunity, fairness, justice, and suchlike. (Merkl 1993a, 71; my translation)

[58] This is so in the manner—whether real or presumed—of 19th-century legal science. On this point, see Ogorek 1986.

[59] On the free law movement, see Riebschläger 1968.

And that lays the groundwork for the distinction Kelsen would later draw between the *scientific* interpretation of law (by the legal scientist) and its *authentic* interpretation (the one found in the judge's decision, or ruling). And even Merkl had underscored that "any practice which should overstep the boundaries of legal interpretation does not thereby necessarily become disrespectful of the law" (ibid.; my translation).

Now, there is no doubt that the problem of interpretation did not make its way into the RRL as a topic of reflection until the idea of the *Stufenbau* was introduced into the system (the idea of the system as a multilevel construction). Besides, it is Kelsen himself who observed as much when he remarked that "the legal system's stepwise construction" entails "consequences of great moment for the problem of interpretation" (Kelsen 1934b, 90; 1968n, 1363; cf. Wielinger 1990, 107ff.). And these are consequences that reveal precisely the contradiction between the static system of law (the original one as set out in the *Hauptprobleme*) and the dynamic, hierarchical system (such as it comes out once Merkl's and Sander's ideas are introduced into the system). The problem, in other words, is the one that confronts us once a system we want to be coherent, the outcome of the method of knowledge, is viewed in light of the role played by volition in the concrete and empirical making of norms—precisely that volition which in the *Hauptprobleme* Kelsen had sought to expunge from a "purely scientific" consideration of law.

In this way, Kelsen proves to be coherent with some of the premises of this thought but incoherent with others. The idea of authentic interpretation as the moment when the general and abstract legal norm is "concretized," or individualized, presupposes that the judge's decision is not *determined* by the general norm but rather introduces into the system a strong volitional element, one that breaks up the legal system's deductive structure and turns the normative system on its head by making it into a *sociological* system, as Ralf Dreier (1981d, 225) has in fact argued. Legal knowledge (*Rechtserkenntnis*) gives judicial decision a picture of possibilities deduced from the system and from the general and abstract norm, and from among these possibilities the judge can choose:

> If by *interpretation* is meant a determination made in knowing the sense of the object to be interpreted, then legal interpretation can only consist in the outcome of what is done in ascertaining the framework set up by the legal system to be interpreted, and with that, in a knowledge of greater possibilities afforded within this framework. (Kelsen 1960, 349; my translation)

And so there can be no "compulsory" solution, as it were, for the only activity that can be engaged in is that of determining the general framework of interpretive possibilities (Ringhofer 1971, 204ff.).

But the problem is that this twofold activity—knowledge-making on the one hand, decision-making on the other—can only unfold within the intellect of the same person, the judge. From which it follows that what in fact prevails is always the decision, which perhaps in this case cannot be said to "arise out

of nothing," as it does in Schmitt, but in any event presupposes an evaluative activity, one that certainly cannot be necessarily objective. Here Kelsen shows himself to be coherent with the anti-ideological attitude he takes in his thought. The law such as it springs from the judge's final decision is the outcome of a taking of positions, of choices to espouse certain values while rejecting others, of power relations, and even of a "relation with power." This ultimately brings to light the specifically ideological character of law, in the sense that all norms fall within a world other than the world of the is—they form part of the world of *Geltung*, of duty—but also in the sense that norms, as ideological constructions, are incapable of representing that specific reality which is society as a world torn apart by conflict among opposing interests. To what extent has Kelsen succeeded in reconciling a vision of legal science as the "pure science" of a "pure object" (pure because produced by the method of knowledge) with a political interest in criticizing ideologies in the name of the principle of democratic pluralism? This is a question that must remain open to future reflection.

2.4. The Vienna School of Law: Merkl and Verdross

2.4.1. Adolf J. Merkl and the Hierarchical Construction of Law

Unlike Kelsen, whose legal science declaredly proceeded from an attempt to elaborate a philosophy of law—or rather, from the need to methodologically work together philosophy and law—Adolf J. Merkl (1890–1970), who himself contributed in an essential way to a "pure theory of law," always worked within the bounds of legal dogmatics, at most taking up the outlying question of morality in relation to legal norms, a relation experienced in the first place as an expression of personal choice.

And so Merkl never did give us any specific philosophy of law. Yet his contribution to the *reine Rechtslehre* did prove to be decisive, since the conception of law as a system—and in particular as a hierarchically organized system (the so-called *Stufenbau*)—traces back precisely to him. In combination with Sander's concept of dynamicity, the idea of a tiered, hierarchical ordering of the legal system wrests Kelsen's theory from its static condition and plunges it into the realm of normative production. But the consequences, in truth, would turn out to be contradictory, in that pure normativity logically presupposes a static vision of the law, whereas production calls into play precisely that phenomenon of the world of the is—empirical willing—which Kelsen (at least in the first decades of his scientifical career) always sought to expunge from the system so as to build an authentic science of law understood as a "normative" science of legal "forms."

The legal order is no longer a coherently organized complex of norms; quite the contrary, it is a system of *acts*: acts that *produce* norms and ones that *apply* them. For this reason Merkl, in one of his best-known articles, could speak of

a "double face of law" (Merkl 1993b, 227ff.; my translation) in that law is at once produced and applied. Each act of production entails an application of the norm being produced, just as each application presupposes a normative production: "The process by which law is applied runs parallel to the process by which law is *produced*, such that with each new act of normative application a new norm is produced" (Merkl 1993c, 477; my translation).[60] Merkl's normativism lies in the fact that each act of legal production is recognized as legal by virtue of a higher norm, and that is what enables Merkl to conceive the legal system, even in its new form, as something normative—something that accordingly presupposes a *Sollen*, in the manner of Kelsen—and not as just a complex of purely factual referents. Still, the voluntaristic, and hence empirical, element in the system for producing and applying the law is constantly reaffirmed by Merkl in the ways that most singularly distinguish legal dogmatics, especially in the area of administrative law. Thus, for example, as far as the question of discretionary power is concerned, we read in his 1927 *Allgemeines Verwaltungsrecht* (General administrative law): "A comparatively abstract act serving as a rule for producing a relatively concrete act cannot determine the latter in its every respect but can only offer a component in the process toward the rule's concretization, and it must necessarily make way for another component, namely, the competent organ's discretion in bringing the concretizing act into being" (Merkl 1927, 142; my translation).[61] There is a legal system that exists as an objective entity, but there is also a subjectivity through which norms are created. Which is to say that the legal system is contemporaneously made up of autonomous determinants and heteronomous ones: On the one hand are the existing rules of law; on the other, the (comparatively) subjective acts through which those rules are applied.

The will thus figures as an essential component in the process by which law properly so called is produced. However, the normative dimension that Merkl picked up from Kelsen loops back into the system, as it were, conferring on it a peculiar characteristic, one that we could describe as the self-production of law. Indeed, like Kelsen, Merkl subscribes to the idea of a *Grundnorm* lying at the basis of the system, a norm that can "close off" the system. As a "closed" system, the legal order consequently becomes self-productive. Writes Merkl:

> The mentioned production relation that holds between every conditioning legal phenomenon and every legal phenomenon conditioned by it clarifies the expression "(stepwise) self-produc-

[60] The German original: "Der Prozeß der Rechtsanwendung läuft dem Prozeß der Rechtserzeugung parallel, und zwar derart, daß mittels jedes normativen Aktes der Rechtsanwendung ein neuer Rechtssatz (oder ein Komplex von Rechtssätzen) erzeugt wird."

[61] The German original: "Ein relativer abstrakter Akt, der als Erzeugungsregel eines relativ konkreten Aktes dient, kann diesen nicht zur Gänze determinieren, sondern kann nur eine Komponente des Konkretisierungsprozesses abgebe und muß einer anderen Komponente Raum geben: dem Ermessen des zum Konkretisierungsakt zuständigen Organs."

tion of law." This expression does not express a belief in the ability of the system to work miracles, a belief that in lieu of human activity productive of law posits some sort of legal *deus ex machina*. The scientific notion of the law's self-production rests on the experiential fact that the legal system is made up of two parts, each having its own, separate content: On the one hand are the rules of human behaviour; on the other, the rules that regulate the introduction and form, namely, the production, of those rules of behaviour. And that, more simply stated, corresponds to the difference between formal law and substantive law. (Merkl 1993c, 475; my translation)

Merkl proceeded by underscoring the important role played, on the one hand, by the "logical completeness" of the legal order understood as a normative system (this is the tribute he pays to Kelsen's "normativism") and, on the other hand, by the necessary presence of rules for the production of rules, in such a way that without the former rules the law would be something static, an idea contrary to the reality of things, in that "law entails the *life* of law, thereby entailing movement;" law "is an essentially dynamic system" (ibid.; my translation).

Merkl's way of looking at law is thus attentive to the reality of things, and so to the life of law. But how to describe this if not as a legal-empirical approach, one that as such distinguishes itself from Kelsenian normativism, and indeed sets itself in contrast to it? And in fact, once this conception is introduced into Kelsen's original system, elements of strong antinomy and contradiction arise, such that Kelsen's normativism itself appears as a foreign body in a "content based" and voluntaristic approach, just as Merkl's conception is a foreign body in the normativist system espoused by Kelsen, whose research activity not incidentally started out with a radical criticism of voluntaristic conceptions.

The legal-empirical (in a certain way 'sociological') approach—always careful to mark the effective reality of things and the changeful motivations acting behind the process by which law is produced—also played a prominent role in Merkl's theory of interpretation, which too was bound to have a strong influence on the pure theory of law. Merkl espoused a relativist theory of interpretation: In his view, "however legal science may interpret the law, that interpretation will be legally unexceptionable, for the law bears the face of its science. Whatever interpretation comes out, that will be the law" (Merkl 1993a, 77; my translation).[62]

In this sense, as much as Merkl's legal science did certainly have a part in shaping Kelsen's *reine Rechtslehre*, it moved away from that theory in such a way as to rise to the rank of an autonomous conception of law and of legal science—two areas that, unlike what happens in Kelsen, are not closely bound up but exist *ab origine* as two different activities. From here we also get a different

[62] The German original: "Jedes Auslegungsergebnis der Rechtswissenschaft ist rechtlich einwandfrei, da das Recht das Antlitz seiner Wissenschaft zur Schau trägt. Wie die Rechtsauslegung, so das Recht."

political outlook and a different political involvement than Kelsen's. Which is another reason why Merkl should deserve to be studied entirely independently of Kelsen's thought.

2.4.2. Alfred Verdross and the Grundnorm *of International Law*

Alfred Verdross (1890–1980) is one of the three main exponents of the Viennese school of law, the other two being Hans Kelsen and Julius Merkl. He attended law school at the University of Vienna, where he studied international law under Leo Strisower (that would become the focus of Verdross's research and the subject he would officially be entrusted with teaching), but he was also very much influenced early on by Hans Kelsen when Kelsen was still a *Privatdozent* at the same university, teaching public law and the theory of the state. The circle of intellectuals who gathered around Kelsen also included, aside from Verdross, Merkl, Pitamic, Sander, and Felix Kaufmann. Verdross participated in its activities with several presentations and discussions on the relation between international and municipal law, a "classic" topic of the time.

One can clearly appreciate how, in this early phase, Hermann Cohen's and Paul Natorp's neo-Kantianism influenced all those in the circle in their discussion of theoretical questions, especially as concerns the idea that the method of knowledge "produces" the object of knowledge. Verdross subscribed to this idealistic method at least until his 1921 article *Grundlagen und Grundlegung des Völkerrechts* (Principles and foundations of international law: Verdross 1921).

It is from the perspective of such critical idealism—or critical positivism, as Kelsen would describe the method espoused by the "fledgling Viennese school of law"—that Verdross would write his first important article, *Zur Konstruktion des Völkerrechts* (On the construction of international law: Verdross1914), permeated through and through by the constructivist idea. Here Verdross contributed two fundamental building blocks to what would then become the "pure theory of law," namely, the monist conception of a single legal system operating as a unified whole from the level of the international community to that of the single nation-states, and the idea of a *Grundnorm*, or basic norm, which in Kelsen's acceptation actually traces back to Verdross. "Indeed, every act the state carries out in a legal sense logically presupposes from the start a legal norm on which basis this act can be recognized as being imputable to the state, and hence as issuing from its will" (Verdross 1914, 329ff.; my translation).[63]

In the 1914 article, where the idea of a basic norm was first introduced, monism was still conceived from within the framework of municipal law;

[63] The German original: "Denn jede Staatstätigkeit im juristischen Sinne setz bereits logisch eine Rechtsnorm voraus, auf Grund welcher eben erkannt werden kann, daß dieser Akt dem Staate zugerechnet wird und daher als sein Wille erscheint."

but in the work Verdross wrote for his habilitation, "Die völkerrechtswidrige Kriegshandlung und der Strafanspruch der Staaten" (The internationally illegal act of war and the criminal claim of states), the relation was inverted, and it was international law that would thenceforward take pride of place, in a conception in truth much more coherent than Kelsen's, who by contrast chose (albeit only apparently) to leave "open" the question of whether it is international law that should prevail (the pacifist option) or whether such primacy should instead be recognized for the domestic law internal to each state (the imperialist option), and in all likelihood the reason for not committing to either of these choices is that, in Kelsen's view, a decision to exclusively uphold the primacy of international law would clearly usher in aspects of natural law, something he instead wanted to avoid, even if in reality he failed in the attempt to remove any appearance that his conception might have a moral foundation.

Be that as it may, it is in an essential way that Verdross contributed to the *reine Rechtslehre*, as Merkl also did with his theory of the *Stufenbau*, the hierarchical construction of the legal system, an idea that Kelsen would bring into his own system, and in so doing he also unwittingly ushered in the problem of value judgments, which Kelsen would rather have cleared away from his field of vision, but which kept coming back in various forms. As we saw earlier, Kelsen's thought can be interpreted as a logico-formal theory of natural law underpinned by a logical structure that presents itself as a deduction, as is typical of the natural law approach modelled after Leibniz. In contrast to this empty and abstract natural law, Verdross, a devout Catholic, developed a theory on which this "law-producing movement" cannot happen independently of some evaluative choices and hence from some determinate legal contents.

In this way, Verdross, who would otherwise remain very much in sympathy with Kelsen, was led to distance himself from what might be called the "official" *reine Rechtslehre*, meaning the understanding of the theory closest to Kelsen's account. And so, as early as in the 1923 article *Völkerrecht und einheitliches Rechtssystem*, Verdross moved away from Kelsen's positions, and in the most significant contribution Verdross would make from a legal philosophical standpoint—the 1923 book *Die Einheit des rechtlichen Weltbildes auf Grundlage der Völkerrechtsverfassung* (The unity of the legal worldview on the basis of the constitution of international law: Verdross 1920)—monism and the primacy of international law are justified on the basis of arguments that by now had taken a clear departure from his early neo-Kantian orientation. Indeed, Verdross explicitly drew on Thomistic philosophy, while also relying on the most recent currents of objectualist philosophy, such as that advanced by Edmund Husserl and the now-forgotten Josef Geyser; and a decisive influence also came from the Spanish school of international law (Francisco de Vitoria and Francisco Suarez). Some have also descried an influence exerted by Othmar Spann's universalist and organicist philosophy (Carthy 1995, 78–97), this also with a view to justifying Verdross's supposed "groß-deutsch" leanings, but there are

no real arguments backing this interpretation, even though Spann did in fact play a prominent role in Vienna in the period between the two world wars; it is documented, in any event, that Spann kept up an acquaintance with Kelsen, too, who also espoused the push for a "great Germany" (on Spann see Section 6.2 in this tome). In certain respects, though, Verdross appears to have been more closely tied to the old imperial Austria (Seidl-Hohenveldern 1994, 98). The ideas of an "objective order" and an "objective value" took root in the cultural debate between the two world wars in the German-speaking area, and in many respects the very cultural conception of the old Austria played a decisive role in forming a conservative Catholic like Verdross. As has been commented,

> the social and constitutional experience of the Austro-Hungarian empire constituted a determining factor both for the formalist approach to the law advocated by the Viennese School and culminating in Kelsen's *Pure Theory of Law*, and for Verdross' universalism. I am further convinced that the trauma of World War I, the ensuing collapse of Austro-Hungary and the hope in the newly established League of Nations, had a heavy impact upon their most obvious expression in the monist construction of the relationship between international law and national law. Monist theory, as developed by Verdross, granting the primacy within the hierarchy of legal orders to that of international law, is nothing but universalism applied to positive law. (Simma 1995, 37)

On Verdross's new philosophical approach, the subject and the object each have an independence of their own, while also being bound by a reciprocal symbiosis. So it is no longer critical idealism that Verdross would embrace in his mature philosophical phase, but what he described as *critical realism*. What counts is no longer above all the method (which according to neo-Kantian philosophy produces and constitutes its object) but the contents of norms, and hence the values that manifest themselves in life and so also in law. There is an objective reason that grounds the values which manifest themselves in norms, moral and legal alike.

So Verdross took it upon himself to revive the classic theory of international law and attempted to tie this rebirth to the philosophy of values propounded by Brentano, Scheler, and Nicolai Hartmann, thus rejecting any idea of international law informed by 19th-century positivism whereby the norms of the international community, no matter what form they may take, are solely dependent on the will of the state. In this Verdross remains tied to Kelsen's conception: Both thinkers set law in contrast to power, because only in contraposition to power does law retain its autonomy without running the risk of dissolving into power.

At the core of Verdross's conception lie the "general principles of law," which principles do not depend on the will of the state or a prince or on a "constructivist" method. They are principles of fairness that the civilized nations (*Kulturstaaten*) bring into being when forging a law of peoples: Such are the good-faith principle, the *Pacta sunt servanda*, and the prohibition against infringing the rights of others. But these are principles that Verdross wanted to deduce from the states' concrete practice, as if to say that a demonstration of

the goodness of natural law lies not in any abstract logical deduction but in the facts of statesmanship. Verdross turned on its head the positivist criticism of natural law by arguing that it contradicts experience to claim that the whole of international law rests on the will of the states and on their agreements: Only as the outcome of a proper "dogmatics" can such a claim be made (Verdross 1931, 356). The states, by contrast, apply these general principles of law because there is a legal consciousness which lives in all of us and which we all recognize: "It must therefore be that we are necessarily dealing with fundamental legal principles that find their way consensually in the legal systems of civilized states [*Kulturstaaten*], because the legal consciousness of the modern cultural community considers them to be necessary presuppositions of civilized societal life" (ibid., 364; my translation).[64]

But how to work out a theory for this basic norm, this nonpositive norm that lies at the basis of the single legal systems and of the international legal community? This is a problem that Verdross entered into in his 1926 monograph *Die Verfassung der Völkerrechtsgemeinschaft* (The Constitution of the international law community: Verdross 1926), where this *Grundnorm* still resolves itself into the principle *Pacta sunt servanda* (as it does in Kelsen), but this is still too abstract a basis on which to satisfy the need for concrete principles, and this is something that increasingly compelled Verdross to look to the Church's social doctrine, even though he never completely turned away from the positions espoused by his friend Kelsen, whom Verdross did, however, interpret more and more openly as a theorist who could never ultimately really dispense with the evaluative factor. The law is understood by Verdross as a value among other values: It comes into the world of the *Sollen* not as a complex of empty and abstract propositions about value but as part of a world that in effect can be identified with the world of the Western tradition—that of classical thought at first, and then specifically that of Christian thought. Stoic-Christian natural law was thus conceived by Verdross as one of several possible doctrines of natural law, and, even more than that, as the one doctrine most suited to the specific anthropology of the European people, an anthropology that presupposes a unity of humankind even with its partitioning into separate states (it is Saint Augustine that Verdross looked to as his reference point). The basic norm thus takes in content as a prescription under which we are to observe the basic principles deriving from the nature proper to each individual and to the communities, as well as from the covenants of international law and from customary law, the one and the other alike understood as bodies of law that have historically developed on the basis of these same general principles (Verdross 1964, 24). And

[64] The German original: "Es muß sich also offenbar um Rechtsgrundsätze drehen, die sich deshalb übereinstimmend in den Rechtsordnungen der Kulturstaaten vorfinden, weil sie das Rechtsbewußtein der modernen Kulturgemeinschaft als notwendige Voraussetzungen eines gesitteten Zusammenlebens betrachtet."

so the basic norm cannot be a mere hypothesis by which to know the law, nor can it be a fiction, but must somehow be a norm proper that picks up specific content. As Pitamic has commented, this is the content on which is predicated the efficacy "of norms that regulate the outward behaviour of human beings" (Pitamic 1960, 213; my translation). In the 1931 article, Verdross specifically suggested what the content of the basic norm of law might be by offering the dictum "Sovereign and quasi-sovereign legal communities: Behave in your mutual relations in accord with the general principles of law, insofar as no valid norms that stray from these principles have yet been formed in the conduct of international affairs" (Verdross 1931, 362; my translation).[65]

Here Verdross established a specific connection with Suarez, who would stand as an essential reference point in Verdross's philosophy of international law. For Suarez every state is a member of the universal family of nations, and for this reason the relation among all states needs to be legally regulated, precisely as a relation among states belonging to this society (Suarez 1872, 19). Suarez's position would subsequently be taken up by Grotius and Christian Wolff, whose idea of a *civitas maxima* Kelsen explicitly invoked in *Das Problem der Souveränität* (Grotius 1625, par. 44.1.; Wolf 1764, par. 8, 10–20; cf. Verdross 1958, 138). The primacy of the international community, derived from the concept of humanity and from the logico-legal principle of unity, thus led Verdross to a monist theory of the relations between domestic and international law, but it is a moderate monism that he embraced, informed by what can ultimately be described as a realist position. As Simma (1995, 39) underscores, for example, Verdross "admits that conflicts between the two systems may indeed arise," and so in some way Verdross recognized a distinction between the international legal system and the national ones, so much so that (as just remarked) the two may come into conflict, but because this normative conflict will have to be resolved at the international level, the primacy of international law would at this point be reconfirmed, along with that minimum moral foundation which underpins international law and requires a respect for the dignity of the person and for the person's basic rights. The general principles of law are thus understood by Verdross to establish a "bridge between pure natural law and pure positive law" (Verdross 1964, 39; my translation).

In the writings that Verdross produced between the two world wars we find all the premises on which he would continue to work in later decades, and which would lead him to increasingly focus on the philosophy of law, to which in the post-war period he would devote a few works that would become well known in the history of this discipline and of its main issues: *Grundlinien der*

[65] The German original: "Souveräne und teilsouveräne Rechtsgemeinschaften verhaltet Euch in Euren gegenseitigen Beziehungen nach den allgemeinen Rechtsgrundsätzen, soweit sich nicht im internationalen Verkehre besondere, von jenen Grundsätzen abweichende, gültige Normen herausgebildet haben."

antiken Rechts- und Staatsphilosophie (Basic lines of ancient legal and political philosophy: Verdross 1946); *Abendländische Rechtsphilosophie* (Western legal philosophy: Verdross 1959); *Statisches und dynamisches Naturrecht* (Static and dynamic natural law: Verdross 1971); and *Die Quellen des universellen Völkerrechts* (The sources of universal international law: Verdross 1973).[66]

2.5. Kelsen's Critics

2.5.1. Introduction

There is certainly no shortage of critics who have taken aim at Kelsen's pure theory of law, coming in from both "the left" and "the right": They range from Carl Schmitt to Rudolf Smend, from Erich Kaufmann to Hermann Heller. In this chapter we are going to focus on three of them who have not been discussed elsewhere in this volume as exponents of other currents of thought, since their fame is tied precisely to their role as critics of Kelsen. Indeed, no one today would know who Hold von Ferneck or Ernst Schwind are if they hadn't each attacked Kelsen's pure theory and if Kelsen hadn't responded to them with specific "anti-criticisms."

The third critic of Kelsen we will be looking at is Fritz Sander, and though it is certainly fitting that he should be discussed in that role, we believe his work also deserves to be considered in its own right, independently of Kelsen's.

As was mentioned a moment ago, the three legal philosophers treated in this section do not make up the whole of the landscape of Kelsen's critics. There are many others who deserve mention. Among these critics is Wilhelm Jöckel, who sharply criticized Kelsen's pure theory in an intellectually subtle book that—perhaps for this very reason—Kelsen chose to completely ignore. But there are also Sauer, Baumgarten, Moór, Somló, Marck, Fraenkel, and Nawiasky, all of whom would have deserved their own discussion apart from their engagement with Kelsen, but who have unfortunately had to be left out, essentially for reasons of space (on Somló and Moór see, however, Sections 19.2 and 19.3.1 in this tome).

2.5.2. Fritz Sander (by Federico Lijoi)

The life and work of Fritz Sander (1889–1939) became a focus of attention especially with the controversy he had with his teacher, Kelsen (Kletzer 2008, 447–8).[67] The most acrimonious episode took place during Sander's early years

[66] On these writings, see Truyol y Serra 1994, 60ff.

[67] The controversy had an echo even in Germany, especially in the letters that Erwin Jacobi wrote to Carl Schmitt, who in turn also mentions Sander's writings. On this question, see Korb 2010, 282–3.

in Prague, with the charge of plagiarism made against Kelsen in *Kelsens Rechtslehre: Kampfschrift wider die normative Jurisprudenz* (Kelsen's theory of law: A polemic writing against normative jurisprudence: Sander 1923c, see in particular 63ff.).[68] At issue was the authorship of the parallel between God and the state (*Gott und Staat*), a parallelism that, as Sander alleged, Kelsen had worked out without duly acknowledging Sander's own *Staat und Recht* (State and law: Sander1922a).[69] The situation came to a head with Kelsen's own request that the matter be submitted to the judgment of the competent disciplinary chamber, which on July 16, 1923, issued a ruling firmly rejecting any allegation that would in any way cast doubt on Kelsen's scholarly integrity.

A decade later the two scholars' destinies would again cross paths. When Kelsen was ousted from the University of Cologne, in 1933, Sander was among those who objected to his appointment at Prague's school of law.[70] Once Kelsen's appointment came through, Sander became two-faced with Kelsen, on the one hand lavishing him with praise and attention, and on the other, if not directly organizing, at least morally supporting the demonstrations staged against him by National Socialist students (see H. Schenk 1971, 614–6; Olechowski and Busch 2009). The contrast between Sander's kindness in private and his hostility in public cannot be ascribed to any psychological instability on his part. On the contrary, it was quite likely that Sander's own situation hung very much in the balance, considering his Jewish background and his role as a National Socialist informer collecting information on what was going on within the university. Indeed, at first, when the Germans occupied Czechoslovakia and drove the Jews from the university, Sander held on to his post—evidence that he received recognition for the services rendered for the party. But on October 3, 1939, he died suddenly—in unclear circumstances, seven months into the German occupation, and without any physical infirmity portending his death (Métall 1969, 73).

The unique position that in a 1923 article Fritz Schreier (1923, 317–8) ascribed to Sander as part of the *Wiener rechtsphilosophische Schule* is certainly owed in the first place to the fact that Schreier was in agreement with the school's main objective—that of purifying legal science of any teleological,

[68] The charge had already been hinted at in Sander 1922a, 1301. From a scholarly standpoint, the controversy got underway with Sander's charge of plagiarism in the journal *Zeitschrift für öffentliches Recht* (Sander 1988), in which Kelsen offered an equally caustic reply (Kelsen 1922c). On the whole matter, see Kelsen 1922–1923 and Sander 1923d.

[69] According to Sander, Kelsen deliberately delayed the publication of *Staat und Recht* to the benefit of his own *Der soziologische und der juristische Staatsbegriff* (The sociological and the legal concept of the state: Kelsen 1922b), which likewise makes the explicit argument that theology needs to be driven out of the realm of legal science. But the analogy between theology and jurisprudence, it bears mentioning, had been established by Sander even before the publication of *Staat und Recht*: It is a point clearly stated in Sander 1988, 246–78, as well as in Sander 1921.

[70] On the details of the incident, see Korb 2010, 238–9.

sociological, moral, or political element—but rejected the means chosen to pursue that objective (Korb 2010, 55, 173). At first, in *Rechtswissenschaft und Materialismus* (Legal science and materialism: Sander 1918, see in particular 333–5, 350–2), Sander defended the *reine Rechtslehre* from the charges laid against it by Bernhard Stark (Stark 1918, 301–4): Sander reiterated the need for a transcendental logic that would proceed from the *Faktum der Rechtswissenschaft* and would define its constitutive principles (*quid iuris*), just as Kant had done for the science of nature. Sander even sought to go *beyond* Kant, who in his assessment "had failed to bring his fundamental philosophical principle to bear on his inquiry into practical reason, this by neglecting to take into account the fact of science" (Sander 1918, 30; my translation).

In subsequent writings, however, it became increasingly apparent just how much Sander diverged from Kelsen's theory (Sander 1919–1920a). This can be appreciated in the first place in Sander's idea that the object of transcendental logic lies not in the fact of legal science (*Faktum der Rechtswissenschaft)* or in the "exit fact" (*Ausgangsfaktum)* of critical philosophy but in the fact of law (*Faktum des Rechts)* (Sander 1919–1920b).[71] As a transcendental philosophy of law, legal science should only be concerned with bringing to light the syntheses the pure will effects in the propositions of law as a fact of experience (the law as a body of positive norms) (ibid.). The judgments of such a science are merely analytic and explicative (*Urteile über das Recht*), not synthetic and constitutive (*Urteile des Rechtes*). Judgments of the latter sort, just like the judgments of natural science, are for Sander "existential judgments" (*Existentialurteile*), meaning that they contain an *Aussage über ein Sein* (a statement about an existent), whereas the normative structure of judgment as formulated by Kelsen "does not in the least amount to a judgment [*Urteil*], despite the use of the word *judgment*, but is rather an evaluation [*Beurteilung*]" (Sander 1922a, 1117–8, 1120, my translation; J.L. Kunz 1923). In Sander's view, then, law falls within the sphere of the *Sein*, not within that of the *Sollen* (Sander 1922–1923, 286–8, where Sander criticizes Kant for having unduly restricted the concept of experience to the *Sein* of nature): The law is the device through which legally relevant facts are brought into synthesis with categorial forms, in such a way that these forms acquire objective validity exclusively within the processual structure of jural experience (*Rechtserfahrung*).

The sense of Sander's argumentation is rooted in the need to free the existence of law and of its norms from the constitutive function of logic and from the ethico-normative presuppositions of legal dogmatics,[72] seeking law's immanent foundation in the synthetic function of the pure will. In the rejection

[71] On this point, see F. Kaufmann 1922 and Schreier 1922–1923, 318.

[72] This point is made, for example, in Sander 1921a, 194. See also Holzhey 1988, 64, and J.L. Kunz 1922, 25–7, 39–42 (see esp. 40).

of science as the productive source of the legal "phenomenon" lies the main impulse behind Sander's attempt to reposition the principles of law within law itself, so as to wrest them from the spell that Kelsen had brought them under as unifying metalegal functions.[73] These principles, therefore, cannot be anything but "analogous" to those of natural science, governing the pure synthesis between the concepts of the intellect and the senses: They can accordingly be described as axioms of legal intuition, anticipatory inklings of legal perception, analogies in the experience of law, postulates of empirical law in general.

Building on the insights of Bülow, Bierling, and Merkl,[74] Sander puts forward a dynamic conception of law. This conception develops out of his criticism of the absolute distinction between norms and *Tatbestände*—the states of affairs or classes of facts to which norms apply—and it accordingly argues for the relativity of the two concepts, under the so-called *Prinzip der relativen Apriorität* (principle of relative apriority) (Sander 1919–1920a, 59). In the legal process, to which corresponds the transcendental schematism of the imagination in natural science, the object of law "develops gradually into increasingly fuller concretions" (Sander 1919–1920b, 85; my translation). The *Tatbestandsfunktion* is the device that makes it possible for each degree of the legal system to be an object or *Tatbestand* for the higher one and a norm for the lower one, in such a way that the law is organized as a hierarchical and progressive system (*Rechtsverfahren*). By analogy to the *Hypothesis der Substanz*, the process's entire movement finds its ultimate foundation in the *Weltverfassung* (the constitution of the world), understood as a methodological hypothesis productive of the unity of the entire legal system (Sander 1919–1920, 73). This makes it possible not only to push aside the problem of the birth of the state, but also to move beyond the dogma of sovereignty: The revolutionary fact from which the state arises no longer consists of a metalegal and preprocessual event but in a state of affairs or class of facts produced by the rules of international law (ibid., 65, 69, 71–3).[75]

Sander's move to substitute the pure will for logic, together with his criticism of the postulate of the normativity of law, contributed to the progressive sociopsychological transformation of his theory. In *Rechtsdogmatik oder Theorie der Rechtserfahrung* (Legal dogmatics or a theory of the experience of law: Sander 1988), he forsook the concept of *Weltstaat* (world state) as

[73] On Sander's point that law needs to be endowed once again with immanence and dynamism, see Marck 1925, 42–59 (see esp. 44), and F. Kaufmann 1924, 143ff.

[74] See the *Kritik der Lehre vom Stufenbau des Rechts* (Critique of the theory of hierarchical systems in law) appearing in the appendix of Sander's *Verfassungsurkunde und Verfassungszustand der tschechoslowakischen Republik* (The constitutional charter and constitutional status of the Czechoslovak Republic: Sander 1935, 169–94).

[75] The problem of revolution and the meta-legal origin of the state had already been clearly identified by Sander in Sander 1918, 34.

an idea overcharged with ethico-political connotations (Sander 1988, 127),[76] whereas in *Das Verhältnis von Staat und Recht* (The relation between the state and law: Sander 1926) he criticized the identity claimed to exist between state and the legal system, arguing that concepts such as state, law, legal system, society, power, and sovereignty "are real opinions of real persons; they are multiplicities (collective entities) of psychical acts, of objective intentional relations; and, accordingly, they all fall within the province of descriptive psychology" (ibid., 160; my translation).[77] Indeed, in the very identity between *Staat* and *Recht*, Sander descries the neoliberal presuppositions underpinning Kelsen's *Rechtslehre*, analyzed by Sander as no more than a "resolute stance taken in favour of parliamentary democracy" (Sander 1936a, 534, my translation; 1934, 3–5, 22–3). In *Das Problem der Demokratie* (The problem of democracy: Sander 1934), Sander assesses the *reine Rechtslehre*, together with the entire 19th-century theory of the state, as an assemblage of "liberal axioms in disguise" (ibid., 23).[78] Specifically, he found political liberalism guilty of having taken an ambiguous and wavering position between the value of *Herrschaft* (*Archismus*) and that of *Freiheit* (*Anarchismus*), an indecision that in his view spawned a deleterious "system of fictions and illusions" (Sander 1934, 22; my translation).

So, in rejecting parliamentary democracy, Sander set that idea in contrast to "liberal Fascism," something that, on the one hand, would be clearly distinguished from historical Fascism—whose nationalism, in a state comprising different nations, proves dangerous for minorities—but that, on the other hand, is essentially oligarchic and antidemocratic (ibid., 4, 85–7). The Czechoslovak Republic's political situation of the time, the basic frame of reference for Sander's political writings, emerges here even more clearly in this role in his constitutional writings (Sander 1931, 1932a, 1932b, 1933, 1935, 1936b, 1938). Indeed, the programme behind Sander's analyses consists above all in comparing the formal constitution (*Verfassungsurkunde*) with the material organization of the public powers (*Verfassungszustand*). In the *scientific* acknowledgment of the widening gap between the two constitutions (Sander 1935, 5), the formal one and the material one, lies for Sander the starting point of *political action*, and this confirms "the need for a theory of law and of the state, a theory serving to answer the different questions that come up in the experience of public and jural life" (ibid.; my translation).

[76] This move would become even more radical in Sander 1936a, 421–5.

[77] Also testifying to the new direction Sander takes in *Allgemeine Gesellschaftslehre* (Sander 1930) is a letter he wrote to the dean of the Law School of the German University of Prague, asking whether his teaching could also extend to sociology, though the request was denied (*Archiv Karlsuniversität Prag*, Fond Sander, *Brief Sanders an den Dekan der rechts- und staatswissenschaftlichen Fakultät vom 9. Februar 1932*). On this question, see Korb 2010, 182; Kletzer 2008, 460–6.

[78] But on this point see the earlier Sander 1988, 260, 269.

One last observation is in order now, and it concerns the *Staatsverteitigungsgesetz* of May 13, 1936, whose *Notverordnungsrecht* (emergency powers) had severely set back the Czechoslovak Republic's democratic development. Sander strenuously resisted this development, and did so insisting on the hierarchy of normative sources set out by the very person with whom he had been so much at cross-purposes politically, namely, his teacher, Kelsen.[79]

2.5.3. Alexander Hold von Ferneck (by Antonino Scalone)

Alexander Hold von Ferneck (1875–1955)[80] studied at the Universities of Vienna and Innsbruck, earning a *doctor juris* degree in 1899. He then further pursued his education at the Universities of Berlin and Heidelberg, where he focused in particular on the philosophy of law. The outcome of this research was his first work and habilitation thesis, *Die Rechtswidrigkeit* (Illegality, in two volumes: Hod von Ferneck 1903–1905), which takes an approach described by commentators as rigidly determinist and imperativist. More to the point, he set out a view of law as made up of a complex of relations, imperatives, and hypothetical judgments. On account of this essentially relational makeup, the law entails a necessary correlation between the rights of some and the duties of others, in such a way that it proves impossible for there to be anything like a right unconnected to a duty. The term *rechtswidrig* (illegal) is to be understood in relation to a right which is violated and which is a right only in relation to a duty-holder (*Verpflichtete*). As a consequence of this approach, Hold von Ferneck denies the existence of a wrong from the "objective" standpoint of the law itself, while he distinguishes two types in the "subjective" sphere of those who are subject to the law: We have a wrong proper (*Rechtswidrigkeit*), connected with a subject's (or person's) actual capacity for action, and we have the kind of wrong that falls outside the scope of legal protection (*ohne Recht*) (Hold von Ferneck 1903–1905, vol. 2, 122). Hence Hold von Ferneck's denial that one who is incapacitated can be found guilty, and his thesis that there can be no wrong without guilt. Because guilt is the outcome of a behaviour contrary to a legal duty, a finding of guilt will simply coincide with a finding that someone was personally responsible for an act the legal system deems contrary to law—a view Hold von Ferneck would reiterate in two later works on criminal law, his 1911 *Di Idee der Schuld* (The idea of guilt: Hold von Ferneck 1911) and his 1922 *Der Versuch* (The attempt: Hold von Ferneck 1922).

[79] On this point, see Sander 1936b, 47–60, 89–94; and Kelsen 1923a, discussing the March 3, 1923 "Law for the Protection of the Republic" (whose provisions were expanded on July 10, 1933). In this regard, see Olechowski and Busch 2009, 1106–9, 1120.

[80] Among Hold von Ferneck's main works are Hold von Ferneck 1903–1905, 1907, 1911, 1922, 1926, 1927, and 1930–1932. On Ferneck, see Graßberger 1972, 523ff., and Korb 2010.

Hold von Ferneck also devoted himself to international law, specifically in two works, *Die Kriegskonterbande* (War contraband: Hold von Ferneck 1907) and the two-volume *Lehrbuch des Völkerrechts* (Textbook on international law: Hold von Ferneck 1930–1932). It is a deeply cautious attitude he takes to the question of the concrete existence and possibility of international law, for on the one hand he locates in a very distant future the construction of an international legal system proper—"Humankind is looking at an evolution stretching out into the millennia, perhaps millions of years long, that may perhaps one day give rise to an international law proper" (Hold von Ferneck 1926, 9; my translation)—while, on the other hand, the existence of international law is equated by him with the concreteness of the jural relations obtaining among states, that is, with the concreteness of the norms "under which states and federations of states *in fact* live" (Hold von Ferneck 1930–1932, vol. 1, 62; my translation). This conclusion is the outcome of Hold von Ferneck's preliminary decision not to set out a general definition of law, despairing of the possibility of finding an agreed concept; what follows is the need to confine oneself to identifying the de facto differences between what is ordinarily understood by municipal law, on the one hand, and international law, on the other.

One can speculate that the main reason why Hold-Ferneck rose to prominence has to do with the acrimonious exchange he engaged in with Kelsen. In 1926, he wrote against the pure theory of law an accusatory piece titled *Der Staat als Übermensch* (The state as *Übermensch*: Hold von Ferneck 1926) to which Kelsen retorted with an article bearing the same title, which in turn elicited Hold-Ferneck's rejoinder, in the form of the 1927 essay *Ein Kampf ums Recht* (A struggle for law: Hold von Ferneck 1927). The two legal thinkers had already been in competition, just after the close of World War I, when it came time to draft a constitution for the new Austrian republic. Chancellor Karl Renner chose Kelsen for the job, nor did Hold von Ferneck succeed in his subsequent attempt to somehow influence the drafting of the text. Hold von Ferneck is highly critical of Kelsen's endeavour to achieve a pure science of law: He takes the view that the legal dimension cannot be separated from the social; and in fact it appears to him that only sociology can grasp the essential features of law and the state (Hold von Ferneck 1926, 27), two entities that unlike Kelsen he understands to be separate. Furthermore, also in contrast to Kelsen, he understands states to be *empirical* entities: "No statesman and no historian," he writes, "has ever thought to doubt the reality of the state" (ibid., 18; my translation).

The law itself spills over beyond its formal description, since its existence, for all practical purposes, is to be found in our habitual compliance with norms (ibid., 5). But it is likely that Hold von Ferneck's main concern in polemicizing against Kelsen lay in what he took to be the politically dangerous, if not subversive, implications of the *reine Rechtslehre*. Indeed, Kelsen's theory, by reason of its "unbridled formalism and empiricism," can bring about consequences (which Hold von Ferneck would like to believe Kelsen is unaware

of) "set to undermine all respect for law and the state" (ibid., IV; my translation). And it is for this reason that Hold von Ferneck felt it was "incumbent upon him," in writing his article, to launch a veritable "campaign" against that theory.

Kelsen's response to Hold von Ferneck's objections was to the point but no less polemical. And, in addition, he could not refrain from closing his discussion with a similar "appeal to police [...] the dignity of free science" (Kelsen 1926a, 24; my translation).

2.5.4. Ernst Schwind: Between History and the Philosophy of Law

Ernst Schwind (1865–1932) is being grouped here among Kelsen's critics, but with the caveat that he was not by training a legal philosopher: He was instead a historian who took up philosophy solely for the purpose of understanding and criticizing the bases and premises of Kelsen's pure theory of law.

Perhaps for this reason the tools at his disposal were weak, for it is certainly not by underlining the primacy of "pulsing life" over abstract logic that one can rebut Kelsen's logico-legal argumentations. Schwind's advantage lay only in his knowledge of the history of law, enabling him to point out the wide cross-fertilization between is and ought, reality and value, that over time contributed to deepening the human awareness of the complexity of reality (Schwind 1928, 26–30).

Schwind saw history and the theory of law as closely bound up—exactly the opposite of what Kelsen argued as early as in the preface to the first edition of his *Hauptprobleme*. Indeed, Kelsen conceived history as a causal science, making it distinct and inherently different from legal science as a purely "normative" discipline. As Kelsen would remark in his reply to Schwind, it makes no sense to bring history into comparison with the theory of law, for these two disciplines are extraneous to each other.

Schwind's criticism of the pure theory of law is emblematic of the rift that in the 1920s pushed two sorts of legal philosophy into opposite camps: On the one hand were the Kantian and neo-Kantian approaches founded on the separation between is and ought, and on the other those that sought to transcend that separation, to this end drawing on Hegel, but also on the historicist tradition (as in Schwind's case), which clearly could not fathom a reflection on law that failed to take account of history, that is, of reality:

> Here, too, the deepest reason for Schwind's criticism of Kelsen's theory of law went to the core, that is, it issued from Schwind's failure to appreciate the decoupling of is and ought, a decoupling that in his view would be a roadblock to history and to the "real pulsing life" connected to it. (Korb 2010, 88; my translation)

From a theoretical point of view, Schwind managed to make an argument proper only in relation to the *Grundnorm*, or basic norm, but here, too, it

must be noticed that Schwind's criticism appears to proceed from a misunderstanding, or rather, from an inability to grasp Kelsen's thesis on the "non-positivity" of that norm. Schwind's objection was that the basic norm posited by the pure theory is no more than a "fiction" (Schwind 1928, 48), one that every political leader could very well do without, and even though he did put his finger on a problem of the *reine Rechtslehre* that many years later Kelsen himself would go back to—rejecting his own earlier view of the *Grundnorm* as a "hypothesis" and claiming it to instead be a "fiction"—Schwind lacked the theoretical tools needed to build on his insights and fashion them into a full-fledged critique of Kelsen's positions. Even so, he was certainly keener than others in seizing the ahistoricism of the pure theory of law, an aspect of it he forcefully condemned. In fact, such was the emphasis he laid on "historical concreteness" that he occasionally risked being mistaken for a scholar not devoid of anti-Semitic leanings.

Chapter 3

THE SOCIOLOGICAL PHILOSOPHY OF LAW AS AN ALTERNATIVE TO NORMATIVISM

by Agostino Carrino

3.1. Hermann Ulrich Kantorowicz and the Free Law Movement

The name Hermann Ulrich Kantorowicz (1877–1940) stills seems to conjure up the free law movement and little else besides:[1] The German jurist's fame is closely associated with a banner programmatic pamphlet he wrote in 1906 under the title *Der Kampf um die Rechtswissenschaft* (The fight for legal science: Kantorowicz 1962d). Even so, his free law continues to receive an interpretation contrary to his intent, especially in the matter of "judging *contra legem*," a motto ascribed to the free law movement despite vehement protests by Kantorowicz himself (Kantorowicz 1911a, 258ff.).[2] Nor have we managed to properly situate Kantorowicz as a legal philosopher influenced by the neo-Kantianism of the Baden school and as someone who anticipated a nondogmatic, relativist sociology of law, an approach not far from Radbruch's conception.

Kantorowicz—influenced in philosophy by Rickert and in jurisprudence by Jhering[3]—was in turn quite influential in the United States: His work and that of the Austrian legal scholar Eugen Ehrlich certainly caught the attention of Karl Llewellyn and the broader legal realist movement. In part, however, Kantorowicz was concerned with mitigating what he saw as the excesses of American legal realism[4], in a critique that goes to show just how "fanciful" the thesis was under which Kantorowicz and the free lawyers sought to confer on judges the power to decide controversies in an arbitrary way without taking the lawbooks into account. Indeed, as Würtenberger observes, the "rationalist" criticism of legal realism shows that Kantorowicz was bound by a strong commitment to the law, which he regarded as being "among the most impor-

[1] For a biography of Kantorowicz that also looks at the political aspects of his activity and at his academic career, held back on account of his Jewish background, see Muscheler 1984. See also the entry devoted to him in Kleinheyer and Schröder 1976, 145–8, and the entry in Frommell 1988.

[2] Kantorowicz subsequently severed his close ties with the free law movement, even if he continued to defend it from the attacks made against it by Marxist socialism—see, for example, Fraenkel 1968—and by the sociological natural law theory championed by conservatives like Erich Kaufmann. On this question, see Muscheler 1984, 50ff.

[3] On Jhering's importance for Kantorowicz, see Kantorowicz 1914; 1962b, 65ff. See also Fikentscher 1975–1977, vol. 3, 365ff.

[4] On Kantorowicz's influence in the United States, and in particular on Karl Llewellyn, see Fikentscher 1975–1977, vol. 2, pp. 282ff. In Patterson 1953, 541, Kantorowicz 1934 is judged to be the best criticism of American legal realism, a criticism somehow internal to that current.

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tant guarantees of human freedom and security" (Würtenberger 1962, 4; my translation).

It is a multiform oeuvre that Kantorowicz handed down—with contributions in a variety of disciplines that range from criminal law to the history,[5] philosophy, and sociology of law—and the whole of it is of current interest even to this day. Here we will concern ourselves with his framing of the concept of law. It bears recalling, by way of a first approximation, that sociologically oriented legal philosophy itself originates from a specific current of philosophical thought, that advanced by the southwest school of German neo-Kantianism. At the core of this concept of law lies the separation between the is and the ought, between facts and values, and for Kantorowicz, Rickert's theory of science, duly complemented with "Max Weber's annotations," offers the "guide" on which basis to found sociology as a science, that is, as a "theoretical and systematic discipline" (Kantorowicz 1962c, 146; my translation).

Kantorowicz's dualistic premise, however, did not prevent him (as it did not prevent Radbruch before him) from developing a three-dimensional theory of law, that is, a theory that rejects the mode of procedure whereby a single aspect of the complex legal phenomenon is picked out and absolutized; on the contrary, a necessary cooperation is postulated among three types of reflections on the law, the first being legal dogmatics, concerned with the *meaning* of law; the second the philosophy of law, whose task, in keeping with Lask's conception, is to be confined to the problem of the *value* of law; and the third the sociology of law, which instead is tasked with empirically investigating the effective *reality* of law. Whereas on the approach advocated by Ehrlich (who, too, was a precursor of the sociology of law) this new science, understood as a pure science, wound up being magnified into the *only* true science of law, Kantorowicz was well aware that if we are to gain a comprehensive understanding of law, we will need to view it from a "panoptic," or all-seeing, angle. And this is the reason why, even when Kantorowicz appears to be focusing on just one of the three aforementioned problems, he is also bearing the other two problems in mind. This is because Kantorowicz's sociological problem does not *directly* involve the fieldwork of sociology as a practical investigation (be it sociology in general or the sociology of law); what instead do have a direct bearing on Kantorowicz, on account of the neo-Kantian premises from which he proceeds, are the theory of sociological knowledge, along with the epistemological and philosophical foundations of sociology, and, consequently, of that applied sociology which investigates the way legal norms relate to social life. "My current research," he writes in *Rechtswissenschaft und Soziologie* (Legal science and sociology), "does not [...] fall within the sociology of law or within sociology in general,

[5] Kantorowicz's historical interest was focused above all on the "Middle Ages of law," importantly contributing to this topic in his *Studies in the Glossators of the Roman Law* (Kantorowicz and Buchland 1938).

but instead [...] concerns itself with the knowledge of sociology, understood as a general auxiliary discipline, that is, as forming part of a theory of knowledge, or rather, a theory of science. My research will therefore always operate as the theory behind the theory" (Kantorowicz 1962e, 119; my translation). In this sense, Kantorowicz must be considered a legal philosopher proper.

It was previously remarked that Kantorowicz proceeds from the dualism between fact and value proper to the southwest school of German neo-Kantianism. From a strictly sociological point of view, this dualism becomes a dilemma, indeed a central dilemma, in his theory. The dualism between fact and value can be made into an unbridgeable divide, as it is in Kelsen, but it can also be taken up as a point of departure—and it is this latter position that distinguishes every authentically critical and historical sociology of law. Now, this problem was worked out and overcome by Kantorowicz on the basis of an epistemological premise quite similar to that of Emil Lask and Gustav Radbruch, whereby culture represents an "interregnum" between pure facts and pure values, a world in which the legal phenomenon sits comfortably. Kantorowicz's methodological trialism thus stands in contrast to the pure, nondialectical dualism propounded by Kelsen, who accounts the separation between the is and the ought, between fact and value, to be all-inclusive, in such a way that there can be no synthesis between the two: the law thus belongs entirely in the sphere of the ought, and legal science can only be a science of the ideal objective meanings of law, a purely normative science of what must (and what must not) be done, and never a science of what actually *is* done. As early as in *Der Kampf um die Rechtswissenschaft* (The fight for legal science: Kantorowicz 1962d), Kantorowicz had positioned himself against this approach:

> Those who have advocated methodological dualism have laid too much emphasis on the notion that the social sciences concern themselves with the way things *are* and the legal sciences with the way things *ought to be*. Indeed, it cannot be neglected that even everything that *ought to* be is something that *is*. What ought to be is what is willed [*Sollen ist Wollen*], even if there is a peculiar streak to this willing: If there is a recognized ought, this is a will of its own; if there is no recognized ought, this is an extraneous willing. Conflicts between willing and the ought are conflicts arising out of a discrepant will. An ought not conceived of as something willed by a personality, be it an individual or a collective personality, one's own or an extraneous one—and so an ought conceived as an "objective" norm—is an unrealizable representation: It is empty. So even jurisprudence must elaborate a *positive* material pertaining to the is: Specifically, it must elaborate a psychological material, as many other sciences do. Jurisprudence can never step outside the sphere of willing: Only in that sphere can jurisprudence find the benchmark against which to evaluate that which *is*; only in that sphere can it find an indication of the ends to be pursued. The is can ever be evaluated only on the basis of the is. The δος μοι π' αν στω και τα γαν κινάσω of objectivist legal philosophy remains eternally unsatisfied. Jurisprudence cannot proceed from this starting point in justifying a principled epistemological difference; it is therefore with good reason that the majority of those who espouse the free law movement call on jurisprudence to cooperate, on the one hand, with psychology and, on the other, with social science, both sciences being akin to jurisprudence. (Ibid. 1962d, 30; my translation)[6]

[6] The German original: "Es ist von den Vertretern des 'Methodendualismus' zu viel Gewicht

The long passage just quoted is important for many reasons, but the first of these lies in the clear stand it takes in antithesis to the methodological dualism that Kelsen would soon thereafter have championed, becoming its chief exponent (though it bears recalling in this regard that Kantorowicz considers Kelsen's work significant and important). Kelsen replied by reasserting the pure normativity of law, and so the pure normativity of the science devoted to the study of law, and by absolutizing the moment wherein lies the value of law, which value is understood not in a cultural sense but in the objective sense of that which is encapsulated within a norm (Paulson 1991, 254). As much as this reply appears logically stringent, however, on closer inspection it cannot but reveal its weakness, especially if we set out to criticize the pure theory of law from within, bringing to light its aporias and contradictions, which invariably eventuate in an outcome contrary to the starting assumption (Carrino 1992). No one can call into doubt the normative character of law—and Kantorowicz doesn't do that, either, especially not in his "rationalist" criticism of American legal realism, which he charges with confounding law with fact, and of failing to also consider the value inherent in law (Kantorowicz 1934, 1248ff.)—but by the same token, no one can deny that a purely normative account is inadequate and unilateral, aside from reducing reality to an oversimplified picture. Legal science serves a practical and historical function insofar as it always also concerns itself, as a science, with the study of a social system made up of human beings and their actions, which actions are meaningful and aimed at achieving a purpose. This is another way of saying that the science of law cannot do without sociology, and precisely sociology of a Weberian cast, which sets up a relation to values (and specifically to law understood as a cultural value encapsulating the entire complex of the ends pursued by a society), and which "seeks to offer judgments but not value judgments, to describe and not to prescribe, to observe and not to guide," and "whose content does not include any

darauf gelegt worden, daß die Sozialwissenschaften darstellen, was *ist*, die Rechtswissenschaften was sein *soll*. Denn es darf nicht übersehen werden, daß auch alles Sollende ein Seiendes ist. *Sollen ist Wollen*, wenn auch eine eigentümlich gefärbte Art des Wollens, und zwar eigenes Wollen, wenn anerkanntes Sollen vorliegt, nur fremdes Wollen, wenn nicht anerkanntes vorliegt. Die Konflikte zwischen Wollen und Sollen sind Konflikte zwiespältigen Wollens. Ein Sollen, das nicht als Wollen einer Persönlichkeit gedacht wird, einer individuellen oder einer Gesamtpersuonlichkeit, der eigenen oder einer fremden, eine 'objektive' Norm ist eine unvollziehbare, leere Vorstellung. Also hat auch die Jurisprudenz einen positiven Stoff des Seins zu bearbeiten, und zwar einen psychologischen, wie viele andere Wissenschaften auch. Über den Kreis des Wollens kann sie nie hinaus, nur in ihm den Maßstab für die Beurteilung des Seienden finden, nur in ihm die Angabe des Zieles. Sein kann immer nur an Sein gewertet werden. Das δος μοι π' αν στω και τα γαν κινάσω der objektivistichen Rechtsphilosophie bleibt ewig unerhört. Ein prinzipieller wissenschaftstheoretischer Unterschied läst sich also von diesem Punkte aus für die Jurisprudenz nicht begründen; ein Zusammenwirken der Jurisprudenz mit Psychologie einerseits, Sozialwissenschaft andererseits wird daher als zwischen verwandten Wissenschaften von den meisten Vertretern der freirechtlichen Bewegung mit gutem Grund erstrebt."

value judgments, for its object consists only in what is given" (Kantorowicz 1962f, 77; my translation). Any one-sided understanding of law will thus fail to grasp law in its complexity, that is, in its "three-sidedness" (Kantorowicz 1962f, 69–70).[7] This triadic theory of law is clarified by Kantorowicz by way of the following example:

> When a lawyer says to a client, "On a correct interpretation of the law applicable to your case, you are in the right; but this is an outdated and unfair law; and so our judge, as far as I know him, will interpret it in such a restrictive way as to not make your case fall within its purview, and so you will be defeated at trial," the lawyer is referring to the *meaning* of the law in the first sentence, to its *value* in the second, and to its *reality* in the third. The reality of law is for the sociology and the history of law to investigate, both of them sciences of reality, their method being empirical. They therefore bear a resemblance, on the one hand, to the natural sciences (while differentiating themselves from the latter, which concern themselves with the physical objects of the external world) and, on the other hand, to the cultural sciences, whose objects are psychical in nature, and which interpret these objects "according to the importance they have for culture." (Kantorowicz 1962f; my translation)[8]

The important link between history and sociology is something that Kantorowicz underscored on several occasions in his writings, and in fact his sociology of law is a history of law, just as his history of law is a sociology of law epistemologically justified by his methodological trialism. The history and sociology of law pose the empirical question of "how the law was envisioned by its authors, how it has been construed by its interpreters, how it is actually applied by judges and officials, and how it is in effect being complied with by those who are subject to it, in such a way as to present a whole spectrum of degrees of realization" (ibid., 72; my translation).

The meaning and value of law form the object of investigation of the general theory of law and legal dogmatics, respectively. In a manner analogous to Kelsen's approach, the general theory of law and legal dogmatics pose the question of "which of the possible interpretations [of law] yields a complex devoid of any contradiction" (ibid.; my translation). The general theory of law and legal dogmatics are sciences properly equipped to enable the judge to work out a solution to the case before the bench, even though they must reckon with possible disparities when it comes to interpreting, and hence applying, the law, in that the same reality can harbour a range of quite diverse viewpoints (ibid., 70).

The philosophy and politics of law are directly concerned with the value of law: Their problem is that of understanding whether the meaning of law is

[7] To be sure, it would be useful here to compare Kantorowicz's position with Max Weber's—considering, too, that they both draw on the same scientific theory, Rickert's—but a comparison would take us too far afield. It will only be noted here that Weber has always served as a model for Kantorowicz and that Kantorowicz's sociology of law owes in several respects a debt to Weber's sociology.

[8] Psychology (at least its "main part") is understood by Kantorowicz as a natural science, whereas sociology is understood as a cultural science. See Kantorowicz 1962c, 151.

just, and whether it ought to accordingly be realized (ibid., 72). A science of experience, a science of meaning, and a science of value: That is how Kantorowicz's methodological trialism is set up.

> Consequently, legal science must necessarily proceed in a constructive, a critical, and an empirical way; it is therefore exceedingly limiting to single out either dogmatism, rationalism, or historicism as the one and only possible method. In any event, legal science, like any other science, can always proceed either in a systematic way (sometimes in a generalizing way, other times in a typological one) or in an individualizing (historical) way. (Ibid.; my translation)

Where does the sociology of law fit into this scheme? This discipline is for Kantorowicz "a systematic science of the effective reality of the law in its entirety," as such contiguous with the history of law understood as an individualizing science of the effective reality of a determinate system of law. Drawing on Rickert's classification of the sciences, Kantorowicz thus classifies as follows legal science as a whole: (1) legal dogmatics, or legal science in the strict sense, which is an individualizing science by reason of its studying law as a historical given; (2) the general theory of law, a systematic science concerned with the meaning of any system of law (a study that consequently also develops into a theory of categories); (3) the politics of law, an individualizing science concerned with the value of a given system of law; (4) the philosophy of law, a generalizing science concerned with the value of law in general, a discipline that consequently also flows into a theory of justice; (5) the history of law, an individualizing science concerned with the effective reality of a given system of law; and (6) the sociology of law, a systematic science concerned with the effective reality of the whole of the law.

Of course, this overall approach raises the problem of the validity of law. According to Kantorowicz, the actual validity of law depends solely on the way the judicial organs make use of the law, that is, on the use they make of enacted and habitual rules. Irrelevant in this respect are those who from time to time issue a rule or norm (the legislature, administrative agencies, private social groups, or other organizations); what counts as decisive is only the judge's recognition of something as law, for only in this way does a norm become legally binding. At the basis of Kantorowicz's legal-sociological conception lies the effort to overcome the methodological dualism between the is and the ought, a dualism from which it is nonetheless necessary to proceed in any rigorous approach to the problem of law. The normativity and facticity of law are two different areas of study, even though they do both figure in the concept and the phenomenon of law (Rehbinder 1967, 114ff.). The concept of law proper of legal science cannot be set in contrast to the sociological concept; what is necessary is for jurists and sociologists to devote themselves to different areas of study, but that without pretending they do not know each other. As has been observed, it makes no sense to keep insisting on distinguishing a legal concept of law from a sociological one, almost as though there were two truths to be

told about law. Differences do exist between jurists and sociologists, to be sure, but they only concern the division of labour between them as they each go about investigating their own field: "That is all" (ibid.; my translation).

3.2. Ignatz Kornfeld and the Law as Force

As much as Ignatz Kornfeld's name may have lapsed from memory, it is worth bringing him up and discussing his work as a jurist who fully grasped the sense of the sociological philosophy of law as a viable alternative to legal formalism: Perhaps, in certain respects, this is an accomplishment for which we owe more to him than we do to the official founder of the sociology of law, Eugen Ehrlich. It is not incidental, in this sense, that the most important discussion of Kornfeld's *Soziale Machtverhältnisse* (Social power relations: Kornfeld 1911) should have been written by Rudolf von Laun (1886–1975), in a work in which he also at the same time addressed Kelsen's coeval *Hauptprobleme der Staatsrechtslehre* (Laun 1912). Kornfeld and Kelsen, both Viennese, both of Jewish cultural background, represent two possible avenues of legal science at the dawn of the 20th century: On the one hand was Kelsenian normativism, attentive to the purely formal dimension of law; on the other hand were all the cultural currents that found such purely abstract considerations of the law unsatisfactory.

As Laun observes, Kornfeld and Kelsen alike were convinced that their respective work was ushering in a new phase in legal science. But as it turned out, Kornfeld's sociology of law would soon be sidelined, not only by the spate of writings that Kelsen put out from his normativist perspective, but also, paradoxically, by the fact that Kelsen did not elect Kornfeld as the symbol of the orientation he criticized (legal sociology) but rather cast Eugen Ehrlich's *Grudlegung der Rechtssoziologie* in this role, as we will see in what follows.

For Kornfeld positive law constitutes not a normative order but "a system of rules that in point of fact frame our social life, and any normative function that can be ascribed to them comes only as a consequence of this effective validity they have" (Kornfeld 1911, IV; my translation). The legal scientist is thus tasked "with explaining the positive law as a system of factually valid rules of social life, and so with explaining law from a sociological point of view, in such a way that the science of positive law—to the extent that it is not merely an applicative discipline or a technique but a general theory of law—can be endowed with the same logical method that other areas of theoretical knowledge use" (ibid., 3; my translation). The "rules' effective validity," however, cannot be confused with the "reality" inherent in the phenomena, for that would amount to mistaking the sociological approach to law for the *contractarianism* of natural law, thereby falling into an improper methodological syncretism between the is and the ought.[9] Kornfeld channels his criticism in two directions,

[9] On the relationship between natural law theory and sociology, see Menzel 1912. Adolf

taking aim at previous sociological theories, on the one hand, and at normative ones, on the other: The former collapse the law into reality; the latter are forced to postulate a fictitious will of the state (Kornfeld 1911, 5ff.), neglecting to consider that human beings have no need for fictional entities, for it is the jural community they build which is primarily functional in enabling them to achieve their aims (ibid., 21).

As the product of society, in consequence, legal rules are not "exact laws and are not in any way general; they are only empirical, describing regular phenomena that do not take place of necessity but rather unfold along experimental paths, and so on a probabilistic basis; aside from not excluding the exception, then, these laws so much as *presuppose* it" (ibid., 27; my translation). "Jural relations therefore amount to social forces, to the realization of power relations geared toward an interest in welfare; to jural forces; and to jural constraints on force" (ibid., 38; my translation).

And so there exist in society legal rules proper, and these must be distinguished from the rules the human spirit devises for ordinarily political ends, in the manner envisioned, for example, by the materialist conception of history (ibid., 50, 69). What matters in the final analysis, Kornfeld argues, are the energies issuing from the will of all those who form a jural community, or the law's effective validity, on which depend other forms of validity that can in a sense be described as derived, as is the case with normative validity or with moral validity as an empirical fact of consciousness (ibid., 58–9). Kornfeld thus explicitly equates law with force: "Juridical power, then, is not encapsulated in the willing subject but is grounded in the set ways of behaving in society" (ibid., 35; my translation). Juridical power is not for Kornfeld a force, quality, or capacity but is rather a relation among willing subjects. Even in this latter sense, however, the concept of force or power always describes an exclusively causal relation among the members of society and so cannot be taken up as a distinctly *legal* consideration. The life of law lies in an effective cooperation among those who form the law for communal social purposes, and the law is the system of empirical rules inherent in the law and aimed at achieving such cooperation. Law, then, is for Kornfeld a system of rules of social behaviour having effective force.

For Kornfeld law does not fall within the sphere of the "normative," for in this sphere we only find value judgments, or morals. Wherever there is no correspondence with facts, the propositions concerned with the normative are for Kornfeld no more than expressions of expectation, discourse having to do more with literature than with actual law. Significant in this respect is the polemic between Kelsen and Kornfeld: For the former, law is concerned only

Menzel (1857–1938) taught at the University of Vienna starting from 1894. In the final years of his life he moved closer to Fascism. Among his works are Menzel 1894, 1895, 1898, 1907, 1912, and 1929.

with the normative; for the latter, only with facts. The *sources* of law are accordingly understood by Kornfeld as "those motivations that, for the purpose of ensuring a social interest, those who form a jural community transform into behaviour that institutes social forces and limitations on force" (ibid., 73; my translation).

The statutes, customs, and sentiments that make up or underpin the law can be sources of positive law only insofar as they draw forth social behaviours compliant with rules that further social purposes. More to the point, the legislative imperative should not be confused with the normative function arising out of that imperative (ibid., 82). Indeed, the legislator's imperative is grounded in the certainty that juridical peers—on account of the rules at work within society—can be expected to obey the imperatives contained in the statutes. The normative moment arises only at a later stage, following that initial moment both logically and temporally (ibid.). Even Kornfeld appears to have been influenced by the free law movement, especially in his taking up a practice that had become common among the movement's exponents, that of referring to Article 1.2 of the Swiss Civil Code, providing that the judge, should any gaps be found in the law, is to decide according to "such social needs and motivations as are widely recognized by the members of the Swiss state" (ibid., 119; my translation).[10]

What matters, then, is that juridical norms should compel obedience, both in the case of the positive law's regular development and evolution and in that of a revolution (ibid., 132–3, 137). The reasons accounting for the birth and extinction of jural relations are not causes but presuppositions of the validity of the rules through which a jural relation is established or terminated (ibid., 136–7). The power to carry out a jural transaction belongs to the person whose will, in accordance with valid legal rules, constitutes a condition for the birth or termination of jural relations (ibid., 142).

It would seem, however, that Kornfeld has not succeeded in clearly drawing the boundaries that distinguish a legal obligation from other types of obligation, *in primis* moral obligation. Any move to collapse the law into power relations carries precisely the risk of causing the law as such to disappear. It stands to reason, then, that this is exactly the aspect of Kornfeld's theory that Kelsen trounces on most pointedly:

> But then, for Kornfeld, legal obligation is no more than a moral obligation. Kornfeld expressly characterizes the obligatoriness of juridical rules as a "moral injunction addressed to every juridical peer who is bound to obey [a legal rule]" (p. 67); he equates legal obligation with "the moral obligations arising out of legal norms" (p. 58); and he even defines legal obligations as "moral forms of free will" that bind everyone to every other juridical peer in socio-juridical life"

[10] The German original: "Kann dem Gesetz keine Vorschrift entnommen werden, so soll das Gericht nach Gewohnheitsrecht und, wo auch ein solches fehlt, nach der Regel entscheiden, die es als Gesetzgeber aufstellen würde."

(p. 60). It is Kornfeld's view, then, that legal obligations are only a specific type of moral obligation. (Kelsen 1912; my translation)

Kornfeld's sociology of law clearly touches many other issues, and he would go back to this subject in his *Allgemeine Rechtstheorie und Jurisprudenz* (General theory of law and jurisprudence: Kornfeld 1920), but without adding much to the approach he laid out in his first work. Indeed, the question of legal obligation remains the sore point of any sociology of law that fails to explain legal obligation as a distinctly *legal* obligation, confusing normativity and obligatoriness, or rather, as is the case with Kornfeld himself, predicating a norm's obligatoriness on its effective obedience by those who form a jural community. In this respect, Kelsen's criticism finds common ground with Laun's previously discussed commentary:

But what has to be considered essentially a failure in Kornfeld is, in the first place, his theory of the obligatoriness of legal norms [...]. That a law should be a legal source only if it is in fact obeyed sounds like a quite enticing proposition, but it leads to the consequence that the judge or administrative official could not apply any legal provision without first determining whether it is actually being complied with or is likely to be complied with—something that cannot possibly be put into practice. Indeed, the practice does not exist, and that, on Kornfeld's own theory, means it does not belong to the law of any state. (Laun 1912, 333; my translation)

Kornfeld builds a sociology of law hinging entirely on the is, thus neglecting the dimension of the *Sollen*. Kornfeld in this sense gives us a unilateral theory. Unilateralism, however, is both a drawback and an advantage of many theoretical constructions of the German cultural world of the period: None of these constructions are self-sufficient, and each forces us to resort to the others. The same goes for Ignatz Kornfeld, too.

3.3. Eugen Ehrlich and the Foundation of Legal Sociology

Although Eugen Ehrlich (1862–1922), along with Emile Durkheim and Max Weber, can be reckoned among the pioneers of legal sociology (Pound 1959, 20, 351),[11] his name continues to be associated with the famous (and in some respects ill-famed) criticism that Hans Kelsen wrote against him in 1915.[12] To

[11] It can be said of Ehrlich as a pioneer of the sociology of law what he himself says of Montesquieu, namely, that it is a "dangerous thing to be a pioneer. The idea of building a sociology of law with the means and materials of the eighteenth century is one of astonishing grandeur, but here, as elsewhere, grandeur is separated from the ridiculous only by a pace. The efficiency of mental effort is conditioned not only by the merits of the originator but also by the whole condition of the country. Even a genius running before his time cannot entirely get away from the atmosphere wherein he breathes" (Ehrlich 1986a, 207; my translation).

[12] Of course, the controversy between Kelsen and Ehrlich did not come out of the blue, not only because Kelsen had already addressed issues in the sociology of law in some previous writings, but also because the problem of the use of sociological methods in jurisprudence had been a focus of attention for several years running, owing in particular to the spread of the *Freirechts-*

be sure, one could no longer comment, as Manfred Rehbinder did as recently as fifty years ago (give or take a few), that "even Eugen Ehrlich, the founder of legal sociology, is extraneous" to legal culture (Rehbinder 1967, 9; my translation), but there is no doubt that a long stretch of time passed during which Ehrlich's influence in the philosophy of law was negligible, and that his importance in Germany was being misestimated even as, paradoxically, his work was drawing much attention in places like the United States and Japan.[13]

The point of departure for Ehrlich, confined in an outlying town like Chernivtsi, was essentially given by the following question: What is the relation between formally valid law and human transactions in real life among a people comprising a diverse range of groups (Bukovina was home to Germans and Jews, Russians and Rumanians, and Romanies and Slovaks, along with several other nationalities)? What is the relation between unity and multiplicity in law? How is it possible that such real-life multiplicity can at the same time constitute a juridical unit? How is it possible that such a unit—the law of the Austro-Hungarian Empire—can be a single, unitary system of law, all the while encompassing, despite such oneness, a diverse social landscape? From the very outset, the same question moved both Ehrlich and Kelsen, but their answers would take opposite paths. Ehrlich started out from the *life* of law, while Kelsen made his primary focus not the breakup of social life but the *unity* of juridical forms, even though, on closer inspection, this problem is itself a problem of life, in which lie unity and multiplicity alike. What gripped Ehrlich's mind was the plurality of concrete jural experience, and in a sense he can be considered a frontiersman; Kelsen, by contrast, came from the "heartland," observing social reality "from Vienna," and so from afar, not quite conversant with its bustle, whereas Ehrlich was fully surrounded by the flavours and colours of life in the province. It wasn't just the concreteness of jural experience but also that of the present, of the here and now, that drove Ehrlich's reflection in his endeavour to deal with different yet coeval social realities. As Rehbinder has observed, empirical inquiry into jural life is useful to the sociologist of law in investigating the law's immanent regularities "in the present," the idea being that such an investigation will eventually develop into a "modern theory of law" that can be turned to for support in developing a politics of law (Rehbinder 1967, 13).

bewegung. A list of readings should at least include Sinzheimer 1909; Spiegel 1909; Gmelin 1910; and E. Fuchs 1910a, 1910b. Also by Fuchs is the collection of the most important writings in the sociology of law and in the free law movement, namely, E. Fuchs 1965, as well as E. Fuchs 1970. See also Kantorowicz 1911b, 275ff.; Kantorowicz 1962e; Wüstendörfer 1913; 1915; 1915–1916, 170–80, 289–320, 422–55; Nußbaum 1968.

[13] See Kawakami 1987. The attention that Roscoe Pound devoted to Ehrlich's works helped to spark the interest that led to the translation of his *Grundlegung* (titled Fundamental Principles of the Sociology of Law: Ehrlich 1936). One indication of Ehrlich's influence in Japan is the book Isomura 1953.

As Dias has observed, the *Grundlegung der Soziologie des Rechts* (The foundation of sociology of law: Ehrlich 1913, 1967b), Ehrlich's best-known work, exerted "a powerful influence in driving jurists to lay aside their purely abstract preoccupations and turn to the facts and problems of social life" (Dias 1985, 426). This work condenses years of empirical research on the Bukovinian people (among others), while also incorporating comparative historical studies. His fundamental thesis is stated in the book's preface:

> It is often remarked that a book should be such that its meaning can be captured in a single sentence. If the present work were held to a similar standard, that sentence would sound like this: "Even at the present time, as in any other epoch, the centre of gravity driving the development of law lies neither in legislation, nor in legal science, nor in the case law, but in society itself. (Ehrlich 1967b, preface; my translation)

This thesis is based not only on empirical fieldwork done in the borderline areas of the Austro-Hungarian empire but also on a vast historico-legal inquiry undertaken according to a philosophico-historical method. Indeed, it is in certain respects a preeminently historiographical approach, it need be said, that Ehrlich takes in arriving at his results: It is history (or rather, the history of law) that forms the basis of his legal sociology.

In effect, his sociology of law as a "pure science" is a historical sociology that uses existing empirical material as a testing ground for historical analysis. The present must serve the purpose of bearing out the results of historical inquiry. As Sinzheimer has underscored, Ehrlich also saw the historical school (Savigny, Puchta) as a sociology:[14]

> As early as with the founders of the historical school, legal science took the path of sociology. The way they conceived the history of law was not much different from what we today call sociology. History and sociology are at least in part complementary: It is from history that sociology sources much of its material. A sociological account of law on historical bases is an account of law in the social context, explaining how law springs from the historical evolution of its society. (Ehrlich 1986b, 193; my translation)

History and reason thus stand as two dialectical opposites in an otherwise incomprehensible polemic. And in this way they find themselves drawing the boundaries of two disciplines: the *sociology* of law, on the one hand, and the *philosophy* of law, on the other. The former, Ehrlich explains, concerns itself with "law as it is"; the latter, with "law as it ought to be" (Ehrlich 1986b, 179;

[14] "Ehrlich was aware that his sociology of law bore a connection to the historical school of law, which held the view that in the spirit of the people lay the original source of law. But this view is something he [...] transformed and developed. He applied the metaphysics of the historical doctrine to the sociological doctrine. He integrated the spiritualism of the 'spirit of the people' with the 'facts' on which legal representations depend. In highlighting the national peculiarity of the legal consciousness, he also underscored its dependence on universal social sources" (Sinzheimer 1938, 249–50; my translation).

my translation).[15] The sociology of law also becomes a sociology of juridical ideas and concepts and sets out to investigate the role and place of legal philosophy in the context of social change. And that, in turn, causes legal philosophy to morph into a *fact*, something that can form an object of empirical analysis (the kind carried out in legal sociology):

> If the philosophy of law has really had an influence on the formation of law, and that has happened frequently, then we have here a social *fact*, one a sociologist cannot fail to take into account but must, on the contrary, observe so as to investigate its causes and effects. (Ehrlich 1986b, 179–80; my translation)

Of course, the relation between legal sociology and legal philosophy is also one of distinction. Indeed, it is precisely through a specific awareness of the need to distinguish empirical analysis from evaluative discourse that a sociology of law can be conceived as a sociology of legal philosophy (or of juridical ideas).

Ehrlich distinguishes three types of law: primary societal law, the jurists' secondary law, and the secondary law of the state. Societal law is founded on social development: It contains legal precepts that play a fundamental role in shaping human behaviour, and it arises autonomously out of the facts of law (relating to use, control, and possession and to declarations of will) as a rule of action structuring a social group.[16] The possibility of violating the primary system of peace brings into existence a functionally different order than that of primary, or societal, law; that is, it brings about the jurists' secondary law, which essentially consists of decision-making rules addressed to the courts (the

[15] Ehrlich is referring in particular to Stammler's theory of just law. This is of great interest because it shows that Ehrlich did not reject the philosophy of law but on the contrary was himself influenced by the neo-Kantian rebirth of this discipline. Indeed, Ehrlich's neo-Kantianism seems even more coherent than Kelsen's, since Ehrlich very much appreciates the sense of the distinction between is and ought as a distinction between the world of the is and that of *freedom*. Whereas Kelsen confuses the method and object of legal philosophy—applying to the world of freedom a method that is only *apparently* normative, a method that ultimately reveals itself to be pseudo-causal, for it is influenced by the method of the natural sciences and is dependent on it, however much *a contrario*—Ehrlich remains within the boundaries of the Kantian conception of law as a moment of the human world of freedom, a world accordingly separated *ab origine* from any purely causal or naturalistic description. The philosophy of law is a science of the spirit in an authentic sense. In the end, Ehrlich takes the *Sollen* more seriously than Kelsen and shows an appreciation for the distinction Simmel drew between two meanings of the concept of a norm. According to Simmel, the term "*norm* has a twofold meaning, for on the one hand it refers to that which happens universally or generally, while on the other it refers to that which must [*soll*] happen even though it may not" (Simmel 1989a, 77; my translation). Whence Ehrlich's thesis that law reveals two systems. As H. Sinzheimer has explained it, one system "contains norms aimed at settling controversies; the other contains norms according to which human action should actually take place. This is a fundamental distinction. The norms in the first system are ones Ehrlich calls adjudicative; those in the other system he calls organizational: The former are 'legal propositions'; the latter, 'societal law'" (Sinzheimer 1938, 234; my translation).

[16] On the concept of the facts of law in Ehrlich, see Rottleuthner 1981, 172ff., 133ff.

courts are for Ehrlich a "third" system of law, and they need not be the courts of the state's judicial apparatus). The jurists' secondary law does not primarily serve the purpose of enabling the *formation* of social groups but is only intended to protect *existing* groups. The enacted law of the state, the third class of legal precepts, "derives from the state, but not so much on account of its form as on account of its content: It is a law which has arisen solely through the state, and which could not exist but for the state, whatever form such law may take in its coming about" (Ehrlich 1967b, 110; my translation). This is ultimately the state's coercive system, which manifests itself in the state's organizational law and in the law serving to protect social life, this latter body of norms containing what Ehrlich calls "rules of intervention" (*Eingriffsnormen*), or what today we would call administrative rules.

These three complexes of rules are engaged in a process of mutual feedback, and as a whole they form what may be called living law, which in Rehbinder's definition consists of "a social law operating on a higher level, for it comes about as a reaction to the jurists' law and the state's law" (Rehbinder 1967, 64; my translation). This conception of living law deserves to be taken up in connection with Roscoe Pound's conception of law in action (Pound 1910), considering that Ehrlich's theory has been found to be a counterpart to Pound's (Zeigert 1979, 225ff.; O'Day 1966, 210ff.).

Ehrlich's interest in the "physiology of law"—in social regularities as against the pathological phenomena of so-called deviance and of the consequent application of penalties—can be clearly appreciated above all from the criticism he makes of the idea that law is made up of legal propositions:

> The *Lex Salica Francorum*, in its boundless provisions, contained all the legal propositions existing among the Salian Franks. But if we compare that text with what Brunner in his legal history has to say about the Franks' law, we will find that only a fraction of this law is derived from the *Lex Salica*: Most of it is reconstructed from indications contained in historical works and documents, among other sources. And so, only a fraction of the Franks' law was encapsulated in legal propositions. (Ehrlich 1986b, 243; my translation)

And, likewise, as Ehrlich remarks elsewhere, if we want to understand the makeup of our agrarian law, we cannot gain that knowledge just by relying on "positive" legal propositions. For the picture these propositions paint is one marked by vague, fuzzy contours: "Anyone looking to find out the real 'constitution' of agrarian law will have to study the actual relations arising out of customs, contracts, and the way estates are divided among heirs" (ibid., 184; my translation). Ehrlich appears to be saying that the regular and orderly functioning of the social organism, of the concrete, always comes before the abstract:

> The state is older than its law; the legal propositions of marriage and family law presuppose the existence of marriage and family. The legal propositions that regulate possession could not have been developed without a given practice of possession, nor could the propositions relating to

contracts have come about before the corresponding contracts were formed; human beings have inherited property for centuries, before any rules on succession were ever formulated. (Ibid., 248; my translation)

The development of these various systems "rests on society's internal movement and is essentially independent of the state" (Ehrlich 1966, 81; my translation).

This emphasis laid on the centrality of the "concrete" in relation to the "abstract" raises a question we should take up, that of the "constitution," or *Verfassung*. The legal propositions set down in the codes never capture the "constitution" of a jural relationship or of any given vital part of the law. So, what does Ehrlich mean by *constitution*? I believe we should take this term to designate a real, effective dimension which precedes any conventionalist account of the law, and whose structure is *ordered*. If we deepen the question, we could easily reach the conclusion that Ehrlich's harmonizing sociology of law presents remarkable affinities with early French sociology, the kind advocated by Joseph de Maistre, Louis de Bonald, and their coterie. Ehrlich can certainly come across as a conservative thinker in this respect: His appeal to a juridical relationship's "existential" constitution can be extended by analogy to the entire legal system. And so it is the social group's legal system that turns out to be "existentially" founded on an unwritten constitution, one that lives in the actual, *physiological* principle regulating relations within and among the groups that make up society. As Julius Binder has observed, it is Ehrlich's view that "law is therefore not coercion but *order*" (Binder 1925, 1001; my translation).[17] Regulation in this sense is sociologically the very existence of a society or social group, and it is therefore not contingent on a judicially mandated punishment or writ of execution or, for that matter, on any threat of punishment:

Coercion is indeed as a rule considered essential to law; that idea, however, rests on a confusion. There generally can be no social rules without a certain degree of coercion, that is, without the idea that compliance is tied to a reward and noncompliance to the infliction of a loss. Morals, customs, education, and the like are imbued with this idea no less than is law. When we speak of legal coercion, we mean the coercion peculiar to the legal norm, that is, the coercion on which depend the criminal justice system, the enforcement of judgments, and especially the enforcement activity of the state at large. This sort of coercion, however, has been entirely absent from the law for extended periods in its development, and the importance of coercion is overstated even today. (Ehrlich 1986b, 185; my translation)

As Ehrlich goes on to observe, no law prohibiting usury can prevent that practice if the conditions for its flourishing obtain (ibid., 186), and these conditions flow directly from the group's structure, from its "constitution." The legal proposition is in Ehrlich something akin to the conception the French reactionary thinkers have of the written constitution of modern states, who view

[17] In Ehrlich's view, Binder further comments, "the only valid law is the law actually observed in the life of the community" (Binder 1925, 1002; my translation).

it as an accretion on the unwritten constitution, conceived as living in the concrete reality of a group or people (or, as Maistre would have said, the nation). Law therefore does not in the least depend on there being penalties: Although this may characterize the legal proposition—it is no accident that Kelsen, a theorist of modern law, makes it a central element of his definition of the legal norm as a hypothetical judgment—the law can even *do without* this element. If the laws protecting property were abolished, Ehrlich comments, this would not make for any greater violations of property than those which take place under the current system.

None of these considerations, however, can make up for the basic flaw of Ehrlich's sociology of law, a flaw that undoubtedly lies in his distinction between legal norms and other types of social norms (Partridge 1961, 1). Indeed, Ehrlich locates this distinction in the different degrees of psychosocial sentiment a norm can elicit: "A legal proposition is above all a product of social forces, and insofar as its scientific study revolves around psychological questions, it is the social psyche that plays the decisive hand" (Ehrlich 1967a, 212; my translation). The various social systems are hierarchically ordered. The law stands highest in the hierarchy, but this ordering is only *psychological*, manifesting itself in the *feeling* that social peers feel when norms belonging to different social systems are violated:

> Different kinds of norms draw forth feelings of different intensities, and it is accordingly with different feelings that we react when these norms are breached. Compare the feeling of indignation [*Empörung*] that follows the infringement of a right, the feeling of contempt [*Entrüstung*] provoked by the violation of a moral imperative, the resentment [*Ärgnis*] one feels at being slighted, the reproach [*Mißbilligung*] felt for a lack of tactfulness, the risibility [*Lächerheit*] occasioned by a lack of bon ton, and, finally, the critical scorn [*Ablehnung*] to which those who champion the fashionable treat everyone who does not measure up. (Ehrlich 1967b, 132; my translation)

Kelsen (1915, 861–2) gave forth with a mordant criticism of this attempt at a psychological classification of norms, and indeed any such classification seems at best unlikely today (Timasheff 1939, 26; Bechtler 1977, 76–8). But aside from that, it is certainly not on the basis of this "orgy of psychological jurisprudence" (as Kelsen described it) that we can appreciate the important role Ehrlich plays as a precursor of modern legal sociology.

Legal science and the sociology of law are thus intertwined, and neither can stand on its own without the other. In a lesser-known passage, Kelsen observes that a jurist must also be a sociologist in order to be a jurist; and the same, conversely, can be said of the legal sociologist, who cannot choose not to also be a jurist, with the only caveat (a matter of intellectual integrity, above all) that one must state up front the role in which one is writing, as a legal sociologist or as a jurist. This, in truth, is something Ehrlich does not do. He is interested in grounding the sociology of law as an authentic legal science. In a sense, that is the fate that befalls those who pioneer a new science, yielding to

the lure of the newfound world. But it would nonetheless be a grave error on our part if we were to stop at Kelsen's criticism, correct though it is, without seeing the reasons behind the sociology of law, and in particular the reasons behind Ehrlich's theory even at this early phase in its development. The legal proposition, Ehrlich says, is "conditioned by society" (Ehrlich 1986b, 250; my translation). Despite Kelsen's mockery of a statement that may seem banal, the view expressed in that statement is anything but trivial. It baffles the mind why Kelsen should have taken Ehrlich to task on this point without saying a single word about another author who held a similar position: That would be Karl Renner, who in a sense was himself a legal sociologist, and who shared a close affinity with Ehrlich on a scholarly level and a political one, too.[18] This circumstance in all likelihood is owed to a specific contradiction in Ehrlich's position, for he confused the *genesis* of legal regulation with regulation itself. Ehrlich, a foursquare adherent to the free law movement, saw that social conflict at some point imposes the making of new law by the judges, as well as the enactment of new statutes, but he confused the locus that harbours the premises and conditions for the creation of new law with the law itself. In the modern state, a *demand* for law is not the same thing as law; for instance, the return to invoking social status as the basis on which social participants (such as women and minorities) in large part assert their claims does not mean that such status in itself is law. Status is the germ from which originates a position that often conflicts with existing law and the current state (on the assumption, for example, that minority groups are discriminated against), but only such law as has already been "made" counts at any given time as law.

3.4. Karl Georg Wurzel and the Social Dynamics of Law

Even among sociologists of law Karl Georg Wurzel is familiar only to those who are conversant with American legal realism or with the free law movement. The first of his two books, the 1904 *Das juristische Denken* (Wurzel 1991a)—translated into English and published in the United States under the title *Methods of Juridical Thinking* (Wurzel 1969)—drew the interest of authors like Jerome Frank, who devoted a chapter to the book in *Law and the Modern Mind* (J. Frank 1970). And yet, despite such relative obscurity, Wurzel must be reckoned among the founders of legal sociology, with his 1924 book *Das Sozialdynamik des Rechts* (The social dynamics of law: Wurzel 1991b).

[18] Indeed, Renner regarded Ehrlich as an ally in the effort to defend the least well-off in society. Two writings by Ehrlich are worth pointing out in this regard: One is *Die soziale Frage und die Rechtsordnung* (The social question and the legal order: Ehrlich 1890–1891), published under a pseudonym in the journal *Neue Zeit*; the other is *Die soziale Frage im Privatrecht* (The social question in private law: Ehrlich 1892), published in 1892, and whose content overlaps almost completely with the first article. Kawakami (1987, 255) speculates that Ehrlich took on a big political commitment at this stage in his life. On Renner see also Section 7.2.1 in this tome.

The foundation of Wurzel's sociological theory lies in relativism: "In the social arena, the criterion of 'truth' is not just *sometimes* relative but is in principle *always* so. There is no eternal truth" (Wurzel 1991b, 113; my translation).[19] In support of this thesis, Wurzel underscores how it is impossible to bypass the subject (the person) as a criterion by which to understand the social world. The subject is certainly the source that can say something about society, but at the same time, as an *acting* subject, he or she is the *object* of such information.[20] To say something, in social science, is to modify the object about which that something is said (the object consisting in the subject's action). In the final analysis, what counts in a social theory is not its truth or nontruth but what the theory can offer, what it inherently "tends toward" its "power to make things real" its "transformative energy": "The most important problem in any area of sociological inquiry is that of the social dynamic" namely, the functional problem (ibid., 114; my translation).

As Wurzel remarks, the sociodynamic question plays a relevant role in any social science, but it is especially prominent when we are dealing with the law. Indeed, the law "is something normative" (ibid., 111; my translation): As such, it cannot coincide with facts, and furthermore, if it is to be valid, it cannot be unstable, or "fact-dependent." In this way, Wurzel rejects two extremes, the first consisting in any uncompromising separation (à la Kelsen) between the world of the is and that of the ought—or rather any distinction which fails to illuminate those connections which do exist between the two worlds—and the second consisting in that doctrine which makes a scientific programme out of praxis, and this is the free law movement as a theory about the "free sourcing of law."

To begin with, Wurzel frames in a new way the transformation undergone by the contrast between a state-centered, positivist conception and the natural law conception of law by arguing that this contrast has now grown into the one between, on the one hand, the pure theory of law, which seeks a pure law, "devoid of any logical obscurity" (ibid., 118; my translation), and clearly set apart from any psychological, social, or physicalist question, and generally any question having to do with the effectivity of law, and, on the other hand, that theory, or rather, that trend, which considers law as a system of empirical rules of social life, and which accordingly regards the description of the facts of social life as the first concern of scientific activity: "Standing in the foreground over on one side is the 'purely formal' concept of law as the condition for any jural experience. Standing in the foreground over on the other side is jural experience itself, the actual *use* of law" (ibid., 182; my translation).

[19] What ultimately matters, Wurzel writes, is not the question of the truth or untruth but that of "what a theory can offer" (Wurzel 1991b, 188; my translation).

[20] "The difficulty involving the sociological-dynamic consideration is huge, since the object of consideration is a part of society, and that object is itself prisoner to the opinions of society" (Wurzel 1991b, 120; my translation).

Wurzel grasps with remarkable lucidity and perspicuity the sense of the contrast between the two currents:

> When, for example, the empirical current asks legal science to do a *comparative* or *historical* inquiry of law, the other current replies, "Before I can even begin to compare the phenomena of jural life among different peoples in different epochs, I must necessarily have a unitary concept of law as a benchmark against which to judge whether this or that phenomenon of life belongs to the life of law. (Ibid., 183; my translation)

In the empirical current Wurzel locates authors such as Jellinek and Ehrlich, for whom validity capitulates in the contrast with facts; and in the opposite, or formal, current he of course locates Kelsen. In the company of Kelsen, however, Wurzel also, and somehow oddly, places not only Kant but also Cohen, and then Stammler, Lask, Iljin, Merkel, and Bierling. In so doing Wurzel makes a certain confusion between the concept of *Richtigkeit* (correctness) and that of *Reinheit* (purity). As theories concerned with social questions, the critical transcendental theory and the empirical one must be judged not on the basis of their truth-content but in view of what they can offer from the standpoint of the social dynamic. Legal science is a practical science, meaning it is driven by practical tasks and purposes. Legal science must develop a sense of reality while also building its own logical force. The pure theory of law can thus be credited with having developed a concept of legal validity that stands firm in the face of facts, even though such facts may be in contrast with valid norms; in a sense, its greatest merit is to have set up a camp on the opposite side of the empirical theory.

But even Kelsen cannot dismiss the empirical moment, because the practical character of legal science requires this discipline to pay as much attention to the formal moment as to the substantive one. The pure theory of law is subject to some operational and performance limits that ultimately make necessary a "leap" proper from the purely "normative" to the factual. To be sure, the limits of Kelsen's doctrine's operational capacity are ones that Kelsen holds up as virtues of this theory, but they are of no help in explaining in a functional (i.e., sociodynamic or sociological) manner the fact that what the jurist constructs is the jurisprudence of the world of the is (the world of force), which is precisely where Kelsen locates the "metajuridical" (and which, on the other hand, makes it possible to treat as valid the various legal systems that lie next to one another in space and come one after the other in time). Now, these limits, with their "bizarre outcome" "force a *leap* into the factual," a leap on account of which Kelsen is compelled to recognize his starting point as an arbitrary choice (ibid., 194).

In reality, even Kelsen is driven by an impulse to assert the world as unity, and antinomies can be detected even in the pure theory of law. Wurzel holds that no consideration of law can do without the sociology of law, for only through such an inquiry can law be presented as a social phenomenon and legal science as a practical science, a science capable of mediating between fact and value. A legal science conceived as a social science must be able to work

simultaneously with two concepts: that of force and that of validity. As Wurzel explains, the concept of force constitutes "the logical tool with which to bear in mind the phenomena of the world of the is, while at the same time not losing sight of the concept of validity" (ibid., 123; my translation). The central concept of Wurzel's legal sociology is (as in Kornfeld's) the concept of force, which on closer inspection will be discovered to be a qualification and refinement of a concept that in turn figures centrally in Ehrlich's legal sociology: the concept of jural life. Indeed, Wurzel addresses the problem which Ehrlich had sidestepped: the problem of the application of law, of a law whose distinguishing feature lies in validity (*Geltung*) and not in its practical effectiveness as determined by its uses and customs. Although even Wurzel is removed from the finer issues debated in the more mindful legal sociology of today, he moves one step ahead of Ehrlich by not rejecting the formal normative aspect of law, and in fact acknowledging its role, all the while taking on the problem of how that aspect can be brought into relation with the real dynamics of society. He is very much aware that sociology is concerned with things such as they *are*, with social life as a complex of facts, and that a contradiction arises between this social consideration of facts and the moment where social life shows deference to law's normativity (that is, to its logico-formal moment); and he also appreciates that the problem is equally contradictory from the standpoint of pure or formal legal science, in that this science concerns itself with law as something intended to be applied, and indeed *requiring* to be applied, and hence conceived as part of the realm of the is, of empirically (i.e., socially) relevant facts. An antecedent to Wurzel's solution can be identified in the one put forward by the Hungarian legal philosopher Felix Somló (1973, 251ff.), who in a criticism of Kelsen draws a distinction between the state and law, the former acting as a "basis" or "support," the latter as that which is "borne" by the state. Just as Somló understands the state, with its forms of organization, as the "force" behind the law (behind the state's enacted laws), so Wurzel sees the question of law's application as pointing to the need for a force capable of "bearing" the norms to be applied. Sociology, however, is tasked with singling out the distinctively social forces, the forces behind the life of law. The sociological concept of law advanced by Wurzel is rooted in the forces (*Kräften*) that act in reality. Indeed, a social science must answer "the needs of *daily life*" (Wurzel 1991b, 215; my translation).

3.5. Ernst Seidler and Empirical Social Science

Ernst Seidler's (1862–1931) legal-sociological thought is essentially set down in a 1920 essay (*Die Theorie des Rechts und ihre Grenzen*, The theory of law and its limits: Seidler 1920–1921) and in another book published one year before his death, *Die sozialwissenschaftliche Erkenntnis* (Knowledge in the social sciences: Seidler 1930).

The 1930 book contains an epistemological analysis, in which regard the reader is referred to the commentary of Günther Winkler, to whom we owe our rediscovery of Seidler, and so we can focus here on the salient features of the seventh chapter, specifically devoted to legal science. For Seidler, law is conceived as made up of norms, where each norm is a *Sollen*, an ought directed toward a purpose. A norm is always a *social* norm, posited by a social institution and coupled to a penalty. As an authoritative and heteronomous construct, a norm acts as an imperative, and as such it represents a force acting on the individual's psyche. Seidler sees law as essentially defined by its constringency, from which it follows that legal science, as an empirical social science or legal sociology, must concern itself with the *content* of legal norms. The object of legal science lies in the *Sein des Sollens*, in the is of the ought, meaning the is as the content of law. To that extent, the science of law is for Seidler a science of the is.

The law expresses a people's vitality, and it is for this reason that in the content of law lies the object of science, because that content is what the people set for themselves as their purpose. Legal norms, then, are not the outcome of a legal method but are instead the given object of legal science, and this object is the product of a will endowed with authority. Legal propositions are consequently legally conceived vital relations. And so, for Seidler, the study of legal form does not suffice; a legal science must fundamentally concern itself with the *content* of legal norms. Undoubtedly, the intellectual lodestar of Seidler's legal sociology is Jhering and his theory of purpose as the creative force of law.

Seidler does not *expunge* the *Sollen* from the law, to be sure, but in framing it as an object of legal science, he considers it to be a psychical phenomenon forming the basis of legally qualified behaviours. A norm is thus a scheme on which basis to qualify behaviours (Kelsen may have drawn on Seidler in formulating his definition of *norm* in the first edition of the *Reine Rechtslehre*, of 1934), and the sociologist

> describes and explains as an is the psychical phenomena of the ought, not unlike what a natural scientist does in identifying and explaining a chemical bond. [...] For an empirical science, the *Sollen* makes sense only if understood as a real, i.e., psychical, phenomenon. Indeed, on this conception, that which cannot be counted among (psychical or physical) phenomena cannot be an object of theoretical investigation: Something like an objective *Sollen* is simply unfathomable. There can be no doubt that a norm is an ought, but it is so only as the content of the will. (Seidler 1930, 200; my translation)

The reference just made to the will implies that for Seidler the law, as an empirical phenomenon, can never be severed from politics and the state, where the will is manifested in relation to a purpose (precisely the point Seidler makes with respect to the law).

3.6. Legal Science and Psychology According to Wilhelm Wundt (*by Federico Lijoi*)

Wilhelm Wundt (1832–1920) is considered the founder of psychology as an experimental science. He was influenced by Müller, Herbart, and Lotze and rejected any unilateral account of consciousness as something to be understood in exclusively materialist or exclusively idealist terms, so he put forward a view of consciousness as a place where a synthesis is effected between the physical and the psychical. Individual psychology so conceived finds a necessary complement in the psychology of peoples (*Völkerpsychologie*). Here Wundt built on Lazarus's and Steinthal's insights so as to drill deeper into the psychological question, while also broadening its scope, by taking into account the higher levels of psychological evolution and organization, thus also grappling with social, religious, and moral problems. So, on the one hand, psychology comes into shape as a psychology of peoples—bringing into play the problems involving morality, society, and religion—and on the other hand it makes it possible to define the structures of psychical individuality through an empirical analysis coordinated with the kinds of investigations carried out in the natural sciences.

Wundt's inquiry into the legal phenomenon is part of a psychological analysis aimed at singling out the conformations taken by the "spirit" of man and of peoples.[21] Wundt held that the law is not fashioned out of an agreement among wills but is rather best understood, by analogy to language and myth, as "a natural product of consciousness" (Wundt 1921, 568; my translation), a product that finds its source in those human sentiments and aspirations which are triggered by social life. In the beginning, law was a single thing with custom (*Sitte*) and was internally connected with religion. But then it broke free and found its own forms of manifestation and application, in the first place as an arrangement of men's social needs effected through organized coercion. Its evolution is depicted by Wundt as unfolding in three stages, though they are not sequential but rather begin to coexist when the last stage is reached: We start out, in the first stage, with the taking of those juridical intuitions whose roots lie in the people's ethical representations; in the second stage the law separates from custom, and juridical ideas find an initial theoretical expression (through the codification of law); and finally, in the third stage, legal norms become an object of systematic analysis of a scientific sort (the systematization of law).

The law is understood by Wundt as an ordering at once logical and ethical (ibid., 590). In the first sense, law finds expression in its being suited to the purposes for which law is intended; in the second sense, it instead finds expression in justice. In both senses, law requires physical coercion. The concept of law

[21] See Wundt 1918 offering a diachronic exposition of the evolution of legal forms; his *theoretical* analysis of law and his method are instead expounded in Wundt 1921, 512–29, 568–624; 1912a, 128–31, 219–44; 1912c, 160–86. On this question, see also Eisler 1929, 633–54 (see esp. 648).

can thus be understood in a threefold sense, for it must be suitable for the purposes it is meant to serve, it must embody a notion of justice, and it must rely on the use of force. Its legitimacy lies in the original general will as manifested in an organic community. And this organicity in turn rests, in the first place, on the sharing of a universal moral content as expressed through common sentiments and concordant representations about the content of justice and of law.

The scientific framing of law takes as its object that peculiar form which the people's juridical intuitions have found in statutory and customary law. The content of these intuitions is expressed in propositions in which are set forth rules for the social action of the members of a juridical community. These rules are the rules of law (legal norms), and as concerns their logical meaning they can be compared to the underivable first axioms of the theoretical sciences. Wundt also draws a distinction between legal norms in a strict sense—*Grundnormen*, or basic norms, so called because they set forth the basic principles of law—and auxiliary legal norms (*Hilfsnormen*), which state not the law itself but the way in which the legal system needs to be protected against the violations it stands to be threatened by (ibid., 614). The basic norms are grounded in universally valid moral intuitions and are accordingly stable and constant, whereas auxiliary norms are contingent on changeful views and external conditions. This contrast is illustrated by Wundt in his remark that the prohibitions "Thou shalt not steal" and "Thou shalt not kill" survive from the dawn of culture as unchangeable legal norms, whereas the laws setting out punishments for theft and murder have changed countless times.

And, finally, as concerns the state, Wundt puts forward a conception of it as the bearer of a high moral purpose, which is to realize the common good and pursue the public interest (ibid., 526; Wundt 1912b, 241ff.). It follows that we have to reject all theories on which the state is claimed to originate out of a pact among individuals. Indeed, the general will manifested in the state cannot come into being through a contract, for it is rather the *condition* for any contract to be possible to begin with. Likewise to be rejected, for the same reason, are those theories of the state that—in accordance with a civil-law method and in opposition to an organic conception of the state—take the single individual as their starting point, on the assumption that the purposes of the state must be tailored to the needs of the members of the community. This erroneous conception, Wundt claims, presupposes the same method that natural law theory rests on, the idea being that individuals—the only reality amenable to any physical or social grasp—must in the first place be protected against the exercise of government power. We must therefore avoid carrying over into public life the concepts proper to civil law. If we are to correctly analyze the essence of the state, we must discard the naturalistic presupposition of an analogy between the social world and the physical and must instead proceed on the basis of an organic cohesion among the multiple forms of social organization (Wundt 1921, 528).

Chapter 4

FROM CRITICISM TO THE PHENOMENOLOGY OF LAW

by Giuliana Stella

4.1. Introduction: The Genesis of the Method

The epistemological programme set out in Edmund Husserl's (1859–1938) phenomenological philosophy, even where phenomenology enters into the realm of law, explicitly consists in an endeavour to seek the ultimate foundation of knowledge. This foundation is found to lie in scientific rigour, a rigour attained in the first place by going through the different stages involved in the subject's analysis of his or her own self, before even proceeding to analyse reality itself. Indeed, it is by carrying out this analysis that we as subjects can reclaim our own original purity, and this, as the phenomenologist would say, enables us to "constitute" reality and "intentionalize" it. What this means is that we become aware of reality through an "intuition" that will seize the "essence" of reality itself, its *eidos* (εἶδος). In a word, our knowledge of the so-called "regions" making up the "material ontology" of the different types of entities—including law, and generally those entities which Husserl speaks of in the *Prolegomena zur reinen Logik* (*Prolegomena to Pure Logic*: cf. E. Husserl 1975)—can come about only after subjectivity and its operations are unveiled, that is, in the language of phenomenology, only upon reaching the transcendentality of the self.

It must be conceded, then, once an approach so described is carried over into the realm of law, that there is no way to arrive at the legal "principles"—understood as "ideas," the essences from which springs the widest variety of contingent legal events, or the models with which such events must comport—unless the subject becomes "transcendental." Kantian transcendentalism meant that we have to represent the very condition for the possibility of knowledge by securing its universality; not too different from that necessity was the kind expressed by Husserlian transcendentalism, which further set out the need to supplement the subjects themselves with the Kantian *noumenon*, something that had hitherto remained *outside* the subject.

Actually, the phenomenological approach, tending toward esotericism and imbued with an aristocratic faith in the value of knowledge, is not so easily comprehensible. It follows that if we are to profitably wend our way through Husserl's theory, we will have to retrace the path taken by those theorists who directly tested that theory by applying its method to a specific area of investigation. Phenomenological philosophy is in the first place a gnosiological method: It needs to be experienced. In the single areas or "regions" of application

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such as law, Husserl's gnosiology effects a refoundation of the relation between subject and object, all the while pursuing scientific rigour in a relentless quest for the truth.

Among the authors making up the speculatively compact "phenomenological school of law" we can count Adolf Reinach and Gerhart Husserl, both German; Felix Kaufmann and Fritz Schreier, both Austrian; and, to a lesser degree, and each in his own way, Gerhart Leibholz and Carl Schmitt, both German. As we will see, the theories advanced by these Husserlian jurists, especially in the 1910s and 1920s, closely followed the ideas and methods of Husserl's first seminal works (cf. in particular E. Husserl 1975, 1984), and so, as we consider legal phenomenological production, we will be able to appreciate how the history of legal philosophy flows directly into the history of philosophy as such, so much so as to make for an additional possibility in interpreting and understanding Husserl's philosophy itself.

The thesis advanced by Husserl and all the Husserlian phenomenologists, including the legal phenomenologists, is aptly encapsulated in the title of a work that Husserl wrote in 1913, namely, *Die Philosophie als strenge Wissenschaft* (Philosophy as rigorous science: E. Husserl 1987). In this sense, the primary objective of a legal philosophy fashioned after this model is pursued by analyzing legal phenomena—such as norms, institutes, organizations, institutions, and nomothetic archetypes—within a framework of scientific rigour. Rigorous science, for its part, ought not to be confused, on a phenomenological conception, with a simplistically experimental reading of the nexus between the subject and the object of knowledge: It rather carries foundational force, for it flows into the broader project, harking back to Leibniz, of a *mathesis universalis*, a science of the sciences. The rebirth of philosophy goes through a rediscovery of it as a foundation of all particular sciences. Therein lies the sense of the Husserlian credo that "the science tasked with the function of critiquing the other sciences, and itself, cannot be anything other than phenomenology" (E. Husserl 1976, 133; my translation).[1]

So the need for "scientificity" that comes through in the phenomenologists' writings reflects nothing if not a concern with finding a renewed way of "philosophizing" and taking the proper caution needed to achieve an effective interpretation of the legal phenomenon. The motto *Zu den Sachen selbst!* (Go back to the things themselves!)—encapsulating the philosophical revolution tied to Husserl's phenomenology as stated in his *Logical Investigations*—does not refer to objects of ordinary experience. Husserl speaks of *eide* (εἶδη, ideas or essences), of *a priori*, for in his view the *eidos* is "prior to all 'concepts' un-

[1] Some essential readings offering a historical and theoretical overview of the phenomenological movement and of legal phenomenology are Van Breda 1952, Schuhmann 1977, Van Breda et al. 1959, Van Breda and Taminiaux 1959, Spiegelberg 1982, Sepp 1988, J. Kraft 1926, Peschka 1967, Gardies 1972, Stella 1990.

derstood as denotations, which, indeed, as pure concepts, ought to be made to fit the *eidos*." In that sense, "in the pure way of the eidetic method," phenomenology is to be interpreted as "an intuitively *apriori* science purely according to the eidetic method" (E. Husserl 1973, 105; my translation).

Husserl's position, clearly expressed in these pages from his 1931 *Cartesianische Meditationen* (Cartesian Meditations), is already present in the two works from which the legal phenomenologists draw inspiration, namely, his 1900–1901 *Logische Untersuchungen* (Logical investigations: E. Husserl 1975, 1984) and his *Ideen zu einer reinen Phänomenologie und phänomenologischen Philosophie* (Ideas pertaining to a pure phenomenology and to a phenomenological philosophy), whose first book, not incidentally, is titled *Allgemeine Einführung in die reine Phänomenologie* (General introduction to a pure phenomenology: E. Husserl 1976). And the same position is explicitly taken up in the works of authors like Adolf Reinach, Gerhart Husserl, Fritz Schreier, and Felix Kaufmann. Thus, for example, Reinach makes use of the *a priori*, a concept that figures in the title of his main work, his 1913 *Die apriorischen Grundlagen des bürgerlichen Rechtes* (The *a priori* foundations of civil law*:* Reinach 1913);[2] Gerhart Husserl, for his part, resorts to the concept of 'essence' or 'idea' in applying the method of phenomenological reduction to the analysis of law considered before time and history; and, finally, Kaufmann and Schreier rely on the concept of 'purity' as the end result of a phenomenological philosophy, and it need be mentioned here that these two authors' cross-pollination between Husserlian and Kelsenian thought also bears witness to the influence that Husserl exerted on Kelsen himself, so much so that only after reading Husserl's *Logische Untersuchungen* did Kelsen alight on his "pure theory of law."

4.2. Adolf Reinach and the *A Priori* Elements of Law

Adolf Reinach (1883–1917)—the first of Husserl's pupils (Husserl himself held him in the highest regard)—was also the first of the legal phenomenologists. He wound up formulating a project driven by the thesis that legal phenomenology ought to be an "Ontologie oder apriorischen Gegenstandslehre" (an ontology or *a priori* knowledge of the object) in the proper sense of the expression, that is, an ontology understood as an *a priori* theory of objects. Indeed, as Reinach writes:

> The so-called fundamental legal concepts, those having a specifically legal status, also have a non-positive legal existence, just as numbers have an existence independent of mathematical science. Positive law can elaborate and modify such concepts at will: These concepts are themselves often

[2] Later published in Reinach 1921, 166–350. Only later would the work be published on its own, under the title *Zur Phänomenologie des Rechts: Die aprorischen Grundlagen des bürgerlichen Recht* (Reinach 1953, translated into English as Reinach 1983). A critical edition of this work can be found in Reinach 1989a, 141–278.

found by positive law, rather than being produced by it. Furthermore, these legal forms come under the purview of eternal laws independent of our understanding of them, as is the case with the laws of mathematics. The positive law can welcome these laws within its sphere and can even set forth exceptions to such laws. But even where it upends them into their contrary, it cannot touch their proper existence. (Reinach 1989b, 145; my translation)[3]

It thus falls within the compass of the phenomenological mode of philosophy to make an idealist methodological choice compatible with an indispensable ontologism, the former aimed at outlining the criteria proper to the subject, and the latter instead intended to make it possible to recognize reality in its autonomous existence, all the while recognizing that the nature of such existence is clearly contingent on the mutual influence between subject and object. In this framework, what it means to grant the existence of legal principles is to move law closer to those "objective" sciences (especially mathematics) whose principles exist independently of whether they will be "grasped" or discovered. That indeed seems to be what the phenomenological programme consists in: in an endeavour to grasp the essences of law. In fact, if legal phenomenology had confined itself to taking cognizance of contingent legal-positivist phenomena, then it would simply have followed in the footsteps of the *Begriffsjurisprudenz* and the subsequent *Allgemeine Rechtslehre*, that is, it would have embraced the method of "inductive generalisation." Reinach's doctrine opened up a whole new scenario for the understanding of law, a scenario where, as is stated in his main work, it becomes evident that

the forms generally designated as being specifically legal can be said to exist in the same way as do numbers, trees, or houses; it thus becomes evident that such existence is independent of whether or not humans become aware of it; and, in particular, it becomes evident that we have to do with an existence independent of any system of positive law. It is not just false but ultimately senseless to define legal forms as creations of positive law. (Reinach 1989b, 143; my translation)

Reinach specifically devoted his analysis to the foundations of civil law, and in particular to the legal concepts of promise and property, in the same way as, for example, fifteen years later Leibholz, in his masterly analysis of political representation, would apply the phenomenological method to public law (Leibholz 1973). Reinach's approach to law, however, is not simply confined to applying a method, since he primarily devoted himself to solving the epistemological question about essences. It was Reinach himself, in his pioneering work in bringing Husserl's investigation to bear on law, who envisaged the application of that investigation to a variety of areas of law. Certainly, it is not irrelevant that Reinach's theory should proceed on the basis of that alphabet

[3] For a better understanding of the phenomenological concept of *a priori*, specifically in the way Reinach uses it, see Reinach 1989c: a posthumously published lecture dated 1914. Not all of Reinach's works are devoted to a legal subject matter. It is worth recalling, as concerns that subject matter, Reinach 1989d, 1989e.

of law which is private law, and even on the basis of that *primum movens* of private law, the idea of the pact, an idea that serves to put the seal on the very concept of obligation. Indeed, it is precisely Reinach's analysis of the promise that sparked the greatest interest even in contemporary theory, which in Reinach's investigations has found an important precedent (this is especially true of John L. Austin's and John R. Searle's theories of speech acts).[4] It is not uncommon, either, for Reinach's exegetes, to make him out to be a sort of guardian of orthodox phenomenology, understood as a form of philosophical realism. That kind of interpretation seems to be just a legitimating alibi for the controversial view that Husserl's thought could be divided into two fundamental, and conflicting, phases: an initial realist one, where Reinach would recognize his own view, and a subsequent idealist one, not in any way genuine. There are multiple reasons that have prompted this line of interpretation. It should be pointed out, to begin with, that Reinach certainly played a prominent role among the first generation of phenomenologists in the years coinciding with Husserl's early work. Among the disciples who in Göttingen formed the circle that gathered around Husserl, he stood out as being especially active and inspired, gaining quite a following as an emerging author, a faithful pupil, an effective teacher, and a versatile scholar. He was even awarded a professorship at the University of Göttingen in 1909. Conspiring with that factor, however, and even more consequential, was Reinach's untimely death in World War I, which put an end to his scholarly output, this in a phase when the inspiration for his thought came from Husserl's first fundamental works.[5]

Reinach's philosophy of law—if interpreted coherently and thus according to its explicit intentions, specifically as concerns his theory of the promise—can be said to present itself in such a way as to take cognizance of a certain *notwendige Wesensbeziehung*, a "necessitated essential connection," a connection qualified as no less than a *Wesensgesetz*, or "law of essence"; his theory, in other words, recognizes that to make a promise is to bind oneself to a performance: Unless a promise entails a duty, or obligation, it will shed all specificity. And by arguing that "a claim and an obligation are grounded in the promise as such," Reinach in fact shows that he holds with the view of the apodictic nature of the nexus by which a promise, a claim, and an obligation are bound together. Coherently with these premises, and specifically in accord with Germanistic legal theory, which diverges conspicuously from Romanistic legal theory on the definition of a promise (see esp. Siegel 1969), Reinach would draw

[4] For an interpretation of Reinach's idea of a promise as an illocutionary act, see Burkhardt 1986 and the essays collected in Mulligan 1987. For an argument against that interpretation, see Stella 1990, chap. 2, pars. 5–6.

[5] Information on Reinach and the early adopters of phenomenology, as well as on the Munich and Göttingen circles, can be found in E. Husserl 1919, Spiegelberg 1982, Avé-Lallemant 1975a, 1975b, Crosby 1983, Sepp 1988.

the important conclusion that a promise is valid even without the promisee's acceptance, a move through which he locates in the promisor, and hence in the obligor, the very source of legality. "In the promise," Reinach writes, "it is the selfsame promisor who takes on an obligation; on the addressee's side, there only emerge claims," meaning that "promises are in and of themselves both binding and irrevocable" (Reinach 1989b, 172, 184; my translation).[6] There can be no conclusion, then, other than that "it is in the essence of a promise to be irrevocable" (ibid., 174; my translation). No doubt, one can conceive the promise as the first act in a contract, but what marks out a promise in its deepest essence is the unilaterality of the obligatory performance, and the promisee is not in fact obligated to do anything in return.

This nexus existing between a promise, on the one hand, and a claim or an obligation, on the other, a nexus in which Reinach recognizes one of the foundations of law *tout court*, is a nexus that from a theoretical perspective is to be conceived as a synthetic *a priori*, for it is precisely in the nature of promise-making that a promise should encapsulate a quality which comes on top of our immediate perception of it in its simplicity, and that quality is a promise's obligatoriness, its having to be kept. One will not find it difficult to see that this view—this decision to qualify the nexus in question, this special *notwendige Wesensbeziehung* (necessary essential relation), as a synthetic *a priori* judgment—conjures up the Kantian gnosiological universe. But Reinach moves beyond Kant, for he winds up making the nexus itself ontological and concludes that the reality proper to it, a pure reality, becomes a possible object of knowledge in the same way as a mathematical truth does. This foundation of law—no less important than law's other foundations, and perhaps even more so—is entirely informed by a principle of self-evidence, in that promise-making embodies a specific *Wesenszusammenhang*, or "essential connection,"[7] and in turn points to further essential connections. It must therefore be noted, first and foremost, that the moment we understand a legal claim as structurally entailed by the act of promising, we do away with the problem of showing promise-keeping to be obligatory: The connection becomes manifest, having the immediate clarity of any intuitive nondiscursive truth. And as Reinach comments, this "is certainly as clear as only a logical or mathematical axiom can be" (ibid., 239; my translation), such that "an attempt to clarify and thus make intuitive [*einsichtig machen*]" the proposition

[6] It is also true, however, that precisely this peculiar and stringent understanding of a promise can be the basis from which to proceed in identifying the essence of law not so much with an obligation (*Verbindlichkeit*), which binds the *promisor*, as with the claim (*Anspruch*) the *promisee* may legitimately assert, demanding that the promise be performed: Such an understanding of the law—as a claim rather than as an offer—would have greater explanatory power and would certainly be sociologically sounder.

[7] According to Reinach the act of promising, in whose essence the production of claims and obligations lies, is an "immediately intuitive and necessary essential connection" (*ein unmittelbar einsichtiger und notwendiger Wesenszusammenhang*): see Reinach 1989b, 157.

that making promises as such brings into being claims and obligations "would make as much sense as an attempt to explain the proposition '1 × 1 = 1'" (ibid., 188; my translation). This is precisely what is meant by saying that it forms the very essence of a promise to give rise to a claim and an obligation, and that the connection between these three elements (a promise, a claim, and an obligation) is grasped by an immediate intuition. An understanding of the juridical world requires "that we go deep and reach for the basic elements of law," moving toward those "connections which are structured according to the laws of essence [*wesensgesetzliche Zusammenhänge*]" (ibid., 205; my translation); such are the connections that issue from those elements, particularly from the promise. In this case, the essential connection lies in the compulsory link mutually binding the promise, the claim and the obligation (see ibid., 172).

Reinach does not rule out that promise-making can be framed as a "social act." Indeed, that is precisely the expression he uses, underscoring that the conventional understanding of a promise as an act or declaration of will needs to be supplemented by taking into account what a promise communicates, this being, on the one hand, the intent contained in the making of a promise, and, on the other, the necessary mirror image of that intent, namely, what the promisee understands that declaration of will to communicate.[8] However, an analysis of the foundations of law that were to stop at this level would simply collapse into an empirico-psychological investigation and would contradict the prime philosophical aim of phenomenology as set out in Husserl's revolutionary works. Reinach speculates that an inquiry into law will lead to an ontology, one he explicitly understands to be a theory of *a priori* objects, that is, objects that only come about as a reality having a sense, or *Sinn*, conferred on it by a "transcendental" subject, rather than by a merely psychological one.[9]

The innovation brought by the phenomenology of law, and specifically by Reinach, consists in postulating an immediate grasp of juridical ideal objects.

[8] Reinach outlines the so-called *Erlebnisse* (or "lived-through experiences") peculiar to law, and especially the equivalence between promise-making and the will's *Erlebnis* as realized in a "social act." To be sure, the question of the *soziale Akte* occupies a rather marginal place in Reinach's phenomenological theory; even so, there is plenty of literature that takes this particular angle rather than concerning itself with the authenticity of the phenomenological reading. This can be appreciated in particular in Anglo-American literature and in the "realist" interpretation of phenomenology. See in general the work found in *Aletheia: An International Journal of Philosophy*. This journal, put out by the International Academy of Philosophy, based in Irving (Texas), presents itself as "the only publication representing phenomenology in its original form as a philosophical realism." Exemplary in this regard is Seifert 1983.

[9] Husserl fights that psychologism at full throttle, not only in his *Logische Untersuchungen* but also in his 1913 *Ideen zu einer reinen Phänomenologie und phänomenologischen Philosophie*. It is not incidental that that year also marked the publication of Reinach's *Die apriorischen Grundlagen des bürgerlichen Rechtes*, and that both of these book-length essays (Husserl's and Reinach's) were published in the first volume of the phenomenological *Jahrbuch für Philosophie und phänomenologische Forschung* (E. Husserl 1976 and Reinach 1913).

Thus, as we have seen, Reinach posits law's attainment of an ontology, an ontology he understands as an *a priori* theory of objects. This result led some to speak of a sort of "Platonism" of two worlds, the empirical one and the essential one, by which is meant an unresolved decoupling of an *a priori* law and a positive law.[10]

The reading of law for which Reinach paves the way is patently a reading that gives access to the law through the mind's eye, through an "inner seeing" or "intuition" that does not stop at sense perception, still beclouded, still caught in the empirical. This intuition, moving past the necessary first step of knowledge, empirically contaminated, manages to attain a level of knowledge that can be described as superior only inasmuch as it possesses objectivity. This is a level the Ego can reach only if it can break its habit of frequenting the empirical, that is, if through an act of *epoché* (ἐποχή) it can bracket the world of experience and thereby distil its essence, or idea. The *a priori* elements of law can thus be described as "constituted" into realities proper only through a knowing self-attaining a higher and higher degree of knowledge—in fact Husserlian philosophy after Reinach would develop the knowing self into a mature conception as the *transcendental* self, a self that by degrees takes on an independence and objectivity of its own—in an evolutive process through which the knowing self "intentionalizes" legal cases in their essence and in this way constitutes them as such, that is, as legal *a priori*, or universals, and so also as the "realities" on which positive law, historical and contingent, is founded. The essences that *a priori* legal theory sets out to investigate are the "prime legal elements," those which the objective legal *will*, the will exercised by power or by an authority, has failed to create (Reinach 1989b, 205).[11]

It is clear that Reinach frames the problem of law with a view to arriving at a *definition* of it, that is, finding an adequate method by which to know the object to be defined. On his philosophical approach, *a priori* legal rules may well have an unconditional value placing them above the rules of positive law. On the other hand, the rules of positive law could not in any way undercut the veridicality of the existence of an *a priori* rule or the veridicality of its distinctive structure. After all, it is precisely the theoretical coherence and impenetrability of the *a priori* which makes it possible to provide a foundation for every possible systematic legal construction. As Reinach says, it becomes necessary

[10] See specifically Bobbio 1934b and 1948. This interpretation, understandable though it may be from a strictly legal-positivist standpoint, fails to consider that what the decoupling effected in Reinach's work seems to suggest is actually to be taken as its pointing out the possibility of two different modes of knowledge.

[11] Reinach's first interpreters were careful to point out the deep meaning of his *A Priori*, and for this reason, coupled with their chronological and cultural proximity to Reinach, they more accurately captured the meaning of his theory. See, in particular, Schreier 1922–1923, Sauer 1923–1924, Dobretsberger 1974, Petraschek 1932; a later but rather faithful account can also be found in Peschka 1967.

to "turn our gaze in an altogether different direction so as to gain access to the realm of purely juridical legalities, which in every respect subsist independently of human knowledge and organization, and above all independently of the world's actual evolution" (Reinach 1989b, 277–8; my translation).

There remains the question of how two entities logically and factually so different from each other as *a priori* law and the law in force can coexist: What kinds of relations hold between them? Is it possible that one of the two elements should prevail? And, if so, what principle would determine its course? Lying in wait here is the risk of lapsing back into the traditional decoupling between positive law and natural law. The solution, again, will consist in clarifying that our grasping of *a priori* law—and so also the very existence of this law—is a matter regarding the effective capacity for an "adequate" knowing, such that nothing deriving from the determinateness of historically enacted law can bear against it, even if such posited legal content should show itself to be contradictory. Reinach writes in this regard that "we cannot speak of 'contradictions' between the *a priori* theory of law and positive law, but only of deviations which the law of being [*Seinsgesetze*] makes from prescriptions of duty [*Sollensbestimmungen*]" (Reinach 1989b, 252; my translation). When "every prescription will conform in the first place to the law of essence [*nach dem wesensgesetzlich Seienden*], insofar as this essence, considered in and of itself, always also coincides with that which ought to be [*das Seinsollende*]" (ibid., 261; my translation)[12] then there will be an identity between positive law and *a priori* law. Reinach thus manages to put forward a conception that appears to inherit the task of natural law: He does so by freeing that theory from any theologizing or axiological presuppositions, that is, by translating the decoupling into logical terms.

4.3. Gerhart Husserl and Law between Time and History

In the preface to *Rechtskraft und Rechtsgeltung* (The force and validity of law: G. Husserl 1925), Gerhart Husserl (1893–1973) makes the following remark:

> The dedication this writing makes to my father is something more than a token of filial recognition. I owe it to him if I have come to understand the principled necessities proper to any authentic science, even in a jurisprudence adequate to the ultimate requisites of scientificity. It is out of this knowledge that the task and method have arisen. In this way the phenomenological model of investigation has exerted an influence. (G. Husserl 1925, VII)

These are words that G. Husserl dedicated to his father in 1925, once he had already committed to a professional and intellectual path. Indeed, the follow-

[12] Reinach's accommodating stance did not exclude polemical episodes, as when he claimed that legal positivism "knows nothing outside the arbitrary positing of positive law and does not want anything to do with the relations of validity existing outside such positing" (Reinach 1989b, 268; my translation).

ing year G. Husserl received tenure in Kiel at the School for the Sciences of Law and the State. And so his dedication recognizes in the most natural way his debt to a thinker who, as the first and foremost source of inspiration for "phenomenological" philosophy of law, also provided that same inspiration for his son's work.

Phenomenology really did provide a model for G. Husserl, who made constant reference to it in his work. In that lies one of his signature traits, a characteristic that comes into even sharper relief by virtue of his no less constant willingness to test that model against other approaches, first among which the one that, while deriving from phenomenology itself, purported to offer an alternative to it, namely, Heideggerianism. In addition to this influence were those of neo-Kantianism and the free law movement (Kantorowicz 1906).[13] This speculative blueprint is clearly present in the previously mentioned *Rechtskraft und Rechtsgeltung* and would grow even stronger in his later production.

The central question G. Husserl took on in this work is that of legal validity. This remained a primary concern for him across the arc of his research, and it is what in his own time drew the attention of legal scholarship, which was especially interested in a line of investigation that could view itself in relation to the Kelsenian standard. Then in 1929 came another important work, a long article titled *Recht und Welt* (Law and world: G. Husserl 1964), where the central themes of G. Husserl's research are developed in a mature way: This applies *in primis* to legal temporality, a question he would go back to over time, even in works of a much later date, and in full consonance with his early beginnings (G. Husserl 1930–1931, 1933, 1955, 1964, 1969).

What is especially striking about the long course of G. Husserl's intellectual development is its coherence and continuity, all the more so if we consider the extensive American experience he shared with the many intellectuals who found refuge in the United States in the 1930s. Indeed, instead of *shaking* the early foundations of his thought—especially as concerns his espousal of the phenomenological principles—this experience served to *enrich* them.

In April 1933, in Hitler's Germany, G. Husserl was dismissed with immediate effect owing to his "non-Arian" origin: He was barred from teaching at the University of Kiel, where he was replaced with Karl Larenz. He thus moved to the University of Frankfurt am Main, but with the passage of the so-called Nuremberg Laws, he was forced to withdraw for good. He thus emigrated to the United States, and in 1941 became an American citizen. He taught at the University of Washington from 1940 to 1948, subsequently serving as legal counsel for the Allied High Commission (High Commission for Occupied

[13] The influence Kantorowicz had on the legal phenomenologists can easily be appreciated just by considering that one of them, Adolf Reinach, had a long scholarly exchange with him (on which topic see Schuhmann and Smith 1987, 6).

Germany), and in 1952 he returned to Germany (at that point a federal republic), where he taught at university as a visiting professor.

His legal philosophy revolves entirely around the idea of temporality as the canon through which to interpret the whole of law. Indeed, this is understood by him as a foundational category, not only in gnosiology but also in practical philosophy. His best-known work, *Recht und Zeit* (Law and time: G. Husserl 1955), actually came much later than other, equally important writings in which he develops the theme of temporality in law, and its title is meant as a deliberate reference to Martin Heidegger's *Sein und Zeit*, whose first edition dates to 1927. In fact it is from this work by Heidegger that G. Husserl took some of the philosophical categories used in writing the earlier *Recht und Welt* (G. Husserl 1964), where for the first time he tackled the question of legal temporality, though it cannot be disregarded that time is also closely bound up with the question of validity, addressed even earlier in the 1925 *Rechtskraft und Rechtsgeltung*. But it also bears mentioning that despite the points of assonance which tie *Recht und Welt* to Heidegger's existentialism, this article was published in the Husserlian journal *Jahrbuch für Philosophie und phänomenologische Forschung* (Yearbook of philosophy and phenomenological research), and it is accordingly an essentially phenomenological imprint that the article bears. So it is in the first place this 1929 article that we must look to for an understanding of G. Husserl's "temporal" reading of law.

The first salient feature of this article lies in the terminology used in it, which is overtly Heideggerian. The existential analytics set out in *Sein und Zeit* forms the basis on which G. Husserl extracts the speculative nexuses describing humans and their specific "there-being" (*Dasein*) as a "being-in-the-world" (*ein In-der-Welt-sein*) and as participation in a being that flows toward death (*ein auf den Tod auflaufendes Sein*) (Heidegger 1979, 12, 53, 65). Now, also belonging to this world of man are those "things" (*Dinge*) which are legal: They are not transitory or artificial, on the contrary they are permanent part of the world of man, they are rooted in it. And yet there is certainly something that changes in connection with these legal things, and that is our way of understanding them (see G. Husserl 1964, 67). Fully in sympathy with the phenomenological school, then, G. Husserl assumes there to be two modes of knowledge, only one of which can lead to a rigorously scientific understanding of law (cf. Edmund Husserl here: E. Husserl 1976, pars. 1, 18–32). The objects of the world, and with them legal objects, are "given" (*gegeben*) to humans in the first place in an intuitive (*naiv*) being-given in which the person remains in the flow of his lived experience of the world, assuming a demeanour that can be described as "natural." The world of experience is a world awash with doubt (*eine Welt des Zweifels*), and this doubtfulness of the world is founded in the temporality (or *Zeitsein*) of human there-being, which in turn is mainly characterized by transitoriness (*Vergänglichkeit*). There does exist, however, the possibility of transcending this "region" (*Weltregion*) of doubt, thereby realizing a world of stable values.

It is necessary to this end to put into practice a behaviour extending beyond the space proper to lived experiences—the space constructed by the "natural" consciousness of the time—so as to move toward a radical "detemporalization" (*Entzeitung*). Therein lies the "ecstatic" (*ekstatisch*) attitude, projecting humans outside their worldly being (*Welt-Dasein*) in the direction of transcendent objects, for in this ecstasy they are "outside theirselves," outside their normal life space, entirely projected toward transcendent things. And so, apart from bespeaking an epistemology cast in a phenomenological mould, G. Husserl's conviction that there are fundamentally two ways of knowing is such that only by lifting ourselves from the "maybe" of the world can we humans be in a position to grasp the *a priori* truths of science, this through an "intentional" stance. Even *legal* objects, after all, fall outside the reach of naive experience, in that inherent in their particular essence is a connection with transcendence (see G. Husserl 1964, 68–9, 70–7). Then, too, since among the shared parameters of juridicality is that of something's being "willed," it can likewise be asked: How can "the once" (*das Einmal*) of a will tied to the here and now form a basis for "the once and for all" (*das Ein-für-allemal*) of legal norms? Here comes into play that "detemporalization" which—by bracketing the immediacy of experience (i.e., performing the "*epoché*" on it) through the so-called ecstatic attitude—can single out an "abstract time," that is, a level of temporality that, however situated it may be between a beginning and an end, does not see its contents reduced to mere contingency.

Let us take a closer look at this passage. G. Husserl claims that law connects certain "legal consequences" (*Rechtsfolgen*) to certain "classes of facts" that can be described as "conditional" (*Wenn-Tatbestände*), forming a hypothetical propositional structure that evidently bears the imprint of Kelsen's normative theory, which at that time stood as an ineludible reference point. These conditional classes of facts cannot, however, consist in temporally contaminated realities; it follows that, in search of an internal truth, the law comes to create its own sphere of voluntary facts, a sphere endowed with a therebeing fully insulated from the changeful reality of social acts. At this point the conditional classes of facts turn into a series of realities of action grasped as to their ability to exist within the region marked off by law (*rechtsregionalen Seinkönnen*).[14] This means that what is rigidly fixed in legal norms is a "complete," self-enclosed world of deindividualized actions, a world that knows no doubt: In it the future has no place, because through the reduction whereby the classes of facts become capable of being touched by norms, the future, from a legal point of view, can be said to have been anticipated (see G. Husserl 1964, 79). Therein lies the temporal abstractness of law.

[14] On the role of the concept of region in phenomenological thought, see E. Husserl 1976, pars. 9, 10, 16; 1971, par. 7.

Shortly after *Recht und Welt*, G. Husserl wrote an article that, as can be gleaned from the title, *Die Frage nach dem Geltungsgrund des Rechts* (The question of the foundation of legal validity: G. Husserl 1930–1931),[15] addresses the question of the foundation of the validity of law. And in treating this question he claims that legal temporality finds its specificity in ascribing to law the singular meaning of a being-there that proceeds from a beginning. Certainly, this comes about not in the sense of contaminating the law itself with a "natural" kind of law, but through the finding that the foundation of legal validity and the beginning of law undoubtedly need to be sought in the structure proper to humans, in their "being-there," which is a being-in-the-world. Precisely from this feature comes the important role the community plays in mediating between law and the individual. And yet this does not yet suffice, because, as G. Husserl sees the matter, we cannot discourse in any exhaustive way on the foundation of legal validity unless our gaze "is turned toward the logico-juridical structure of the beginning of the law's there-being": There are "*a priori* ideas," transcending the present and announced in the there-being through an ascription of meaning, and because this ascription bears a different temporality and is imbued with values, it brings ideas themselves into connection with the there-being, in such a way as to mediate the eternal logical with "natural time" (G. Husserl 1930–1931, 157–66; my translation).

So what G. Husserl is trying to do in this analysis is to find the possible relation between the stability proper to law and the fleetingness of time. And through this investigation he is led to claim that the synthesis of norms with factual circumstances makes it possible to "anticipate" the future, in the sense that the future is phenomenologically "reduced" to the sphere of foreseeability. What it means for there to be no future in the legal corpus is that there is no temporality understood as an immediate flowingness: The temporal structure proper to law is that of "abstract time," which is attained through that special procedure which is conceptually equivalent to the phenomenological idea of reduction (the *epoché*), namely, "detemporalization" (*Entzeitung*). This passage is necessary for the existence of law to have meaning, but is insufficient if the law neglects to come to terms with history. To this end it is advisable to bring law into comparison with a single legal system, which is always the system of a given legal community. We must in the first place understand the determinacy of every single order, and this must be done by mediating its historicity with its underlying social ethos. Indeed, the law always corresponds to the will of a legal community, a community made up of "partners-in-law," and so it is only through a "voluntary intention" (*Willensgesinnung*) to endorse a body of

[15] In this work, which revisits the question of validity, Husserl takes issue with Karl Larenz's *Das Problem der Rechtsgeltung* (The problem of legal validity: Larenz 1967): It is G. Husserl's contention that in this work Larenz confuses the autonomy of the legal region with metaphysics and morals, conceiving the is in light of a hypostatized ought informed by cultural prejudices.

norms that the legal order itself can arise and be sustained. Subjectively corresponding to the objective existence of the norm is a "persisting-in-an-intention-faithful-to-the-norm" (*In-Norm-getreuer-Gesinnung-verharren*). Evidence of this lies in the taking down of law over the course of a revolution, once the members of the legal community at issue no longer share any voluntary intention to keep the law in place, and with the breakdown of that shared voluntary intention also comes the breakup of the single persons who have lost their original intention (see G. Husserl 1964, 80).

There are two bulwarks that law can put to use to ward off contingency: One is pure essence, which lives in abstraction from time and so ensures the identity of the foundation; the other is the guarantee afforded by intention itself, by the voluntary perduration of juridical behaviour.[16] The concept of intention imparts a directedness to the foundation and to perfection, a teleologism that G. Husserl draws from phenomenology itself and whose evident Kantian lineage is completed through another important theoretical move. Indeed, as G. Husserl explicitly claims, even though the transformation wrought by law cannot be understood to mean that social life has been reconfigured under the lodestar of eternity, what actually props up the commitment to law is the human directedness toward perpetual peace (G. Husserl 1964, 80–3).[17] It is noteworthy, then, that G. Husserl should construe the law as structurally "valid once and for all" and as devoted by vocation to being an "end" in itself or, better yet, an "outcome" ("Recht ist selbst ein Ende": G. Husserl 1964, 79). This is an idea he clarifies in this way:

> The human there-being spans from life to death, and that way of being is proper to its essence. Its being temporal has the meaning of being on a journey (a being-toward-death). The law's temporal structure is instead something different. The law is not geared toward the aim, but rather wants to be itself an outcome. (G. Husserl 1930–1931, 157; my translation)[18]

The question one is prompted to ask in connection with a theory so framed—the question, What is the ultimate foundation of law?—can be answered by noting that in G. Husserl's discussion we find two modes of foundational le-

[16] One should not fail to appreciate that this "intention"—this *Gesinnung* that G. Husserl resorts to in backing up his own legal theory—has a philosophical lineage that is no doubt important. The idea traces back to Martin Luther and is picked up by a whole constellation of important thinkers, first among whom is Immanuel Kant in his doctrine of moral intention as treated in his *Kritik der praktischen Vernunft* (Critique of Practical Reason), where it is argued that moral action is grounded in freedom understood as the causal law of the will, from which it follows that what brings about the performance of a willed duty is an "intention" aligned with the moral law. Two other authors that can be included in this lineage are Gustav Radbruch and Rudolf Stammler (see specifically Radbruch 1956a and Stammler 1926).

[17] As is only natural, in treating this topic G. Husserl refers to 1795 Kant's *Zum ewigen Frieden* (Perpetual peace: Kant 1968).

[18] The German original: "Es ist nicht auf ein Ende hin, will vielmehr selbst ein Ende (*finis*, τέλος) sein". On teleology and rights, see Stella 2013, 1–23.

gitimacy, each interwoven into the other and both equally prominent: On the one hand is the mode tied to the *Gesinnung* (or basic attitude), and on the other the one accessed through so-called ecstasy, that is, a distancing of oneself from immediate temporal reality. The first mode lies in the choice we make to go beyond ourselves and project ourselves into the transcendent through the infinite finiteness of the juridical. The second mode is instead modelled on the transcendental phenomenological reduction, in that ecstasy is a means through which *homo iuridicus* can attempt to doubt his own being-there, so as to prime himself to grasp the essence of law.

That is precisely the frame within which the theory can bring the parameter of temporality into play, along with another parameter, consisting in that special event from which the law is claimed to originate, namely, the *Entzeitung*, an event treated in greater depth in the 1955 *Recht und Zeit*. It is by this means that we can attain those specific forms, belonging to abstract time, which are the essential legal categories, a chief example of which is given by the concept of a legal claim. G. Husserl argues that through this detemporalization we can overcome the contingency of the single legal order as an order tied to a given time and possessing a historical uniqueness, since in *this* form a legal order is set in the historical reality of *this* legal environment. There comes into focus in this way "a system of significant nuclei [*ein System von Sinneskernen*]" of legal "ideas" which show themselves to be suited to being relocated from one legal environment to another, and which to that extent can lay claim to universal validity (*Allgemeingültigkeit*). An example of a claim to validity so construed lies in the Roman *ius gentium*:

> The classic example of a system of legal ideas distilled by reducing a given legal environment to its meaningful core lies in the Roman *ius gentium*. The *ius gentium* comes into being claiming to be a worldwide system of law—a system of legal principles and concepts having validity whenever and wherever there are politically organized societies. (G. Husserl 1955, 13; my translation).

However, because the laws of thought "are not maxims of action," and their function consists in setting out "the logical presuppositions a judgment must comply with if it is to be true," then the following must also be the case:

> So long as we proceed correctly, our conceptual recourse to the "significant nucleus" of the legal classes of facts we encounter in legal reality opens our eyes to a system made not of "higher level" behavioural norms but of legal *truths*, which as such have *no* normative force. A reduction that accomplishes as much will reveal to us the fundamental structures of every possible system of law: These structures have the form of a legal *a priori*. What we make our own in this reductive procedure (which is that of abstraction) are certainly the *logical* presuppositions, not the merely logico-*formal* presuppositions, those we are obligated to comply with if a social order is to have meaning as a legal order. (G. Husserl 1955, 13–4; my translation)

As can readily be appreciated, G. Husserl's theory echoes the scheme drawn directly from his father's phenomenology, a scheme that had already been ex-

perimented with by other legal phenomenologists before G. Husserl, and in particular by Adolf Reinach (1913).[19] There is much that G. Husserl extracts from Reinach's investigations, as well as from Felix Kaufmann's inquiries into propositional logic,[20] even though G. Husserl's penchant for quoting Heidegger prompts him to express himself thus: "The juridical man's being-in-the-world is a commitment made to being for the ought" (G. Husserl 1964, 78; my translation). G. Husserl is adamant about the need to embed pure logicity into reality, emplacing the ideal categories of law into the historicity of lived experience; and it is "temporalization" (*Verzeitung*) which can bring the legal *a priori* into contact with human existence, and which is accordingly entrusted with this indispensable task. This means that law grounds its validity in the concreteness of its own actuation. The procedure by which the law's permanent structures are identified, then, unfolds in three distinct stages, namely, *Entzeitung*, *Abstraktion*, and *Verzeitung*. In the first of these, detemporalization, we identify law's significant kernel, ever valid across time; however (and this is where the second and third stage come into play), the force of law cannot move *a posse ad esse* (from potentiality to actuality) unless legal norms, having been "abstractly anticipated" by way of *Abstraktion*, are in their turn "temporalized" in relation to their content: This is the role entrusted to *Verzeitung*, through which norms are applied to the manifestations of social reality.

In order for there to be a "realization of law," it is necessary to move from the "hereafter" of the temporalized world into the "here and now" of willing reality, which is set in the temporal flow of time (G. Husserl 1964, 82). Applied law has the distinction of superseding, completing, and bringing to maturity the pure logicality of norms, which only in this way can gain full validity, thereby coming into force: The role of applied law is to complement legal essence, and in it consists the evidence of law (ibid., 82–4). The task of interfacing the two worlds is carried out by the judge, whose role—in this global vision of juridicality connected with being—is contextualized in an absolutely primary way. This speculative move by G. Husserl—a move reflected in which are the ideas of the *Freirechtsbewegung* (or free law movement), also very much in evidence in Fritz Schreier's legal phenomenology—comes at a crucial juncture in *Recht und Welt*. Here the "theory" of law comes face to face with the "practice" of law, in the sense that "the problem of the concretization of law is that of the social reality of law, which through its concrete operation extends downward into the lived time of society, and in whose sphere of action

[19] A phenomenological reading of G. Husserl's work can be found in the contributions collected in the commemorative Würtenberger 1969a. See above all Reiner 1969, Würtenberger 1969b.

[20] Kaufmann's propositional analysis is something that G. Husserl looks to in light of his essentialist gnosiological vision, and so in keeping with the basic tenets of phenomenology. See G. Husserl 1955, 13.

the legal order intervenes" (ibid., 86; my translation). The absolute protagonist in this phase is the judge; indeed, because judges effect within themselves a "reduction" (*Reduktion*) of their being-persons to their being partners-in-law and alienate themselves from their being-there in the world—this in virtue of the ethico-religious commitment through which they are enabled to reach the law—they make themselves into a single thing with the willing intention of the juridical community they themselves belong to. They act as "living organisms" within the legal community, whose normative will they make effective in the concrete individuality of social reality, and this is possible precisely because they recognize themselves in a "pure" and exclusive way as juridical partners, that is, as subjects for whom only the law is originally given in the entirety of its essence:

> In seeking to arrive at a legal decision, it will be necessary in the first place to proceed in such a way that one's attitude to the social world of actions is reduced to an attitude as a partner-in-law, so that the intention of the juridical community (an intention he must query) will reveal itself in a pure way. (Ibid., 89–90; my translation)

It is a central place, then, that comes to be occupied by interpretation, an indispensable element for the purpose of actualizing the law. Writes G. Husserl:

> When interpreting a law, it is necessary to go back in thought to the historico-temporal context in which the law was originally posited through its creative act. But this is only the starting point in the process of interpretation. In the next step it will be necessary to view the law by reference to its time of inception, so as to "throw it into relief" against that background by mentally tracing its course to the present. Only in this way is it possible to create a living relationship with the current day and its issues. [...] Legal norms carry out an action conforming to their meaning, this inasmuch as, and for as long as, [...] "they travel in the company of time." (G. Husserl 1955, 30; my translation)

Another clear example showing the importance of bringing the study of the different modes of time to bear on law can be appreciated in the analysis of the concept of a claim (*Anspruch*), to which G. Husserl devotes a specific interpretive effort. He maintains that there generally exist legal concepts having the nature of events and actions, "which happen or are carried into execution at an established moment" (G. Husserl 1955, 29; my translation). More complex, by contrast, is the meaning ascribable to legal concepts belonging in another category: those whose structure lies in their "extending over a time span" (*Zeitspanne*), and which in turn break down into two types, depending on whether or not the relevant time boundary is set by law. It is under the first type that we should classify a claim, understood as a "mandatory legal request," since these kinds of requests are creatures of law through and through (ibid.). A claim reveals itself as a pure category, its peculiar structure being given by its unhistoricalness. Its existence is bounded by two temporal endpoints, "from-to" (*er besteht von - bis*), and can therefore be measured; a claim does

not entirely lies beyond time, and yet it is not contaminated by happening. It has its own internal structure, and this characteristic makes it exemplary in outlining the temporality distinctive to legal truths.

4.4. Felix Kaufmann: The Form and Meaning of Legal Norms

Felix Kaufmann (1895–1949) owes his fame to what is considered a classic of sociological thought, a work known especially in its English version, namely, *Methodology of the Social Sciences*.[21] He is not equally famous as a legal philosopher, to be sure, but this, too, is a field to which he has made an original contribution. He introduces us to a cultural milieu whose distinctive trait by comparison with that of the fountainhead of phenomenology of law, Adolf Reinach, lies in the new important place occupied in legal philosophy by Hans Kelsen. Indeed, Kaufmann regarded both Kelsen and Husserl as his teachers, but unlike Kelsen he did not shy away from the project of analyzing law and society with the tools of phenomenology, and he wound up bringing Kelsen's deontic logicism into relation with Husserl's ontology.

Initial evidence of cross-pollination between Husserlian and Kelsenian modes of thought can already be found even in Kelsen's *Hauptprobleme*. It is Kelsen himself who, in the preface to the 1923 edition (Kelsen 1923c), outlines the evolution of his innovative theory pointing out Husserl's contribution to it, while also mentioning two of his own disciples, whose work likewise drew inspiration from Husserl's philosophy. As Kelsen remarks,

> There emerges in the *Hauptprobleme* the contraposition between the pure theory of law and socio-psychological speculation, in parallel to the general contraposition between logicism and empiricism, such as it is classically represented in Husserl's *Logische Untersuchungen*. (Kelsen 1923c, IX)

And he goes on to say that "this tendency was then carried forward" not only in his own writings, notably in his 1916 *Die Rechtswissenschaft als Norm- oder als Kulturwissenschaft* (Legal science as a science of norms or as a science of culture: Kelsen 1968f) but also, and especially, in the work of Felix Kaufmann and Fritz Schreier, both of whose writings are "oriented toward Husserl's phenomenology" (Kelsen 1923c, X; my translation).

Kaufmann, who in 1922 was supervised by Kelsen (along with Hold-Ferneck) for his habilitation exam in legal philosophy at the Vienna University School of Law,

> soon became a regular participant in the *privatissimum* that Kelsen held at his home for an elite circle of budding young jurists and political scientists. The core of this group was formed, from before the Great War, by Adolf Merkl, Alfred Verdross, and Leonidas Pitamic. After the war,

[21] The German original is F. Kaufmann 1936, republished with a rich and learned foreword by G. Winkler (F. Kaufmann 1999). The subsequent English version, dating to Kaufmann's American period, is a different work: F. Kaufmann 1944.

the group gradually grew by also taking on board Felix Kaufmann, Fritz Sander, Walter Henrich, Fritz Schreier, Josef Kunz, Josef Dobretsberger, and Erich Voegelin. (Winkler 1999, XIV; my translation)

However, even though Kelsen, the founder of the Vienna School, drew his original inspiration from the phenomenological element, he would soon fall out of harmony with it, finding himself better attuned to the theory set out by the coeval and homogeneous neo-Kantian Hermann Cohen. In this way he parted with realism in favour of a logicistic choice.

Quite different was the position taken by Kaufmann, who on the contrary never disowned the phenomenological lineage. In light of that fact, it even makes sense that in his approach he should have turned to the social sciences: The realism proper to the social sciences did not stray too far from the phenomenological method and subject matter.[22] After all, starting from about the latter half of the 1930s, Kaufmann set aside legal issues to focus on socio-economic ones, and it looks like in so doing he resorted to an eclectic array of methods, displacing phenomenology as the sole methodological reference point.[23] This should not come as a surprise if we consider that

from the 1920s (from 1923, actually) Kaufmann also regularly took part in the colloquia of the philosophical circle that in Vienna formed around Moritz Schlick. Rudolf Carnap, who arrived in Vienna a couple of years later, recalls the situation as follows: "Also a frequent attendee at the meetings was the legal philosopher Felix Kaufmann, though he did not count himself as a member, because his philosophical outlook was something quite apart from ours. He was mainly influenced by Husserl's phenomenology, and then, in America, he moved closer to an empiricist view." (Winkler 1999, XV; my translation)[24]

It should be considered that just as Kaufmann was trying to move his own posi-

[22] In *Methodology of the Social Sciences*, Kelsen's *Reine Rechtslehre* is hailed as "one of the most remarkable critical achievements in the social sciences," attesting to Kaufmann's conviction that the science of law is only "one" of the social sciences, forming a continuum with all the others (F. Kaufmann 1944, 209).

[23] Kaufmann was *Privatdozent* of legal philosophy in Vienna until 1938, the year in which, on account of his Jewish origin, he was forced to flee to the United States, where he continued to teach the same subject at the Graduate Faculty of The New York School for Social Research, a position he held until his untimely death. He was also coeditor of the journal *Phenomenology and Philosophical Research*.

[24] Winkler's source is Voegelin 1994, 22ff. See also Stadler 1997. A firsthand account of the relation between logical empiricism and phenomenology can be found in F. Kaufmann 1940. It should also be noted that the doctoral dissertation in philosophy that Kaufmann submitted in 1924 at the Vienna University School of Law was supervised by Moritz Schlick and Robert Reininger.

Other accounts of the intellectual life surrounding Kaufmann's activity can be found in Métall 1969 and Zilian 1990. Interpretations of Kaufmann's legal philosophy viewed by analogy with Fritz Schreier's can be found in Bobbio 1934a and Ebenstein 1969. An exceptionally prescient critical reading is offered in Walz 1928.

tion closer to the specific point of view of Moritz Schlick's circle, he focused on the essential role played by the "*a priori* conception" and on the dual mode of knowing, which elements are both typically phenomenological objects of study.[25]

Two are the essential works we need to look at if we are to grasp the sense of Kaufmann's phenomenological philosophy of law: *Logik und Rechtswissenschaft* (Logic and legal science: F. Kaufmann 1966a) and *Die Kriterien des Rechts* (Criteria of law: F. Kaufmann 1966b), published in 1922, and in 1924 respectively). The first one is significantly subtitled "Elements for a system of pure theory of law"; the second, a more mature work of greater depth and complexity, embarks on "an inquiry into the principles of the legal theory of method" (so reads the subtitle); but the point is that the one and the other alike start out from Kelsen's already established theory of law. It bears pointing out, however, that Kaufmann recognizes an equal debt to both Husserl and Kelsen.[26] This nod of recognition is reiterated again and again over the years, even when, having broken away from the logicism inherited from them—whether such logicism be real or presumed, homogeneous or heterogeneous—Kaufmann will turn to a sociologism of both method and content. This sociologism is supposed to be a natural consequence of the phenomenological concept of experience. The Husserlian method in fact invokes a kind of knowledge that passes through many steps. The first of these is the one proper to sensitive intuition: It is a step wholly set in experience (*Erfahrung*). Only later is it possible to reach intellectual, *a priori* intuition. Between these two "locations" (let us so call them) one can find a whole graduality, where the subject begins to reveal himself to himself, in a movement through which he eventually achieves transcendentalism and, from a realistic point of view, grasps the related εἶδη.

Kaufmann espouses Husserlian transcendentalism, at the same time showing a full understanding of an epistemological project that starts out from antipsychologism and finds a coherent conclusion in transcendental idealism. In this very criticism of psychologism, and in the endeavour to supersede it by bringing transcendentalism to bear on the law, lies the point of departure for Kaufmann as he sets out to analyze legal norms. This analysis consists of a twofold quest to find a norm's "specific content of sense," while also holding fast to the pursuit of "form" in law. As concerns the first prong of this programme,

[25] See the letter Kaufmann wrote to Carnap in 1929, asking him not to include his name in the pamphlet "The Vienna School on the Scientific Understanding of the World," in that he feels he cannot fully espouse that school's epistemology (The University of Pittsburgh Libraries, Special Collections Department, serial number 028-25-03, quoted in Zilian 1990, 21).

[26] See F. Kaufmann 1966a, and 1966b, chap. 4. The 1922 work is nothing other than Kaufmann's habilitation thesis in the philosophy of law, while the 1924 work is his doctoral dissertation in philosophy. The Viennese years are those in which Kaufmann's work turns to legal issues. Dating to 1929 is his book on criminal law (F. Kaufmann 1929). After that comes an essay published in an anniversary volume for Kelsen: F. Kaufmann 1931. His last legal work clearly signals his choice to analyze law within a socioeconomic frame: F. Kaufmann 1934.

Husserlian orthodoxy leads Kaufmann to develop his logical investigations along a path clearly divergent from Kelsen's. And as concerns the second prong, as much as Kaufmann is very much with Kelsen in looking to Cohen as an important source and inspiration,[27] he nonetheless will end up more or less wittingly moving away from Kelsen's pure theory, an inevitable outcome of the two thinkers' different understandings of form. Whereas Kelsen understands form to coincide in the final analysis with the *Sollen*, Kaufmann equates form with the idea, with the essence or archetype, the *a priori*: Form thus encompasses the full spectrum of possibilities, *including* the *Sollen* but also extending beyond that sphere. So for Kaufmann—and so also for Husserl, obviously—if there is any *Sollen* (an ought), it is because there is a *Sein* (an is): Form is ultimately connected to the *Sein*. Kaufmann subscribes to Husserlian logic, and so his theory of law is to be considered completely independent of Kelsen's theory: It is by proceeding from Husserl's theory that Kaufmann approaches the analysis of legal norms, thus enriching his own vision of law by bringing a speculative element to bear on it. Kaufmann's formalistic theory hinges on certain "relations of essence" and describes the validity of these relations as dependent on the given area of content, this in accordance with two postulates: that of the freedom of experience and that of the delimitation of content (see F. Kaufmann 1924, 26). In his system, the "pure theory of law" morphs into a "legal theory of forms," by which is meant "the system of those truths that come from the specifically meaningful contents of norms, that is, a theory of the formal criteria of law" (F. Kaufmann 1924, 68; my translation). Kaufmann thus moves beyond Kelsen, for he is convinced that

> the biggest obstacles in the way of finding solutions to methodological questions usually arise from a denial of the theoretical knowledge of the *essence* [...]. The expression of this fundamental belief lies in the *postulate of methodological purity*, pointing to the need to structure scientific subjects from exclusively theoretical standpoints. (Ibid., 162; my translation)

He thus starts out from a theory of "purity" as a matter of theoretical choice, driven as he is by the need to come to an understanding of the prime elements of knowing. This purity cannot just be reduced to purity in the manner of Kelsen, for the theory, in its avowed commitment to search for the "essential" foundation, sets out a more engaging argumentative challenge. There is

[27] A motto encapsulating both of Kaufmann's books on legal philosophy is found in a famous passage he quotes from Cohen: "Only that which is formal is real [*sachlich*], and the more a method is formal the more it can become real. And the more a problem is objectively [*sachlicher*] framed in the full depth of the real [*der Sache*], the more it needs to be grounded in the formal" (Cohen 1977, 587; my translation). A few years later Kelsen would quote the same passage making the following comment: "Like every species of knowledge, legal knowledge must necessarily formalize its object. This 'formalism' cannot be the basis of an accusation, for in this formalism lies what, as a virtue, is set in opposition to 'formalism' viewed unfavourably as a vice, namely, its reality [*Sachlichkeit*]" (Kelsen 1929a, 1723; my translation).

no doubt that behind Kaufmann's system looms Kelsen, with his pure theory of law and his drawing on the legacy which set up the classic problem of the spiritual sciences versus the natural; in Kaufmann, however, the issues are driven to extremes, edging beyond the safe boundaries of Kelsen's theorizing, as to both the object of the theory and its method. And so, in turning to the standard distinction between explicative and normative sciences and to Kelsen's outline of the tasks of legal science, Kaufmann innovatively comments that

> The normative sciences represent [...] only one species within the area encompassing the sciences of value. The statements "Something (if its makeup is thus and so) ought to [*soll*] take place" and "An event of that type is valuable [*ist wertvoll*]" are equivalent. [...] [T]he methodological separation between the science of nature and the empirical science of value cannot lead us to disregard all the things they have in common, which from the outset are rooted in the very nature of these sciences as sciences of experience. (Ibid., 63–4; my translation)

The essential "form" of the juridical—the form of norms—would appear, on the face of it, to be framed in similar way in Kelsen and Kaufmann; yet this is precisely the question that brings out Kaufmann's peculiar take on Kelsen. We should bear in mind, to this end, that Kaufmann offers two specific definitions of law.

The first one reads: "The law as an object of legal science is a system [*Inbegriff*] of norms, that is a system of propositions, of legal objects" (ibid., 52; my translation).

The second one reads: "The law is a system of sanctionative norms applying to human behaviour" (ibid., 69; my translation).

Kaufmann ascribes greater theoretical importance to the first of these two definitions, proceeding on that basis to reformulate the pure theory as a special discipline aimed at analyzing the legal contents of meaning, which meaning can be arrived at through an "intentional judging" connecting subject and object into a single meaningful thing. In Kaufmann's description, there is an added complexity gained by the "form" of norms in the sense inherited from Kelsen, that is, the form of so-called *pure* norms, or, better yet, of norms one comes to know in a pure way. Indeed, Kaufmann works from the phenomenological model to mould the legal proposition, or *Rechtssatz*, in relation to three constitutive moments. Behind the "You ought to," the prescription, one finds an underpinning value judgment (the axiological moment), and behind this judgment, connecting this value to a subject (or person), one finds the norm's meaning, or sense, which is configured through the intentional act; in turn this act can express a judgment only insofar as it intentionalizes an object. This is the object to which the norm's meaning itself refers: It is an ideal object, and this ideal object, the *eidos*—the idea, essence, or form—is what makes it possible to say that behind the ought there necessarily must be the is.[28]

[28] The idea that the analysis of law needs to take into account the role played by the propositional meaning of norms is something that Kaufmann pursues in the 1920s and in the essay *Juristischer und soziologischer Rechtsbegriff* (Legal and sociological concept of law: F. Kaufmann 1931).

Consequently, the "form" of a (pure) norm is so configured: "If A does not display behaviour B^1, a behaviour he ought to display, there ought to take place behaviour B^2 in relation to him" (F. Kaufmann 1924, 71).

This signifies something essential as concerns the so-called pure norm. As much as this norm, in Kaufmann's own words, conjures up Kelsen's theory, this is precisely the place where it reveals the deepest difference from Kelsen's pure norm, considering that, as is stated on the same page, the pure norm in Kaufmann's sense

> is distinguished from the simple norm "If A does not display behaviour B^1, there ought to take place behaviour B^2 in relation to him" only through a *Normierung*, that is, through an ascription of value to behaviour B^1. Accordingly, for the purposes of *legal dogmatics*, which is called on to *define classes of acts*, it is irrelevant whether any value, positive or negative, is ascribed to a given behaviour [...], but this question is not the least bit irrelevant for the *pure theory of law*, which is called on to investigate the *meaning* of legal propositions. Indeed, evaluative sentences have their own meaning, and the proper meaning of each legal proposition is given by its containing two of these evaluative sentences. (Ibid.; my translation)

If we want to set out the "content of meaning" of legal propositions, and so also the "type of nexus" by which variously many legal propositions are connected in the unity of law, we will have to push to the background the definition of law as a "system" (*Inbegriff*, embodiment) of *sanctionative norms*, favouring in its stead a definition where the task is to describe a system of *ideal objects*. Indeed, if in a Husserlian manner, we consider the *Inbegriff* as "the objectual correlate of the act of conjunction,"[29] we will be able to grasp the intentional-coordination effect exerted by the subject in ascribing meaning to a behaviour. Of course the sanction here still figures as only an empirical "criterion" (*Kennzeichnung*), whereas logico-propositional meaning is a formal-universal criterion (*Merkmal*). Kaufmann writes that "the definition of an object by empirical indication as a *distinguishing mark* [*Kennzeichnung*] must be distinguished from the logical *definition*" (F. Kaufmann 1924, 18–9; my translation). Distinguishing marks are of course something other than "markers" (*Merkmale*): Although both are criteria [*Kriterien*] of knowledge, the former are empirical, whereas the latter are logical. The *criteria of law*, for which Kaufmann entitled his 1924 work, approach the object of inquiry in such a way that they show themselves to be perfectly integrated by the deep gnosiological and methodological concern shared by both of the schools of thought that were current at the time, the phenomenological school and the neo-Kantian.

[29] It is a pregnant role that term *Inbegriff* plays in Kaufmann's discussion. It comes from the speculative system that Husserl set out in his first and second *Logical Investigations*. Here it retains the meaning just mentioned as "the objectual correlate of the act of conjunction," where it is necessary to highlight the presupposition of the act out of which meaning arises. The intentional subject has an active part in the moment of the knowledge-gaining approach. Therefore, like the system through which knowledge is gained, the legal "system" is such only to the extent that the subject confers meaning on a series of data, on a certain material reality with which he or she is confronted.

Kelsen's methodological approach therefore receives a critical rereading in Kaufmann, who reinterprets it thus:

> In knowing the opposition between *is* and *ought*, we must therefore forgo any attempt to seize the essence of normative concepts by way of is-data, and so we must also stand firm in our refusal to define punishment and enforcement as "coercion," and, correspondingly, legal norms as coercive norms, in the manner that *ought* himself picked up from ancient doctrine. (F. Kaufmann 1924, 73; my translation)

The contrast Kaufmann sets up between his own approach and the one embraced by Kelsen can best be appreciated in the following passage, however long-winded it may perhaps be.

> The term *legal obligation* must be understood to designate a commanded behaviour—that is, a *behaviour endowed with a positive "value index"* (an obligation)—whenever its omission entails a certain other behaviour that must take place with respect to the omitter. Now, this "behaviour with respect to" is called the "consequence attendant on an offence" (it is a punishment). Conversely, a behaviour designated as the consequence attendant on an offence (a punishment) defines as a *legal obligation* that behaviour whose omission means that the behaviour in question must take place. An omission consisting of an unperformed obligation is called an *illegality*.
>
> However, because in the performance of a norm-bound [*normiert*] behaviour, i.e., a behaviour understood as value-laden, lies the content of obligations in general, legal obligations do not consist of a certain class of obligations—in that their *content* would be a "determination" of "obligation at large" in relation to content—because here the specific characterizing marker [*Merkmal*] consists only of the sanctionative nexus. It is therefore the "behaviour with respect to" that marks out an *obligation* as a *legal obligation*, enabling us to recognize it as such; and yet a behaviour usually defined as an obligation is never characterized as an obligation only in that way. (F. Kaufmann 1924, 78; my translation)

The "characterizing marker," the *Merkmal*, which as we have seen is a formal-universal criterion, cannot be identified with the sanction, for this is rather an empirical factor, as such devoid of logical self-sufficiency. The sanctionative nexus is still only a contingent determinative modus: It is simply an accretion coming on top of an obligation that was already characterized as such from the outset. The meaning of a legal proposition lies in its *denotatum*, in the being proper to essence, that of the ideal object. A norm is a value judgment, and as such it refers to a being. So, only in the sense just explained can Kaufmann claim that "one can speak of a definition only where the genus falls within the range of compatibility of the specific difference" (F. Kaufmann 1924, 17; my translation), namely, of the *Merkmal*.

4.5. Fritz Schreier and Legal Interpretation

Fritz Schreier (1897–1980) is rightly included in the "circle" that formed around Kelsen,[30] and in the study of the different currents that shaped the phi-

[30] Schreier is indeed mentioned in an essay by Meinhard (2008) as being among the authors

losophy of law in the early decades of the 20th century, he is usually set, in particular, next to Felix Kaufmann, not only because they both studied under Kelsen and Husserl but also because in applying the phenomenological method to law they both devote special attention to the analysis of the legal proposition.

Schreier was Jewish and in his life felt the blunt hand of Nazism, winding up, like many, taking refuge in the United States, where he unfortunately did not manage to find a stable academic position that would enable him to systematically resume the research which had previously yielded brilliant essays. In his work, however, he never ceased to concern himself with issues in the philosophy of law, and his writings kept to a methodological blueprint consistent with the speculative choices he had made in his youth (Schreier 1922–1923, 1924, 1926, 1927, 1929, 1931, 1935). The first work we must refer to is his *Grundbegriffe und Grundformen des Rechts* (Fundamental concepts and forms of law: Schreier 1924), which he submitted as his *Habilitationsschrift* for his degree in legal philosophy, and clearly evidenced in this work is his commitment to applying Husserl's phenomenological method to law. This youthful effort, dating back to 1924, earned him praise from both Kelsen and Husserl, but it also drew the trenchant criticism of Hold von Ferneck, who apparently wouldn't so much as call Schreier by name, choosing to instead refer to him as the pupil of the intellectual foe on the opposite side, Kelsen.[31] Just like Kaufmann's coeval works *Logik und Rechtswissenschaft* (Logic and legal science: F. Kaufmann 1966a) and *Die Kriterien des Rechts* (Criteria of law: F. Kaufmann 1966b), this dissertation can immediately be perceived to bear a Kelsenian imprint, in that the author unhesitatingly deploys the indispensable assumption of the pure theory of law, namely, the idea that in order to define law it is necessary to define a norm, and that the latter needs to be interpreted in logical terms. It must also be noted, however, that even at this inceptive stage, Schreier's programme declaredly consists in "attempting to ground the pure theory of law—such as it is pursued by *Kelsen* and his disciples—in *Husserl's* phenomenology, so as to frame legal issues from new points of view, thus possibly unravelling them" (Schreier 1924, III; my translation). And so it is that Schreier, in the preface to his dissertation, acknowledges his debt to both of his "highly esteemed teachers," that is, "to his secret mentor *Husserl* and to Professor *Kelsen*," but "especially to the former for having made his unpublished manuscripts available for study" (ibid., IV; my translation).

It is in fact significant that, as can be gathered from the numerous references present in Schreier's writings, he engaged not only with Husserl's *Lo-*

in Kelsen's circle. See also Loidolt 2010, 153–61; Goller 1997, Jabloner 1998. Earlier commentaries that continue to hold their value, offering insight into Schreier's thought as they do into Felix Kaufmann's, are Bobbio 1934a and Ebenstein 1969.

[31] See Hold von Ferneck's criticism in Hold von Ferneck 1926 and Kelsen's reply in Kelsen 1926a.

gische Untersuchungen, but also with the other of Husserl's two basic works, namely, the first book of his *Ideen zu einer reinen Phänomenologie und phänomenologischen Philosophie* (Ideas pertaining to a pure phenomenology and to a phenomenological philosophy), published in 1913 under the title *Allgemeine Einführung in die reine Phänomenologie* (General introduction to a pure phenomenology: E. Husserl 1976). That very fact marks Schreier's distance from Kelsen, who in his famous *Hauptprobleme* had declared himself to be in agreement with Husserl's new epistemological objectives, this at a time (1911) when Husserl had not yet come out with the work that would advance the development of the basic elements of the phenomenological theory. What marks out Schreier's contribution (in which regard we ought not to discount his access to Husserl's manuscripts) is that his recourse to Husserl's gnosiology as his chosen model for the analysis of legal phenomena takes into account the transcendental development of that gnosiology. This enables him to extract important consequences concerning the study of legal phenomena in general and the interpretation of law in particular. So, as much as Schreier retained a lifelong allegiance to Kelsen's schooling, he reinterpreted Kelsen's theory in an intelligent and innovative way that undeniably evinces a direct link to the developments of phenomenology.

That Schreier was pursuing an objective essentially different from Kelsen's can be appreciated from the very title of his *Grundbegriffe und Grundformen des Rechts*, where he refers not only to forms but also to concepts: The latter, as we can see, are characterized as "basic," or fundamental, and this tells us that Schreier is invoking axioms and principles. Kelsen, by contrast, had very early on settled into a clear relativist antimetaphysical position, from which a theoretical analysis of law could only be undertaken within the framework of a "general theory." Not so in the case of Schreier, who, in sympathy with the phenomenological approach, sought to uncover meaningful laws of essence for a science of law and for any possible law; so, while on the one hand the highest principles of law are formal—as well as "unreal," but only to the extent that the products of law do not belong to the natural world—on the other hand it crucially falls to phenomenology itself to identify them, and that consistently with a conception barring the possibility of their being invented out of whole cloth, that is, created from scratch. Principles are ontologically autonomous.

Schreier reveals himself to be a phenomenologist through and through when—reasoning from a perspective that recognizes legal essences, the ideas of law, as having a subsistence of their own—he speaks of the need to "find" or "discover" the concepts underlying the existence of legal products. As early as in his first philosophically mature work, namely, the previously mentioned *Grundbegriffe und Grundformen des Rechts* (Schreier 1924), the fundamental concepts and forms of law are to be understood within the framework of a "phenomenologically founded formal theory of law and state" (which, as we learn from the subtitle, is precisely the kind of theory this same work attempts

to sketch out). And so, in studying Kelsen's work and taking up his conception of the norm as an objective hypothetical judgment structured by the imputative nexus, Schreier appears to be primarily interested in mastering Husserl's teaching, reducing every science, including the science of law, to a *mathesis universalis* harking back to Leibniz.

That is the sense of the argument laid out in the chapter titled "Law and logic" (Schreier 1924, chap. 11; my translation), which in combination with the chapter titled "Possible law and real law" (ibid., chap. 12; my translation) makes up the core of a discussion aimed at showing that the pure theory of law forms a part of logic. As we have seen, Schreier subscribes to the idea of the need to identify the "fundamental forms" of law (which he believes ultimately come down to the forms "class of acts," "person," "performance/sanction," and "state"), and at the same time he espouses Adolf Reinach's view of the basic legal laws of essence:[32] These two elements of his thought combine to bring out not only the "ontologizing" intent behind his reliance on Husserl's theory but also the importance of two specific passages in Schreier 1924. The first of these concerns the theory of "possible law," while the second blocks out an analysis of legal "interpretation"—two themes not contained in the original core of Kelsen's theory of the purity of law, and Schreier treats them in an original way. What prompts him to define the phenomenological "essence" of law in terms of possibility is the need to clarify the dialectical relationship between *a priori* law and positive law, a relationship that can otherwise be framed as that between ideal and real law. Here the concept of possible law replaces that of *a priori* law or essence, in such a way as to explain the *a priori* itself, understood in its Leibnizian and anti-Kantian acceptation as a "necessity," of which "reality" is but one of multiple realizations.[33]

Possibility, so understood as one of the modes of being, is thus laid at the foundation of law. This move adds a further dimension to Schreier's theory, and as is the case with the foundational strategies adopted by legal phenomenology—apriorism, essentialism, realist idealism—it can be understood as what sets phenomenology apart from Kelsen's pure theory. Indeed, one has the impression that this last theory contents itself with attaining a dogmatic coherence, at which point it ceases to concern itself with its own speculative bases, especially the phenomenological one (perhaps prematurely so, thinking there is no longer any need for such bases). The "doctrine of possible law" reveals a

[32] Reinach's pioneering 1913 essay *Die apriorischen Grundlagen des bürgerlichen Rechtes* (The *a priori* foundations of civil law) is discussed in Schreier's book, in which Schreier points out its phenomenological orthodoxy.

[33] The analysis of so-called possible law (*möglichen Recht*) was developed by Schreier as early as in Schreier 1924, and not long after that, he went back to that analysis in greater detail in the important essay *Über die Lehre vom "möglichen Recht"* (On the theory of "possible law": Schreier 1926). For this thematic idea Schreier has deservedly been described as "the most original continuator of the pure theory of law" (Weinberger 1988a, 117; my translation).

decidedly superior coherence: By addressing the question of the system's need for a foundation, this doctrine firms up some important theoretical passages—so important, in fact, that one comes to regret that Schreier did not make this the main focus of his investigation.

The question whose analytical development Schreier does not, by contrast, nip in the bud—so much so as to turn this into an opportunity to integrate Kelsen's theory—is that of legal interpretation, which is not just a fundamental theoretical tract for an adequate understanding of law but is, more specifically, the place where Schreier manages to successfully work together phenomenology and the pure theory of law. Schreier's theory of legal interpretation is set out in two writings, namely, the 1927 book *Die Interpretation der Gesetze und Rechtsgeschäfte* (Statutory interpretation and legal transactions: Schreier 1927) and an article of 1929, so they both precede the most organic text that Kelsen devotes to this topic (*Zur Theorie der Interpretation*, On the theory of interpretation: Kelsen 1934a, 1968n).[34] As can be appreciated from the title of the 1927 book, Schreier was attempting a theory for the interpretation of laws and legal transactions, a theory homogeneous with Kelsen's, which at the time was still lacking on this topic. This is something Schreier expressly comments on:

> It must be recognized […] that until a fairly recent past the Vienna school showed little interest in the issues pertaining to legal interpretation, in effect not taking any position in this regard. This vacuum was thus filled with equivocal positions thought to be deducible from the claims the proponents of the Vienna school put forward with regard to other issues. (Schreier 1929, 322; my translation)

In going about integrating Kelsen's pure theory, Schreier takes up the innovative conception of interpretation systematized by the *Freirechtsbewegung*, or free law movement, which revolutionized the old schemes still bearing the imprint of the exegetical school:

> In my own *Die Interpretation der Gesetze und Rechtsgeschäfte* I studied the relationship between the Vienna school and the theory of the free law movement; I treated the issues of interpretation from the standpoint of the Vienna school, and the result validated the theses upheld by the free law movement. (Ibid.; my translation)

To which he adds that his book "is driven by a strong gnosiological concern." This is not to say that he has "turned away from the view espoused by the Vienna school, as has been claimed in some reviews." On the contrary, because his conception "is shared by the proponents of the Vienna school," he feels he is within his rights to speak "for the entire Vienna school" (ibid; my translation).

[34] See Schreier 1927, 1929, as well as Kelsen 1968n. Kelsen's text was immediately included in Kelsen 1934b, 90–104. On the question of interpretation in Kelsen, see Paulson 1990, Walter 1993, and Winkler 1990, esp. chap. 8.

The theory that Schreier formally developed within the framework of the *reine Rechtslehre*, and to which he devoted his most original work, clearly bespeaks the influence of Husserlian phenomenology—this despite Schreier's own concern to team up with the Vienna school. Kelsen, for his part, found himself in a sense "forced" to absorb his own pupil's approach to the interpretation of law, even if this approach not too circumspectly wound up encasing the pure theory of law within a vision, the one developed by the free law movement, that instead was careful to stay away from any notion of legal purity. It is for different reasons that Kelsen and Schreier were prompted to take the different attitudes they in fact took. Kelsen was taken up with the problem of rebutting the charge of formalism, a charge which at that specific point was being laid against his theory, and which, on the level of the history of ideas, tended to throw the theory back into a mere "conceptual jurisprudence." So the theory's "befoulment" with an approach as "sociological" and "empirical" as that of the free law movement can equip the theory to keep at bay the spectres of abstractness and artificiality. And Schreier, for his part was so taken up with Husserlian phenomenology that it proved impossible for him to think form distinctly from essence, and hence from being, even though he does not shun the moment of contact between being and experience as the first indispensable step toward the truth; so, from Schreier's viewpoint, the free law movement makes it possible to integrate legal "reason" with "experience," and it is for the most part the judge, the interpreter par excellence, whose shoulders are made to bear that experience.

In Schreier's analysis, the question of the interpretation of law turns on what he calls the "integration" principle (*Ergänzungsprinzip*), under which we must not confine ourselves to "analytically" interpreting the law in a literal way but must also engage in a substantive "synthesis" by which to fill the gaps in the law. Schreier seems initially to simply follow in the footsteps of Kelsen's theory of validity, and so—by analogy to Kelsen's anchoring the validity of law to the *Grundnorm*, or basic norm—he claims that the interpretation of law must proceed on the basis of this integration principle as a principle understood to ensure the operativeness of law. Schreier feeds this principle to methodological doubt, eventually finding a "third foundational way." Indeed, he reaches the conclusion that it is impossible to proceed solely on the basis of inductive experience or deductive reason, and from this premise he deduces the necessary existence of a metalegal principle governing the interpretation of law. In this sense, then, the integration principle, expressly derived from Kelsen's principle of the *Grundnorm*, becomes indispensable, for it "carries the validating logical value of a hypothesis," insofar as it comes into play in combination with positive norms. Which in turn betokens a transcendental nexus entrusted with the task of averting the opposite extremes of logicism and sociologism. Schreier's approach, however, differs from that of Kelsen, since Kelsen's transcendentalism is integrated by him with that of Husserl.

Kelsen himself, after all, takes up the theme developed by his pupil, bringing the question of interpretation into his pure theory, precisely for the purpose of defending this theory from the charge of formalism. The trail has already been blazed: Schreier develops his theory of legal interpretation by splicing the principles of the free law movement onto the trunk of the pure theory of law. Speaking for the Vienna school, he even declares that the two approaches to law are fully compatible, and this gives him quite some leverage in dismantling the charges of formalism laid against Kelsen and his school:[35] He can do so by showing that this charge relies on a false parallelism between the pure theory of law and conceptual jurisprudence, a parallelism based on the (equally false) claim that the two theories share a rejection of "legal content." Schreier instead believes that there is no real divide between the pure theory and the free law movement, and indeed that the two are connected by many points of affinity. He strenuously argues that the works coming out of the Vienna school are entirely consistent with those produced by the free law movement, and that the "guiding theme" of Kelsen's purity of method—namely, the method of legal science understood as a theory of law in general, a "theory of the essence of law," in Schreier's description of it—does not entail any need to aprioristically rule out the role of content next to that played by the essence of law, even if Kelsen did deploy this essence as mere form. The purification effort undertaken by the Kelsenian theory was only targeted at abstractly constructed "preconceived ideas," precisely the sort of baggage ascribed to conceptual jurisprudence by its critics, and so it can be appreciated in this sense how the pure theory works in the same direction as the free law movement (see Schreier 1929, 321).

The approach worked out by Schreier—avowedly so close to the Kelsenian Vienna school, yet not fully in agreement with its theoretical presuppositions—makes it possible to reconstruct in a fairly accurate way a speculative situation that had taken shape over time through a confluence of multiple and diverse stimuli. This confluence can be appreciated, in particular, by noting the proximity the Husserlian jurists saw between the theoretical contributions coming from Husserl's methodological model and the properly Kelsenian contributions; and so it came to be that, as pupils of Kelsen, these jurists also championed the Husserlian conception. This is precisely what happened with regard to the theory of legal interpretation, with Schreier staking out a position that Kelsen would also later adopt, though admittedly this was not a perfect fit. In fact it bears noting that Kelsen would never have fully endorsed the perspective of the free law movement, for as has been pointed out already, he "cannot be said to belong *in spirit* to the free law movement" (Lombardi Val-

[35] Schreier 1929 offers an account of the dispute among the different schools active at that time.

lauri 1975, 364; my translation)[36] and undoubtedly it was Schreier's book that held his feet to the fire on a question he had hitherto neglected.

To understand what triggered Schreier's speculative turn, prompting him to graft onto the trunk of the *reine Rechtslehre* that "law which we live and which, by virtue of its living in us, we feel," as Hermann Kantorowicz put it in setting out his *Freirechtsbewegung* (Kantorowicz 1962d),[37] we have to go back to the new doctrinal outlook he embraced, leading him to lay emphasis on the need to take more directly into account the social reality in which that living law is set, and so, even as he welcomed the logicism of the pure theory, he came to believe it was necessary to explore the possibility of an osmosis between logic and psychology. Having taken to heart the *Freirechtsbewegung* catchphrase that calls for specialization, while also being versed in the phenomenological method, which advocated an experience aimed at grasping the truth, Schreier could emblazon himself with the title of dual defender of logic and psychology, fully to the advantage of an understanding of law on which no moment or event was to be expunged from it. Wrote Kantorowicz:

> Husserl has no doubt radically severed the whole of the psychological from logic, but the converse undertaking—the task of freeing psychology from the logical elements that have illegitimately crept into it—is something he has not at all set his hand to. (Kantorowicz 1962d, 30; my translation)

At work in these remarks is an authentic appeal to the Husserlian phenomenological method. On the one hand this method is careful to prevent a rudimental "psychologism" from undercutting the result obtained by logically investigating the ultimate foundations of knowledge (these foundations are ideal, and only as such they are real), but on the other hand the same method is also intent on expanding its project to make philosophy anew, the intent being to bring within the scope of the project the inexhaustible task of setting psychology itself on a new foundation as a transcendental science, in accordance with a transcendental perspective that is not merely formal. It is no accident, then, that when it comes to outlining a renewed landscape for the analysis of law, Schreier should urge us to take into account the contribution that may accrue by virtue of "jurisprudence cooperating with psychology, on the one hand, and social science, on the other, [...] as between like sciences" (Kantorowitz 1962a; my translation), nor is it an accident that his theory of interpretation should devote a great deal of attention to the question of the will (Schreier 1927, 53–73).[38]

[36] "Kelsen does not belong to the free law movement *in spirit*, for his theory does not at all proceed from the basic experience (*Erlebnis*) of that movement; it rather proceeds from a contrary *Erlebnis*, that of 'purity,' an experience that led him to separate legal science from ethics and sociology, rather than seeing them as forming a necessary, organic whole with legal science—as the free law movement instead sought to demonstrate" (my translation).

[37] Later published as Kantorowitz 1962a. In sympathy with that conception are also Ehrlich 1888, 504ff.; 1917, and 1987.

[38] A similar view can be found in Walter 1993.

The paradox Schreier's doctrine ultimately runs into, in its relying on Husserl's phenomenology to surpass Kelsen's construction, lies in the fact that this doctrine turns out to be most controversial and problematic precisely where it most deliberately invokes Kelsen's theory, that is, where it brings into play the theoretical construct of the *Grundnorm*. As we have seen, Schreier takes up the two questions of validity and interpretation precisely in order to set up a parallelism between Kelsen's basic norm (the condition of validity) and the basic principle of legal interpretation (the integration principle), since through this parallelism the conclusion can be reached that, just as metapositivity (and metajuridicality) is key to the essence of the *Grundnorm*, the same goes for the *Ergänzungsprinzip* forming the basis of legal interpretation. But whereas Kelsen over time strips the *Grundnorm* of substantive content—of any suggestion that it may figuratively allude to natural law, for he is rather looking to firm up a logico-formal transcendentalism by which to carry through the original plan to "purify" law—Schreier proceeds in exactly the opposite direction: What Kelsen moves away from is precisely what in Schreier serves to legitimize an "empirical" function like that of legal interpretation, an activity that certainly could not exist unless it was firmly anchored in metalaw.

In this way, Schreier could confidently assert that

> the integration principle stands *in front of* positive norms; it is suprapositive by nature, transcending positive law, and hence is not immanent in such law. […] Naive positivism is untenable: Oozing from every pore of the positive law, and making its way forward, is "natural law." [...] We see how interpretation comes in from all directions; it is governed by principles whose validity is not predicated on positive law. The integration principle transcends positive law. (Schreier 1927, 53–4; italics added; my translation)

Indeed,

> what brings out the fact that positive law bristles with suprapositive elements is the choice made in setting out, not so much the basic norm, as the interpretive method. [...] The substrate of positive law and of the nexus of validity is metapositive, and, especially, it is meta-legal-positivist in nature; in the same way, the problem of interpretation shows that every single determination of positive law is laden with suprapositive content. (Ibid., 9; my translation)[39]

[39] This is an argument Schreier can make with much ease, in a footnote, by setting up a contrast with the formal apriorism found in Kelsen's 1920 *Das Problem der Souveränität*, though this work certainly lacks many of the contents that Schreier himself would give to apriorism having gone deeper into Husserl's phenomenology.

Chapter 5

FROM THE CRITICISM OF NEO-KANTIANISM TO NEO-HEGELIANISM IN THE PHILOSOPHY OF LAW

by Agostino Carrino

5.1. The Crisis of Neo-Kantianism in Erich Kaufmann's Philosophy of Law

Erich Kaufmann (1880–1972) was an international lawyer as well as a philosopher of law. His point of departure in the philosophy of law was the neo-Kantianism of the southwest school (Windelband, Rickert, and Lask), a current of thought concerned with the problem of values, and which at the same time sought to lay out the method and epistemological framework specific to each of the special sciences. But with the 1921 *Kritik der neukantischen Rechtsphilosophie* (Critique of neo-Kantian philosophy: E. Kaufmann 1921), he avowedly abandoned the neo-Kantian method and took a neo-Hegelian and ontological turn. This turn is undoubtedly rooted in historical reality, in Germany's new situation, which led Kaufmann to turn away from his former beliefs and embrace a "metaphysical" worldview. What prodded Kaufmann in this direction was an attempt to offer an "internal" explanation of why the German empire fell apart and turned to democracy. Neo-Kantianism—especially that of the Marburg school—no longer appeared to him as the antipole of Marxist sociology and materialism: It was rather perceived by him as a mode of thought that somehow underpins any empiricism involved in breaking up the whole. So his metaphysics is not a simple metaphysics of natural law but is rather cast as a new metaphysics seeking to grasp the "essence" of things from a neo-Hegelian perspective (a perspective in some respects also describable as institutionalist). What we have, then, is not a metaphysics of "nature" but one of "essence," and most importantly of the historical essence of the German people. This comes through very clearly, more than in his 1921 *Kritik*, in his essay on the principle of equality under Article 109 of the Weimar Constitution (E. Kaufmann 1927). At issue was whether the principle should also apply to legislators as a standard limiting the scope of their activity; and in keeping with the metaphysical outlook just briefly mentioned, Kaufmann interprets this principle not in a "normativist" way but in an "essentialist" one as a principle *inherent* in the German people: "The principle of equality before the law is a fundamental right of the *German* people, that is, a right owed to every German as such in relation to the state, that is, in relation to the Reich and the *Länder*" (E. Kaufmann 1927, 7; my translation; Kaufmann's own italics on the word *German*).

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The philosophy of law and of the state must therefore be made to rest on a people's *essential* nature, not on stale theoretical legacies. Kaufmann goes so far as to say that because Germany had

> no philosophy of the state or of law—considering that the state and society had been founded merely on the pale legacies of Kant, Hegel, Stahl, and Marx, and not on any independent and living social philosophy—the country's state and law ultimately rested on feet of clay, which broke into pieces through the great trials of history that the German spirit and state alike had to overcome during the Great War. (E. Kaufmann 1921, 2; my translation)

But in reality, concealed beneath these principled statements was a specific political agenda: Through his "essentialist" reading of Article 109 of the Weimar Constitution,[1] Kaufmann was hoping to thwart the activities of the democratically elected legislative body. Even in 1930, Hermann Heller (1930) made it clear that this was an attempt, set on a purportedly scientific foundation, to keep the parliament in check through the judiciary, whose members had been serving since before the advent of the republican form of government.[2] The community, in a sense—still conceived in a historical and cultural sense, rather than in a biological and racist one—was thus set in contrast to the law, just as the "spirit of the people" was in relation to the exsanguine, diaphanous forms of formalist and neo-Kantian methodology, and as arrant subjectivism was in relation to the objectivity of the legal system's procedural mechanisms and forms.

The problem of legal philosophy is thus brought closely into connection with the question of a people's destiny: Neo-Kantianism, with its value-neutral method and relativism, reflected an age steeped not in the essence of the German people but in abstract intellectualistic conceptions that undermined the very quality of the people. Only war and defeat, then, can make it possible to reframe the philosophical problem within its proper context in the clash among worldviews or, better yet, in a clash between an indeterminate, universalist, subjectivist worldview and an objectivist, determinate worldview rooted in the essence of the people.

The contrast can be framed as one between is and ought, *Sein* and *Sollen*: The *Sollen*, pure neo-Kantian duty, cannot establish a connection with the sociological concreteness of the existential given of the people, but rather impos-

[1] Kaufmann's talk at the conference on public law held in Münster in 1926 stood in contrast to the one given by Nawiasky, in which an argument was made in favour of formal equality, and which was greeted favourably by Kelsen, Heller, Thoma, and Anschütz.

[2] "In effect, Heller and those jurists who were more attentive to the political import of their activity appreciated that the new reading of the principle of equality became a conduit through which to develop the 'scientific' attempt to curtail and possibly thwart the initiatives of the legislature (its majority initially liberal-socialist, and in any event progressive) through the intervention of the judges, who had no sympathies for the democratic, liberal republic looking to effect socialist transformations by enacting a constitution, and who even made direct compromises with the 'right-wing' reactionary forces and the Nazi Party" (Volpe 1977, 102–3; my translation).

es from the top statically conditioned constructs devoid of any substance. The rejection of neo-Kantianism in its various forms, from Stammler to Kelsen, is rooted in this need to underscore the evolution of the spirit (Hegel), in this making of the spirit in the historical concreteness of a people transitioning from a given set of conditions to new vital conditions. The turn against neo-Kantianism therefore did not also apply to Kant's own philosophy, which answered a real need of the time. For it is only *neo*-Kantianism that, betraying Kant's spirit, detached thought from being.

By fashioning the philosophy of law and of the state into a science of pure forms, neo-Kantianism caused those who are spiritually and intellectually most gifted to move away from the science of the state, which consequently lost any ability to express the essence of the people, leaving them at the mercy of Marxism and making morality authoritarian, a rule imposed on the German people from the outside.

That very idea forms the basis on which Kaufmann criticizes Kelsen: Kelsen, with his radical *Sollen*, wants to impose a certain morality (that of the Enlightenment) on the German people's spontaneous morality. Kaufmann's interpretation of Kelsen's formalism is significant precisely because it seizes the political import of that formalism by showing how Kelsen's critical positivism is itself politically and morally charged. Kaufmann and Kelsen therefore embody a conflict between history and reason, between rationalist universalism and historical concreteness. Not incidentally, Kaufmann cannot conceal a certain affinity with the historical school of law, while Kelsen's legal-political theory continues to be ahistorical.

However, Kaufmann's propensity for this new kind of natural law—organically woven into the essence of the people—cannot be read as having anticipated the Nazi theories,[3] this despite the controversial thesis he advanced in his best-known book, *Das Wesen des Völkerrechts und die Clausula* rebus sic stantibus (The nature of international law and the *clausula rebus sic stantibus*: E. Kaufmann 1911), where he claims that "it is not in the freely willing community of human beings that the social ideal lies: The social ideal is rather to be found in victorious war" (ibid., 146; my translation).[4] For it is Kaufmann's view that in the particular there is always manifest the universal, and that the particular has no legitimacy and no dignity of its own except insofar as there abides in it the universal:

> The distinction between general and particular law is but an aspect of the general problem of the relations that hold between the universal and the particular—the great conundrum that has preoccupied the human spirit from Plato to Aristotle. The universal is always inherent in the par-

[3] "Kaufmann's scholarly work is absolutely devoid of any connection to Fascist thought" (W. Bauer 1968, 260; my translation).

[4] The German original: "Nicht die Gemeinschaft frei wollender Menschen, sondern der siegreiche Krieg ist das soziale Ideal."

ticular, in a sense constituting the very soul of the particular, its shaping force, its living energy. (E. Kaufmann 1935, 314; my translation)

What the essence of the German people ought to have consisted in, however, remains an obscure point. In the run-up to Hitler's rise to power, Kaufmann lamented a compassless stewardship of the ship of democracy, pummelled by movements, isms, and decisionisms of all sorts, but he cannot be held blameless in relation to the very crisis he denounced. Wasn't the absence of any debate, a failing he himself decried (E. Kaufmann 1960, 297ff., esp. 299–303), precisely the issue of that "essential" law he invoked? He took issue with positivism as the reason for the bewilderment that had taken root, but his rejection of relativism is precisely what in part lay at the basis of the call for surefooted decision-making and will power.

Kaufmann's criticism was met by Kelsen with a counter-criticism contained in a long footnote in his 1922 book *Der soziologische und der juristische Staatsbegriff* (The sociological and the legal concept of the state: Kelsen 1922b, 99–104). Kelsen's counter-criticism addresses in the first place the charge of "deception," the idea that Kelsen would have passed off as a scientific theory what in reality was a political agenda, meaning his predilection for the primacy of the international legal system, a subjective and morally driven predilection. Kaufmann, more to the point, accuses Kelsen of "deducing" international law from the *Sollen*, and in this way—by deducing the idea of a *civitas maxima* superior to national legal systems—Kelsen would have confused the political with the legal, thus undermining his own basic premise of the separation between is and ought, while also failing to stay true to his rejection of the theory of the state's two faces.

Kelsen denies that the postulate of the unity of the entire law must necessarily entail the primacy of international law: The two hypotheses, says Kelsen, are equivalent from a legal point of view; one can for moral or political purposes choose the primacy of international law or that of domestic law, but the outcome in either case will be the same, and we will always find that from a scientific point of view the whole of law is a single, unitary entity, whereas the basis on which we choose the one or the other is always going to be political and moral. But in this counter-criticism, in truth, Kelsen does nothing except reiterate what he previously stated in *Das Problem der Souveränität* (Kelsen 1920a), without addressing Kaufmann's criticism on its merits, where Kelsen's conception is reconstructed in such a way as to bring out some underlying incongruities.

Likewise, on the matter of the confusion that in Kaufmann's opinion Kelsen makes between the is and the (pure) ought, Kelsen simply refers us to some of his own previous writings, where he defends the separation between is and ought and the impossibility of bridging the deep gap between the causal world of the is and the world of norms and values. And here, too, in reiterat-

ing these theses, Kelsen does not really address the substance of Kaufmann's criticism—which points out a contradiction between the premises of Kelsen's thought and its concrete outcomes—but rather turns the criticism into a counter-criticism concerned more with Kaufmann's overall conception than with the specific view expounded in the book on neo-Kantianism. Kelsen faults Kaufmann for confusing sociology (a causal-naturalistic science) with normative science and for proceeding on a naturalist, non-normativist basis in the study of law. It is impossible, writes Kelsen, not to consider the legal system's specific unity, a unity demanding that the law be understood as a noncontradictory system. Two norms contemporaneously prescribing *a* and non-*a* cannot both be said to be valid, because the content that makes up the meaning of legal propositions expressly rules that out. To be sure, it can certainly be imagined that someone, in their will, might represent the contemporaneous validity of two norms standing in contradiction to each other, but this is not possible in mathematics or in the legal system:

> The essence of law (and the state) lies in the specific content, or meaning, of legal propositions, not in the psychological process of our contemplating those propositions or in the physical movements caused by psychical processes. (Kelsen 1922b, 101; my translation)[5]

Kelsen rejects Kaufmann's criticism by rejecting the very idea of a jurist dealing in sociology. If truth be told, this does not look like an adequate reply to Kaufmann's criticism, and one can only remark here, on Kelsen's behalf, that Kaufmann's position cannot but conjure up in certain respects the conception expounded by one of the founders of legal sociology, Eugen Ehrlich, in that they both underscore the priority of unwritten law over codified and legislatively formulated "legal propositions."

5.2. Two Precursors of Legal Neo-Hegelianism: Josef Kohler and Fritz Berolzheimer

When speaking of neo-Hegelianism in German legal philosophy, the mind cannot but travel back to the thinkers who wrote in the 1920s and 1930s, from Binder to Larenz. These authors will be discussed later, but before we do that, a few words are in order about two precursors of the neo-Hegelian rebirth, namely, Josef Kohler (1849–1919), perhaps chiefly known today for his essay on Shakespeare and law (Kohler 1919), and Fritz Berolzheimer (1869–1920).

Together, these two authors founded the journal *Archiv für Rechts- und Sozialphilosophie* (Archive for legal and social philosophy)—initially titled *Archiv für Rechts- und Wirtschaftsphilosophie* (Archive for legal philosophy and eco-

[5] In this book, on the sociological and the juristic concept of the state, Kelsen uses the same thesis to also criticize Max Weber's "interpetive" sociology.

nomics)—intended to serve as a tool through which to foster the Hegelian rebirth.

This rebirth, however, looked to Hegel more as a historicist than as the theorist of the ethical state or of the dialectical method, so much so that, as has rightly been observed, Kohler's neo-Hegelianism ranges "between legal positivism and neo-Kantianism" (Hürstel 2010, 58; my translation). It is no accident that, whereas the neo-Hegelianism of the 1920s and 1930s revived the concept of community as the locus for the unfolding of ethicity, Kohler regarded ethicity "as a secondary phenomenon" (Kohler 1914–1915, 45; my translation). The philosophy of law is thus brought into relation with the history of law, in the sense that only in empirical history, in his opinion, can philosophy find the material on which to engage in reflection. Kohler's Hegelian renaissance is thus hemmed in by historicism and legal positivism, and Kohler can in this sense be said to be a thinker firmly ensconced in the 19th century. His Hegelianism is thus confined to recovering "the unity of subject and object, the movement of the universal spirit, and its realization in an infinite number of particular beings, as well as the constant progress brought about through the ever-renewing output of history" (Kohler 1911–1912, 106; my translation).

The same idea of an idealism (or presumed idealism) attentive to historical fact and to culture can be found in Fritz Berolzheimer, for whom the philosophy of law acts as a principle regulating the activity through which a given legal culture comes to be known. So in this sense, as much as Berolzheimer may look to Hegel, he appears still tethered to Kant and to neo-Kantianism, and even more to the positivist tradition of the 19th century (Berolzheimer 1913–1914). Kohler's and Berolzheimer's *Kulturphilosophie* is thus informed by a conception of law as an empirically determined entity.

5.3. Julius Binder, Founder of the Neo-Hegelian School

As Ralf Dreier has remarked, Julius Binder (1870–1939) was not a great legal philosopher, but he certainly was a "tragic" thinker (R. Dreier 1991, 144), in the sense that he wanted to achieve great things but failed in a big way. His neo-Hegelianism—he can rightfully be recognized as the fountainhead of this current in 20th-century German jurisprudence (considering that Kohler and Berolzheimer slot more easily into what might be termed the Hegel Renaissance)—was supposed to deliver groundbreaking results, making significant contributions not only to the philosophy of law but also to philosophy as such. But the fact is that this legal neo-Hegelianism can essentially be considered to have been crushed under the rubble of the fallen Third Reich. And indeed, as much as Binder comes into the picture as a neo-Hegelian legal philosopher (and this is how he will be discussed here), for all practical purposes he can equally be counted as a Nazi jurist.

Binder was born in Würzburg in 1870, and in 1939, just two days before the outbreak of World War II, at the age of sixty-nine, he died of complications from a surgery. He was professor emeritus at the University of Göttingen. In the first phase of his scholarly activity he was mainly concerned with themes and subjects in Roman and civil law. In his second phase, from 1914 onward, he enthusiastically devoted himself to the philosophy of law, which in essence became his proper area of study.

Of course, a personal philosophy of law can be discerned in his work even before this second phase, in a development that initially led him to espouse legal positivism, especially as interpreted by Windscheid and Bergbohm. Law, for this early Binder, is a fact of being from which no obligation of any moral nature can be derived. In his pro-rectorial address of 1911 he put in a remark that would become famous in its own right: "Legally, the law does not obligate anyone to do anything" ("Das Recht verpflichtet rechtlich zu nichts": Binder 1911, 16; my translation). In light of this remark, Leonard Nelson, who would later be a colleague of Binder precisely in Göttingen, elaborated his thesis of "legal nihilism."

But Binder's strictly legal-positivist phase would not last long, for he soon felt drawn to neo-Kantianism, even though he did so criticizing the thinker who at the time was its main exponent, namely, Rudolf Stammler. Indeed, it is to Stammler that Binder devotes his first dense work in legal philosophy, his 1915 *Rechtsbegriff und Rechtsidee* (The concept and idea of law: Binder 1915). In this book, Binder strives to stay true to a "pure" understanding of the concept of law, taking Stammler to task for setting out a legal-philosophical doctrine which formally rested on a Kantian foundation, but which in reality ended up driving the object of the transcendental method right back to its original empiricalness, without showing any real categorial transcendentality. Binder therefore thought that Stammler's philosophy of law was actually empirical, ultimately resolving itself into a psychological concept of law. Our willing is an empirically observable event, not a precondition of our knowing; it is therefore in this willing that Stammler in the end grounded his legal thought, not in the transcendental categories of thought. Binder's philosophy of law was thus grounded in Kant (though to some extent it was already looking beyond Kant), and central to it was the *idea* of law, an idea that serves two complementary functions, one of them being constitutive and the other normative. This means that on the one hand (on the normative side) law asserts itself as being *just*, but at the same time (on the constitutive side) it asserts itself as *being*, by institutionalizing itself into forms made determinate by their content. For Binder, this twofold function entails a differentiation between the idea of *law* and the idea of *morality*, two ideas that in Stammler instead wind up merging into a single thing, a kind of natural law. In Binder's view, *law* owes its value to its ordering function, in the sense that through law individuals find themselves obligated to take their place within their own political communities, whereas *morality* owes its value to something *other than* this po-

litical function of law, whose form, not incidentally, was for Binder that of the state—and that is how he would continue to understand its form.

If truth be told, Binder's criticism of Stammler looks weak, this to the extent that it seeks to be itself a neo-Kantian criticism. It is no accident, in this connection, that Binder would not dwell long in neo-Kantian territory, shortly thereafter taking a surefooted turn away from Kant toward Hegel, so much so that he would go on to become Germany's leading exponent of legal neo-Hegelianism in the 1920s and 1930s.

The move from Kant to Hegel was in reality implicit in Stammler's criticism for distinctly *political* reasons. Indeed, one could ask: What was it about Kant that might have made him worthy of study and appreciation in the eyes of a German philosopher in Binder's time? It wouldn't be unreasonable to say: The fact that Kant, despite his cosmopolitanism, rested practical reason on the concept of duty (*Pflicht*), which is what at that very historical juncture (1915) was driving the German troops to a variety of fronts. Evidently, this Kantian concept of duty was not reason enough for Binder to stick to neo-Kantianism, so much so that he was already aligned with Hegel by the time the war was over (with Germany winding up on the losing side): He got there through Fichte, and although his reading of Hegel was initially mediated by Rickert's neo-Kantian philosophy of values,[6] he did construe Hegel as a philosopher of the German spirit and of the authoritarian state—a political-philosophical outlook Binder found himself quite at home with. After the war, it would no longer do to lay out a "just" concept of law and the state; it was instead necessary to remake the state and the law from the ground up:

> The issues arising in connection with the nation and the state move from a marginal concern of reflection to its centre. In *Rechtsbegriff und Rechtsidee*, the state was merely conceived as the guarantor of the validity of law. From here on out, he would address the meaning and conditions of the state's existence. Binder's philosophy of law came to importantly incorporate a theory of political philosophy [*Staatsphilosophie*]. (Jacob 1996, 36; my translation)

Binder's neoidealism itself went through two phases—a first one that can be termed "objective" idealism, and the second "absolute" idealism—both to be distinguished from any sort of "rationalism," as was essentially true of his previously espoused critical approach. But even in the most significant book he wrote in his first phase, the 1925 *Philosophie des Rechts* (Philosophy of law: Binder 1925), a massive work, to say the least (running to 1,063 pages), and not devoid of passages brimming with nationalistic pathos, we find the groundwork for his absolute idealism in the consummate criticism he directs at legal positivism, liberal naturalism, and Marxism. What Binder is trying to do here, in this sense tak-

[6] In a 1921 essay (Binder 1923a), Binder recognizes that the object of legal science, namely, law, is not prescientific but is itself laden with concepts, as had previously been observed by Emil Lask (see the previous discussion in Section 1.4 in this tome).

ing up the criticism of formalistic neo-Kantianism advanced by Erich Kaufmann and others, is to replace the "formal" concept of law with a "material" one, and indeed to replace the abstract conceptualism of neo-Kantianism with an idea of law whose contents are determined by the values specific to the German people: These are the values of the *Gemeinschaft*, the nation, but they are interpreted as contents distinctive to the form proper to them, that of the state.

The state is the cultural state, the national state. Politics and philosophy always go hand in hand in Binder.[7] In relation to the state as a form of the national community, the law is tasked with organizing into a harmonious unity among the individuals who make up the nation itself:

> The idea of the state, however, is conceived here [...] as the synthesis between the individual and the totality [*Gesamtheit*], a totality that conditions the people's community and community life, which is made possible by the coercion of the law. In this way, the legal order itself figures as a condition for the existence of the state; it is the law which endows this whole [*Ganzen*] with its own form, transforming it from an aggregate into an organism, through which [...] there emerges a relationship of exchange between the individuals and the entirety, a relationship that makes the latter a condition of the former, and vice versa. (Binder, 1925, 487; my translation)

The state is understood by Binder as an "organic" state, because only in this way can the state make it possible for there to emerge, out of the chaos of experience, the harmonious cosmos of a politically well-ordered society (Binder 1926a, 45ff.). The law is consequently defined as a coercive mode of being part of an ethical community ("Zwang zur sittlichen Gemeinschaft": Binder 1925, 359). The philosophy of law therefore cannot confine itself to recognizing the law's internal structure (in the manner of Kelsen, for example): It must also take on the question of its *telos*, the aim of the legal system as a whole, an aim that cannot be sought in a "metalegal" sphere but should on the contrary be construed as being inherently legal.

In an essay on Binder, Ralf Dreier argues that although in 1925 Binder was no longer neo-Kantian, he wasn't yet neo-Hegelian, either, for otherwise he would have had to accept the rationality of the real, and in particular of the very real he rejected, namely, the democratic Weimar Republic (R. Dreier 1991, 154). But in reality, even in the 1925 *Philosophie des Rechts*, Binder had already laid the groundwork for a resolute move to an absolute idealism, that is, to a conscious Hegelianism, and indeed this orientation can already be espied in the criticism that in 1915 he directed at Stammler and his methodological dualism between the concept and the idea of law. "Indeed," Binder argues,

> if the law is everything that exists in virtue of the idea of law, then the more something corresponds to this idea, the more it will be law, or, in other words, if we try to restate this idea in Stammler's terminology, our representations of legal aims can in general be measured only against the idea of law. (Binder 1915, 203; my translation)

[7] On the point, see Hürstel 2010, 168, 74–5.

And according to Binder this idea of law cannot and must not be traced to natural-law theory (no matter what premises this idea rests on) or to any of the abstract, anti-historical forms of liberalism. As early as 1915, in other words, Binder's neo-Kantianism was projected beyond Kant himself, however much in a still ambiguous and contradictory way, to the extent that the dualism of form and content was softened but not solved.

It is only in 1925, with the *Philosophie des Rechts*, that Binder made a decisive move beyond neo-Kantianism toward a return to Hegel. This work is judged by Larenz as the "the highest point reached over the entire course of legal philosophy, while also setting a milestone in the philosophical evolution of our own times" (Larenz 1931, 31; my translation). So, while the law Binder is concerned with is the *positive* law, qua real law, the sense of this positive law is found to lie in its rationality. Hence the idea that "law is rational reality and real reason" (Jacob 1996, 50; my translation). What imbues law with rationality is its aim, the law being understood as a tool through which to achieve an ethically grounded community where individuals each find their role on the basis of the obligations the community ascribes to them, and where rights, in a way, can accordingly be said to emerge only as a reflection of the obligations so assigned (Binder 1923b).[8] Binder is now openly declaring himself to be contrary to any form of abstract individualism and in favour of a transpersonalist worldview (albeit a conservative one by comparison with Radbruch's progressive transpersonalism). Writes Binder:

> Transpersonalism is not the negation of personality but its affirmation; I have personality the moment I know myself to be a member of the whole, to the extent that in my actual and living consciousness I know the very reason which at the same time is the idea of the whole. (Binder 1925, 288; my translation)

In this work, however, the march toward Hegel grinds to a halt where Binder takes the view that law (and hence the state) needs to be subordinated to morality. Binder's idealism, in other words, is still a transcendental idealism that owes a great debt to Kant and Fichte, who indeed in his opinion live not in the "neo-Kantian" revival (especially not in the neo-Kantianism Cohen was advancing in Marburg) but in idealism itself, that of Hegel, and now that of those for whom Fichte, Schelling, and Hegel are models to look to.[9]

[8] Fichte is regarded by Binder as the true precursor of the idea of transpersonalism and of community understood as the specific place of individual freedom: "The I needs other beings endowed with reason, for its being lies in freedom, and only in relation to other free beings am I free" (Binder 1923b, 215; my translation).

[9] What in Kant is eternal, writes Binder, "survives in the systems constructed by his followers, the great idealists. It thus seems to me that neo-Kantianism has not resulted in Kant's true resurgence: This is something that has yet to be realized through the nascent movement for a new idealism" (Binder 1924, 50; my translation).

But it is in the ensuing years, as the Weimar democracy fell deeper and deeper into crisis, that Binder followed through and completed his move from Kant to Hegel, a move we can appreciate in the two works of his maturity—his 1935 *Grundlegung zur Rechtsphilosophie* (The foundation of legal philosophy: Binder 1935) and his 1937 *System der Rechtsphilosophie* (System of legal philosophy: Binder 1937)—reflecting as well an intensification of the antidemocratic, anti-egalitarian tendencies in Binder's thought, with Binder increasingly intent on reconciling Hegel with the Nazi regime. The criticism that in the 1925 *Philosophie des Rechts* Binder devoted to the logicist philosophies of law (the neo-Kantian ones, but also the phenomenological ones and those based on the experience of law)[10] now translates into a call to supersede the mere conceptual signification of a legal norm and embrace the centrality of the sense of law as a whole, by which is meant its ideal meaning as given by the aim the legal order sets out for itself. Here Binder is deepening some themes that in truth had been simmering in him from the outset, but their development is now explicit in the two works of 1935 and 1937, and even though these works had been anticipated by some minor writings—particularly the one devoted to the *Volkstaat*, or popular state (Binder 1934)[11]—we now see a footsure connection being established between the positive law and the world of ethico-political values.

In the first two chapters of *Grundlegung* (Binder 1935), Binder systematically sets out the basic tenets of his absolute idealism, where the whole of law is defined as the "unity of the particular and the universal will," and consequently as "freedom existing in itself" (Binder 1935, 116, 117; my translation). Writes Binder going back to this definition:

> If the many wills are to develop from a mere collective will [*Kollektivwille*] into a unitary will [*Einheitswille*], they are going to need a will which knows what the people's true will is, and which wants this will and actually imposes it. A person who fits this description we call [...] Führer. (Binder 1937, 317; my translation)

This person, Binder goes on to say, cannot be elected or nominated, insofar as the bond between the Führer and the people is, so to speak, natural; in fact it is a sort of "God-sent miracle" if a people that has long been guideless will ultimately find its own guide in which it recognizes its own will. This political dimension can be said to come about as a result of of carrying over into the practical realm the theoretical premises of the absolute idealism characteriz-

[10] See Binder 1925, 196ff. On Binder's stance against Sander and his philosophy of jural experience, see ibid., 204ff.

[11] According to Hürstel, one can perceive in this booklet by Binder "an inflection clearly evincing an affinity for Nazism and for the idea of a total state (*totaler Staat*)" (Hürstel 2010, 194; my translation). In reality, this sliding toward the total state is not as clear as this author makes it out to be, though admittedly Hegel's philosophy of law does take on strong Nazi overtones in Binder's hands.

ing Binder's philosophy of law in the 1930s, that is, the idealism under which consciousness and reality come together as a single thing in the absolute spirit. The value of law is entirely resolved in the reality of law, in the sense that the idea of law is, at this point, the concept of law fully realized: "The idea is not an atemporally valid norm to be compared with temporal law, but is rather the concept that realizes itself over time as temporal law" (Binder 1935, 147; my translation).

However, despite recognizing the Führer's role in this and other respects on a theoretical level, in the 1930s Binder's absolute idealism would come into conflict with a central aspect of Nazi legal thought, namely, its contempt for the state as a freestanding entity specifically endowed with a dignity of its own. Hegel's idea of the state as a historical expression of its citizens' freedom could not but elicit hostility from the likes of Reinhard Höhn and Alfred Rosenberg. Indeed, as Dreier observed, "one could not neglect to appreciate that Hegel's philosophy of the spirit, even in the interpretation Binder gave to it, was hard to reconcile with the *Blut-und-Boden* [Blood and Soil] motto embraced in the new epoch" (R. Dreier 1991, 161; my translation). Indeed, Binder's philosophy of law is devoid of that biologistic naturalism distinctive to the Nazi doctrine, and in fact the state is also meant to serve precisely the purpose of "denaturalizing" the nation, which itself lies at the foundation of everything: "The state, according to its own concept, is the living form of the nation, and as such it fundamentally constitutes the nation's effective reality, and that means that the nation is the idea and the state its realization in process" (Binder 1935, 48; my translation). And so it came to be that other neo-Hegelians closer to the regime, like Schönfeld, actually took Binder to task for espousing a sort of "noble positivism,"[12] a charge Binder was unable to rebut.

Indeed, despite Binder's best efforts to embed the reality of the state and of Nazi law into the forms of his idealist philosophy, the unity of consciousness and reality (not contingent reality but the "essential" reality)—the unity of the general and the particular will—is traced by him to a universality that cannot easily be reconciled with the Nazi theory of law and of the state. Binder's philosophy of law is a "dialectic" philosophy, in the sense that it supersedes the antithesis between universality and particularity, between the people and the ruler, by reconciling the two into a higher unity where even the parts are maintained and preserved, in such a way that the individuals themselves ultimately find their place. It should not come as a surprise, in this regard, that Binder cannot do without the concept of the *Rechtsstaat*. As an essential reality, the authoritarian state can only be a *Rechtsstaat*, however much in a new sense. The state in a universalistic sense is the state community that maintains and

[12] Schönfeld 1938, 106. Schönfeld had already criticized Binder on a previous occasion in reviewing his *Grundlegung*: see Schönfeld 1935, where he accuses Binder of falling behind the times.

moves beyond its parts, whereas on the Nazi conception, the parts are simply analyzed as ultimately inexistent, and the same goes for the concept of the person, which Binder instead understands to be ineliminable. Writes Binder in his 1937 *System der Rechtsphilosophie*:

> Man is thus necessarily a person and is thus endowed with legal capacity, by which is meant that the legal system must, in accordance with the necessity proper to his concept, recognize him as a person, as an end in himself, and has having legal capacity; and the legal system would fall apart if it failed to do that. And to that extent, men are all equal, regardless of whether they belong to the Arian race. If an attempt were made to deny this undeniable consequence of the concept of law, that would lead to Bolshevism. (Binder 1937, 36–7; my translation)

Nor can it be denied that the Nazis understood their own ideology to stand in opposition to philosophy as such, which by contrast aims for the universal (cf. Hürstel 2010, 205).

None of this should be taken as a reason to downplay the fact that not only did Binder attempt (however much in vain) to make Hegelianism the official philosophy of the Nazi state, but even sought to play up the new regime's racial aspects and objected to the academic appointment of "Jewish" thinkers like Gerhart Husserl in Göttingen. On the other hand, it cannot be ignored that his idealist philosophy found no significant take-up among the leading exponents of the Nazi regime, and this, too, is a fact that cannot be pushed to the side. Even his 1935 *Grundlegung*—despite making the validity of law dependent on the positive law, and hence indirectly construing the idea of law as the form taken by the valid law currently in force, namely, Nazi law—was not welcomed as warmly as his 1925 *Philosophie des Rechts*. And the reason for this overall lukewarm reception is that Binder's conclusion about the form of law was a mere possibility, in that, even in the *Grundlegung*, he makes the positive law dependent not on the Führer's will, which is but one element of validity (even though the text makes no explicit reference to the political contingency of the moment), but on legality as such, which is always a synthesis between law and liberty. There is a concept of law that cannot be brushed aside or disfigured by any discretionary power, for otherwise legal norms and court rulings alike would have to part with their legality.

All told, Julius Binder is a philosopher worth reading and knowing even today, albeit in many respects critically, especially as concerns his last major work, his 1937 *System*: Perhaps realizing that his own idealist system in several ways stood in contradiction to the reality of Hitler's regime, he sought to overcome these antinomies in a final attempt to reconcile his own philosophy of law with the *völkisch* ideology of Nazism and with the idea that the foundation of law lies in the Führer's will (see Binder 1937, 312–20; cf. Binder 1934). But this, too, was a failed attempt, and it does not carry much theoretical weight, either, since at best it betokens a certain opportunism on Binder's part, who in any event cannot do without concepts and categories that continue to be

incompatible with the Nazi ideology. Suffice it to mention here the concept of a person, which an author like Höhn instead tried to unreservedly expel from legal conceptualization.

Binder would end his life in a state of relative intellectual and political isolation. His disciple Karl Larenz, along with another neo-Hegelian, Walther Schönfeld, emarginated him by reason of his erstwhile positivist and Kantian allegiances (to which Schönfeld ascribed what he alleged to be the erroneous interpretation Binder offered of the relation between Kant and Hegel: Schönfeld 1938),[13] and together they sought to lay the groundwork for a reconciliation between Hegel and Nazism, even though Hegel's spirit—geared toward reclaiming the process of liberty in history—would undoubtedly not survive their construction in any meaningful way, so much so that Larenz (1938b, 237ff.), accusing Binder of failing to appreciate the historicity of law and falling back on natural law, would attempt a *völkisch* theory of law that would consciously move even beyond Hegel.

Binder's reply was rather ineffectual and clumsy: He reprimanded his former pupils for criticizing his own Hegelianism from a standpoint closer to that of Schelling than to that of Hegel himself (see Hürstel 2010, 275).

5.4. Karl Larenz up to 1933

Karl Larenz (1903–1993) studied in Göttingen and formed a bond with Julius Binder, whose conception he inherited, while also fashioning himself into a critic of the neo-Hegelian rebirth. Larenz's dissertation thesis (Larenz 1927b) tackles the Hegelian theory of imputation and of objective imputation, against which he sets a *teleological* account of imputation: "In teleology lies the truth of causality; it is only as an end that a cause becomes what it is, or that an effect becomes its own effect and not an accidental one" (ibid., 44; my translation), Larenz claims drawing on a theory of the subject found to be at work in Hegel's philosophy of law, as well as on the principle of free will. Only by going through Hegel will it be possible to bring back to prominence the properly ethical and social character of law, beyond the formalisms that law has been reduced to by the neo-Kantian approach.

In 1927, Larenz published an article on the reality of law where that topic is treated by filtering the philosophy of culture through an understanding of culture as a unity of meaning and form, that is, as the manifestation of form

[13] "In truth," writes Schönfeld (1938, 106), "Julius Binder's idealism, as a conception that is not critical but dogmatic, appears to be more a positivism than an idealism. [...] As a 'positivism of conscience,' it is certainly a refined form of positivism, a sort of high-level positivism, so to speak, but precisely for this reason it reveals itself to be particularly dangerous, as it is not easy to recognize. [...] It is a positivism that has donned the cloak of idealism, a contradiction in terms that sooner or later must blow up and self-destruct" (my translation).

through history (Larenz 1927a, 204–10). In this sense, the reality of law can be understood only by proceeding from the historicity of law, a historicity that comes through in the idea of law: "All law is real, but all law is ideal, that is, it looks to the idea of law, in that law is real only insofar as it carries meaning, and it carries meaning only inasmuch as it reflects the community's will, which knows itself as a universal will" (ibid., 210; my translation).

In 1929, Larenz published a more extended essay on the problem of legal validity (Larenz 1967): What can the validity of law be made to rest on from an idealist perspective? Can that validity be grounded in the neo-Kantian distinction between *Sein* and *Sollen*? Clearly, in Larenz's view, any such separation is going to set up a false answer to the problem of validity (*Geltung*), for it is only by reconciling ideality with reality, or the normativity of law with its positivity, that a theory can be worked out capable of accounting for the phenomenon of legal validity in its full complexity. The *Sein* and the *Sollen* must be thought contemporaneously as moments dialectically connected in the consciousness of the self. Larenz believes that in this way he can also transcend the opposition between legal positivism and natural law: "Hegel," he writes, "is the philosopher who, in German idealism, demonstrated the positivity of law proceeding from the essence of the Idea, and who at the same time grounded positive law in the *idea* of law" (ibid., 26; my translation). In this sense, Larenz takes the validity of law to mean

> the existence over time of a norm whose bindingness [...] rests on that timeless foundation of validity which is the idea of law. [...] Natural law and legal positivism alike are thus transcended, since natural law asserts the timelessness of law and legal positivism its plain timefulness. (Ibid.; my translation)

The idea thus realizes itself in the historical world of human communities through a specific tripartition, that is, through the idea of law, through right law (*richtiges*), and through positive law:

> We thus have to draw a distinction among the idea of law as such, which can be determined only as the dialectical unity of all the "moments" that manifest themselves in the history of law; right law [*richtiges Recht*], that is, a representation of law corresponding over time to the Idea or to the ideal of law espoused by a given people in a given epoch; and positive law as the realization of the idea of law which at any given time is current. (Ibid., 32; my translation)

In this way we have a validity of law specific to, and immanent in, law as such, understood at once as an idea (the idea of law) and as that law which actually regulates a people's life. Larenz makes himself out to be more coherently Hegelian than his teacher, Binder:

> It is Hegel's theory of the "objective spirit" that makes it possible to consider law as an "autonomous" sphere of value, where law finds the foundation and criterion of its own validity in itself, that is, in its own Idea, such that its ethical character rests on its agreement, not with positive law and the moral convictions of individuals, but with its own Idea. (Ibid., 36–7; my translation)

In a Hegelian sense, then, it is "the present time" that determines the content of both philosophy and, clearly, of legal philosophy: "The famous saying 'The world's history is the world's tribunal' holds also for the philosophy of law" (ibid., 41; my translation).

So, on the one hand Larenz is a neo-Hegelian philosopher of law whose adherence to Nazism (as discussed in Section 9.4 in this tome) cannot be said to follow as a matter of necessity from his thought in its development until 1933, but on the other hand some of the premises can be espied in the essay on the theory of the community he wrote in 1932 and published the following year, as well as in the first edition of another essay published in the same year on the contemporary history of legal philosophy (Larenz 1931, 1933c, 1933b).

5.5. Walther Schönfeld: From Idealistic Personalism to Christian Theology of Law

Worthy of note among the jurists tied to the neo-Hegelian movement, many of whom would then adhere to Nazism, is Walther Schönfeld (1888–1958), a philosopher known only to a few today, but who nonetheless deserves to be studied not only as a matter of historical interest but also for some of the content and theses of his legal philosophy, which in truth is best described less as neo-Hegelian and more as neoidealist.

Indeed, as much as Schönfeld looks to Hegel, he is perhaps even more influenced by Schelling, but above all he draws on the entire German idealist movement starting from Kant, who instead of being rejected is actually drawn *into* the idealist revolution. So it is the *neo*-Kantian movement that Schönfeld takes exception to, from a philosophical as well as from a legal standpoint: As Schönfeld (1936, 5; my translation) sees it, Kant as interpreted by neo-Kantianism "is not the whole of Kant, and so is not the real Kant. Neo-Kantianism stands to neo-Kantian philosophy roughly as the Pandectist law of the 19th century stands to Roman law in its full breadth." The indictment against neo-Kantianism is that it ignores the complex dialectic internal to Kant's philosophy, where practical reason may be an end-result from an *external* point of view, but from an internal one it comes in at the beginning of Kant's philosophizing, and that precisely because Kant's philosophy is

> a philosophy of community, of man, and of freedom [...]: Therein lies the deep import of his theory, with the primacy it assigns to practical reason, and that is precisely what neo-Kantianism has failed to appreciate, having failed to gain a clear grasp of its governing dialectic. (Ibid., 7; my translation)

Schönfeld's legal philosophy is mainly devoted to the historical movement, and it accordingly regards Hegel as the apogee of idealism, but for that very reason it also understands that to be the point beyond which any further going can

only be downhill. And because Schönfeld's legal philosophy is in fact open to history, it takes the view that no definition of law can neglect either of the two moments, the dogmatic one and the historical one. For it is in history that the Spirit—the *Geist* of universal history—plays itself out and becomes manifest, and one cannot underestimate how significant it is in this regard that Schönfeld should seek to reconcile two thinkers who appear to have been at odds with each other, namely, Hegel, on the one hand, and on the other the founder of the historical school, Savigny (Schönfeld 1927b, 361).

In fact, despite Schönfeld's neo-Hegelian and idealist background, it is impossible for him to abandon Savigny, because concealed in Savigny's historical and historicist approach is a deep philosophical calling; the real, making possible a positivist approach, presupposes a prepositivist dimension, which does not mean a sort of natural law (a theory Schönfeld would nonetheless arrive at over the course of his speculative development) but is rather to be conceived as a *logos*, consisting in particular of legal reason, the kind that confers on positive law its specific quality as law. The positive law is such because it finds its place in history, and therein the is and the ought are never irreconcilably separate, as they are in Kelsen, because to remove the factual from the law means to remove the law as fact, which is precisely the law as the object of legal science (Schönfeld 1927a, 11). Although the is and the ought can be distinguished from each other from a *logical* point of view, the *historicity* of law implies that the history of law and the science of law cannot be separated in such a clear-cut manner. Not incidentally, as Schönfeld comments, Ehrlich's sociology is a history of law, and so a *science* of law, only to the extent that any science of law in its own turn must presuppose a philosophy.

In this way, in this connection between reason and history, idealism is reconciled, on the one hand, with some phenomenological approaches (Schönfeld mentions Reinach, G. Husserl, and Fritz Schreier) and, on the other hand, with von Gierke's "corporatist" conception. Indeed, Schönfeld anticipates the effort that in the 1930s some of the main proponents of Nazi law put forth to revive Gierke. This twofold reference to Hegel and Gierke permeates what is arguably Schönfeld's theoretically most significant work before his decision to adhere to Nazism, a work of 1927, *Die logische Struktur der Rechtsordnung* (The logical structure of the legal order: Schönfeld 1927a), analyzing the connection between the history of law and legal science. Schönfeld understands law as an inherently historical phenomenon, from which it follows that there can be no such thing as a unilaterally normativist and formalist legal science purporting to seize an abstract, ahistorical reason. Schönfeld appreciates that the formalist approach—premised on the primacy the modern sciences ascribe to function—appears to prevail over the historico-teleological approach; however, as he opines in a review of a book by Kelsen, "we believe this to be a Pyrrhic victory, and that the truth in the end lies with the temporarily vanquished enemy, for a legal philosophy that deliberately 'shuts out' the history of law

cannot and will not do justice to the nature of law or to its science" (Schönfeld 1928–1929, 620; my translation).

At the same time, however, historicity does not *ground* the scientificity of law, the latter of which presupposes a prepositive legal reason. Yet this reason is not something *apart from* positive law but actually lives *in* positive law itself. As Schönfeld explains it:

> Quite simply, even if there exists no natural law, there does exist a *reason* of law [...], and positivism wrongheadedly objects to this fact. There is an *a priori* of positive law, a system of conditions that any historical system of law must meet in order for it to be possible as real law [...]. Of course, this prepositive *a priori* of law does not in itself constitute law, for it is none other than the *possibility* of law. (Schönfeld 1927a, 37; my translation; italics added)

As Sylvie Hürstel points out in her brilliant reconstruction of legal neo-Hegelianism, "the logical structure of law, which couples the historical reality of law with its ideality, is understood by Schönfeld as having a teleological nature rather than a purely formal one, as Hans Kelsen would have it" (Hürstel 2010, 168; my translation). Teleologism is indeed what separates the two main currents of German legal philosophy since Heinrich Rickert's 1888 dissertation, "Zur Lehre von der Definition" (On the doctrine of definition): On the one hand is a rejection of the idea that law should be driven by a purpose, so as to assert the coherent (noncontradictory) nature of the legal system; on the other is the contrary idea of law as *imbued* with purpose, and so with the reasons and motives behind juridical decisions (rules and rulings), which reasons and motives are often political. Writes Schönfeld:

> Legal science, as a science of positive law, is an *ideological* science; or, stated otherwise, if we fear this term for its otherworldly overtones and want to express ourselves in more down-to-earth ways, it is a *teleological* science, since a purely logical consideration, one devoid of ideas or ends, winds up destroying positivity, which is what we should be trying to understand in the first place. (Schönfeld 1927a, 47; my translation; italics added)

On these premises Schönfeld openly invokes Julius Binder, embracing the need to set legal science on a philosophical foundation. And as much as he will later criticize this view, in the mid-1930s, he now positively affirms: "Legal science, understood as the unity of all the sciences of law, is a philosophical science, and the jurist who seeks this unity is a philosopher and not a historian. Legal philosophy is the science of all the sciences of law" (ibid., 84; my translation).

Schönfeld's criticism of legal positivism, then, is based precisely on the principle for which Schönfeld himself held good positive law as *law*, rather than positive law as the "positivity" of law. That amounts to reducing law to legislation, and so the science of law to a legislative science, that is, to a merely technical craft, which nonetheless winds up making absolute what is actually relative.

Schönfeld's legal philosophy is in effect an original philosophy of law of his own making: It cannot be reduced to neo-Hegelianism or to the *völkisch* philosophy that would take hold with the advent of Nazism, even though he would later count himself in as part of that movement. This is probably because Schönfeld's underlying conception is at once personalist and religious and cannot find any adequate expression in his philosophy of law and of the state.

The reference to Christianity is of course a reference to Protestant Christianity, and to Luther's in particular, which Schönfeld views as part of a line of development that includes Hegel, Bismarck, and Gierke—and also Adolf Hitler! And Christianity so understood is viewed by Schönfeld as closely bound up with Germanic thought, so much so that one can only wonder about the reasons that led him to embrace Nazism, a movement that fought not only Roman law but also, to a good extent, Christianity as such.

It should not come as a surprise, in view of the ambiguous and sometimes convolute premises of Schönfeld's thought, that he should ultimately reveal himself to be a proponent of natural law understood in a Christian evangelical light: we can see this in his 1943 article *Die Geschichte der Rechtswissenschaft im Spiegel der Metaphysik* (History of legal science in the light of metaphysics), as well as in the republished version of it, which came out 1951 under the title *Grundlegung der Rechtswissenschaft* (The foundation of legal science: Schönfeld 1951). And so, in effect, he closes his career as a theologian of law.

Chapter 6

LAW AND THE STATE IN THE CONSERVATIVE REVOLUTION

by Agostino Carrino

6.1. Law and the State in Oswald Spengler

Law is the subject to which Oswald Spengler (1880–1936) devotes some fifty pages in his *Untergang des Abendlandes* (The decline of the West: Spengler 1922–1923), and he also devotes to it some theoretical considerations in the second volume of that same work. However, it is not from here that I wish to start in offering the brief remarks that follow but from the fourth chapter of Spengler's 1924 *Neubau des Deutschen Reiches* (Reconstruction of the German Reich: Spengler 1924), where Spengler writes that "Roman law has corrupted us" (ibid., 241; my translation). This is not just an assertion of fact, for it gives us to understand that a different development of German culture might have been possible in which this culture was not saturated with Roman law, and hence was not "corrupted" by it, in virtue of the historical phenomenon of reception. Why is it that Roman law (or rather what came to be called Roman law from the time Irnerius rediscovered the Justinianian Pandects) exerts this corrupting force (and so carries a negative connotation)? The reason for it, Spengler explains, is that Roman law "dangerously stokes up the average German's tendency to stray from the course, to imbibe anything existing as a matter of fact" (ibid., 241–2; my translation). What this actually means is not entirely clear, even if a little later we do get something of a clarification: The reception of Roman law—the law of the Pandects—has corrupted the properly German ideal of liberty; this reception, in other words, has fouled up the original German liberty with the idea of obligation, the idea of the synallagmatic relation between a claim and a performance. And as Spengler specifies, this idea of obligation came about as the result of an interpretation tailored to the needs of the emperors of Byzantium: It was therefore moulded by the shaping hand of an oriental spirit, a spirit that knows no spiritual freedom but only knows obedience and servitude. Law has in this way taken the path of its rationalistic formalization, of its abstract conceptualization, but this has given rise to a contrast between "the book" (Justinianian Roman law) and "life," in an effort to adapt the latter (life) to the former (the book). As has been observed, "the whole of the modern development of law would seem to bear out this long struggle between the book and life, between the authority of the concept and reality, between theory and practice, between form and substance" (Farina D'Anfiano 1931, 311; my translation). Roman law was understood by Spengler as the unique and untranslatable product of the

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politico-economic needs of the time; law was something concrete, having no use in the modern world; the idea of copyright, for example, is a specifically modern, i.e., nonconcrete, construct. In relation to this process, the modern jurists—"infected" by Roman law and by the geometrizing formulas of natural law—instead of favouring the concrete, the needs of concrete life, have sought to adapt life to the categories of the book. Romanists are, in Spengler's view, pedantic conservatives insensitive to the needs of concrete historical processes.

This push to reassert the primacy of Germanic law over Roman law (an issue that certainly became a focus of attention among German historians of law at the time) was increasingly taking on political overtones: The charge laid against Roman law, however much this law may have been misconstrued and even doctored, was aimed at advancing an ostensibly ancient Germanic law politically founded on specific values, those of subjectivity, entailing a corresponding set of choices. What was being criticized, in essence, was the concept of *Rechtsstaat*, such as it had been developed in European thought from the late 18th century onward: One should think here of the monopoly on the use of force, a use that on the criminal wrongdoer is reserved to the state and its organs (organized under the principle of the division of labour). This idea is criticized by Spengler, arguing that the criminal offender, "when in the act of committing a crime and fleeing [...], has no rights" (Spengler 1924, 246; my translation). The *Rechtsstaat*, in other words, "denies the free man's claim to defend himself, his own dignity, his own security and property and those of his people and homeland using all the means available to him" (ibid., 245–6; my translation). In truth, pressing forward in full force behind this reference that Spengler makes to Germanic freedom are the preoccupations of a petit bourgeois spirit, perhaps shaken by the end of the empire and the collapse of the Bavarian Soviet Republic: Those "who forcibly break and enter into other people's property to raid the place or commit theft are outlaws" (ibid., 246; my translation),[1] that is, they become an object of any possible action by the person wronged. Even in his subsequent book, the 1933 *Jahre der Entscheidung* (Years of decision: Spengler 1933a), Spengler does not soften the hard line he takes with deviants, a group in which he unqualifiedly includes "failed academics, adventurers and speculators, criminals and prostitutes, bums, the mentally deranged" (Spengler 1933a, 90; my translation)[2]—all of them set in contrast to those who bear their poverty in silence.

When Spengler remarks that "a universally valid law can be found only in the minds of intellectuals and dreamers far removed from reality" (ibid.; my

[1] Not incidentally, Spengler's "political existentialism" has also been characterized as the "literary outlet for his fear of actual reality" (Lübbe 1993, 143; my translation).

[2] A certain bourgeois mentality comes through as well in Spengler's response to Jünger's gesture of sending him a copy of *Der Arbeiter* with a nice dedication on it: see Lübbe 1993, 145. But on Spengler's reaction to Jünger's work, cf. Koktanek 1968, 429ff.

translation), he contradicts the content of his own properly Germanic law, which instead very much resembles the instinct for vengeance that everywhere and everywhen takes hold of property owners upon realizing that their property has been taken away.

It was, however, typical of the conservative German bourgeoisie of the time to compose hymns to the "justice" of victory, or at least, as was the case with Erich Kaufmann, despite his Jewish background, it would not have been unusual to belaud "victorious war" (E. Kaufmann 1964), what in Spengler is the "success through which the law of the strongest becomes law" (Spengler 1922–1923, vol. 2, 450; my translation). We find in Spengler an opposition—no less stark than it is unsupported by any argument—between truth and reality: There is a law based on speculation geared toward the truth, and there is a law that is simply real, effective; the former corresponds to what is known as domestic or state-enacted law, the latter to what would instead be recognized as international law, even though Spengler only speaks of "external systems of law." These outside systems, thought Spengler, "do not in any way make a claim to justice. They just need to be effective. What speaks to them is *life*, embodied in which is not any causal or moral logic but a much more coherent organic logic" (ibid., 451; my translation). But if this is the essence of international law, it is only for a love of symmetry that Spengler also speaks of so-called municipal law. Law, Spengler writes, "is an expression of power" (ibid., 452; my translation), regardless of whether this power is internal (national) or external (international).

What is striking here is that Spengler's thesis can be construed as quite close to Marxist theory of law, so much so that one can make out in his thought a sort of relation of dependence of the superstructures on the structure of life and culture, or rather of life understood as structure. And yet, precisely at the point where he appears to be closest to this theory, we can also find the deepest contrast. Indeed, as much as the law is always the law of the most powerful class (such as the Roman patricians) or the most powerful state, the "power" held by this class or state is never understood in economic terms but is rather invested with a meaning of "sacredness." The law being conjured up here is an everlasting law "rooted in time immemorial, for it springs from the experiences of the blood, and yet it reveals itself to be efficient" (ibid., 449; my translation), that is, "sacred."

The law is for Spengler form, but in a sense altogether different from the way in which the jurists take it: Law is form understood as the manifestation of a specific, historically determined substance, that is, as a sign, as an abstract token of the worldview espoused by those who have created it. It is static, for example, in ancient Rome, but dynamic in Faustian modernity. Every culture thus has a law proper to it, and in this sense there is no reason why the West, having moved into the phase of civilization, should replace the law corresponding to the Faustian phase of its movement with a law that no longer

belongs to it. Modern law—geometric, rationalist, formalist—is precisely the law of what we call modernity, so it would prove futile, and even contradictory, to hold up against it the idea of an alternative law, a law that for the reasons explained would exist simply as the figment of the imaginings and egoisms of a highly conditioned class.

Therein lies, in truth, the basic contradiction of the whole of reactionary thought, which mixes into its analytical lucidity a programmatic strain preventing it from really accepting the implications of its diagnoses, even when these are correct. For Spengler, as for other great reactionary thinkers like Joseph de Maistre (see also Section 3.3 in this tome, on Eugen Ehrlich), it is not the written law that matters:

> What is written in a constitution is always inessential. Everything turns on what the general instinct at any time does with that written text. The English parliament governs on the basis of unwritten laws, sourced in an ancient practice and often very little democratic, and precisely for that reason with great success. (Spengler 1920, 18; my translation)[3]

Spengler can be situated here in a tradition critical of liberal constitutionalism, a tradition that goes back to Edmund Burke, Maistre, and Luis de Bonald, who share the view that the true, "authentic" constitution is given by a people's existence, not by what is statutorily set down in writing, which is no more than the contingent product of an arbitrary will. From this perspective, Spengler's overall conception, like those of many other champions of the German "conservative revolution," can be seen to owe a debt to a work that truly broke new ground in social philosophy, namely, Ferdinand Tönnies's 1887 *Gemeinschaft und Gesellschaft* (Tönnies 1887, translated into English as *Community and Civil Society*: Tönnies 2001). The very distinction between culture and civilization is in several respects a historico-philosophical sublimation of the sociological categories analyzed by Tönnies.

6.2. Law and the State in Othmar Spann's Universalist Philosophy

Othmar Spann (1878–1950) taught political economy and social theory in Brünn and then, from 1919 onward, in Vienna. Despite this focus, there can be made out in his work a veritable philosophy of law and the state, a philosophy cast in a conservative and "organicist" mould. In Vienna, in particular, he developed a theory of society based on a conception structured around logico-philosophical categories, though a mystical strain does also run through his vision (his writings include a book on Meister Eckhart).

[3] In this regard, Koellreutter saw a similarity between Spengler and Weber, in that they both rejected that "cult of the constitution" with which the German theory of the state became so infatuated after the revolution (Koellreutter 1925, 482).

Spann's philosophy,[4] which he himself defined as "universalism," or "theory of wholeness (*Ganzheitslehre*)" (Spann 1928b) declaredly presents itself as an ontologically oriented effort to renew idealist philosophy, albeit through a reformulation of it couched in an original vocabulary that coeval philosophers and sociologists could not always understand. In any event, he does array himself against what he called pseudo-universalisms, especially Marxist collectivism and 19th-century materialism and naturalism. In so doing, however, he resists the pull of any methodological tendency that, like neo-Kantianism, appears to him to indulge too much in value relativism, with the result of according some sort of primacy to individuality, thus neglecting to recognize the originality and import of "aggregates" and "totalities," of society conceived as an organism and a whole—whence Spann's theory of "wholeness"—in the sense of a logico-conceptual and spiritual dimension where the whole is manifested in the parts and the parts are components of the whole, where the individual and the community are engaged in a dialectic meant not to crush the individual but to enable both to thrive.

Spann is not interested in a causal investigation of society and its structures but in the *telos* or ends a society pursues by virtue of its existence. It can be appreciated, in light of these premises,[5] why he should have taken exception to the materialist conception of history as one of his main targets. What it means to understand society and its structures, he thought, is to move beyond causal explanations, which break up the social whole, and which in this way lead to individualism. In contraposition to that approach he offered a method aimed at seizing the essence of things, an essence he understood to lie exclusively in their organicity.

What comes first, for Spann, is the spirit. What he means by the spirit, however, is not the manifestation of culture as a changing historical reality; rather, the spirit is itself reality and is universally valid. Then, too, this reality is not devoid of a mystical dimension transcending any sociology of religion or the church. This mystico-spiritual propensity leads him to favour small communities and to unqualifiedly deny the premises of any totalitarianism. For this reason it would be wrong to characterize Spann as a "reactionary" thinker, much less as sympathetic to the totalitarian movements of his day: He certainly was conservative, but he worked within an independent theoretical frame.

Spann recognizes society as an evident historical datum. However, society is made up not of individuals, as the liberal conception would have it, but of

[4] Spann's main works include Spann 1914, 1921, 1924, 1928a, 1932, 1934, 1937, and 1947.

[5] It has rightly been observed that Spann works out an *a priori* concept of wholeness independent of empirical analysis, and indeed simply superimposed on such an analysis. See the critical reconstruction in Baron Wrangel 1929, 3–4. Indeed, the science of society is not understood by Spann as a pure experiential science, for it does not proceed inductively, this despite the fact that references to experience and induction do come up in his work from time to time.

many small communities, and these are not separate from one another but are organically linked up through a system of evaluations pertaining to the function proper to law and the state. Despite the difference among communities, and even the potential for conflict among them, the state remains a corporative organization, connected to all the others but superior to them in virtue of its proper end, and this is so even in a liberal society, where "it is necessary to preserve a minimum degree of organization in determining evaluations, government approval, benefits, and subjection" (Spann 1931, 215–8; my translation). Indeed, this "classist" view of society does not prevent Spann from envisioning a decisive role for the state; in fact, it is social pluralism itself—in a society made up of corporative bodies, communities, and social formations—that compels the state to take on a role where it acts to integrate and unify the diversity existing within society. Spann's state is not a machine—in the sense of the metaphor through which the modern state is conceived, as an entity separate from society and its conflicts—but rather exists entirely *within* pluralist society: It represents, as it were, a phase or "state" (*Stand*) of that society and is made up of a political elite or an aristocracy of the spirit. This is no doubt a *premodern* vision of the state, but it does reckon with the reality of social conflict, a reality that Spann is very much aware of as a sociologist.

Spann's state is of course a "decentralized" state. One can appreciate, then, how difficult it is to square Spann's ideas with the centralist visions propounded by the Nazi and Fascist regimes. Spann's conception of law clearly takes an anti-normativist and anti-formalist angle. The law is such, for Spann, only if morally grounded, and indeed only if it coincides in good measure with morality. Indeed, an amoral law can only make a subjective claim, that of atomized individuals detached from the organic and vital community of the state. As Spann remarks,

> when law is considered from the universalist standpoint, it is at one with ethicity: Only that which is ethically right can be law. This is what sound reason also wants when it cannot bring itself to embrace the "heteronomous" law of the doctrine of singularity. (Spann 1931, 49; my translation)[6]

Spann's universalism thus stands in stark contrast to the liberal conception and to legal positivism (ibid., 19). Law is not a heteronomous entity, one that (as early as with Kant) is found to be in contraposition to autonomous morality; rather, law and morals are blended into a single thing in the universalistic vision of society, where there are no autonomous arenas to be found, since every area of social life is functional to the welfare of the whole, the *Ganzheit*, which alone constitutes the primary reality as objective spirit (in Hegel's sense). The error of neo-Kantian positivism, understood by Spann as embodied in the

[6] The German original: "Universalistisch gesehen ist Recht außerdem eins mit Sittlichkeit; nur was sittlich richtig ist, kann Recht sein. So verlangt es auch die gesunde Vernunft, während sie das 'heteronome' Recht des Einzelheitslehre niemals annehmen kann."

work of Stammler and Kelsen, lies in its absolutizing a partial datum, making out of it a sort of totality that absorbs the rest, just as in Kelsen the law can be seen to absorb the state, and the state is accordingly collapsed into the legal system, shedding all dignity and autonomy. All the spheres of social life beckon to one another and in some way depend on the entireness, which makes them into manifestation of the entireness itself. Writes Spann:

> The methodological claim at hand is perhaps nowhere better illustrated than in the example of law. […] We can understand Stammler's error and that of the like-minded Kelsen. Stammler only wants to distinguish "the activity of regulating" (the law) from the "content" of that which is regulated (the economy), both understood as partial wholes in the global whole of society. Kelsen does not go that far, but he does seek to reduce the state to the law, and in this way he essentially winds up doing the same thing, that is, making law the only feature of the social world. Kelsen indirectly and Stammler expressly and directly refuse to acknowledge the existence of many partial wholes within society, and they instead pretend to reduce the whole of law to its matter. They appear to succeed in this effort precisely because the partial whole can in effect be understood in relation to law only through its own legal nature. They regard the whole of society from a single point of view, that of a single partial system. But, by the same token, everything in economics appears in an economic light (witness Marx's historical materialism), everything in science in a logical light, and so on. [...] The task of a theory of society, however, is to observe society not from the viewpoint of a single partial whole, but as a global whole made up of all the partial wholes. (Spann 1921, 486; my translation)

It is the main concern of Spann's theory of society to overcome the absolutist tendencies of partial social systems, all the while recognizing the unity of these systems, and specifically that of the law as a unity of norms (*Satzungen*) and of the state as a unity of legal institutions and principles (*Anstalten*) (Heinrich 1979, 354ff.). This means that we have to overcome the classic dualisms, particularly that between *Sein* and *Sollen* (is and ought) at the basis of neo-Kantian philosophy of law (see Spann 1923, 555ff.). Indeed, Spann analyzes the is as that which ought to be (*gesolltes Sein*); and the ought, for its part, *fulfils* the is and thus makes up its very essence: "The whole of the real can be understood only as the realization of an ought. The essence of being lies in its realizing an ought" (ibid., 560; my translation). For this reason knowledge is understood by Spann as an evaluating knowledge, never as neutral (*wertfrei*) knowledge, from which it follows that what is deduced from the logical categories cannot be exempt from ethico-legal postulates of one sort or another, but as Sander comments in a critical essay, this leads Spann to confuse the *method* of inquiry with its *object* (Sander 1924).

Spann is thus led, on this approach, to embrace a political philosophy that recognizes the autonomy not only of the political sphere but also of the state as such, this to the extent that the state is recognized as the embodiment of a culture, rather than as a "minimal" night-watchman state. However, Spann's state is a decentralized entity based on the subsidiarity principle (Heinrich 1979; 359–60): It is a state that recognizes differences and indeed rejects the concept of equality (a concept endorsed only to the extent that it entails a respect

for the equal dignity of all persons). The state is an organic entity that does not depend on the individuals' will or on any meeting of the minds. It essentially consists of a spiritual entity entailing the primacy of quality over quantity, and hence a rejection of democracy in whatever form, including the form for which Hans Kelsen provided a justification. But now we are entering into the question of Spann's ideological choices, and that falls outside the scope of the present discussion. It should only be underscored here that law and the state are partial wholes making up the overall whole we call "society," and that they partake of the inner nature of this whole despite their distinctness. So, instead of having the law as *Sollen* and the state as *Sein*, we have two phenomena that both transcend the is-ought dualism posited by Stammler (Spann 1902) and Kelsen, with an ought incapable of realizing itself and as a reality that allegedly has no traffic with the *Sollen* (Spann 1923, 556–7).

As much as Spann may criticize Kelsen's neo-Kantianism and methodological dualism, his universalism can be analogized in several respects to Kelsen's legal, moral, and political universalism, insofar as the concept of unity prevails over that of division, and the concept of coherence over that of antinomy: Just as Kelsen's legal system can be an object of knowledge only to the extent that it is unitarily and coherently constituted by the normative scientific method, so Spann's universalism is founded on the coherence of organic wholes. The system, and specifically the legal system, precedes its parts. It is no accident that a disciple of Kelsen, Alfred Verdross, should have attempted to pull Kelsen's theses closer to those of Spann and to reconcile the two (Verdross 1924–1925, 413–31), offering a positive evaluation of Spann in light of the concept of objective value they both subscribe to: In Verdross "the organic theory of Spann is employed to support the mutual interaction of State and international community as equal expressions of a unified legal world" (Carthy 1995, 87).

6.3. Nihilism, Power, and Bourgeois Law in Ernst Jünger

Among the keywords in Ernst Jünger's (1895–1998) *Der Arbeiter: Herrschaft und Gestalt* (The worker: Domination and form, Jünger 1982), published in 1932, is *scheinbar*, "apparent."[7] Apparent is in the first place the whole domination of the bourgeoisie,[8] by which is meant the 19th-century liberal legisla-

[7] In the growing literature on Jünger, one ought to at least see Graf Von Krockow 1958 and Barnouw 1988, 194ff. Even more essential are two older works: H.-P. Schwarz 1962 and Bohrer 1978.

[8] As Delio Cantimori has observed, Jünger "does not use the term *bourgeoisie* or the term *bourgeois*. He instead uses *Bürger*, a term set in contrast to *Arbeiter* (worker), to designate now the bourgeois in the military, now the citizen, now the *citoyen* among jurists and politicians, now the bourgeois depicted in socialist propaganda. So *Bürger* does not have any clearly defined meaning in his work, but rather packs all those meanings into one: This engenders a certain confusion in the inductions he makes, but it does not prevent him from achieving the coherence of deductive logic in the consequences he extracts." It is Jünger's disdain "for the 'civilian'—such as

tive state that sought its legitimacy in the social contract as a sphere of defensive security—an illusory (apparent) security, because structurally incapable of seeing and seeking danger, the basic element which always *is*, and which does not just pretend to be part of any possible order "but is also the matrix of that higher security from which the bourgeois will always be excluded" (Jünger 1982, 51; my translation). Negotiation and compromise, which characterized the Weimar democracy itself, are what the bourgeois tends toward by nature. The bourgeois's central concern is with defence. As Jünger writes, this explains "why in bourgeois politics, lawyers as a class [*Advokatenstand*] have played a quite peculiar role from the outset" (ibid., 48; my translation). At the same time, however, the apparent dominance of the liberal state reveals the deep, concealed essence of abstract rationalism, or formalism: "The ideal in the space governed by liberal principles is that of outsized power, exercised not conspicuously but in a veiled manner, counterbalanced by a veiled slavery" (ibid.). Outsized power and slavery, piracy and free trade based on liberal concepts (Jünger 1980d, 464), are two sides of the same coin, namely, appearance, meaning the absence of form, of "metaphysics," or, stated otherwise, the hovering of the world "in a strange phase where there is no *longer* any dominance and not *yet* any dominance" (Jünger 1982, 190; my translation), where the individual has lost the ability to manage the state.

But appearance, for Jünger, is always working away in the background, sucking life, nature, and spirit from the world of form. The age of the apparent dominance of the liberal legislative state subtracts meaning and significance from things, life, and the world. It subtracts being from power and power from being, that is, it does away with the primacy of form. What survives is an abstract order where all bonds of responsibility are transformed into "contractual relationships with the option to rescind the contract" (ibid., 23; my translation), and the transformation of these relationships distinctive to the *Rechtsstaat* brings on the advent of nihilism. Appearance prospers in purely social, contractual relationships, the repudiation of what the state is in essence, an essence originarily extraneous to those spaces which are purely legal (in a formalistic sense) and moral (ibid., 267).

Not incidentally, the liberal space of apparent dominion, as Jünger would write in his 1950 *Über die Linie* (Beyond the line), "becomes a nihilistic object" (Jünger 1980c, 248; my translation), and the legal regulation of violence in which consists its function reveals the absence of limits on the use of violence itself.[9] The state that has turned apparent brings about a total absence

it has been handed down by tradition, as well as his disdain for its intellectual and moral culture and for life according to rational norms—that grounds all the other motifs in his impassioned plea" (Cantimori 1991, 220; my translation).

[9] "In the military clashes with the East, the rules that govern on the Western battlefields have no place. Their codification in the Hague Conventions [of 1899 and 1907] already bespeaks a

in the meaning of things: This is precisely the kind of absence that goes by the name of nihilism, where nothing is left for the individual to do "but choose among different modes of injustice" (Jünger 1980c, 256; my translation): As Jünger writes in *Der Gordische Knoten* (The Gordian knot: Jünger 1980d), "where the sword of Themis rusts, the axes glisten with sparkling lustre" (ibid., 419; my translation). Nihilism "can actually harmonize with ordinative worlds of vast proportions" (Jünger 1980c, 249, my translation), and in fact it must presuppose a sort of prearranged legal order, a unique and abstractly immutable system of law, as a condition lacking which it could not be nourished and grow. But we know, Jünger writes in reply, that "there is no such thing as an immutable system of law: There only exist systems of law which are created and maintained and which perish. [...] Because life is multifarious, it is necessary for law to also be multifarious, to the effect that what is good for one could not in any way be suitable for the other" (Jünger 1927, 4; my translation). An abstract, formal, apparent order devoid of an organic "landscape" of its own—an order that is just "spiritual" (intellectualistic, rationalistic, economistic)—"is not just fit for nihilism but also belongs to its style." It is the very aim of nihilism" (Jünger 1980c, 249),[10] and so it comes to be that "in concentration camps, a murderer can look to a more favourable treatment than that reserved for the political prisoner" (Jünger 1980d, 419; my translation).

Certainly, in the 1950 *Über die Linie*, Jünger's positions are in many respects different from those he previously advanced in the period immediately after World War I, with the idea of a "conservative revolution," as well as from those set out in his 1930 *Die totale Mobilmachung* (The total mobilization: Jünger 1980a) and his 1932 *Der Arbeiter*. Once again, it was the war that marked the watershed. But the deeper themes remain in place, this through the personal equation in Jünger, who keeps thinking about the same problem, that of the opposition between appearance and reality. Even after we move past the vanishing point, the domination of appearance, of arbitrary will,[11] will still be found to remain standing—and, what is more, also unfulfilled will be the promise that the nihilism proper to the mythicized Worker can be overcome so as to found a "new dominance" in a new metapolitical community. The state, the Leviathan, will continue to show itself to be invincible, to the point where "it could gobble down in a single bite what residue continues to be extraneous to the secularization processes, were it not that a certain mistrust prevents it from doing so" (Jünger 1979, my transla-

certain decadence. Indeed, the knightly warriors had no need for them, because these warriors were well aware of the limits of violence" (Jünger 1980d, 450; my translation).

[10] Something along the lines of this *Stimmung* (sentiment) in the German conservative milieus of the Weimar Republic can be found in E. Kaufmann 1921.

[11] The theme of the arbitrary will as opposed to the organic will—a contrast analogous to that between society and the community—is developed by Ferdinand Tönnies in his 1887 *Gemeinschaft und Gesellschaft* (Community and society: Tönnies 1887).

tion). In spite of that, or maybe precisely *because of* that, its invincibility still is and always will be an illusion, and yet in this very illusoriness and appearance "lies its strength. The death promised by [the Leviathan] is illusory, and hence even more terrible than death on the battlefield" (Jünger 1980c, 270; my translation). There emerges here a relevant difference between Jünger and Schmitt. For Schmitt, who in this instance is evidently writing under the influence of Hegel,[12] "in Germany the spirit has once again outdone the Leviathan" (Schmitt 1950, 16–7; my translation); Jünger, by contrast, believes that the invincibility of the Leviathan lies precisely in its "appearance," in its lightness and illusoriness. Here Jünger is more insightful than Schmitt, seeing the Leviathan in the unwritten legal system, and seeing this as the normal state where the nihilist acts, and where "the only thing left for the individual to do is choose between different modes of injustice" (Jünger 1980c, 256; my translation).

There are indeed two ideas of justice, one of them abstract and formal, or functional, and the other concrete, which is more than real, in the sense that it has always been embedded in the range of possibilities, sustained by the eternal effort of the being, whose action is guided by an ancient ethics. Jünger's Worker is a character representing the will to power in the age of the planetary domination of technique: It is the "cosmic clockwork," and as such it symbolizes the idea of "concrete" justice found in the "natural" order of things, a justice rooted in the task assigned to it, manifesting itself as power in the effort to lay bare meaning (Jünger 1982, 83).

This task is to uncover the *nontechnical* essence of technique in the very process of subjugation to technique through the heroic act of accepting pain in the world. This is the task that puts the Worker on the line, that is, on the vanishing point of completion and announcement: the completion of nihilism and the announcement of its supersession. This completion and this announcement manifest themselves in the Worker's inner capacity for *ascribing and generating meaning*. Like Nietzsche's *Übermensch*, Jünger's Worker belongs with the essences of the will to power; as Heidegger has pointed out, however, this drive signals a lacking, a shortcoming, and hence a will. In the provisionalness of the total mobilization of planetary energies—the total mobilization in which lies the distinguishing feature and import of modern progress—"nothing has any lastingness except the diagram of power" (ibid.); the will to completion, however, is unaware of the apparent state and of calculative liberalism. The overall sense of Jünger's enterprise, then, apart from the contingent interpretations he himself put forward, is to be found in a (metapolitical) conception of politics intended not to reject but to supersede the state's role in that sphere:

[12] An aspect that in those years was certainly common to Jünger and Schmitt is their interest in Georges Sorel (1847–1922), whose importance in Jünger's work was first underscored by Cantimori (1991, 210, 217).

"Those wishing to pronounce themselves on supreme things must stay outside the state" (Jünger 1959, 253; my translation). Jünger's Worker, then, appears as a metapolitical figure, touching the intimate and arbitrary aspects, purely subjective, typical of the bourgeois world, of the bourgeois as an apparent figure, as a mere "individual."

6.4. Rudolf Smend and the Constitution as "Integration"

Rudolf Smend (1882–1975) played a significant role in conservative thought in the context of the Weimar Republic, specifically on account of a book on public law he wrote in 1928, namely, *Verfassung und Verfassungsrecht* (The constitution and constitutional law: Smend 1968).

As was the case with conservative thought across the board at the time, so also for Smend individuals have any meaning only insofar as they are members of a community, not in the sense that the latter will prevail on the individual but in the sense that the individual gains self-consciousness only as a social being, and hence as an individual situated in a cultural community. Smend's most important philosophical reference point in this regard was Theodor Litt (1880–1962), the author of a book titled *Individuum und Gemeinschaft* (The individual and the community: Litt 1924).

Here it won't be possible to lay out in full the arguments Smend deploys on the state and on the central concept of his constitutionalist thought, namely, that of integration. But it will be mentioned that his politico-legal conception owes a significant debt to the experience of the Italian Fascist state, taken up as a model in conceiving the state as a dynamic entity. The state as integration is indeed understood as a politico-intellectual process in which the single individuals participate as members of a national community so as to make the state itself into an experience of collective life.

The state, as Smend conceives of it, is not given once and for all but is every day built and rebuilt, thus finding its own legitimacy in the mutual recognition between the state itself and the community. This integrative activity is both personal and functional, in the sense that the organs of the state contribute in different but necessary ways to fashioning the state into a spiritually and politically unified—and hence "integrated"—entity.

One can easily appreciate how this conception of Smend's stands sharply in contrast to Kelsen's, on which the state is equated with the norms of the legal order, the state being conceived as no more than the formula expressing the legal order's logical coherence. Whereas Kelsen understands coherence as belonging exclusively to the world of norms (see Kelsen 1930)—made logically "homogeneous" with one another in virtue of the constitutive activity of legal science, this in contrast to the sociopolitical world, overtaken by conflict and by the plurality of classes, parties, and the like—Smend takes the view that homogeneity can and must belong precisely to the people, whose representative

organs, whether they are rulers or a parliament, must serve a further integrative function on the basis of this social and spiritual homogeneity.

In Smend and Schmitt alike, democracy and parliamentarism each go their separate ways: Parliamentarism has seen its demise, and parliaments can play any role only if they can contribute to an integrative process by representing the people as a unitary and somehow homogeneous entity. The state and its people are accordingly conceived by Smend as coextensive with a territory with its distinctive landscapes, history, and traditions. Integration is therefore a complex process that cannot be reduced to formal legality but must have a legitimacy of its own stemming solely from integration in its every form: personal, functional/formal, and material. Once again Smend's conception can be seen to be quite sympathetic to the experience of Italian Fascism in the 1920s, where integration appears to him to respond to the sociological reality of society and the state as modern formations, for in this setting it would certainly no longer be possible to envision a traditional type of community, blotted out by the advent of industrialism and capitalism. The modern age is an age of masses, and so neither liberal parliamentarism nor any reactionary mythology can meet the challenges posed by the radical socioeconomic transformations set in motion by World War I.

When viewed in this light, Smend falls comfortably under the rubric of the conservative revolution. The state is not conceived by him as something given, a bureaucratically organized structure, but as an ongoing construction. And, by the same token, the "constitution"—understood as an "integrative order"—is itself a continuing process, one that eludes any formalism and resists any attempt to exalt the "ought" without any ontological foundation on which to base such an endeavour.

Chapter 7

MARXISM IN THE PHILOSOPHY OF LAW

by Agostino Carrino

7.1. Anton Menger and "Ex Cathedra Socialism"

Anton Menger (1841–1906) will be remembered here for his *Neue Staatslehre* (New theory of the state: Menger 1903). He can rightfully be considered the father of legal socialism, perhaps the first thinker to have put forward a "democratic theory of law" (Reich 1972, 93), a theory informed by a specifically reformist and hence nonrevolutionary intent, for it is concerned to preserve the institutions of the *Rechtsstaat*, while positing the need for the working class to take part in those institutions, however much for the purpose of transforming economic reality in keeping with a social democratic model.

Menger's legal socialism differs from Marxist legal socialism by reason of the way it frames the distinction between structure and superstructure, in that he stresses the need not to reduce ideological forms, and specifically the law, to what is understood to be the economic structure (though, in truth, something along these lines can be said to hold as well for all Marxist and neo-Marxist jurists). Law is to be viewed primarily in connection not with the relations of production but with force, so much so that through force the law can even modify economic relations; to be sure, this transformation can work in favour of the ruling classes, but it can also work out to the benefit of the underclasses, should these seize hold of the means of lawmaking. As N. Reich has observed,

> an important role is played [in Menger] by ideas of social justice, by the reformulation of basic social rights, and by the need to prevent exploitation and eliminate unearned windfall income. In contrast to Marx, he subscribes to the view that the present flaws of a concrete legal order can be eliminated. (Reich 1972, 93; my translation)

Menger is thus essentially concerned with private law, in which regard he underscores the primacy of public law, understood by him as the primacy of the collectivity over the abstract individual *qua* self-interested subject placed at the centre of social relations. In putting forward his "legal socialism," Menger seeks to point out a viable political avenue for the workers' movement, fashioned into an active subject presupposed by a new science of law, a legal science understood in a "social" sense, that is, as disclosing the ideological and class presuppositions of the categories of bourgeois law (whose "functional transformation" Renner will subsequently bring into relief), a law that can be changed through a specific politics of law.

Consequently, if the law rests on force, the state, on Menger's analysis, must be an instrument of power, and one would be hard put to it to imagine (on

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these premises) how the state might be extinguished, even in a socialist society. Indeed, if anything, the state in such a society will have to *augment* its powers, inasmuch as "there will be a need for direction not only in relation to the process of social production but also for the purpose of keeping human beings within the legal order" (Menger 1930, 189; my translation), the latter conceived as an order of power aimed at transforming the nature of property relationships (understood in the classic sense) from individualistic to social.

Despite this role ascribed to force, Menger's theory of the state was regarded by his contemporaries as essentially utopian, since Menger's emphasis on rationalistic centralization, with its Benthamite overtones, cast the socialist as a threat to concrete individual liberties. In fact, as Menger saw it, the tool by which to achieve socialism was distribution, which cannot be effected without recourse to the law. In this sense, it can be appreciated that Menger is a "gradualist," and "evolutionist," and certainly not a revolutionary. And in fact his legal socialism drew criticism from much of the Marxist intelligentsia, especially from Engels and Kautsky—with an 1887 review of Menger's *Das Recht auf den vollen Arbeitsertrag in geschichtlicher Darstellung* (The right to the total labor product in a historical perspective: Menger 1886), Engels and Kautsky 1887—and subsequently from Rosa Luxemburg, among others.

7.2. Austro-Marxism

Marxist legal philosophy in the early 20th century played no more than a marginal role in thrashing out the central issues of the politico-ideological debate: class struggle, the relation between structure and superstructure, Bernstein's revisionism, parliamentarianism, the primacy of equality, the extinction of the state, religion, and nationality. Even so, some of the leading Marxist philosophers of the time saw fit to devote themselves to the problem of law and its functions, both within the legal system in force (and hence the "bourgeois" system) and in regard to a future socialist system.

Among these thinkers were some of the most significant exponents of so-called Austro-Marxism, designating socialist thought within the frame of *felix Austria*. Nor could it be otherwise: Austria at the turn of the 19th and 20th centuries was a crucible into which flowed the most diverse cultural streams, from art to literature to psychoanalysis.

What *was* Austro-Marxism? Politically, it was an attempt to find a third way between Marxist orthodoxy and revisionism, whereas in a human and cultural sense it was an actual intellectual community, one that would later be described as follows by one of its chief political exponents, Otto Bauer:

> What brought them together was not any particular political orientation but the nature of their research. They had all come of age in an era when people like Stammler, Windelband, and Rickert were using philosophical arguments to fight Marxism. Marx and Engels had taken their cue

from Hegel; later Marxists found their starting point in materialism; the youngest of the "Austro-Marxists," by contrast, proceeded in part from Kant and in part from Mach (cf. Adler 1911). But in the university milieus, in the arena of political economy, they also had to reckon with the so-called Austrian school, and it was through this exchange, too, that the method and structure of their thought was shaped. (O. Bauer 1970, 49–50; my translation)[1]

The Austro-Marxist school was thus forged alongside the Austrian school of economics (Mises, Hayek), the Austrian school of law (Kelsen, Merkl, Verdross, Pitamic), and other currents typical of Austrian thought in this period. It also bears mentioning, however, that this intellectual community was not immune from internal dissension, especially after World War I in the 1920s: The arguing even grew bitter, going to the very foundations of the theories being put forward. In response to a criticism by Renner, for example, Max Adler, who was radicalizing his own positions, took him to task for espousing a "crass empiricism" (Adler 1983, 51; my translation)[2] and a conception of the state as a means by which to advance the workers' struggle, a conception exactly contrary to that of Marx, for whom the state is inevitably a tool for the *oppression* of the working classes (ibid., 58). And indeed it would not have been too difficult to make out, within Austro-Marxism, different attitudes split along basic political lines. Still, as has been observed, the practical achievements of Austromarxists in Vienna

were very great, and they might well have been extended successfully to the whole country if the S.D.P. had attained the majority in parliament [...]. In the theoretical sphere they made acute analyses of studies of the changing character of twentieth-century capitalist society; of the economic structure, the development of social classes, and the changes in law and the state. (Bottomore 1978, 44)

The leading exponents of Austro-Marxism in Vienna were Karl Renner (1870–1950), Otto Bauer (1881–1938), Max Adler (1873–1937), and Rudolf Hilferding (1877–1941), but only Renner can also be considered a jurist, whereas Adler, a philosopher, was mainly concerned with the theory of the state, of which he put forward his own conception.[3] Both thinkers, in any event, engaged with Hans Kelsen, who worked with Renner in drafting the Austrian Constitution of 1920 and trenchantly criticized Adler and his conception of the state.

7.2.1. Karl Renner

Karl Renner is the theorist of Austro-Marxism who more than any other thinker in this current developed a theory of law conceived in its own terms, a

[1] An anthology of significant writings by Bauer, including on Marxist philosophy and the question of nationalities (which he particularly cared about) can be found in O. Bauer 1961.

[2] This is Adler's reaction to Renner in Renner 1983, 31ff.

[3] See in any event, more in general, Butterwegge 1991.

theory seeking in particular to guarantee at once the dignity of the individual and that of the community, all the while recognizing that there is no way to avoid conflict (political or otherwise) within the forms of law and through the tools made available by the legal system as the expression of a historically determined culture.[4]

The main problem Renner's legal thought is concerned with is that of the relation between individual will and the general will, between autonomy and heteronomy.[5] This ultimately boils down to the problem of democracy and the ability of this political arrangement to realize a practicable form of individual liberty. Renner thought this was an imprecise and limited realization, in that it works especially by *mediation*, or, as Kelsen would have said, by *compromise*.

As the outcome of a compromise, the general will fails to reflect the individual wishes of those who have taken part in the compromise: It rather constitutes a complex mechanism that works precisely through the diversified input provided by the gears and levers it is made of (Renner 1950, 136). And so in a posthumous work, *Mensch und Gesellschaft* (Man and society: Outlines of a sociology, Renner 1953), Renner argues that there is no way to eliminate the tension between the autonomy of individual will and the heteronomy of the general will (ibid., 211).

The inevitability of heteronomy means that individuals cannot be considered equal, because if there were equality among them, then no community would be possible. The social impulse, which Renner brings out overtly drawing on Aristotle's *Politics*, forms the premise for a political community, but this is not to be understood as an authoritarian community; it only amounts to an alternating play between individual rights and obligations. Writes Renner:

> Dominion is like labour, divided among all components of society, and just like obedience it does not lie in a privilege conferred on this or that individual. Dominion is shared among everybody, not because all are equal, but precisely because they are each endowed in different ways. Everyone constitutes the general will, and precisely in that lies everyone's supreme organic right [...]. We thus know what equality in human society consists in—certainly not in any physical or

[4] In Renner's *Die Menschenrechte* (Human rights), for example, we find this significant and emblematic passage of his thought: "In this agreement between the community and the individual, in this juridically ordered agreement, we see realized the essence of democracy, which lies precisely in the cooperation of all despite the inherent fight against all, in the cooperation of all next to the struggles of all against all—but that within the forms of law and through legally regulated means" (Renner 1948, 39; my translation). On Renner, see Hannak 1965.

[5] Writes Renner in this regard: "All law is imperative, an imperative directed by the collective will at the individual will. All law is heteronomy of the will; it is a will imposed on the autonomous will of the individual from the outside, absorbed in his consciousness and which has thereby become the co-determining motive of his actions" (Renner 1953, 211; my translation). The German original: "Alles Recht ist imperativ, das von dem Gesamtwillen an den Einzelwillen gerichtet ist. Alles Recht ist Heteronomie des Willens, ist ein Wollen, das dem autonomen Willen des Individuum von außen auferlegt, in sein Bewußtein rezipiert und dadurch zum mitbestimmenden Motiv seines Handelns geworden ist."

natural equality [...]. What is natural is precisely the particular, the individual. Only society can reduce the individual to the universally human, in the same way as the social economy reduces concrete labour to socially abstract labour, universally human, and the law operating in society reduces the concrete individual to the unitary formula of the so-called legal "person" and to this person's rights. (Renner 1908, 295; my translation)

For this reason, too, Renner thought, it is a mistake to reduce human nature to the causal laws of nature. He did not shrink back from the philosophical debate that also took Austro-Marxism by storm, a debate ignited precisely by the contrast between causality and teleology (cf. Adler 1904). He does not enter into the problem per se but accepts the distinction between facts and norms, a distinction that will form the basis of the pure theory of law. No appeal to nature—whether in gnosiology or in ethics—can legitimize a scientific method; and, what is more, any such appeal is going to entail a social policy not functional to the essence of the political will.

Freedom naturally conceived winds up contradicting the very essence of the concept of freedom, whether the concern is to guarantee the rights of the individual or those of the collectivity. Anarchism and liberalism are from this standpoint homologous, both being grounded in natural law, a conception that Renner rejects. Many are the analogies that Renner's theory of law bears to the later theses of the pure theory of law. Writes Norbert Leser:

Karl Renner, in his pioneering work *Die soziale Funktion der Rechtsinstitute* [The social function of legal institutions: Renner 1904], did not only investigate the way the right to property and its functions have changed over the centuries, while also offering a contribution "to the critique of bourgeois law" (as the subtitle of his book indicates), but also developed the groundwork for a distinctive theory of law, one that shows broad systematic overlap with Hans Kelsen's later "pure theory of law." (Leser 1978, 43; my translation)

Even so, it would be an error to see Renner as having anticipated Kelsen, at least Kelsen at the time of his first "pure theory of law." Like Kelsen, Renner separates knowledge from will, but he does not believe that knowledge and the scientific method can engender social and political liberation. What matters in this regard is will, the will that Kelsen (in the 1910s and 1920s) views as secondary to the ability of the scientific method as such to yield effects in the very determination of the object of knowledge. In this sense, the analogies that Norbert Leser underscores between Renner and Kelsen apply much better to Kelsen at the time of the second edition of the *Reine Rechtslehre* and in the 1960s, with his change of tack as concerns imperatives and the imperativeness of norms.[6]

Undoubtedly, in any event, law is conceived by Renner as a normative phenomenon, a phenomenon in a state of tension with social reality and its needs, which determine the structure and functions of legal concepts, especially the

[6] On the second phase of Kelsen's *Reine Rechtslehre*, see Section 2.3.2.2 in this tome.

concept of property (Renner 1965, 70). Sociology and jurisprudence work hand in hand, and yet Renner will declare himself to be against any syncretism of method (as Kelsen will later also do), for that would amount to confusing the efficacy of law with its normativity. But unlike Kelsen—at least in the phase where he was making overtures to neo-Kantianism—Renner understands norms to be imperative.[7]

It would be a mistake, however, to judge Renner's theory simply against the pure theory of law, not least because Renner takes the view that no theory of law can be pure, since legal norms and the legal system as a whole are very much contingent on social transformation, which in turn is contingent on the outcome of class conflicts. There are no such things, for Renner, as rights operating independently of the concrete socio-historical situation or, consequently, of the concrete legal system. The right to property, an ever-evolving legal concept, is determined by the norms currently in force, not by any prelegal "natural rights." No division can be drawn between public and private law, in that the whole of law is law belonging to the state and to its legal system; thus, for example, the capitalist's right to exploit the product of wage labour "is transferred public power, blindly handed over to the power holders: The work relationship is a mediated relationship of domination" (Renner 1965, 107; my translation).

The core of Renner's legal philosophy clearly lies in his critique of private property, whose changing function he investigates proceeding from the distinction between its economic and its legal function and arguing that the latter cannot be explained by reduction to its economic function. Over time, however, legal concepts (here property) and the underlying social relations undergo change, and this process will eventually make those concepts obsolete, when jurists fail to appreciate the ways in which the society at hand has changed. This is not to say that the structure determines the superstructure, but it does mean that they interact as a unitary entity, what might be called socioeconomic formation broadly understood. Unlike the medieval socioeconomic formation, the capitalistic one is not conscious of the world of production, and yet it pretends to separate this world from ideological forms, separating form from matter, as Renner puts it, bringing the example of Stammler's philosophy of law (see Section 1.3 in this tome), where

> the formal element is moved entirely within the law. In effect, the purely economic object (capital) finds its own formal determination prior to the law. A given sum of money, for example, where no question arises as to its legal qualification, appears in an exchange under the form of an equivalent, in a mortgage under the form of capital, in the process of circulation as a means

[7] "Certainly Renner, with the strong emphasis he lays on the imperative character of all norms, anticipated the modification that Kelsen would later make to his own theory of the basic norm so as to bring that norm into line with the maxim No imperative without an emperor" (Leser 1978, 43–4; my translation).

of circulation, in the hands of a property owner under the form of a cache. (Renner 1965, 86; my translation; cf. Renner 1924)

Law and the economy are thus connected, but over the course of history they develop unevenly, showing that what causes the economy to evolve is not the law:

A legal system in a historically given form acts as the presupposition and condition for the existence of society such as it is, but not as the cause of social change. [...] The function of society changes without an accompanying change in the legal concept. (Renner 1965, 172; my translation)

But social change does not determine legal change if not gradually and in the first instance in relation to the function of a norm, which can continue to exist as the same norm even as its meaning changes in accordance with social change, understood by Renner not in a normative way but in a naturalistic one:

The change in function consequent on society's shifting economic and natural base can continue until the norm ceases to be in any way effective, and this explains desuetude, the fact of a legal concept having fallen into disuse even though it has not been legally eliminated. If a legal concept becomes functionless, it can tacitly and unobtrusively vanish from society, without the components of society itself having any conscience of this vanishing, and so without its being laid down from the top. (Ibid., 177; my translation)

It is thus a complex relation that holds between law and society, a relation requiring, on the one hand, the autonomy of legal science (since what this science takes for its object is a "whole"),[8] and on the other a scientific, sociological foundation for social analysis. But this autonomy does not entail that either legal science or the scientific foundation can do without the other: Legal science itself, understood as the "art of legislation," "consists above all in an accurate judgment of the mutual influence between norms and their substrate" (ibid. 178).[9] All this happens over the course of the slow but uncheckable process through which the legal system shifts from the primacy of private law to that of public law, a process that from a distance can also be seen to mark the shift from capitalist to socialist society.

Science, whether it be jurisprudence or sociology, thus proves necessary if, even in the sphere of law and the state, Marxism is to be prevented from collapsing into a sort of catechism of the proletariat. Just as legal concepts evolve and change their function, so science operates not in the manner of a reality given once and for all but in the manner of a dynamic process, inevitably in-

[8] Renner writes in this regard that "the law is an articulated whole determined by the needs of society" (Renner 1965, 70; my translation).

[9] The German original: "Die Kunst der Gesetzgebung liegt vor allem in der richtigen Abschätzung der Wechselwirkung von Norm und Substrat."

teracting with the proletariat's political perspectives and struggle, without this meaning that we have to fall into the trap of the unity of theory and practice, a unity that winds up being a simple ideological mask.

This did not prevent Renner from embracing a political view of legal science, however indirectly so, especially as concerns the relation between national states and the international community. It ought to be observed that in this very regard Renner's conception probably influenced Kelsen as he went about developing his own conception of the *civitas maxima* and his criticism of the dogma of sovereignty. In a significant work of 1914 devoted to the nation as a legal idea, Renner presents the state as an entity destined to yield ground to the primacy of the international community. Wrote Renner:

> The concept of sovereignty is conceivable only within a community of states [...]. The legal system will be complete only when the law of the most powerful among the states will have been replaced with the regular legal process of international jurisdiction and enforcement. (Renner 1914, 10; my translation)

And yet, from Renner's realist perspective, the state can hardly be transcended; quite the contrary, the state is conceived as the tool, the basic lever for moving from capitalism to socialism (see Renner 1917, 28; cf. Leser 1966, 156ff.). He can in this sense be said to espouse an interventionist, social, and administrative conception of the state, so much so that Kelsen defined Renner's position as nothing less than the "apotheosis of the state" (Kelsen 1924, 12; my translation).

7.2.2. Max Adler

Max Adler was the *philosopher* of Austro-Marxism. Here we will be concerned not with his epistemological and moral conception—though it, too, is worthy of being investigated,[10] at least from a historico-philosophical perspective—but only with his conception of the state.

It should be observed, however, before we start, that Adler rejects the dualism of structure and superstructure, believing it to be abstract and inadequate as a basis on which to understand the role of ideology in history; in fact he explicitly underscores instead the autonomy of the "forms of consciousness," including law, morality, religion, art, and the like (see Adler 1964a, 33ff.). This is not to say that ideology cannot turn into appearance: It will do so if it casts off its presuppositions and becomes established as something independent of the socioeconomic context. The "material" element and the "ideal" one are somehow both retained in the historical process and in every single socioeconomic

[10] On Adler's philosophy, see at least Heintel 1967. A collection of minor writings can be found in Leser and Pfabigan 1981.

formation: "Ideality without materiality is ineffectual; materiality without ideality is senseless" (Adler 1913, 17; my translation).

The foundation of Marxism—understood as a sociological, not a political, theory—lies in the unity of theory and practice (Adler 1981, 56).[11] This leads Adler to view the state as a "phenomenon of social life" (see Adler 1964a, 72ff.; my translation), where the concepts of society and life are to be understood as forming part of being. "The starting point for Marxism is thus the concept of society as a social being and happening, making human beings as isolated impossible from the outset" (ibid. 31; my translation). Human beings, on Adler's conception, are always consubstantial with society itself, in that there is no original or foundational moment of society. Humans are by nature social beings—admittedly not a new thesis, but Adler supplements it by stating that even the state is not something apart from society: "Society and the state are not for a Marxist two different things, much less are they set in contraposition to each other" (ibid. 33; my translation). When the state is effective, it always exists as the form of society.

One can understand here the basic criticism Adler directs at Kelsen.[12] On Kelsen's conception, the state is equated with the legal system understood as a normative system; Adler, by contrast, equates the state with society and makes both into an object of causal, sociological knowledge.

To investigate the state sociologically is to historicize this ideal form of social relations. The state can thus perform two functions, each opposite to the other, depending on whether it is to be construed as the ideological form of a solidaristic society or a conflictual one, as is the case with the capitalist society. This means in the first place that it is wrong to think of the state as something that must be "extinguished," for it can easily serve a positive function in a solidaristic society, the kind a future socialist society could be. But in a world dominated by opposing interests, economic and ideological, the state cannot be considered in any other way than as the expression of class conflict, and hence ultimately as a class instrument itself. In fact, democracy, founded as it is on the majority principle, ultimately itself amounts to a dictatorship, to one class's domination over the rest of the population.[13]

This confers on the state its characteristic contradictory position, for on the one hand it claims to be "universal," but on the other it cannot help but represent the interests of a specific social class, the one that controls relations of production. Writes Adler:

[11] The German original: "Diese innige Beziehung des Sozialismus zur Wissenschaft, vielmehr diese Stellung der Wissenschaft selbst, demzufolge Sozialismus gar nichts anderes ist als ihre umfassende gesellschaftliche Praxis, ist die zweite große Bedeutung des Sozialismus für den Intellektuellen."

[12] On the debate between Kelsen and Adler, see Pfabigan 1978.

[13] In making the case that there is no antagonism between democracy and dictatorship, Adler also draws on Carl Schmitt essay on dictatorship. On this subject, see Ananiadis 1999, 118.

> Only in a classless society can the interest of the individuals in the totality coincide with the interest of the whole. In a class society there is not yet a totality to which such a universal interest can conform; and what is habitually labelled as such comes down to the most elemental vital necessities, which can encompass the greatest inequality of vital interests. (Ibid., 155; my translation)

Adler would consequently come to the conclusion, in *Politische und soziale Demokratie* (Political and social democracy: Adler 1964b), that democracy and the state are mutually exclusive, that the order existing within the state cannot but stand in opposition to the order which will come into being in a socialist society.

As far as the law is concerned, then, it will be necessary to envision a society founded on heteronomous norms and another one founded on autonomous norms, the latter so designated in the sense that they have been set up by agreement among their addressees themselves. A nonsolidaristic society requires a heteronomous order; a solidaristic one, by contrast, requires an essentially autonomous legal-political organization. In societies of this latter kind, writes Adler, constriction "is owed exclusively to everyone's working and living conditions; it is [...] experienced not as constriction but as something that regulates all individual working and living conditions with respect to this society" (ibid., 45; my translation).

Clearly, Adler's conception of social democracy, as distinguished from his political conception, is not devoid of utopian traits, but it must be underscored that in this democracy the primacy of collectivity should in any event be reconciled with a respect for individual freedoms, where individualism expresses not a self-interested conception but a drive toward self-determination and a conscious deepening of one's own personality. As much as Adler's political philosophy undoubtedly bristles with "illusions" (Leser 2013, 116), we would do him wrong if we failed to recognize his effort to develop a neo-Marxism attentive to the critical points of its own premises, his effort—at least in the first phase of his thought—to find a "third way" (this is his own expression; see Pfabigan 1981, 14) between revisionism and Bolshevism.

7.3. Georg Lukács, Karl Korsch, and "Western Marxism"

Georg Lukács (1885–1971) and Karl Korsch (1886–1961) (and subsequently also Ernst Bloch, 1885–1977) represent the current of thought that in the 1920s in Germany revived a mode of philosophical reflection that moved away from the orthodoxy of the Second International (Karl Kautsky), as well as from the Third International of Bolshevik persuasion (Lenin, Bucharin, Stalin).

This, however, was a reaction to the criticisms directed at Marxist thought from outside Marxism itself, found to be dogmatic and incapable of adapting to the social and cultural changes the political and social consciousness of European intellectuality had gone through in the 19th and 20th centuries.

Marxist philosophy had not yet produced anything on the order of Rudolf Hilferding's 1910 *Das Finanzkapital* (Finance capital), Rosa Luxemburg's 1913 *Die Akkumulation des Kapitals* (The accumulation of capital), or Vladimir Ilyich Lenin's 1917 *Imperialism, the Highest Stage of Capitalism*. The Marxists' philosophical speculation found itself trapped in an exegetical exercise narrowly focused on the writings of Marx and Engels themselves. Even Lenin, with his 1909 *Materialism and Empirio-Criticism*, could not overcome this limitation. In reality, the philosophical rejuvenation of Marxism was in large part the outcome of the October Revolution and sprang from the need to reflect on the transformations underway in Russia as well as in the countries of Western Europe. But this reflection on the revolution would soon, in its own turn, become revolutionary, sparking reactions from both the orthodox Marxists and the Russian revolutionary Marxists. Western Marxism thus acted as a catalyst precipitating internal dissension among Marxist parties. But it would take several decades before anything positive could come of this situation, opening new perspectives when Western Marxism was rediscovered, and with it the critical thought of Antonio Gramsci.

7.3.1. The Concrete Totality in Georg Lukács's History and Class Consciousness

At the core of the conception developed by Georg Lukács lies a reading of dialectics as a method to be applied uniquely to the historico-social world, a method aimed at uncovering ideology as a false consciousness. Specifically, for Lukács, Marxism needs to be explained as a historically determined conception: as a method for subjecting the capitalist bourgeois world to critical analysis and not as a science of society in general. The basic elements of this method were, as Lukács's development of it, the identity between subject and object and, even more importantly, the concept of a concrete totality.

The concrete totality is a socioeconomic formation in a state of constant flux. Writes Lukács:

> It is not the primacy of economic motives in historical explanation that constitutes the decisive difference between Marxism and bourgeois thought, but the point of view of totality. The category of totality, the all-pervasive supremacy of the whole over the parts, is the essence of the method which Marx took over from Hegel and brilliantly transformed into the foundations of a wholly new science. [...] *The primacy of the category of totality is the bearer of the principle of revolution in science*. (Lukács 1971, 27; cf. Lukács 1968, 94)

As Korsch did in an even more straightforward manner, Lukács refused to imagine a socioeconomic formation entirely dependent on the economic structure. To speak of the concrete totality is to say that the social structure cannot be reduced to a single factor but rather represents a set of jointed material and spiritual elements, where being and consciousness are interlaced, giving rise to

a dialectically complex reality that cannot be reduced to any naturalism. Empirical data can take on any meaning only if embedded in the concrete totality, where the structure and the superstructure condition each other, and where the dialectical method uncovers the reifications and the ideological alienations concealing the real power relations. The method of the concrete totality "deconstructs" the object in its false givenness and reconstructs it in light of theoretical concepts making it possible to understand real data (in Weber's sense of the term *understanding*), all the while explaining the same data, and to unmask the social conflict existing in the concrete totality, in which Lukács also sees the potential for revolutionary, political action:

> Thought and being are therefore identical not in the sense that they "correspond" to or "mirror" each other or that they proceed "in parallel" or "wind up coinciding" (all these expressions are just dissembled forms of a rigid dualism): Their identity rather consists in their being moments of the same historico-real dialectical process. (Lukács 1968, 349; my translation)

Class consciousness therefore plays an essential role in the process of transformation: It does so as a historical outcome that, having been subjectivized, is then objectivized in a historically ongoing dialectic, a dialectic that for this reason cannot be reduced to a gnosiological relationship, for it is tailored to the praxis of the subject understood as a collective subject. As Lukács sees it, even "nature is social a category" (Lukács 1971, 130; cf. Lukács 1968, 372), and reality "cannot *be*; rather, it *becomes*, but it cannot do so without the intervention of thought" (Lukács 1968, 349; my translation). The most important objection made to Lukács was that of subjectivist idealism, and indeed the idealist strain comes through clearly when viewing Lukács against the background of Marxist orthodoxy.

His conception of law and of the functions of legal institutions in the formation of the capitalist society and economy hinges on his theory of reification as a core concept of the Marxist method. In *Die Verdinglichung und das Bewußtein des Proletariats* (Reification and the Consciousness of the Proletariat, in Lukács 1971), law appears as something static, in the sense that the bourgeois false consciousness (bourgeois ideology) has transformed the meaning of rules, for these are functional to class interests even though they also appear to be ontologically given, so much so that one is at a loss to figure out how to overcome reification itself as distinct from objectification, and so as subject to the proletariat's revolutionary action.

Lukács looked to the general theory of law, not in general, as Korsch would later do, but with specific reference to the conceptions expounded by Georg Jellinek and Hans Kelsen, this because, in keeping with Marx's insights, capitalist legal relationships are to be understood by him as entirely distinct from legal relationships such as they existed in precapitalist societies, where they are *not* mediated. In precapitalist societies,

legal forms must constitutively intervene in economic nexuses. There are no pure economic categories [...] that appear in legal forms, having been folded into legal forms and become enveloped in them. Rather, economic and legal categories are in their content concretely, indissolubly interwoven into one another. (Lukács 1968, 135–6; my translation)

This is so in the same way as economic relations themselves are not independent of other sorts of relations, especially the state as one such relation. Writes Kelsen in his *Hauptprobleme*:

What is done in the lawmaking act represents the great mystery of law and the state; so there may well be good reasons why the essence of this act is made intuitive only through adequate images. (Kelsen, 1911, 411; my translation)

Lukács proceeds by taking up an observation that Somló makes in his *Juristische Grundlehre*:

It is a distinctive feature of the essence of law that even a norm which has come into being in a way contrary to law can be a legal norm, and so, in other words, that the condition for its coming into being cannot be included in the concept of law. (Somló 1917, 117; my translation)

Lukács's comment on these passages by Kelsen and Somló is particularly significant:

This clarification intended for critical knowledge could take on the sense of an actual clarification, thus advancing our knowledge, if on the one hand the problem of the origin of law, consigned to other disciplines, could really find a solution, and if, on the other hand, it were possible to really grasp and deepen the peculiar nature of law as it arises in this way, whereby law only serves the purpose of calculating the consequences of our actions and framing, from a classist point of view, certain rational modes of action. (Lukács 1968, 206–7; my translation)

It must preliminarily be recalled that the genesis of modern law is described by Lukács, who in so doing draws on Max Weber's insights, as a "rational systematisation of all statutes regulating life, which represents, or at least tends towards, a closed system applicable to all possible and imaginable cases" (Lukács 1971, 96; cf. Lukács 1968, 189), and "it requires no further explanation to realise that the need to systematise and to abandon empiricism, tradition and material dependence was the need for exact calculations (Lukács 1971, 97; cf. Lukács 1968, 189–90).

Lukács criticizes Kelsen for failing to see that history, sociology, and the other empirical sciences are not up to the task of solving the problem of the "origin" of law, as well as for failing to see that "the law maintains its close relationship with the 'eternal values,'" and that "this gives birth, in the shape of a philosophy of law, to an impoverished and formalistic reedition of natural law (Stammler)" (Lukács 1971, 109; cf. Lukács 1968, 207). Clearly, the problem is for Lukács that of "recomposing the totality" that "the particular sciences have so conspicuously renounced by turning away from the materi-

al substratum of their conceptual apparatus" (Lukács 1971, 109). Traditional jurisprudence has methodologically given up on the possibility of a rational foundation, on the idea that the content of law can be rational, and has seen nothing in law other than "a formal calculus with the aid of which the legal consequences of particular actions (*rebus sic stantibus*) can be determined as exactly as possible" (ibid., 108; cf. Lukács 1968, 206). "With this the primitive, cynically sceptical campaign against natural law that was launched by the 'Kantian' Hugo at the end of the eighteenth century, acquired 'scientific' status" (ibid.; cf. Lukács 1968, 205–6).

In Lukács's view, then, the Austrian pure science of law is no less blameworthy than the traditional jurisprudence that spans from Savigny to Jellinek, for its "formalism" is none other than the final outcome of a process that goes way back in the foundation of the bourgeois world, a process that substantiates itself in an "inability to penetrate to the real material substratum of science," an error that "is not the fault of individuals. It is rather something that becomes all the more apparent the more science has advanced and the more consistently it functions from the point of view of its own premises" (ibid., 107; cf. Lukács 1968, 203). This incapacity of post-revolutionary "bourgeois" science (set in contrast to the "synoptic view of economic life" captured by the 18th-century bourgeois scientists and philosophers) "emerges with even greater clarity and simplicity" in the science of law, since this science is no longer cognizant of revolutionary natural law theory, where reason and content cannot be decoupled, in that, by contrast, the "universality of the law (and hence its rationality) was able at the same time to determine its content" (Lukács 1971, 107).

> Of the tenets of natural law the only one to survive was the idea of the unbroken continuity of the formal system of law; significantly, Bergbohm uses an image borrowed from physics, that of a "juridical vacuum," to describe everything not regulated by law. (Lukács 1971, 108; cf. Lukács 1968, 205)

> Science is thereby debarred from comprehending the development and the demise, the social character of its own material base, no less than the range of possible attitudes towards it and the nature of its own formal system. (Lukács 1971, 105; cf. Lukács 1968, 201)

> By confining itself to the study of the "possible conditions" of the validity of the forms in which its underlying existence is manifested, modern bourgeois thought bars its own way to a clear view of the problems bearing on the birth and death of these forms, and on their real essence and substratum. (Lukács 1971, 110; cf. Lukács 1968, 201)

So, in Lukács's view the "'systematisation' of the whole" (Lukács 1971, 102) cannot be effected by going through the empirical sciences, not even through the philosophical sciences, for these

> divorce these empty manifestations from their real capitalist foundation and make them independent and permanent by regarding them as the timeless model of human relations in general.

(This can be seen most clearly in Simmel's book *The Philosophy of Money*, a very interesting and perceptive work in matters of detail.) (Lukács 1971, 94; cf. Lukács 1968, 187)

As has been correctly observed, this conception

evinces Lukács's specific journey from Kant to Hegel, a journey that by virtue of its specific object must necessarily proceed beyond Hegel: Formal law is the real universality of bourgeois society; it spreads across the concrete totality of the life of the people, but (contrary to what Hegel still thought) it does not in effect constitute the dominant principle of bourgeois society; rather, it is itself only a function of the dominant economic anarchy. (Apitzsch 1990, 80; my translation)

Lukács's theses on law do not on the whole differ a great deal from Korsch's. One significant difference does, however exist, for the two authors take different positions on the question of natural law. Indeed, for Lukács, natural law can be analyzed as the linear expression of the revolutionary bourgeoisie, and formal law, such as it emerges from a dissolution of the principles of natural law, winds up being no more than "a function of economic realities" (Lukács 1971, 228), and hence a universal and insurmountable *antinomy* of bourgeois thought; for Korsch, by contrast, with his substantially unitary conception of the process of human liberation, natural law takes on a historically boundless but ontologically determinative dimension in the process of liberation itself.

7.3.2. Karl Korsch: From the Free Law Movement to the Materialist Critique of Law

Karl Korsch completed his studies earning a law degree at the University of Jena in 1911. As Goode (1979, 5) reports, "philosophy would have been his own chosen area of study, but his father insisted on law"—precisely the lot that had befallen the young Marx.

Korsch became engrossed in the *Freirechtsbewegung*, or free law movement, devoting his doctoral dissertation to the question of how the rules of evidence apply in civil procedure (Korsch 1911). The whole discussion revolves around the distinction between *abstrakte Beweislast* and *konkrete Beweislast* (abstract and concrete evidence), and even though Korsch does not stray too far from traditional legal dogmatics, at the very outset, in the introduction, he touches a question that would be crucial to him, that of the relation between praxis and "abstract ideas."

What held his interest at this early stage was the classic concern of the free law movement itself, namely, the need to critically reassess the whole notion of the completeness of the legal system, a question he turned to in the first part of a 1914 article (Korsch 1914), where he discusses the interpretation and application of foreign legal rules on the part of a domestic judge, a procedure essentially made to depend on "the way in which abstract norms ought to be applied in practice" (ibid., 286; my translation).

But our focus here needs to be on his most widely known work, namely, *Marxismus und Philosophie* (Korsch 1923, translated as *Marxism and Philosophy,* Korsch 1970). It is in this work, and in the coeval *Kernpünkte der materialistschen Geschichtsauffassung* (Principles of the materialist conception of history: Korsch 1922), that Korsch fleshes out his interpretation of Marxism as a specific revolutionary epistemology and his so-called critical Marxism. Writes Korsch:

> It is a grave error the erudite bourgeois make when they set out from the assumption that Marxism sought to replace traditional (bourgeois) philosophy with a new "historiography" and the traditional (bourgeois) theory of the state and of law with a new "theory of the state and of law." (Korsch 1922, 5; my translation)

For Korsch, the essence of Marxism instead lies in its critique of the ideological premises underpinning the bourgeois sciences. Marxism is thus understood as the theoretical expression of the revolutionary practice in a social movement that unmasks the class interests informing the bourgeois sciences. Clearly, this conception of Korsch's falls some distance from the conception of Marxism as a social science, a conception expounded in his 1938 *Karl Marx*: "Every critique [...] of law must therefore necessarily find its ultimate foundation in the 'most radical' of all critiques, that is, in the critique of political economy" (Korsch 1938, 286).

In other words, Korsch understands there to be in Marx a *layered ontology* where political economy grounds the totality of the social formation. This grounding, however, does not immediately make for a criticism of forms and of "spiritual" production in general. Indeed, as much as forms are real (this also applies to the form law), they cannot be grasped through a Marxist critique. It follows that it would be useless to attempt a "Marxist" theory of law and the state; in fact, any such theory would be mistake proper from the standpoint of historical materialism, since no "partial" theory can be self-enclosed but must necessarily bring into play the layer that grounds the totality encompassed in which is each single object, including each single "theory": A theory may well be ideological, but it is an effective reality all the same (and Korsch is referring here to Emil Lask's *Rechtsphilosophie*: see Section 1.4 in this tome).

Korsch's totality, however, is not the same as the one envisioned by Lukács: Korsch takes totality to be more an empirical criterion of analysis than a philosophical category. All the branches of knowledge are connected with production, but the social sciences are so only in a "mediated" way, and the spiritual sciences are only connected with spiritual production.

In Korsch's assessment, therefore, the Austro-Marxist Karl Renner is proceeding along a false path in his attempt to integrate Marxism's political economy with a theory of law: "The Marxist system," writes Korsch, "is in no need of any such integration, just as it does not need a Marxist 'philosophy' or 'mathematics'" (Korsch 1922, 13; my translation). If from the standpoint

of Marxism as an expression of revolutionary practice, "even the science of ought is conditioned by the degree to which material production and the other branches of the overall social propaganda have advanced," then the very notion of a Marxist legal science must be a contradiction in terms, since a science of this sort would have to be "specifically" concerned with an object—law, though this also holds for the state or for any other "form," including language in general—that in itself refers to its own grounding layer, the one that founds, determines, and supports it in the complex of totality.

Law and the state, such as they have emerged from the process of history and from the breakup of the medieval unity through the epoch-changing bourgeois revolution, are closely bound up with a specific historical time, that of the bourgeoisie, after which, through a succession of real cleavages, there is only the classless communist society. That is why Marxism, as an expression of the social revolution effected by the proletariat, sets itself up as a revolutionary criticism of the bourgeois science of law and the state, using this critique to arrive at the object of this science, in just the same way as Marx criticized Hegel's philosophy of the state so as to arrive at a critique of the state itself.

Law and the state are construed by Korsch as the immediate expression of the bourgeois revolution, and as the perfectly rational accomplishment of any conceivable class rule. The state embodies the final and most powerful form of bourgeois and capitalistic domination, effecting the "the grand, all-inclusive synthesis in which all contradictions are or can be resolved" (Korsch 1922, 53; my translation). For this reason, writes Korsch,

> Marx and Engels not only combated one specific historical form of the State, but historically and materialistically they equated the State as such with the bourgeois State and they therefore declared the abolition of the State to be the political aim of communism. (Korsch 1970, 49)

What is original about the kind of Marxism propounded by Korsch (who in this sense can be counted among Emil Lask's indirect pupils) is the suggestion that the method of historical materialism can be applied recursively to historical materialism itself, thus historicising historical materialism. In fact, we have here the central point of *Marxismus und Philosophie*, namely, the thesis of the reality of the forms of consciousness, of ideology, and generally of all so-called superstructures: "It is essential for modern dialectical materialism to grasp philosophies and other ideological systems in theory as realities, and to treat them in practice as such" (Korsch 1970, 66).

The economic conditioning of the forms of law and of the state should not, in Korsch's opinion, be taken to mean that the proletariat's practical activity thereby collapses into the economic sphere. Rather, this activity must invest the totality as a whole, and so must also invest "forms" as such. And it is not just law and the state that are "real" but also the ideologies themselves, along with legal and political theories. According to vulgar Marxism, Korsch claims,

there are three degrees of reality: (1) the economy, which in the last instance is the only objective and totally non-ideological reality; (2) law and the State, which are already somewhat less real because clad in ideology, and (3) pure ideology which is objectless and totally unreal. (Korsch 1970, 73)

This contradicts the Marxist notion of the concrete totality, where the structure and the superstructure call each other out, as it were, in the sense that the forms of consciousness are not simply the product of economic reality but are ultimately what makes possible the very reproduction of economic relations. Law, the state, and the economy all conspire in constituting the socioeconomic formation we call the bourgeois or capitalist society; in this sense law is to be understood not as the formal reflection of class interests but as constituting the necessary form of class relations, in such a way that to upend jural relations is to upend economic relations.

There is, however, another writing that needs to be taken into account in blocking out Korsch's legal thought: an introductory lecture he delivered as an untenured professor in 1923 at the University of Jena under the title "*Jus belli ac pacis* im Arbeitsrecht" (*Jus belli acpacic* in labor law), an ambivalent text, in that it can be read in light of his earlier writings on *Sozialisierung* (socialization), on workers' councils, and on labour law, but it can equally lend itself to a more straightforwardly legal-philosophical reading. In *Marxismus und Philosophie* Korsch sets out to reclaim what he takes to be the historically and theoretically necessary relation between Marxism and classic philosophy; in *Jus belli ac pacis* he proposes to lay the groundwork on which basis to reclaim the relationship between the bourgeoisie's natural law theory and the new natural law of the working class (see Seifert 1972).

The categories devised by the revolutionary bourgeoisie, Korsch argues, retain their validity even in the era of the proletarian revolution, despite the transformation they undergo as to their immediate contents: There is an "essential and necessary relation between German idealism and Marxism" (Korsch 1923, 67; my translation). There is therefore a connection between the war waged by the proletariat against the capitalist bourgeois society and the war waged by the bourgeoisie against the feudal class society:

This is in particular where we should locate the fact that with the classic theorists of natural law (Grotius, Hegel, and Clausewitz) and with the political economists of the working class (Marx and Lenin) we can understand the real nature of war and of its relation to peace. (Korsch 1972, 147; my translation)

Natural law theory—the kind that can be described as "authentically scientific, living, creative, and revolutionary" (ibid.; my translation)—is recovered by the workers' movement of the 19th and 20th centuries as a critical weapon against the wedge driven by bourgeois legal positivism between the "peacetime order" and the "law of war," a separation that according to Korsch was entirely unknown to the first great bourgeois natural lawyer, Grotius.

What in Korsch's opinion made Grotius's work scientific was the idea that "the whole of law, considered according to its true concept, is a law of war and peace [...]. For Grotius, war and peace form a social totality, and it is precisely as a totality that jurists ought to understand and develop it" (ibid., 143; my translation). To distinguish a particular *jus belli* from the law "ordinarily" in force is tantamount to concealing the real fact that "inherent in any and every legal event in the contemporary bourgeois society—in the most private jural relationship as in imperialist trading on a world scale—is a moment of war" (ibid., 144; my translation).

By comparison with the mystifying "positive" science of the bourgeoisie, the working class hoisted in the legal arena the flag of natural law that had been taken down by the reactionary bourgeoisie, thus bringing the law of war and peace among classes back into the fold of social relations. And one can also appreciate here why Korsch should later have taken an interest in Carl Schmitt and in his concept of the political grounded in the theory of the distinction between foe and friend (see Korsch 1932).

7.4. Hermann Heller: Socialism, the State, and Culture

Hermann Heller (1891–1933) is certainly among the most interesting and original socialist philosophers of law.[14] He, too, thought that class struggle cannot rest on the force of economic interests alone but must also involve a cultural struggle framed in terms that go beyond the classic Marxist categories. This can be appreciated, for example, in Heller's relation to the German Social-Democratic Party (which he joined in 1920 even though he was Austrian by birth), in that he sought to bring back within the party's conceptual frame the idea of the nation and the state, whose universality cannot be disacknowledged for the sake of an alleged primacy of the economic structure.

Heller's philosophy in effect presents itself as a philosophy of culture very much indebted on the one hand to Hegel's idealism and on the other to the sociological dichotomies of the time, such as community vs. society and *Kultur* vs. *Zivilisation*.

In Heller's view, neither the individual as a conceit of liberal thought nor the class as a notion popularized by Marxism can help us gain any substantive insight into the historical process, since it is the nation, not the class, that figures as the basic engine of evolution. There comes to light here the distinctly Austrian imprint of Heller's cultural background, in the sense that Heller shows himself to be sensitive to the question that had gripped the political debate in the Austro-Hungarian empire, that of the relationship among national minorities. It is the nation that, for Heller, provides the proper setting—or rather, the com-

[14] For an essential bibliography on Heller, see Albrecht 1983, Blau 1980, Dyzenhaus 1997, Müller et. al. 1984, Robbers 1983, and Schluchter 1983.

munity—within which culture can thrive: "The human being is a dead conceptual abstraction" (Heller 1992a, 464; my translation).[15] As Dyzenhaus observes:

> Human nature is culturally determined but also determinative of culture. Culture comes about because human nature is utopian in the sense of setting goals and then trying to attain them. But these goals necessarily operate within the context of a culture that is not directly of our making and which thus forms a relatively objective and constitutive basis for our individual efforts. (Dyzenhaus 2000, 254)

This view—let us call it "substantialist"—makes Heller's democratic socialism unique by comparison with the interpretations offered by the other social-democratic legal philosophers who were writing on political science in Germany at the time of the Weimar Republic, so much so that the interpretation Heller offers of democracy and Fascism does not hold back from revealing certain sympathies with the latter, however much superficially, or from giving certain decisionist undertones to the democratic system, fundamental to which, in his view, is the organizational function of decision-making freedom. Heller would be dismissed from his teaching position and be forced to emigrate with the advent of Nazism, but later on, in the post-war Federal Republic of Germany, his social-democratic conception came back into the limelight thanks to a couple of concepts he had theorized, namely, the "social *Rechtsstaat*" and the homogeneity of the national collectivity:

> In the absence of a "social homogeneity" that guarantees social equality, he reasoned, individual liberties for which liberals fought are worse than worthless. For these liberties can be politically and socially divisive when groups of individuals find the law's formal promise of equality and liberty for all to be merely formal—that is, insubstantial. (Ibid., 250–1)[16]

Heller's philosophy of law is in synchrony with his theory of the state. Its primary concern is with rebutting normative and "nomocratic" positions, specifically as embodied in Kelsen's pure theory of law. Heller criticizes any methodological purity at root, calling instead for a methodological syncretism making it possible to grasp the law as a multiplex phenomenon. The law cannot be reduced to a norm: It rather requires investigations at once jurisprudential, sociological, and politological. Writes Heller in *Die Souveränität*: "Every legal problem, none excluded, is anchored at the bottom in sociology and at the top in the ethico-political sphere, and it is not just *amenable* to both a caus-

[15] The German original: "'Der Mensch ist eine tote gedankliche Abstraktion; dieses abstrakte Gespenst kann deshalb auch niemals das zu gestaltende Material des Sozialismus sein."

[16] Writes Heller (1992c, 427): "Democracy is supposed to be a conscious process of the formation of political unity from bottom to top; all representation is supposed to remain legally dependent on the community's will. The people as a plurality is supposed consciously to form itself into the people as a unity. For the formation of political unity to be possible at all, there must exist a certain degree of social homogeneity. [...] It is thus the case that the degree to which it is possible to form a political unity depends on the extent of social homogeneity; likewise the degree to which it is possible to put in place a system of representation, and stabilizing the representatives' position" (translation from Heller 2000).

al and a normative analysis but actually *requires* both" (Heller 1992b, 57; my translation).[17] From a methodological standpoint this means that no adequate understanding of law can be had through a merely logico-formal analysis; from the standpoint of the premises and results of an inquiry into the law this means two things: first, that no jurisprudential theory of the state can ignore practice (and vice versa), and second, that law is not a pure form but is also content, for it consists not just of procedure but also of decision-making.

The state cannot be dissolved into the legal system: It rather *precedes* legal norms, for otherwise the theory of the state would resolve itself into a theory of the stateless state. Norms should accordingly be recognized as imperatives issued by the organs of the state at its various levels: They express the decision-making capacity proper to the state. Unlike Kelsen, Heller thinks that the foundation of law lies not in the law itself but in power, which in turn cannot but be the expression of a conflictual society.

From this also follows Heller's conception of sovereignty, set in sharp contrast to Kelsen's, on which sovereignty instead needs to be eradicated, root and branch. For Heller, sovereignty is founded on the existence of a "universal decision-making unity" in which lies the origin not only of political decisions and legal norms but also of the very rights of those subject to the legal order. Sovereignty "is the property of a universal unity of effectiveness and decision across the territory, a unity owing to which sovereignty, for the benefit of law, will in certain cases assert itself in an absolute way, even contrary to the law" (ibid., 185; my translation).[18]

Heller's conception cannot, however, be fully understood if we overstress the ways in which it may come into contradiction with concepts he accepts, even if only formally. Despite the points of contact with conservative thinkers like Carl Schmitt, Heller remains at heart a socialist thinker, fully aware that politics is conflict,[19] and hence that law, as an abstract and equal rule, may *conceal* conflict but not root it out. In this sense, as much as Heller may depart from vulgar and deterministic Marxism, he certainly can be said to follow in the tradition of the workers' movement, and specifically in that strand of the tradition which most sharply criticizes liberal formalism and the illusion of parliamentary compromise.

[17] The German original: "Ausnahmslos jedes juristische Problem ist nach unten in der Soziologie und nach oben in der ethisch-politischen Sphäre verwurzelt; jedes juristische Problem ist einer sowohl kausalen wie normativen Betrachtungsweise nicht nur zugänglich, sondern fordert sogar beide."

[18] The German original: "Souveränität ist die Eigenschaft einer universalen Gebietsentscheidungs- und Wirkungseinheit, kraft welcher sie um des Rechtes willen sich gegebenenfalls auch gegen das Recht absolut behauptet."

[19] Even the homogeneity that Heller believes is needed to achieve political unity "can never mean the abolition of the necessarily antagonistic social structure" (Heller 1992b, 428; my translation).

It is precisely this socialist tradition critical of bourgeois formalism that Heller would return to in his last work, the posthumous and unfinished *Staatslehre*. However, in this work—evidently under the impelling force of a number of factors, not least of which was the escalation of political events that led to Hitler's rise to power and to Heller's own emigration to Spain—Heller reconsiders the categories of liberal constitutionalism, reevaluating the role of the parliament and of parliamentary representation, and in so doing he moves away from his earlier decisionist positions.

7.5. Franz L. Neumann's Critical Theory of the State

Franz L. Neumann (1900–1954) is the author of some writings of fundamental importance to political science. This is especially true of *Behemot* (F. L. Neumann 1977) a work devoted to the institutional makeup of Nazi Germany. It was published in 1942, during his exile to the United States, and in it he analyzes the demise of the liberal *Rechtsstaat* and its transcendence by the Nazi "nonstate" (*Unstaat*) understood as a social form where "the dominant groups directly control the rest of the population without the mediation of the minimally rational coercive apparatus thitherto known by the name *state*" (F. L. Neumann 1977, 543; my translation).

Neumann is among the few jurists directly or indirectly affiliated with the Frankfurt school (another one is Otto Kirchheimer, 1905–1965, though he will not be treated here because the legal-philosophical component of his thought is, all told, minimal,[20] and there are also Georg Rusche, 1900–1950, and a few other lesser lights). In any event, Neumann ought to be remembered here for an article of 1937 devoted to the changing function of law, though in the 1920s he had also come out with a considerable number of constitutionalist and legal-philosophical writings, even if this was at a time when he was mostly busy as a lawyer working for the social-democrat unions.

Neumann's first stab at dealing with issues in jurisprudence came with his habilitation thesis (F. L. Neumann 1923), but where takes a properly jurisprudential angle to these issues is in the second (1929) edition of a study discussing Karl Renner's article on the concept of property.

However, it was Carl Schmitt's decisionism that would exert a stronger influence on Neumann (see V. Neumann 2009, 79ff.), and subsequently even more so on Kirchheimer. Indeed, Schmitt's ideas on the parliamentarianism and the constitution of the Weimar Republic certainly provide an important frame of reference for Neumann (who espoused socialism in his legal philosophy), at least until Hitler's rise to power. Neumann at one point put forward the idea of a "social *Rechtsstaat*" (comparable to the one advanced by Hermann Heller), but he subsequently saw this idea founded through the inability

[20] But see the essays collected in Van Ooyen and Schale 2011.

of both the left and the conservative right to work out a non-totalitarian alternative in the face of the crisis of parliamentarianism and the rule of law, which Neumann did account to be inherently limited, but which nonetheless, in his view, still served as a guarantee for the weaker and secured at least a modicum of freedom and equality for the underclasses (see F. L. Neumann 1978a).

In the 1930s, Neumann radicalized his views by laying even greater emphasis on the classist nature of social conflict, thus seeing the need to set in contraposition to the bourgeois dictatorship a proletarian dictatorship understood as a stepping stone on the way to a socialist society (see F. L. Neumann 1978b, 1978c), which society will nonetheless never be able to do without a state.

In 1937, Neumann published in the journal *Zeitschrift für Sozialforschung* an article titled *Der Funktionswandel des Gesetzes im Recht der bürgerlichen Gesellschaft* (The statute's functional change in the law of the civil society: F. L. Neumann 1967), analyzing the concrete relationship between the concept of law on the one hand, and on the other the capitalist mode of production at the peak of the transformations leading to monopolistic capitalism and mass democracy. The backdrop against which Neumann carried out his analysis was that of the political situation of the Weimar Republic and its law, where a conservative judiciary made it a practice to invoke general clauses and principles, thus turning the law into a pliant tool, liable to a range of interpretations depending on the circumstances of the moment. Writes Neumann:

> This rediscovery of "general principles" destroys the system of positive law, a system into which many important social reforms had been built: What gets destroyed is the rationality of law. The structural transformations the economic system had undergone wrought significant changes in the function of the "general principles," which had thitherto been like illegitimate children and now became favourite darlings. (F. L. Neumann 1967, 78; my translation)

Principles and general clauses are for Neumann "indicators" signalling the socioeconomic transformations in the system underlying the legal order. Law sheds its generality, and in its place come individual provisions more closely reflecting the exigencies of monopolistic capitalism. It is clear that if we proceed on the basis of these analyses in sociology and political science, any legal philosophy of a positivist sort is going to appear incapable of adequately explaining, and indeed understanding, the system's socioeconomic and legal transformations. As it turns out, however, institutionalism itself mystifies real social relations: just as normativism concealed the reality of social conflict by putting on it the mask of the "legal person," a procedure suited to the era of competitive capitalism, so institutionalism effects a concealment suited to the new era of capitalism: "To the extent that norms, as against contractual agreements, take the form of unilateral commands, the legal theory of positivism will disintegrate and be supplanted by institutionalism" (ibid., 87; my translation).

The law is understood by Neumann as "the state's hypothetical judgment on the future of its subjects." This judgment takes a statutory form, but its

universality conceals the bourgeoisie's class rule and the fact that individuals formally (i.e., legally) endowed with equal status are socially and economically unequal, and this inequality is entrenched in virtue of the notion of the state as a supposedly neutral power, a notion that clearly appears to him as a mere ideological fiction. The formalism of modern law, a formalism consequent on a Weberian *Entzauberung der Welt* (disenchantment of the world), and so also the formalism of law as such, has eventuated in a definitive disconnect between natural and positive law, and so also between law and morals.

The formalism of the statutes therefore contains at least three fundamental functions of statutes themselves as abstract and general rules: On the one hand this formalism dissembles the real power relations among human beings; on the other, encompassed within the statutes' generality is the close relationship between capitalistic calculability and the predictability of normative consequences, a relationship functional to free trade; but there is also an ethical function served by general statutes, in that positive law guarantees a minimum degree of liberty and equality, a minimum standard that definitely collapses with the shift from competitive to monopolistic capitalism, the former modelled through the legal form of the rule of law, the latter having the politico-legal makeup of the Nazi nonstate (*Unstaat*). In the *Rechtsstaat* of general and abstract statutes, economic and legal calculability stood as a protection not only for the bourgeois but also for citizens as such, whom the totalitarian state effaces:

> If the general statute is the basic form of law, if the statutes consist not only of *voluntas* but also of *ratio*, then the Fascist state cannot be said to have any law. Law as a phenomenon separate from the sovereign's political command is possible only on condition that law is manifested in general statutes. (F. L. Neumann 1977, 522; my translation)

Neumann argues on this basis that the Second Reich, the one governed under Bismarck and Wilhelm II, can still be considered a *Rechtsstaat*, clearly distinguished from any totalitarian state.

As a Marxist legal philosopher, then, Neumann can be seen to be in several respects eclectic, so much so that we even find the occasional reference to Kelsen, whose conception is indirectly evaluated by him in a positive way, even though Kelsen's formalism could not be reconciled with Neumann's content-laden approach. At the same time, many of Neumann's positions show the influence of Carl Schmitt's teaching, as in the way the idea of homogeneity as the premise of democratic organization is translated into a distinctly social concept. As Scheuermann (1994, 206 n. 37) has observed:

> Neumann's category of homogeneity lacks the explicitly anti-universalistic elements basic to Schmitt's formulation of it. At the same time, the way it is linked to the idea of a fundamental contradiction between political liberalism and democracy [...] probably reveals something of the imprint of Carl Schmitt [...]. Here again, Neumann's traditional Marxist position is probably mediated by categories shaped or even borrowed from Schmitt.

Chapter 8

FROM NORM TO DECISION TO THE CONCRETE ORDER: THE LEGAL PHILOSOPHY OF CARL SCHMITT

by Agostino Carrino

8.1. Constitutional Theory

Carl Schmitt (1888–1985) went through cultural periods shaped by different doctrinal and political worldviews and systems, and there is no way to treat authors like these by exclusive reference to any specific work. So if we are to reconstruct Schmitt's philosophy of law, we must instead take the broader view and look at his overall approach, considering the important role he played in Europe's intellectual history in the 20th century, and considering as well that he still finds himself at the centre of lively discussions, especially as concerns his involvement with the Third Reich and his adherence to the Nazi Party.

It would be inaccurate and misleading to reduce Schmitt to his Nazi phase, and even more so to paint him as a Nazi through and through.[1] It is, by contrast, in light of what Schmitt says and writes about legal science itself that we must construe him, without attempting to force his entire scholarly output through the view afforded by a single phase he went through (considering, too, that his work goes back as early as the 1910s). Schmitt's thought should be neither under- nor overestimated, and we cannot discount the fact that it has been deemed worthy of discussion by authors as diverse as Raymond Aron and Alexandre Kojève.

An error often made in evaluating Schmitt lies in making him out to be a political scientist, when in reality he was a jurist and wanted to be regarded that way: "I am a jurist!" he once exclaimed, and it is as a jurist that he ought to be studied, even if his legal science requires that specific attention be paid to philosophy, theology, and politics, and even literature. And this is because the law making up the object of his science of law is unlike what it is in conceptions such as Kelsen's, where law is the object constructed by the scientific method itself. For Schmitt, law instead faces the observer as an object distinct from the scientific method through which it is known: It is in this sense an object the observer must adapt to, in an effort to grasp it in its full complexity. And so for Schmitt law must never be analyzed *only* as a norm but *also* as a

[1] I am referring here to Jean-Yves Zarka's recent work and to the 2005 debate published in the French daily *Le Monde*. See Pol-Droit 2005, but see in particular the very balanced article Kérvégan 2005.

E. Pattaro, C. Roversi (eds.), *A Treatise of Legal Philosophy and General Jurisprudence*,
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norm; never *only* as a decision but *also* as a decision; never *only* as will, custom, or reason but *also* as will, custom, or reason. Law, in a word, is a complex historical phenomenon bound up with a people's concrete life, with its *Geist* as revealed to us by experience. We can thus understand Schmitt's focus on Savigny, and also on Roman law and its reception, but this only after Schmitt's wavering in the Nazi period, considering that the Nazis condemned Roman law as extraneous to the German tradition. On the other hand, it would be misleading to neglect Schmitt's lineage from Max Weber and his characterization of politics as conflict, for Schmitt's concept of decision is in effect a legal translation of Weber's sociopolitical concept of conflict. It is not irrelevant in this regard that Schmitt and Weber alike were historically situated in a specific context, that of the heyday of the nation-state as a power state, and this is also what marks out the historico-theoretical boundaries of the conceptions developed by Schmitt and Weber alike.

Schmitt's juristic thought can best be understood starting out from his views on the constitution and on constitutional law, bearing in mind from the outset that, for Schmitt, even Plato, Aristotle, and Hegel are essentially jurists, not philosophers:

> The philosophy of law does not, as I understand it, consist of a glossary extracted from a given philosophical system and applied to legal questions, but rather consists in developing concrete concepts rooted in the immanence of a concrete legal and social order. (Schmitt 1950, 427; English translation from Schmitt 1990).

Here we can confine ourselves to two essential writings by Schmitt affording a better grasp of his legal philosophy than does his overtly "theoretical" work: The first of these is his 1928 *Verfassungslehre* (Constitutional theory) and the second his 1930 essay on what he calls the guardian of the constitution.

Schmitt distinguishes between a constitution in an absolute sense and one in a relative sense. The former lies in the essence of a state as a form of power, and in this sense the state can never be said to have a constitution, for it *is* the constitution. The state's will is not formed through the provisions set forth in the constitution, which would thereby limit the state and shape its decisions "into form"; rather, the state's will is *itself* the form of its own substance, and it alone enables the state to exist. Making up the state is a political substance that determines its form as a political unit. Here the constitution lies in the very existence of the state: The constitution is a *fact of the state's being*, and not a set of norms that from the outside impose certain behaviours as being "due." As a de facto existing form, the state qua constitution, that is, the state's constitution, always exists in a given form: that of a monarchy, a democracy, a government of the soviets, and so on. As much as this form may be part of the world of the is, it cannot really be conceived as a form given once and for all; as a form in history, it undergoes change and is always in becoming, for in order to overcome existential continuity, it must overcome the crises, conflicts, and transforma-

tions imposed on it by history. From this point of view, Schmitt shows himself to be indebted to Rudolf Smend's theory of integration (see Section 8.4 in this tome), arguing that the constitution as a whole "is the active principle of a dynamic process of effective energies, an element of the becoming, though not actually a regulated procedure of 'command' prescriptions and attributions" (Schmitt 2003a, 19; my translation). Schmitt's conception can thus be summarized under the motto "the constitution as existence," where existence is governed by history and tradition and by the political forces acting in concrete ways at a given historical moment. In this sense, the constitution is equated by Schmitt with the state, and the state with the historical form giving expression to a certain people's mode of existence in a certain phase of its being.

In contraposition to this concept of constitution in an absolute sense there can also be another concept, one that might be termed "bad absoluteness," along the lines of Hegel's idea of "bad infinity." This bad absoluteness is that of the normative claim: an absoluteness that does not come from being—it is not existential—but is rather willed from the outside by a reason that arbitrarily imparts its own form to that which *is*, in such a way that instead of the state being the constitution, it is the constitution which is the state, where the constitution is understood as the "law of the laws," seeking an order conforming not to itself as a historically shaped entity but only to the constitution as a higher law, indeed as an immediately sovereign law.

Here Schmitt singles out a specific form of state, namely, the 19th-century legislative state, pretending to finally realize the age-old ideal of a "government of laws," where the sovereign is no longer the prince or the people—which in any event are concrete entities, at least to the extent that the people are understood in a determinate way as the poor, the working class, the bourgeoisie, and so on, well outside the modern false representation of democracy as the "government of all"—but is rather the constitution. This idea of the sovereignty of the constitution is functional to the neutralization process underway since the 17th century, a process geared toward singling out a "neutral sphere" beyond conflict, a sphere which by that time appeared to be well established, insofar as it had come to be identified with technique.[2] Schmitt seems to be setting up a homology among technique, the neutralization process, and the *Rechtsstaat*,

[2] Writes Schmitt in 1929: "In the 19th century, the monarch and then the state became neutral entities, and in the liberal doctrine of *pouvoir neutre* and of the neutral state, there came to completion a chapter of political theology in which the process of neutralization settled into its classic forms, since by that time it reached a decisive point, that of political power. [...] The European humanity has continuously been migrating from battlefield to neutral territory, and ceaselessly a newly conquered neutral territory is promptly transformed anew into a battlefield, so it becomes necessary to find new neutral spheres. [...] The process of neutralizing the different spheres of cultural life has come to a head, for it has arrived at technique. Technique is not neutral territory in that process of neutralization, and any power politics can use it to advantage" (Schmitt 1963; my translation).

that is, the state as an entity based on the rule of law;[3] indeed, the last of these items (the rule of law) constitutes a specific and autonomous element within the state: It is the *formal legal* element, over against another element also embedded within the state, namely, the *political* element.

To be sure, the political element and the *Rechtsstaat* element both lie within the state form, and yet they somehow efface each other. The rule of law makes it necessary to limit the state's power through the technical devices of constitutionalism—especially the separation of powers as the principle organizing the state's functions, which are an expression of this neutralization process—but within the state there always exists a contrary principle, consisting in the original, properly political element that claims its privileges: "In reality, the *Rechtsstaat*, despite all its legality and its juridical foundation, continues to exists as a *state*, and so next to the specific element of the *Rechtsstaat* itself (the rule of law), it will always also contain the specifically *political* element" (Schmitt 2003a, 125; my translation). This position, to be sure, is turned on its head with Schmitt's adhesion to the Nazi Party, but the framework in which the position is set out does not change. In the Third Reich there is no longer a *Rechtsstaat* because the premises have changed and the foundations have crumbled that made it possible for that form of state to subsist ("Hegel is dead"). The Nazi regime has eclipsed the separation between the state and society: It has done so by realizing a living political unity, thus making the *Rechtsstaat* "superfluous" (Schmitt 1995b).

For Carl Schmitt, then, politics comes *before* the law, at least in the sense of law as enactment, meaning the statutory law designed to regulate social, economic, and historical contingency.[4] Politics is primary and original, for it is inherent in the ontological naturality of things, in which there is to be found that conflict and antagonism that humans always tragically strive to overcome: "The political is the most intense and extreme antagonism, and every concrete antagonism becomes that much more political the closer it approaches the most extreme point, that of the friend-enemy grouping" (Schmitt 2007, 29–30). "The political can derive its energy from the most varied human endeavors, from the religious, economic, moral, and other antitheses. It does not describe its own substance, but only the intensity of an association or dissociation of human beings [...]" (ibid., 38).

It is this originalness of the political element that initially leads Schmitt to criticize the Weimar constitution as a constitution founded almost unilat-

[3] Of course, it is well known that the German "Rechtsstaat" is similar to but not identical with the term "rule of law."

[4] The idea that the political order precedes the social one is highlighted in Mortati 1973; cf. Nigro 1986b. Schmitt himself makes the following claim: "Before any regulation, there is a fundamental political decision by the constitutional power holder" (Schmitt 2003a, 23; my translation). And in the same vein is his claim that "only (political) decision can ground norms and the system alike. [...] Sovereign decision is the absolute beginning. (Schmitt 1993, 23–4; my translation).

erally on the rule of law and so as a decadent and even "posthumous" constitution (Schmitt 1995a, 44ff.), and then to interpret the age of fascisms as the age of "total politics" (Schmitt 2003b). The *Rechtsstaat*—the state under bourgeois law—will hold itself up only to the extent that representation is homogeneous, that is, only insofar as the state's command is unitary, in the sense of there being a relation of identity between the people and their representatives (between those who are represented and those who do the representing): The identity in this case is one of class, as in the census-suffrage phase of the *Rechtsstaat*, when the "electoral body" accounted for only a fraction of the population. Representative government makes sense and works only as the government of a homogeneous power, as when the *Rechtsstaat* is a one-class state, where the discussion is among subjects representing the same interests, such as the interests of the propertied classes.

Where representative government is plural, rather than homogeneous, and so where it is conflictual, the *Rechtsstaat* becomes an ideological superstructure, serving only to cover clashes and power struggles, and indeed makes it impossible for the state to carry out its new tasks and function, which is to deal with the problems the state itself faces with the advent of the masses. From this point of view, in Schmitt's assessment as well as in that of other jurists, like Hugo Preuss, the Weimar constitution was no more than an armistice. It is significant, however, that in a book Schmitt devoted to a discussion of Preuss, he expressed the hope that it could be something more than that, namely, "a peace" (Schmitt 1930, 42; my translation). After all, we all too readily forget that before 1933, the threat from which Schmitt was trying to save the Weimar Republic was coming from two fronts: There was the Nazi threat and there was the Bolshevik threat.

Schmitt's criticism of the *Rechtsstaat* as a partial and hence antinomic, contradictory element leads Schmitt to distinguish two concepts of the constitution: On the one hand is the constitution as the product of the bourgeois revolution—and so as an expression of what Marcel Gauchet calls the "human-rights revolution"—and on the other is the constitution as a fact, as the "fundamental political decision by the bearer of the constitution-making power" (Schmitt 2003a). The former is merely the *Rechtsstaat*'s *Konstitution*; the latter is the *Verfassung* of the political order as such. The concept of the constitution as a fact and as a fundamental political decision presupposes someone capable of *making* this constitution: It presupposes a *pouvoir constituant*. Here Schmitt's conception reveals its historical limitation, especially in virtue of its dependence on the views advanced by contemporary authors like Charles Maurras of France. Indeed, the constitution-giving subject is identified by Schmitt not with the people (however conceived) but with the nation:

> Nation and people are often treated as equivalent concepts. Nevertheless, the word "nation" is clearer and less prone to misunderstanding. It denotes, specifically, the people as a unity capable of political action, with the consciousness of its political distinctiveness and with the will to politi-

cal existence, while the people not existing as a nation is somehow only something that belongs together ethnically or culturally, but it is not necessarily a bonding of men existing *politically*. The theory of the people's constitution-making power presupposes the conscious willing of political existence, therefore, a nation. (Schmitt 2008, 127; cf. Schmitt 2003a, 79)

While, on the one hand this conception locates Schmitt in a dark tract of history fraught with gloomy and ghastly connotations, and in this sense can be said to represent the less significant part of his thought (making him a theorist of something that might be described as "legal nationalism"), on the other hand he ought to be credited with having put forward a concept of the constitution that cannot be reduced to the idea of the constitution underlying the bourgeois state, that is, the idea of the constitution as a norm grounded in another norm or, worse still, in itself. The constitution as a normative fact entails a deeper reality forming the foundation for that particular norm we call "the constitution." This deeper reality is referred to by Schmitt as the concrete legal order, a typically German rendition of the Italian and French concept of institution (Santi Romano, Maurice Hauriou).[5] A state can only exist in a given form, and this form is always complex, in that it can never do without, on the one hand, some kind of representation and, on the other, some elements of identity, the latter consisting in that specifically modern translation of ancient acclamation which is public opinion, the foundation of the identity principle: "There is no democracy and no state without public opinion, as there is no state without acclamation" (Schmitt 2008, 275; cf. Schmitt 2003a, 243).

Schmitt's constitutional theory is thus a realist theory, for it does not deny the existent but rather embraces its deepest structures, even when they reveal themselves to be antinomic, as in the case of the relation between pluralism, by which Schmitt means conflict, and the consequence necessarily entailed by it, meaning the need for representation based on identity, this through a political entity capable of "representing" that which is not present, namely, the people, in the decision-making phase.

Public opinion, about which Ferdinand Tönnies wrote an essay at roughly the same time that Carl Schmitt wrote his *Verfassungslehre*, is thus construed as the modern translation of traditional acclamation, in that it legitimizes the sovereign powers' political decision: "The people as an entity that is not officially organized [...] become valid in individual moments and only by way of acclamation, hence today as 'public opinion'" (Schmitt 2003a, 275; my translation). No state exists without conflict, but every conflict needs to be overcome through a decision, and that presupposes the existence, somewhere and somehow, of a sovereign entity capable of resolving the conflict, even if only temporarily.

[5] On Italian and French institutionalism see, in this tome, Sections 11.4 and 12.2 respectively.

It is for this reason that Schmitt ascribes a particularly important role to constitutional preambles as concerns a people's fundamental political decision about its own future and form of political organization. In preambles Schmitt finds an express statement of the will forming the basis of the constitution itself. The Weimar constitution is in effect a decision in favour of democracy, federalism, and liberalism. That is the basic political decision lying at the basis of that constitution, and it is all contained in the preamble to the constitutional charter itself:

> The 1871 and 1919 Reich Constitutions contain prefaces, "preambles," in which the political decisions are expressed especially clearly and emphatically. [...] But the decisive point is that the preamble of the Weimar Constitution contains the authentic declaration of the German people that as the bearer of the constitution-making power, it will decide with full political consciousness. (Schmitt 2008, 78–9; cf. Schmitt 2003a, 25)

Why does Schmitt ascribe such importance to constitutional preambles? The best guess is that they appear to him as a succedaneum for the essence of "pure" democracy, which he identifies not with electoral procedure, the secret ballot, and the like, but in the power of the people to say yes or no to, a power through which decision-making proper is exercised:

> Individual secret balloting, not being preceded by any procedurally regulated public debate, wipes out the very potential specific to a united people. Indeed, [...] the original democratic phenomenon, that with which even Rousseau identified authentic democracy, lies in acclamation, the cry through which a gathered mass expresses its approval or rejection. [...] Acclamation is an eternal phenomenon present in any political community. No state can exist without the people, just as no people can exist without acclamation. (Schmitt 1927, 34; my translation)

From this approach stems Schmitt's distinction between the constitution and constitutional law: The constitution owes its existence and legitimacy not to a legal norm but to a politico-legal will; constitutional laws, by contrast, do rest on an existing set of norms. Under Article 76 of the *Weimarer Reichsverfassung* (the Weimar Constitution), constitutional laws may be modified according to a formally established procedure; the constitution, by contrast, is a nation's founding political decision that can only be modified through another such basic decision, that is, through another constitution based on a different political decision. Schmitt's position can in certain respects be said not to stray too far from the materialist conception of history, with the only caveat that in the "materiality" of history we find not only economic relations but also ideological, religious, and moral ones, along with the facts of the spirit, even though it is only to the extent that these ostensibly immaterial elements and relations find themselves embodied in certain political forces and classes that they count as part of the material structure.

The constitution as conceived by Schmitt thus runs head-on against the idea of it proper to normativism. The constitution is for him a historical fact,

and only consequently and by reflection a norm, whereas what liberalism *imprimis* and fundamentally sees in the constitution is a project conceived to bring about something that has to be concretized (equality, rights, freedom, and the like). In reality, Schmitt argues, no legal system can as such overcome the dominant political forces prevailing in society, and in fact the constitution always and only exists as the juridical form giving expression to the legal order's political substance, a substance that may manifest itself as a norm, as a decision, or as both, as the case may be. There is a "constitutional law" more substantive than the enacted, written constitutional law, a deeper law which consists in the dynamic of political relations, and which cannot but prevail on the positive law, whether it be in a gradual, peaceful manner or in a dramatic, tumultuous fashion. For this reason, Schmitt's decision can never fall outside the law: It is always inherently legal and law-creating.

That is the reason why Schmitt denies that the guardian of the constitution can be a judicial organ, a constitutional court, as Kelsen instead argues. An organ of this sort would, by its nature and by virtue of its functions, be incapacitated from interpreting the political forces at work in the social structure; what would matter is formal positive law as interpreted in light of the court's own reading of the letter of the law or in light of the values the judge subjectively injects into the normative text. Only a representative of the people can defend the constitution, because only those who directly interpret the popular will can grasp the present reality of political power relations, such as they are given on the level of the homogeneous body social. Indeed, it is essential for Schmitt to know who makes the decisions. Even in what is apparently a highly technical work, the 1927 *Volksentscheid und Volksbegehren* (Referendum and popular initiative: Schmitt 1927), the argument for this view boils down to a few lines:

> As is the case for all indeterminate concepts that are indispensable for the state's existential reality (such as security and a public system of laws), so here, too, the need to normatively understand every conceivable case through a formulation conforming to the state of affairs is less important than the question of who it is that *decides* how such concepts apply in the concrete case. The question here, too, is the decision-centred *quis judicabit?* (Ibid., 30; my translation)[6]

Or, in other words, quoting a famous passage from his *Politische Theologie* (Political Theology: Schmitt 1985a) "sovereign is he who decides on the exception" (ibid., 5; my translation), in that only by looking at how a state of exception is worked out is it possible to know who the sovereign is in any given historico-political phase a given people may be going through.

[6] The German original: "Wie bei allen unbestimmten Begriffen, welche für die existenzielle Wirklichkeit des staatlichen Lebens unentbehrlich sind (z. B. öffentliche Sicherheit und Ordnung), kommt es auch hier weniger darauf an, in einer tatbestandsmäßigen Formulierung jeden denkbaren Fall normativ zu erfassen, als vielmehr auf die Frage, wer über die Anwendung solcher Begriffe im konkreten Fall entscheidet. Die Frage ist auch hier das dezisionistische *quis judicabit?*"

Through the problem of the sovereign we can see what Schmitt takes to be the limits of the constitution. His view, in a word, is that the constitution always depends on the relation among political forces. This makes it possible to appreciate why Schmitt thought that the legislative-parliamentary form proper to the 19th-century liberal *Rechtsstaat* made for a harmonious relation between the formal constitution and the material one, for it enabled the state, the constitution, and the dominant political forces to flow together on a basis of homogeneous correspondence in making the fundamental political decision. This is different from what is the case with post-liberal states, the so-called welfare state, for in these states the constitution is based on compromise, which is always liable to come undone, so there is always the prospect of a separation between the formal constitution and the material one—which in turn means that the state of exception is ever ready to break out. So much is that so that these forms of state were designed to revolve around the parliament as their central organ, and for some time this organ has ceased to carry out any useful tasks and functions, ever since the dominant social force (the bourgeoisie) splintered and thus lost its homogeneity. The parliament is thus regarded by Schmitt as unfit to effect the synthesis needed for the conflicting interests in modern society to coalesce into a coherent force.

So it won't suffice, in Schmitt's view, to simply agree on a method to be adhered to, on a set of procedures, on *Legitimität durch Legalität* (legitimacy by legality), to frame the idea from a Weberian perspective. Always lying in wait, on any approach centred on the formality of procedure, is the risk of unchecked pluralism, of the emergence of conflict that breaks asunder the unity of political decision in favour of partial and special interests. That is one of the reasons why Schmitt does not accept that the role of "guardian of the constitution" may be entrusted to a judicial organ. It hasn't been emphasized enough, in this regard, that one ground on which he criticized the "judicial state" and the judge's power is that in the United States, for example, judicial review has been used to advance specific class interests, sacrificing women's protection and the fight against child labour to the overriding concern to secure a business-friendly capitalist economy. Writes Schmitt in his *Hüter der Verfassung* (The guardian of the constitution; Schmitt 1985b):

> In this way, it has become the practice of the United States Supreme Court to look to the Fifth and Fourteenth Amendments—setting out the much-debated due process of law—as a basis on which to strike down the lawmakers' initiatives in a bid to uphold the principles of the bourgeois socioeconomic order as the highest system and authentic constitution. (Ibid., 14; my translation)

It is indeed a mistake to view Schmitt as an absolute theorist of presidentialism. He does defend the powers of the president of the Reich under Article 48 of the Weimar *Reichsverfassung*, but he sets this view within a broader argument that in the first place calls into question the idea of a "judicial state" (*Richterstaat*) as

an alternative to the legislative state. As much as parliaments may no longer be capable of carrying out their tasks and functions, and for this reason have come to pose a threat to concrete constitutional systems, no less inefficient and perilous are, in Schmitt's view, the projects for "judicializing" the state. Legislative and judicial power are both bounded by clearly marked, indeed "natural" limits, overstepping which would be deleterious to politics and justice alike. It is significant in this regard that Schmitt should quote a passage from an important book by François Guizot, *Des conspirations et de la justice politique* (On conspiracies and political justice: Guizot 1821), where Guizot, staking out a position against the "juridification" of vital relationships, states that "politics has nothing to gain from that, and justice everything to lose" (ibid., 109; my translation).

The crucial flaw, for Schmitt, is that the normativist and formalist approach is stopped in its tracks the moment it takes up the problem of defending a higher law. Indeed, there can be no jurisdiction of one norm over another, unless the term *norm* becomes a vehicle for all manner of ambiguities;[7] in essence, a constitutional judge is always only a "constitutional legislator holding a high-ranking political office" (Schmitt 1985b, 48; my translation), but devoid of any democratic legitimacy, an organ empowered to decide on its own competence, that is, on the grounds of its own sovereignty. What follows is therefore a violation of the Weimar Constitution itself, which "embraces the democratic idea of the homogeneous, indivisible unity of the German people" (ibid., 98; my translation). Invoking the judge as the "guardian of the constitution," then, simply amounts to concealing the reality of things under an artificial contraposition between what is "legal" and what is "political"; it also amounts to positing "pure" forms of state, failing to see that every concretely existing state is always a mixed state, however much there may be in it an organ that prevails over the others, as the case may be.

8.2. On European Jurisprudence

It will serve us in good stead at this point—if we are to have a more organic appreciation of the complexity of Schmitt's philosophy of law—to devote

[7] It is significant in this regard that Schmitt should have criticized as follows the speech Hans Kelsen delivered at the conference the German constitutionalists held in 1927: Kelsen's "entire talk proceeds from the fact that the constitution is the same thing as constitutional law, and constitutional law the same thing as norms. Here this ambiguous concept of a norm once more reveals itself to be a vehicle of conceptual overreach, for it turns out that the whole of the possible is in force as a norm. We can even lose the basic trait distinctive to the concept of the constitution, which finds itself at the centre of every practical and theoretical discussion in constitutional theory—Is the constitution a political decision of the unity of the people? Is it a law? (And, if so, who is its maker?) Is it a contract or a compromise? (And, if it is a contract, who are the contracting parties?)—and this whole ensemble, inclusive of decision-making, law, and contract, can be brought under the umbrella of the word *norm*" (Schmitt 1985b, 63; my translation).

some time to an essay he wrote in the wartime years, and which foretokens the catastrophe that was about to unfold. The essay was originally written for a conference whose proceedings were initially published in Hungarian, and only in 1950 did it come out in German, under the title *Die Lage der europäischen Rechtswissenschaft* (Schmitt 1958b), later translated into English under the title *The Plight of European Jurisprudence* (Schmitt 1990).

The essay was originally meant for a *Festschrift* devoted to Johannes Popitz,[8] and it figures among the most important of Schmitt's works when it comes to understanding how his thought evolved, this in two respects. For on the one hand the essay helps us gain a grasp of Schmitt's theory of law and the state, and on the other it opens a window into his relation to the Nazi regime and into the way his politico-existential outlook changed over time.

As concerns Schmitt's philosophy of law, *Die Lage der europäischen Rechtswissenschaft* testifies to the scope and import of the *legal structure* of Schmitt's thought, while also highlighting the central role the concept of *jus* plays in shaping the overall cast of his oeuvre, which is less doctrinaire than it is attentive to, and grounded in, the concrete situations in the world about us (from which also comes the charge that this essay is "occasionalist").[9] But we must also bear in mind here another element characterizing Schmitt even

[8] This *Festschrift* was never published, because Popitz was executed for his role in the July 24, 1944 plot against Hitler.

[9] The charge is made in Löwith 1935. To which Schmitt might reply along these lines: "There is nothing significant that can be said about culture and history without an awareness of one's own cultural and historical situation" (Schmitt 1988, 121; my translation), an attitude he shares with Weber and Hegel, and which therefore does not easily lend itself to "occasionalist" interpretations.

Schmitt's close engagement with the concretely given situation has made it difficult, and will continue to make it difficult, to definitely settle the question of how to "periodize" his thought, or rather, the intellectual phases he went through, as can easily be appreciated in connection with what is perhaps the most authentically Schmittian problem, that of legitimacy. As Hasso Hofmann has illustrated, Schmitt's theory of legitimacy goes through several phases, and even though Schmitt was very much aware of that fact, he deliberately chose not to explain those phases, viewing them as the (intellectual) outcome of a concrete (historical) situation. As C. Gusy has observed, Schmitt's "theory of legitimacy is for the most part developed in different phases. Schmitt himself refrained from bringing the links to light and clarifying any perceived contradictions. The reason for this silence on his part may be that political and legal concepts are understood by him as operating in relation to the concrete situation of the moment in the state's existence" (Gusy 1987, 47; my translation).

See in any event Hasso Hofmann's fundamental *Legitimität gegen Legalität* (Legitimacy against legality: Hofmann 1995c): "Through our consciousness of the utter contingency of our being-there, we experience its facticity in its unique and unrepeatable specificity. It is therefore an extraordinarily prominent role that in his work is played by the concept of the concrete in general and the concept of the concrete situation in particular—and that is so much earlier than the turn he took in 1933/34 in embracing the 'concrete legal order.' The word *concrete* comes up in many contexts and is more frequent than any other word. Nothing appears to him to be amenable to a general understanding any more; rather, each and every thing can only be understood starting from the concrete existential situation" (ibid., 167; my translation).

under the Weimar Republic, and that is his ambiguity, a trait that in an essay on the methodological controversy in public law led Erich Schwinge to dub Schmitt the "Sphinx" of modern German public law.[10]

The first thing we have to draw attention to here is the role that legal science takes on in Schmitt's historical approach and in relation to the legal phenomenon as such: What is the relation between legal science and law? Here Schmitt comes up with the illuminating idea of reception, an idea he does not confine to the better-known reception of Roman law but extends to the entire history of European peoples and interprets as a phenomenon having deep roots:

> It can even be claimed, without exaggeration, that the entire history and development of the European peoples is a history of receptions cutting both ways, where by *reception* is meant not a banausic acceptance devoid of any creativity, but a back-and-forth process of incorporation, adaptation, and refinement, often in the face of strong resistances—a process that may even feed back on received law itself, whose evaluation in each single case is a question apart. (Schmitt 1958b, 391; English translation Schmitt 1990)

To which I would add that in this essay Schmitt allows it to be understood (a suggestion not backed by any argument) that law and legal science might almost be the same thing, such that neither could logically be the product of the other. The reception of Roman law appears to be a preeminently cultural phenomenon, where different European peoples recognize one another as belonging to a single clan, the issue of a common lineage as a people who have dwelt in the same land:

> Through the work of the jurists of all European peoples, Roman law has become a common vocabulary, the language of the community of legal science, the de facto standard for conceptual legal work, and hence a conceptual and spiritual European Common Law, without which it would not even have been theoretically possible for jurists across national boundaries to understand one another. The cultural edifice here put up by the European spirit rests on this shared basis produced by a common European science of law. (Schmitt 1958b, 396; English translation Schmitt 1990)

This mutual recognition among European peoples through the life of the law takes on a peculiar meaning in this essay. Indeed, whereas the state is, for Schmitt, a historically determined phenomenon (Schmitt 1958a), and as such is bound sooner or later to be eclipsed, the law is understood by him as that specific form—a form distinctive to European culture—wherein the European consciousness can attempt to find a new beginning, having been uprooted and alienated from itself through the progressive and looming loss of the state, considering that the state had been Europe's answer to the crisis of Christian medieval unity and the ensuing religious wars (at once religious and civil). And

[10] "Carl Schmitt is the Sphinx of the modern theorists of public law, since he eludes from the start any attempt to classify him" (Schwinge 1930, 15; my translation).

so this essay (which I suggest reading in parallel with Ernst Jünger's roughly contemporaneous essay on peace: Jünger 1980b, 193ff.)[11] is undoubtedly deserving of credit, for as much as it may not be judged equal to his later *Der Nomos der Erde* (*The* Nomos *of the Earth*: Schmitt 2003c) it shows that Schmitt did not give in to the pessimism then rampant but instead sought to cast his gaze beyond the ruins of contemporary Europe.

And indeed *Die Lage der europäischen Rechtswissenschaft* carries some broadly "Catholic" undertones, in the sense of its embracing hope, and what nurtures this sense of hope is precisely the force of law, in that law resists any attempt to collapse it into the state, much less to outright *identify* it with the state à la Kelsen. We cannot here take up the question of how Schmitt positions himself relative to natural law and legal positivism. But we can say that this latter current is certainly criticized by him for its legalism, that is, ultimately, for its reducing the law to a product of the state. It is still a deep misconception found in any superficial account of Schmitt that he revered the state form. In fact, the contrary is actually the case: The state for him (who never lost sight of his own Catholic roots) is at best a "magnificent evil." It is magnificent because this product of European culture has worked wonders in the project to overcome civil war, for it managed to set itself up as a "mortal god," thus establishing its own teleological structure; at the same time, however, it is an evil, not only because the modern state, precisely through that attribute (its being modern), necessarily falls subject to the modern world and therefore follows its course, embracing a purely instrumental and calculative "rationality,"[12] but also, and ultimately, because the state issues from a mode of thought that is itself the outcome of a cleavage, a dualism that has not yet been worked out, namely, the dualism between thought and being, between subject and object. The state is construed by Schmitt as the answer to European civil war, but at the same time—with Bacon, Descartes, and anti-theological rational philosophy—it is viewed as encapsulating the modern revolution.

On Schmitt's conception, law is firmly set in reality. In fact, reality is *itself* law. Or, as this idea has been expressed (including by Schmitt himself), law is the "concrete [legal] order"—though it can also simply be said to consist of the *jus* (and later the *nomos*), i.e., law as distinguished from the positive law. And so law is equated by Schmitt not with the *ought* (a mere *Sollen*) but with

[11] Aalthough the work was published in 1945, it had already been blocked out in 1941. It will be mentioned in connection with Jünger that the essay by Schmitt under consideration (*Die Lage der europäischen Rechtswissenschaft*) closes with a note on pain: "Let us recall to mind the history of our travails, for our strength is rooted in the close familiarity we have with pain" (Schmitt 1958b, 426; my translation). And these words are reminiscent of Jünger's extraordinary 1934 essay, while also conjuring up the pain proper to the Worker, representing man thrown into titanic modernity, the full weight of which rests on his shoulders, and that is precisely all pain.

[12] "The modern state has historically arisen out of a practical technique (*Sachtechnik*) within the political order" (Schmitt 1994, 12; my translation).

the *is* (the *Sein*), so much so that this latter element, the *is*, comes into contrast not with the *ought*, as it does in Kelsen, but with the *non-is* (with the *Nicht-Sein*, or nonbeing) (Hofmann 1995c, 21).

The *is* Schmitt is thinking about is not an empirical, contingent *is* but a historical one, so much so that the law he speaks of in this essay is Roman law such as it historically lives in legal science: Law is not the "product" of legal science but is what is *thought* by legal science; it is what legal science *knows* about law, or what its consciousness and understanding of law is. One cannot underestimate in this regard the import and significance of the German historian Savigny, whose work, in Schmitt's words, "is an existential reflection *on* the law *by* the law itself, a great appeal made to the science of law in its role as custodian of law, enacted or otherwise" (Schmitt 1958b, 411; English translation Schmitt 1990). We can appreciate, then, by virtue of this feature alone, that the science of law can be likened to an art: Just as Europe is ultimately encapsulated in its essence in its cathedrals, churches, palaces, art museums, and music, so it is encapsulated in its legal wisdom.

But Europe is also its *positive* law, which needs to be actualized and does not content itself with a lifeless existence in the pure abstraction of norms. It does not emerge clearly enough from this essay that Schmitt is not putting forward a theory of *natural* law:[13] He does not set natural law against "positive" law, for in positivity—understood by him as the historicity of law—we also find positive law, namely, enacted law, and to some extent also written law. There is Savigny on the one hand, and there is Hegel on the other. The existentiality of law is certainly its "positivity," in the sense of its unfolding through an unwitting evolution, in the sense of its givenness, its being an order that in some respects calls to mind Friedrich von Hayek's "spontaneous order." Writes Schmitt:

> As absolutely existential sense can be ascribed in particular to Savigny's theory of the sources of law. Through his conception, Savigny gave a new and intense meaning to the theory of the sources of law and to our image of it. Savigny and his peculiar concepts of "historical" and "positive" can be understood only by seriously reflecting on the fact that his theory of legal sources, and the image through which he depicts such sources, are closely connected to the fight for survival in which legal science is engaged. As a concrete order, law cannot be isolated from its history. True law is not posited but rather arises through an unwitting evolution. In the present day, then, what is true law can only be determined by looking at its concrete historical form of existence as shaped by jurists cognizant of this evolution. The concept of what is positive, in the sense that legal science ascribes to this term, is understood by Savigny as tied to a particular kind of legal

[13] Worthy of mention in this regard is the Catholic criticism directed at Schmitt by F. A. Von Heydte: "Carl Schmitt [...] neglects to consider that [...] over the last twenty years" a new legal science has resurrected that "does not fear speaking about God and about a God-given natural law. It is here that this science looks for the authentic source of natural law, instead of proceeding, as Carl Schmitt does, from a secularized human science" (Von Heydte 1950–1951, 288; my translation).

source—the kind safeguarded by jurists, with whom the law in a quite distinctive way finds its origin as something *given* rather than enacted. (Schmitt 1958b, 411; English translation Schmitt 1990)

So nothing, then, is more positive than this law which the jurists are safeguarding, and nothing could be farther from uncritical positivism or even from (Kelsen's) critical positivism, since the former reduces law to an arbitrary act of will, and the latter espouses a purely scientific vision purporting to reduce to unity and make coherent the law posited by the lawmaker. But at work in this legal positivism and this "positive law" Schmitt also sees something deeper, namely, their will to power, their being an expression of the epoch of formal computability and predictiveness: Legal positivism "only knows fundamental, hypothetically posited causes or norms. It seeks the opposite of a law devoid of ambitions, and its ultimate ambition lies in domination and calculability" (ibid.). The motto of legal positivism is "Predict in order to regulate"; on an existential conception of the legal order and the world, by contrast, the law is understood as the fruit borne by a tree, that is, as the end result of an original moment that has no purpose other than that of being itself. And for this reason, despite the opportunistic compromises Schmitt made with the Nazi regime, he cannot intellectually be ascribed to that regime, whose plebeian and massifying, crudely racist traits could very well be located in a linear history which is that of modernity and its mythologies.

Whence the paradigmatic significance of the positivity of law, set in contrast to legal positivism—and also the emblematic significance that in this sense Schmitt ascribes to the debate between Savigny and Hegel:

As much as the highly charged nature of this debate may have made it unfruitful, in Schmitt's eyes the debate testified to what was at stake, one last time before legal positivism was to sally forth, and before legal positivism could bring to light the crisis of the state as a subject of law. The breakdown of this dialogue is, among other historical factors, one of the reasons for the legal incognizance characterizing the 20th-century "motorized lawmaker," for whom the decree, the ordinance, and the administrative memo are in point of fact substituted for the general legal norm, but who has failed to extract the legal and political consequences deriving from this fact. (Kervégan 1992, 142; my translation)

But if all of this is true, what are we to make of the fact that for several years Schmitt was tied to the Nazi regime, even styling himself as its authentic and "official" interpreter (*Kronjurist*)? It is true that many regard the Nazi phenomenon as a sort of a reaction against the modern world, as an anti-modern movement. But if, as I would argue, this interpretation is mistaken—and Nazism ought to be understood precisely as an unleashing of Titanic, and hence essentially modern forces—how can we reconcile that with Schmitt's philosophy of law and politics, which takes a critical stance to modernity?

In support of the thesis of the "Titanic" and technological nature of Nazism, I should like to recall a largely unknown author, Fritz Nonnenbruch,

the theorist of Nazi economic policy: Not only does Nonnenbruch not see any contradiction between Nazism and technology, but on the contrary, the new politico-economic system put in place by Hitler is regarded by him as none other than an "infinite push for technology" (Nonnenbruch 1936, 154; my translation; cf. Nonnenbruch 1939). As much as capital (big money) is for him stateless, and branded by him as "Jewish," it is also at the same time regarded by him as the enemy of the very technological progress championed by Nazism (Waibl 1988–1989). If that is the case, and there is in fact no way to separate Nazism from technology, then on this basis might be rested the claims of the apologists for the other great "decisionist" of the time, Martin Heidegger, since it was their strategy to equate Nazism with technology so as to fashion Heidegger into a critic of Nazism (albeit an indirect one). In other words, the exaltation of Titanism is set in contraposition to all those who instead have criticized modernity for its will to technology, and so for its drive for domination.

It is therefore not impossible to see, either on a literal level or an intellectual one, how Nazism might be incompatible with Schmitt's conception—an incompatibility that becomes apparent in his essay on European legal science, all the more so that *Nazism was a staunch adversary of Roman law*. The fight against the corrupting spirit of Roman law even found its way into the Nazi Party programme, where it is presented as a basic tenet of Nazism: "We demand that Roman law, which serves a materialist ordering of the world, be replaced by German common law."[14] This was a statement meant to apply in particular to property, but in reality Roman law had always been targeted as such in German conservative quarters.[15]

Now, it can easily be appreciated, even on a superficial reading of Schmitt's 1950 essay on European jurisprudence, that he does not take exception to Roman law or to Roman legal science. Yes, he does generalize the phenomenon

[14] Point 19 of the "Program of the National Socialist German Workers' Party" (1933). In *The Avalon Project: Documents in Law, History and Diplomacy*, at http://avalon.law.yale.edu/imt/nsdappro.asp. The German original: "Wir fordern Ersatz für das der materialistischen Weltordnung dienende römische Recht durch ein deutsches Gemeinrecht." On Roman law in Nazi Germany and on the issues arising in connection with the Nazi rejection of Roman law, see Pieler 1990.

[15] If we just consider the movement that came to be known as the Conservative Revolution, it will suffice to look at the writings of Oswald Spengler (as a rule included in that movement) to appreciate that Roman law was regarded as a corrupting force proper, gutting the primeval "Germanic freedom." Writes Spengler: "Roman law has corrupted us. It dangerously abets the average German's tendency to daydream, to wander, to buy into whatever exists as a matter of fact" (Spengler 1933b, 241–2; my translation). An even more ideologically uncompromising position was expressed by the Nazi jurist Helmut Nicolai in *Die rassengesetzliche Rechtslehre* (The jurisprudence of race-based laws: Nicolai 1932, 6ff.). Of course, it is out of the German studies of the mid-19th century that had come the dogma according to which "the reception of Roman law has been a national curse" (Pieler 1990, 430ff.; my translation; also discussing the same attitude on the part of Gierke and the later Fuchs).

of legal reception, but nowhere on these pages do we find any hint of an unsympathetic attitude. This observation is all the more significant if we consider just how different Schmitt's attitude to Roman legal science is here by comparison with the view he had previously espoused from 1933 to 1936. This is a point that comes through clearly in two writings from that period: his 1934 book *Über die drei Arten des rechtswissenschaftlichen Denkens* (Schmitt 1993, translated under the title *On the Three Types of Juristic Thought*: Schmitt 2004) and his 1936 article *Aufgabe und Notwendigkeit des deutschen Rechtsstandes* (The task and necessity of the German jurists: Schmitt 1936). Let two passages illustrate:

> Medieval Germanic thought [...] was fully concrete, but starting from the 16th century the reception of Roman law in Germany removed this mode of thought from the jurists by favouring an abstract normativism. (Schmitt 1993, 9; English translation Schmitt 2004)

And then, in the 1936 article, Schmitt argued that only by overcoming the "domination of Roman law" is it possible to do away with the "class system keeping watch over German law":

> Neither thing is thinkable without the other. If the emperor's clothes go, so must the emperor. If we fight the reception of Roman law, we will not only be fighting the content of certain legal propositions, on whose coherence we might perhaps have a debate, but we will also, and in the first place, be fighting to construct a unitary German guardianship of law, one whose organization and structure will satisfy all the conditions needed to create and keep watch over a common German law. (Schmitt 1936, 181–2; my translation)

It is impossible not to see the chasm that separates Schmitt in this phase, in 1934 and 1936,[16] from Schmitt in 1943, or even, going back in time, from Schmitt as a quasi-neo-Kantian normativist in his 1914 essay on the state (Schmitt 1914). It falls beyond the scope of this discussion to try and understand what drove Schmitt to adhere to Nazism, through a rather unnatural conversion. But one thing is certain: About this time he was a prominent exponent and an *authentic representative of Nazism*, or at least this is the role he fashioned for himself,[17] and that is how he was regarded by jurists abroad, for example, in France and Italy.[18]

Is Schmitt the Nazi proponent the coherent outgrowth of Schmitt the scholar of the 1920s? My own view is that that is quite implausible, just as it seems to me that one cannot doubt the fissure between the Nazi Schmitt and

[16] On Schmitt as *Kronjurist* of Nazism, see (among the earliest and most virulent writings) Schultes 1947.

[17] As did his pupils, a case in point being Ernst Forsthoff, who in 1933 wrote an essay on the total state fully aligned with the directives of the new regime (Forsthoff 1933).

[18] See Wilk 1934, Perroux 1940. Likewise, A. Volpicelli commented thus: "Carl Schmitt, one of the official theorists of National Socialism" (Volpicelli 1935, V; my translation).

his later avatar.[19] Of course, it must still be possible to discern a red thread running through the "three Schmitts," a basis and a personal equation explaining the thinker's outlook in every phase of his thought. I believe this means tying Schmitt closer to the "ruler" of the party—closer to the "body" and "functions" of the Führer—than to Nazi ideology, and it also means throwing into relief the drive for unity which characterizes Schmitt's thought, a drive which on the one hand would lead him to defend Hitler after the Night of the Long Knives (or Röhm-Putsch, the purge carried out against Ernst Röhm and his *Sturmabteilung*, or SA), and which at the same time would also cause him to see in the *ruler* the defender of law, representing an impartial, organic legality.[20]

Indeed, in the Nazi phase stretching from 1933 to 1936 (and perhaps lasting a few more years),[21] Schmitt followed a certain Hegelian revivalist vogue then underway, and in so doing highlighted some elements of Hegelian Prussianism or Prussian Hegelianism that certainly could not be reconciled with the Catholic view. One need only mention here the passage he wrote on Hegel in the book on three types of juristic thought. Writes Schmitt: "Before the demise of subsequent generations, concrete institutional thought comes back to life with an immediate force one would scarcely have expected after the 17th- and 18th-century development of the theory of law and the state." Hegel's state, which appears to Schmitt as more an empire than a modern state, "is not to be found in bourgeois peace, in the security and order of a legal functionalism. It lies neither in sovereign decision nor in a 'norm of norms' [...]. It is the concrete order of orders, the institution of institutions" (Schmitt 1993, 38–9; English translation Schmitt 2004).

But there is also in Schmitt's legal thought an underlying continuity that is usually not brought into relief. In other words, there is in Schmitt the constant idea of a twofold superiority: that of the spiritual world,[22] on the one hand,

[19] That there is a definite break in the "development" of Schmitt's thought is evidenced (albeit circumstantially) by the fact that already in the second edition of his *Begriff des Politischen* (the 1935 edition), the bibliography in the appendix does not list any relevant juvenilia, not even the 1924 essay he wrote on Roman Catholicism. (Might this be a sort of self-censorship à la Lukács?)

[20] Here we ought to bear in mind a theme that runs through Schmitt's thought from the outset, namely, the view that absolute sovereignty never stands *above* the law but rather *embodies* the law: "The absolute sovereign rises above the relativities of temporality; he no longer counts as an individual at all; he no longer has moods and amusements; he has in every respect become 'the law'; he is not above the law any more than he is above grammar" (Schmitt 1917, 95; my translation). And shortly thereafter: "The dignity he demands and which is conferred on him is good in his capacity as a sovereign and not as a mortal man. Owing to the divine cachet the monarch has qua 'living law,' he is subject to the law, just like God as conceived in theology, whose all-powerful will cannot will anything bad or nonrational" (ibid., 96).

[21] Just how many more years is not easy to say. But for an interpretation that sees a line of continuity, especially as concerns his *Großraumtheorie* (or theory of spheres of influence) as a justification for the Nazi predominance in Europe, see Gruchmann 1962, 121ff.

[22] This idea has been used to explain Schmitt's compromise with Nazism: The core of

and that of the "spiritual" nature of law, on the other. When in his youthful book on the state he wrote that law is an abstract idea, independent of facts and having no relevance for facts (Schmitt 1917, 37–8),[23] he was expressing the same thought one can see expressed—however much with greater pathos and a rhetoric befitting the new, tragic experiences Europe was going through—in his essay on European jurisprudence, and that is the idea that

> even in the terror of the instruments of annihilation that the modern science of nature places in the hands of every power wielder, a legal science made to rest entirely on its own foundation will find the mysterious crypt in which the germs of its spirit are protected from any persecutor. (Schmitt 1958b, 426; English translation Schmitt 1990)

Law is not the same thing as the positive law, just as legal science cannot be equated with the relentless activity of the "motorized lawmaker." The one and the other are rather rooted in a positive but invisible reality, in a form not amenable to modern humanity's will to dominate. Here Schmitt brings back a modicum of rule of law (*Rechtsstaatlichkeit*) as something inherently valuable, contra the vilification directed at the desire "to secure an individual sphere persistently protected as a typically bourgeois liberal need, as a sense of mistrust that undermines the state's power" (Stolleis 1972, 145; my translation):

> We cannot choose regimes and fleeting power-holders depending on whatever suits our fancy; rather, with each changing situation we must protect that on which rests a rational way of being human, something that cannot do without the principles of law. Among these principles are a recognition of the person, which recognition cannot fail even in controversy, and which is grounded in mutual respect; a sensitivity for logic and for the coherence of concepts and institutions; and a sense of reciprocity and for the minimum degree of procedural regularity, that due process of law absent which there can be no law. What everywhere shelters law's indestructible kernel from any splintering normative activity is the dignity we are endowed with, a dignity that today is present in Europe more than at any other time and more than in any other part of the earth. (Schmitt 1958b, 422–3; English translation Schmitt 1990)

Schmitt's essay on European jurisprudence thus marks Schmitt's "return" to his pre-Nazi phase, and perhaps it also foretokens a rethinking of the youthful roots to which he will soon be compelled to return by the new post-war experiences ("wisdom from the cell": *Weisheit der Zelle*). The essay certainly also signifies a disavowal, but not—mind you—a denial: While disavowing what he undoubtedly did, he also accepts responsibility for it. Only fools or

Schmitt's openness to Nazism, P. Noack has commented, "lies in my view in the fact that as one representing a spiritual world, he felt far superior to those he was making himself available to. I have already quoted his remark, 'I felt spiritually infinitely superior to Hitler.' But this remark bore the mark of Schmitt's Hegelian background. This man, who thought the worst of human beings, nonetheless believed that the spiritual world would one day reveal itself to be superior to all other worlds" (Noack 1993, 211–2; my translation).

[23] The German original: "Das Recht ist abstrakte Gedanke, der nicht aus Tatsachen abgeleitet und nicht auf Tatsachen einwirken kann."

the weak can pretend to deny their own past (something that in the manner of Heidegger can only mean self-denial). Schmitt brings his own mistakes to fruition so as to give deeper thought to himself, to the modern world, and to the possibility of human redemption.

This is where he discovers himself to be a jurist, as against a political philosopher. In rediscovering the legal structure of his thought, he of course also rediscovers the philosophicalness of the legal thought distinctive to the German cultural consciousness. I am not sure whether it is more appropriate here to speak of a Christian and Augustinian vision,[24] or of a Hegelian one, or of a sui generis existentialist one. On the specifically "philosophical" dimension of Schmitt's thought I will for the time being withhold judgment. But those who knew him well, like Hugo Ball, singled out a personal propensity that somehow can shine a light on those many aspects of his thought which still lie in the shadows: This is his "propensity for the absolute." However, it is a propensity that

> does not in any way incline one toward abstraction [...] but is rather geared toward concreteness. [...] Like any Kantian, Schmitt starts out from *a priori* concepts: He starts out from his own ideology of law. But he does not content himself with defining these concepts in themselves and bringing them into relation with one another. He seeks to locate his legal concepts in forms of state that either currently exist or have existed in tradition, and does so in a progressive way, following their primal connections, following their secularization relative to all the other higher categories (philosophy, art, theology). (Ball 1983, 101; my translation)

The burden of this passage ought to be clear to anyone familiar with German epistemology in the first two decades of the 20th century. For Schmitt takes a Kantian or even a neo-Kantian approach, but gives it a phenomenological and ontological angle (following the path opened by the neo-Kantianism of the Baden school, especially with Emil Lask: see Section 1.4 in this tome). It is this connection that anyone looking to seriously investigate Schmitt will have to focus on. What we have here, in other words, is a neoplatonic perspective which, when viewed through a Catholic lens, turns Augustinian (this is the interpretation offered in Beaud 1993), but which, in my own assessment, retains its inherent neoplatonism even when the Catholic vein fades away (at it did in the Nazi period). And crucially, if this assessment is correct, one cannot fail to see the dual nature of all phenomena, at once historical (and hence fleeting) and perdurable. It is no accident that, while Schmitt strives to define the concept (the essence) of the political, he nonetheless fully appreciates the historicity of the state. And to this latter feature of his thought we should devote a few words.

Schmitt at the same time grasps the historicity of the state and its decisive importance in the modern history of the West. While it is true that he is not a

[24] Schmitt's purported Augustinianism forms the central theme of the introduction O. Beaud (1993) writes to the French translation of Schmitt's *Verfassungslehre*.

true étatiste (contrary to what some are prone to thinking), it is equally true that the state is for Schmitt an inherently valuable phenomenon (a "magnificient evil"), such that he could not but look askance at all those phenomena that ended up chipping away at the state's sovereignty (Vesting 1992, 29ff.). All through this, however, Schmitt is a studious analyst, clear- and cool-headedly investigating the historical processes in progress. Indeed, there are two concurrent phenomena he identifies in the gradual erosion of sovereignty: on the one hand is the socialization of the state, and on the other the statization (or juridification) of society (two phenomena that would subsequently be investigated by one of Schmitt's most important disciples, Ernst Forsthoff). To be sure, this amounts to staking out a position, but even more importantly, Schmitt is laying out an issue. It has been observed in this regard by M. Nigro that

> once we credit Schmitt with having understood way ahead of his time and with true ingeniousness that a process was afoot merging the state and society in the dual form involving the statization of society and the socialization of the state, and with having recognized as existent and widespread the bewilderment and powerlessness the current state is experiencing, precisely in virtue of pluralism and its increasing development, we have to view pluralism not as the antithesis and corrupting element of the administrative state, but rather as its dialectical correction. (Nigro 1986a, 793; my translation)

In other words, the import of Schmitt's discourse goes well beyond his deliberately staked-out position; Schmitt shows that only a hard-boiled analysis makes it possible to construct a discourse about what is valuable, a discourse grounded in a worldview. Although a worldview does not issue from any scientific investigation, no historically justified worldview can ever neglect to engage in a disentranced diagnosis of the "state of the world."

In this sense, Schmitt can be said to owe a great debt to another towering figure of contemporary thought, namely, Max Weber. There is no way to understand Schmitt without taking into account the sociology of politics and law developed by Weber, whose most significant student was indeed Schmitt himself. And I should like to advance here the thesis that the common denominator between Schmitt and Weber lies in their rejecting the tendency to absolutize any single factor or area of life. This is something of a bold thesis, to be sure, because Schmitt could easily be grouped among those for whom "everything is politics," in line with Charles Maurras's idea that politics comes first (*politique d'abord*). And in fact it is not difficult to find in Schmitt several toeholds for this interpretation. But it is also true that the contrary thesis is not so rash as it might seem. And testifying to that view is the article he wrote on European jurisprudence.

Chapter 9

NAZI PHILOSOPHY OF LAW AND OF THE STATE

by Agostino Carrino

9.1. Introduction

We cannot enter into the Nazi philosophy of law and the state without first drawing a preliminary distinction between two groups of philosophers: On the one hand were those who had their own conception of philosophy or legal philosophy and for a variety of reasons decided to adhere to the Nazi regime; on the other hand were those who specifically and deliberately worked out a "philosophical" theory *of* law and *on* law conforming to the tenets of the emerging Nazi regime.

Figuring prominently in the first group are Carl Schmitt and Julius Binder, for which reason they are both treated separately from the other authors in this chapter: see Chapter 8 and Section 5.3 in this tome, respectively. An exception is Karl Larenz, who would have to be classed in the first group in every respect but for an important book he wrote (Larenz 1936) which bears directly on the question of Nazism, and for this reason he, too, unlike Schmitt and Binder, has been placed in this chapter, where we turn to what can specifically be described as the Nazi philosophy of law and the state (but, on Larenz, see also Section 5.4 in this tome).

The premise of this philosophy, assuming we can so call it, lies in the primacy of the community and the people. These entities, however, are conceived in neither a sociological, nor a spiritual, nor a moral sense but are rather understood as an organic, racially determined reality. What we have here, in effect, is a structurally racist theory of law, grounded in the idea of blood and soil (*Blut und Boden*), rejecting any history having any place for the "race" enemies of the German people, namely, Christianity and the Catholic church (see Baehr 1939), Roman law, Hebraism, and even the state and its theorists, in that the modern state has failed to absorb the Church, along with all the realities external to the people, thus failing to reduce everything to the unity of the people as a racially homogeneous group (see Keller 1939). Even a conservative like Erich Kaufmann—the author of an article on international law ending with a song of praise for "victorious war-making" as a "social ideal" (E. Kaufmann 1911, 146; my translation)—was rejected as incapable, by reason of his Jewishness, of grasping genuine "German law" as founded on the idea of *Volk*, or race (Gürke 1935, 15).

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9.2. Race as the Foundation of Law: Helmut Nicolai and Others

The sense in which National Socialism embraces a fundamentally antijuridical conception of law,[1] understood as a form of shared life, is nowhere more clearly exemplified than in the work of Helmut Nicolai (1895–1955),[2] a staunch supporter of Hitlerism. In a writing on the legal theory of the racial laws, Nicolai underscored how the Nordic god Týr encapsulated a dimension at once juridical and warlike, for he is depicted as carrying a sword, symbolizing both law and war. War, Nicolai (1932, 19) comments, "is not a violation of law but a juridical action," because the strong "have a right over the weak, a rightful claim that the weak should make way for the strong" (my translation). Nicolai doesn't say that the strongest must necessarily be identified with the German people, but he nonetheless appears to reduce law to the law of the strongest, where the criterion for identifying the strong is fundamentally that of the race one belongs to.

For Nicolai and the other Nazi theorists of law, any consideration about law must take concrete reality as its point of departure. This reality (in this foundational role) is understood by them to lie in the permanent division of humanity into races. And there are two models on which basis society can be organized into races: the typically organicist, positive model consisting in the racial homogeneity proper to the *Gemeinschaft*, and the negative, dissolutive, sociological model of the *Gesellschaft*.

From a Nazi perspective, the community is a *biological* entity, not a cultural one. It is founded on blood and soil (*Blut und Boden*), making it in its most authentic sense the community of a racially pure people (*Volksgemeinschaft*) (M. Bonnard 1936). Racial purity is the basis for an effective (i.e., "scientific") understanding of reality, this because, among other reasons, law is understood to preexist the community conceived as a phenomenon that binds people by virtue of the very blood of the race. This type of community is indeed "a creation of nature, and like nature it arises out of the forces from which springs all life: from the impulses of blood, from the *Saften* (juices) of the soil, from the interiority of an equal *Gesinnung* (frame of mind)."[3] As Erik Wolf (1934, 3) writes, "law is something that lives in the blood" ("Recht ist etwas im Blute Lebendes": my translation).

This way of invoking nature warrants a characterization of Nazi legal theory as a theory of natural law (however much in a sense specific to these

[1] That National Socialism was an essentially anti-juridical political movement was perceived by more than a few people, and almost immediately at that. See, for example, the proceedings of the conference held in Paris in December 1935 published under the title *Le droit national-socialiste* (National Socialist law: Cot et al. 1936), with a contribution by Harold Lasky.

[2] Nicolai's relevant works as a legal philosopher are Nicolai 1932, 1933a, 1933b, and 1934. On Nicolai, see Housden 1992, 252.

[3] See Eberhard (1934, 22), for whom "German blood carries in its character [*Naturanlage*] the idea of German law" (my translation).

authors), in that nature, blood, and race, in a biological and empirical sense, are found to lie at the foundation of law, which can actually be "felt" by the people—the more so, and more clearly, the more the people themselves are racially "pure."

The people's law is therefore a natural law, but is neither universal nor absolute, for it is distinctive to each people and is thus relative (Eberhard 1934, 40), insofar as a people's concrete needs are historically contingent and hence changeable.

What carries primary importance in this natural law biologically underpinned by race is a notion of race inequality that draws on the work of Joseph-Arthur, comte de Gobineau, whose ideas attracted a following in this period. It is against the background of this idea of race inequality that the Germanic race is held up as the chosen race, selected as superior on account of its biological characteristics. The Nazi theory of law is thus a politically driven theory, envisioning a form of law functional to the interests of the chosen race, in a struggle for supremacy and survival. Law is consequently always the law of the strongest (Nicolai 1932, 21).

One can see here the sense in which the state ceases to be the highest form of national life and is demoted to the status of an instrument. As Carl Schmitt put it, Hitler's rise to power definitely marks Hegel's demise in Germany: "For us National Socialists," writes Hans Frank (1900–1946), minister of justice and an influential organizer of the legal profession at that time,

> the people in themselves constitute a primary, God-given ordering. As a form of human organization, the state must serve this community entrusted to it by divine providence. The people do not exist just to provide the state with content; quite the contrary, a state is entitled to exist only insofar as it can serve the people entrusted to it, in the manner of a means to an end. [...] Every people thus has an original right to shape the state's organization in the manner necessary to its own existence. (H. Frank 1938, 11; my translation)[4]

The state has in effect been reduced to a tool, and positive law, that is, the law of the state (*Staatsrecht*), is none other than the racially determined "natural law" of the people: of the *Blutgemeinschaft* (blood community). This is precisely the justificatory basis for the Führer-principle, which holds good only insofar as a supreme ruler is capable of "sensing," grasping, interpreting, knowing the "truth" deposited in the deep layer of "his" people's life. Whatever furthers the good of the community is law (*Recht*); whatever fails to do so is nonlaw (*Unrecht*), a wrong. As Karl Larenz writes, what is decisive for the makeup of the community in the National Socialist state is above all "the idea of race, which determines one's understanding of the conditioning that unfolds in keeping with the people's blood" (Larenz 1934, 39ff.; my translation).

[4] On Frank, see D. Schenk 2006.

9.3. The Fight against Rights

Clearly, in this strongly organicist, biologically determined conception of race there can be no place for the distinctive concepts of the liberal legal tradition, especially not for the concept of rights, a concept in different ways rebuffed by all the main Nazi jurists, from Karl August Eckhardt (1901–1979) to Karl Larenz and Ernst-Rudolf Huber (1903–1990), as well as others who did, however, try to soften this veritable crusade against the concept of rights (see Thoss 1968 and Grimm 1990, 38–54). Thus, for example, Eckhardt (1936, 7ff.) viewed rights as a holdover from a bygone world—that of individualism and liberalism, both enemies of the community—and for Larenz, a jural condition should not be seen, from the standpoint of "private" law, as what enables individuals to relate to one another, for it is a condition that instead means "occupying one's place within the order of a people's life, having one's assigned function and station as such a member." Legal capacity, then, consisted in "having not rights [...] but rather certain jural positions. Legal capacity is the capacity *of* the law, pointing to the possibility of taking part in the community's jural life" (Larenz 1935, 240, 244; my translation). Larenz does not deny that the individual may have rights, but these do depend on one's juridical position, and in particular on the obligations owed to the community of which one is a member. Still, even in Larenz the individual is understood to have at least some leeway, this insofar as the community cannot substitute for the individual in every respect, from which follows that "even in the National Socialist regime there must necessarily be some space for individuals to realize their personality, while at the same time identifying with an interest in the progress of the community's jural life" (Thoss 1968, 48; my translation).

Similarly, Ernst-Rudolf Huber took the view that, from the standpoint of public law, the *Grundrechte*, the fundamental rights enshrined in the constitution, had made it possible for the people's life to be depoliticized in the Weimar Republic, in such a way as to destroy the basic "unity and totality [*Ganzheit*] of the people" under the pressure of disarraying individualistic impulses. Even Huber, however, makes an effort to salvage at least some degree of individuality, by drawing a distinction between the individual as a member of the community from the individual as the subject of an absolutistic regime. Even in the Third Reich individuals are free, but their freedom "consists in the free, creative, responsible use of personal talents and strengths for the people's totality" (Huber 1936, 441; my translation). Even more emphatic in this sense was Walther Schönfeld, a Hegelian turned National Socialist who sought to soften the contrast between the individual and the community, and in fact claimed it to be essentially a spurious contrast.[5] Every community is made up

[5] On Schönfeld, see also Section 5.5 in this tome.

of individuals, who only as such can be held responsible for the community and accountable to it: "A community that does not know and does not recognize the individual as such will cease to be a community" (Schönfeld 1937, 108; my translation). These positions debouch into that of the most sure-footed rights advocate in the Nazi era, Alfred Manigk (1873–1942), the author of a monograph on private autonomy where rights find their place as necessary elements for the legal order at large (Manigk 1935). In the final analysis, despite the criticism that Larenz addressed at this very book, even from the standpoint of the positive law the new National Socialist Civil Code, which was to replace the *Bürgerliches Gesetzbuch* enacted under Wilhelm II, simply could not fail to take into account the latter's enshrinement of rights (Grimm 1990, 52).

9.4. Karl Larenz and the Call to "Renew" Legal Philosophy

A logical place to start from as we turn to the Nazi legal philosopher Karl Larenz is his short book *Deutsche Rechtserneuerung und Rechtsphilosophie* (The renewal of German law and legal philosophy: Larenz 1934), where he outlines a new legal-philosophical programme designed to advance the National Socialist vision. The purpose of this Nazi call to remake and renew law was to "bridge the disconnect between the people and its law, creating a law that will be in agreement with the moral conceptions of our people and will answer its vital needs"—a law, in other words, that can "truly be called *German* law" (Larenz 1934, 3; my translation, italics in the original). This German philosophy of law, if we so choose to call it, is driven in the first place by an exigency to fight the spirit of the Enlightenment and is rooted in an interpretation of German idealism (Fichte, Schelling, Hegel) solely concerned with refuting the 18th-century philosophy of rationalism. Law, on this "novel" conception, is "a vital ordering closely bound up with the community's moral and religious life, an ordering that with its own claim to validity sets itself against the individual (ibid.). Nazi legal philosophy is thus in Larenz an all-enveloping communitarian philosophy, uncompromisingly opposed to any individualistic or contractarian conception. The community of the people (by which is meant the *German* people) comes first and trumps all else: It is the *prius*, and individuals can have any role in it only as elements necessary to this community, a community that Larenz, going back to Hegel, qualifies as "concrete." Law arises not out of individual will, but out of the collective or general will (*Gemeinwille*)—but what this collective will is he does not say. It is not Rousseau's *volonté générale*, which is no more than individual will writ large, but rather the general will hypothesized by Hegel or by the Historical School's spirit of the people. What matters, it would appear, is the question of the interest to be furthered: This is not the individual's interest, which only comes second, but that of the community, which for Larenz finds its highest expression in the state, understood precisely as the most important community. It is significant that Larenz, an

author with a deep knowledge of the idealist philosophies, does not conceal Kant's and Hegel's conceptions of the individual but instead bends them to a specific communitarian conception. To be sure, there is a role envisioned for the individual in Larenz, too, but this role consists in being responsible toward the community. Individuals are free to the extent that they are responsible, and their responsibility means that they must specifically be accountable to the community they are part of. The law cannot be reduced to what is set forth in the statutes, for it is grounded in the moral ideas that live within the community. Legal positivism, and specifically Kelsen's *reine Rechtslehre*, is so concerned to safeguard the bindingness of law that it fails to recognize the judge's responsibility toward the people's community, and although this is actually a misstatement of Kelsen's account—which precisely on this point takes a view of judicial interpretation as a law-*creating* activity—Larenz insists that if the judge no longer has a commitment to the community, the blame lies with the legal-positivist emphasis on the binding nature of law, intended to safeguard the certainty of law, a desideratum in turn understood by him as an expression of economic liberalism. So the legal renaissance prefigured by Larenz actually positions itself by carrying forward the fight that for some time had been in progress against legal positivism, "and in particular against the 'pure theory of law'" (ibid., 15; my translation). This push for the new shifts the focus from the subjective to the objective, from formal logic and abstract theory of knowledge to an objective logic immanent in things themselves ("zu einer immanenten Sachlogik des Gegenständlichen"). Here Larenz draws on two sources—the revival of Hegelianism (an effort he himself is part of, as discussed earlier) and modern phenomenology—seeing both of these movements as having restored strength and substance to the idea of an objective spirit, by which Larenz means "the community's spiritual life, with this life depositing into the community's objectifications, into works of the spirit that, however much separate from the stream of creative life in motion, are bound to serve this life, and in this life they find their subsistence" (ibid., 15–6; my translation). If this was only about a people's language, customs, law, culture, and the like, there would be nothing to object. But for Larenz this "objective spirit" is never to be ascribed to any single individual as such: It rather belongs to the community as a "living totality" (*Lebensganz*), and so in reality it consists in the spirit of a given people as shaped from within by its "blood and destiny" (ibid., 16). For Larenz, law is not immediately a norm but is "something effectively real," "a real force in the life of the people and of men" (ibid., 19; my translation) and it is real as something embodied in the state, in culture, in morality, in social life in general.

Law realizes itself because, quoting Hegel, it is not an "impotent *Sollen*" but rather claims a staying power and substance for itself and is thus closely bound up with power, enabling judges and the executive to flesh it out and bring it into being. Law does configure itself as a norm, however, to the extent

that individuals can gain consciousness of their possible separateness from the community, thus becoming aware of their each being a single entity. At this point the will of the community—coinciding with the will of the individuals insofar as they recognize themselves as members of that community—morphs into something different, becoming for individuals an obligation, a duty, and the law to them becomes a "norm." Law thus turns out to be something complex, and in the new National Socialist conception it discovers in the judge someone entrusted with applying not "the law" but the community's common will, which of course ultimately resolves itself into the will of the Führer.

In this way Larenz drives to extremes certain earlier trends in German legal philosophy, so much so as to distort their import. Indeed, these movements had good reasons to exist in the 1920s, yet the shape Larenz gave them in his Nazi period just turned them into inconceivable theses for any sensible legal-philosophical mode of reasoning, so much so that, on closer inspection, they turn out to be the mirror image of the normative stance. In Kelsen, for example, we have the unity of the normative order; in Larenz, the unity of the community; likewise, both hold that the judge *makes* law; and both view this judge-made law as an individual norm, but for Kelsen this norm serves the unity and coherence of the legal system, whereas for Larenz it serves the will and interests of the community, specifically through "the continuity of the people's life" (ibid., 26; my translation), and so through the historical tradition of a given community marked by racial homogeneity. In this community lies "the real," wherein the is and the ought do not come apart but rather share a space and indeed *meld* into each other, in that this communitarian reality, this effectively real community, is at the same time a reality, a being, and a norm. The community is the unity that internally differentiates but does so remaining loyal to itself as a unity of is and ought, fact and value. What ensures this unity of the community and its law is the Führer, in such a way that the legislator and the judge do not just act *in compliance with* the Führer's will but do so by specifically embodying his "spirit." This book by Larenz in effect offers the best possible introduction to the ideas of Nazi legal philosophy, for it lays out the premises from which the various strands of Nazi "legal philosophy" subsequently branch out. Writes Larenz:

> In the French revolution the ideal of coexistence among individuals is coupled with that of their equality. Justice consists in equality for all. The basic principles of law are thus to be found in the abatement of all class, gender, and religious differences. The abstract principle of equality ultimately leads to communism. According to the German idea of law, mere coexistence among individuals is replaced with the community, and abstract equality with the *individual's physical membership* [*Gliedhaftigkeit*] *in the community*. (Ibid., 39; my translation)

This community is grounded in the idea of race (*Rassengedanke*). The core concept around which revolves the new legal conception is no longer that of the person (as is paradigmatically the case with liberalism) but that of member-

ship, in the sense of the individual being concretely determined through the specific communal function of serving the community and its Führer, a function the individual serves as "farmer, soldier, intellectual worker, wife, family member, servant of the state" (ibid., 40; my translation).

The real relations of private law lose their meaning in Larenz because understood as expressing a liberal conception of the state and of law. This also changes the content of rights. What matters is the individual's responsibility toward the community: It is not the individual's will that drives the content of rights, but the sense to be ascribed to that will. What counts, in other words, is not what individuals may think or will but their objective position within the racial community, so much so that marriage and family ultimately have any value only "from the standpoint of racial hygiene and political demography" (ibid., 41; my translation). And so likewise, for example, a punishment is no more than retribution (*Vergeltung*) for the crime committed. There is no way to educate the individual if not through punishment and for the good of the community. "The highest juridical good," Larenz comments, "is to be located not in the freedom or welfare (*Wohlergehen*) of the individual, but only in the *people* and the *state* as unified entities expressing the will of the community forged out of blood and soil, culture and history" (ibid., 43; my translation). This willing unit is represented by the Führer, "who embodies all responsibility to the community: All those who act as members or organs of the community answer to the Führer" (ibid., 44; my translation). The Führer does not obey any abstractly posited norm but only follows the vital law of the community, a law that "has become his own flesh and blood" (ibid.; my translation). The conclusions drawn in this little book, mystically informed by a sacred vision of Hitler, certainly prove difficult to reconcile with the philosophically thought-out ideas that Larenz put forward as a neo-Hegelian jurist. This "making anew" of legal science rather looks like the foundering of reason into the *darkness* of reason, including reason as exercised by reputable jurists, philosophers, and intellectuals like Larenz, among many others.

9.5. Reinhardt Höhn: The "State's Personality" and the *Volksgemeinschaft*

Of all theorists of Nazi law, Reinhardt Höhn (1904–2000) was certainly the most coherent, driving to extremes the regime's politico-ideological premises, beginning with that of a racially determined *Volksgemeinschaft*, or "people's community."[6] Paradoxically, for example, Höhn argues against the possibility of preserving the idea of sovereignty, at least in the domestic legal order, because the state is no longer a legal person set in contraposition to so many atomized holders of public rights—such is the "liberal" construction offered by legal dogmatics—but is rather a simple tool, the means through which to

[6] Hohn's relevant works as a legal philosopher are Hohn 1929, 1935a, and 1935b.

satisfy the interests and will of the people's community. Höhn credited Nazism with introducing an ideal conception radically subverting the established order, for which reason, he thought, it becomes the basic task of legal science to single out concepts and constructs suited to Germany's new cultural and political makeup.

Höhn's *bête noire*, the constant target of his criticism, was individualism. He thought it necessary to set out a legal science capable of moving beyond the conceptual legacy issuing from the individualistic worldview, so as to erect a science of law founded on the idea of *Gemeinschaft* and race. In this complete categorial *bouleversement*, Höhn spared nobody, not even the jurist that some, notably Otto Koellreutter, had pointed out as being among the precursors who paved the way for a National Socialist philosophy of law, namely, Otto von Gierke. Höhn even devoted an entire book to criticizing Gierke, in an attempt to show that Gierke's *Körperschaft* (corporative body) has nothing to do with the *Volksgemeinschaft* envisioned by National Socialism. Indeed, as much as the two ideas may share an emphasis on the community, the former is framed within an individualistic conception, as the latter is not.

The same idea forms the basis of Höhn's argument in this work as in all his work from the 1930s, all of it driven by Nazi ideology: In the idea of the "personality of the state" lies the stigma of the liberal, individualistic conception, and the new legal philosophy is tasked with laying this idea bare wherever it might be hiding, even in the legal philosophy of a thinker like Gierke, who in the eyes of many conservative commentators, even those of Nazi persuasion, appeared to be a reference point for a *völkisch* reconstruction of the law and its concepts.

And, in fact, Höhn was doing a great favour to Gierke in this way, in effect validating Gierke's theory of the medieval corporations (*Genossenschaften*) as a scientifically grounded theory incompatible with a Nazi worldview. Gierke rejected formalism and its conceptual abstractions (he thought concepts are inherently abstract) and confined himself to bringing out the concrete dimension of the social and sociological substrate of law. This, in a word, was perceived as too little from the standpoint of one who had theorized the *Volksgemeinschaft*, all the more so that Gierke recognized the liberal constitutional state as a state founded on rules formed by a parliament to which he ascribed the attribute of being a *Genossenschaft*, just as he recognized the people as having the attribute of being a person—a method of operating that went in a direction exactly opposite to that of Höhn.

9.6. Franz Jerusalem: From the Individualistic State to Equality Under the Law

It wouldn't quite be accurate to remember Franz Jerusalem (1883–1970) as just a Nazi jurist, in part because one of his chief works, *Soziologie des Rechts* (Soci-

ology of law: Jerusalem 1925), dates back to 1925, and one can scarcely find in it any hint of a political view suggesting that he would inevitably adhere to the Hitlerian regime, so much so that only in 1937 did he become officially affiliated with it. But on the other hand, the work for which he is most famous, *Der Staat*, of 1935, ought to justify his being treated here as a Nazi jurist, as perhaps does his role as a teacher to the most dogmatic of all Nazi jurists, namely, Höhn.

Jerusalem's most important work before Hitler's rise to power was the aforementioned *Soziologie des Rechts*. In it Jerusalem draws on Weber and Ehrlich to construct a sociology of law he describes as grounded in the method of the *reine Gegenständlichkeit* (pure objectivity). This legal sociology he built is expressly set in contrast to Kelsen's pure theory of law, for it refuses to reduce law to the pure normativity of the *Sollen*, instead taking a view of law as part of the social experience. Social life, however, is not for Jerusalem a vague, ever-changing notion; rather, specifically where the law is concerned, it presupposes two core ideas that stand as conditions of pure objectivity, namely, legality and collectivity (ibid., VI). Clearly, the more important of the two principles is the second one, for it runs contrary to individualism, which in this early phase Jerusalem already targeted as his main enemy, drawing to this end, among other sources, on the organicistic views put forward by the Viennese thinker Othmar Spann (see Section 8.2 in this tome).

Jerusalem's approach is clearly organicistic, and indeed there is no shortage of references to so-called vitalist authors in his writing. And this is one respect in which his philosophy can be regarded as having anticipated the Nazi philosophy of law, to the extent that it sets itself against the phenomena of modern life, which through processes of "reduction break up the whole, the totality, into plural mechanistic relations. Thus, for example, modern bureaucracy becomes the instrument of a conceptual abstraction, namely, the state, rather than functioning as the vital servant to a concrete person, as the prince instead was" (ibid., 119; my translation). Social life does not accomplish itself by disgregation, which is only apparent, but does so in the "self-realization" of an impulse inherent in any organism, namely, the impulse to realize a concrete order, that is, to be in conformity with the laws.

The state thus expresses the originalness of the collectivity, whose decisive importance to social life was first remarked by Rousseau. This neocollectivism now found expression in the nationalist conceptions, and in particular in Italian Fascism and the *völkisch* movements (ibid., 220), attesting a shift toward collectivism that followed the age of individualism, which had brought on a loss of the sense of law as a "spiritual lived experience."

It is incumbent upon us, at this point, to see how Jerusalem's "sociology of law"—as expounded in his 1925 *Soziologie des Rechts*, which was meant to continue with a second but never-published tome—comes to bear concretely on his theory of the state as expounded in his later book of 1935, *Der Staat* (The state: Jerusalem 1935).

In *Der Staat* Jerusalem proceeds from the idea of the state as a *Gemeingeist*, or collective spirit, but in a way that sets it apart from any of the perspectives in classical idealism, and in particular from Hegel's conception of the state as an objective spirit. Jerusalem says he wants to ground his philosophy of the state in Weber's concept of authority, but he is ultimately forced to depart from that concept because Weber's sociology is based on the rationality of *individual* action: It therefore commits one to a methodological individualism that cannot recognize or allow for the rationality of *communitarian* action as such.

Jerusalem distinguishes two types of community (the term he now uses in place of *collectivity*, which instead was in use in the works he wrote before the Nazi regime took power): We have open communities and closed communities. The latter are marked by the people's racial unity, and the individuals are fully embedded in the *Gemeingeist*. History has shown that communities can shift from one form to the other, each expressing, in the final analysis, its own worldview: individualism and communitarianism, respectively.

So, on the one hand, we have rights and obligations set forth by the legislator, for whom there only exist individuals acting according to their own free will; on the other we have a community borne by individuals (who can accordingly be described as its "bearers"). Jerusalem evokes the new "epoch" of National Socialism as he writes:

> If today, having moved past individualism, we have ushered in an epoch of community, then this individualistic method will likewise have to be superseded. It will be necessary to again place the social forces of our sense at the basis of decision-making. (Jerusalem 1935, 80; my translation)

So, if we ask what the unifying element is behind the reflections advanced by Jerusalem, whose importance should not be overplayed, but who distinguishes himself, if not for anything else, for being thoroughly conversant with the legal and philosophical literature, a body of literature that—it bears pointing out—he quotes without drawing any "racial" distinctions, we would see that, as was discussed at the outset, the unifying element we are looking for lies in the concept of the *Gemeingeist*. What is the *Gemeingeist*? The *Gemeingeist*, Jerusalem cautions us, must be kept distinct from both public opinion, which is changeful, and from a political system's founding decision. And in truth he does not commit to any conceptual definition. The collective spirit, the *Gemeingeist*, appears to ultimately rest on the existence of a given juridical community having its own distinctive features: It is, in a word, a sort of principle of effectivity.

Like other Nazi jurists, Jerusalem cannot resist characterizing the Hitlerian state as a *Rechtsstaat*, a state under the rule of law, on the reasoning that "as a state organization, it preserves its individualistic character" (ibid., 305; my translation). The Nazi state, on this conception, would have moved beyond the bourgeois principle of equality whereby people are equal in a merely formal

sense, meaning that each individual in such a state is no longer an "abstract personality" but is a bearer of "concrete forms" beyond the reach of parliamentary lawmaking: The subjects continue to be "addressees" of the state's norms (therein lies the state's individualistic makeup), but now they do so only as factory workers, peasants, craftspeople, writers, and so on (and here we find the corporative conception of the state). In Jerusalem the point is to *set aside* the system of "abstract rules" in favour of an organic state based on a class system (*ständische Staat*), and it is this thesis that, moving him closer to Othmar Spann's conception, prevents him from grasping the radical *Unrechtsstaatlichkeit* (lawlessness) of the Nazi state. Writes Jerusalem:

> With the birth of a class-based legal system, and a law *particular to* each class, it would be possible to definitely abandon, within the framework of such a class-based system, the principle of formal equality under the law which characterizes the individualistic state. Through a principle of legal equality gauged to the various members [of society]—a principle that can fully be developed only within this class-based system—we would truly usher in a new age of law, and to that extent the age of individualism would be eclipsed. (Ibid., 320; my translation)

9.7. Otto Koellreutter: People and the State in the "Return to Gierke"

Otto Koellreutter (1883–1972) expounded a general theory of the state whose undoubtedly Nazi cast should not be a reason to dismiss this jurist altogether, for he has some culturally interesting insights to offer. Koellreutter starts out from the people as a primigenious element of his legal and political philosophy. The people are for him that which gives content to juridical forms—such as the state, the party, and the movement—which would exist as mere abstractions but for the people providing them with content; the state is the "shaping into form" of the people, he writes referring to Oswald Spengler (Koellreutter 1927, 8; my translation). The idea of the people should not in this sense be confused with that of the *Volk* appealed to by National Socialism, for in reality we have to do here with a way to express the historicity of the state. In a short essay on the German state as a federal state, an essay published before Hitler even took power, Koellreutter wrote that "the state is not [...] mere form, not mere organization, for what is essential to the concept of the state is its content as a historical reality, as a historical existential quantity." The national people's community makes up "the real foundation of all state life" (ibid.; my translation).

Legal and political concepts alike, then, are defined not by abstractions, as through Schmitt's distinction between friend and enemy, but by concrete historico-spiritual and cultural realities. For Koellreutter the basic presuppositions of legal philosophy are to be found in aggregations, not in oppositions; thus, for example, he does not challenge the persistence of individuality but makes it an element specific to one's belonging to a people, a community, which certainly is conceived as a racially determined community but is also a

community grounded in history and culture. In this way the people become a politically conscious nation, and we will come up short here if we rely on Oswald Spengler's idea of a cultural nation (*Kulturnation*),[7] for there is lacking in this construct the element of a will, an element through which the people can form into a nation having an active role in political history.

The people's will is properly a communitarian will: It is the will of the community understood as an existing and acting agent. Here Koellreutter draws on Otto von Gierke's theory of corporative organizations (*Genossenschaften*). What in some way distinguishes Koellreutter from the other theorists of National Socialism like Höhn, for whom nothing ever counts outside the Führer's will, is that on Koellreutter's conception, in order for the people to make themselves into a conscious nation, there needs to be a process that can never do without the form of the state, for it is in the state that the people's nation becomes self-conscious as a unitary acting subject. Significant in this regard is Höhn's criticism of the conception of the state advanced by Koellreutter, who in Höhn's opinion cannot qua jurist "part with the individualist notion of the state's legal personality"; Koellreutter, Höhn underscores, is caught within the "typically individualist thinking of the 19th century" (Höhn 1935a, 11; my translation), this even in his theory of the state, encased in a conception of the state's legal personhood, such that, as much as Koellreutter may be "politically" aligned with the new regime and may have worked out an adequate concept of "the people," that concept winds up being "altogether individualistic" from a legal standpoint, since the people are for Koellreutter none other than "the sum total of all individuals bound by the legal vinculum of the state" (ibid., 14; my translation).[8]

Without ever making a point of it, Koellreutter treads this traditional legal ground because he understands that some form of organization is necessary, and that this role can only be entrusted to the state, absent which any community risks breaking up. Clearly, the question whether this state can still be construed within the liberal framework of the rule of law doesn't even come up, because it is immediately clarified that we are dealing with a *Machtstaat*, a state grounded in the use of power. But how is power exercised? Koellreutter is quite mindful of the risk of falling back on some form of normativism, for which reason he seeks to single out a kind of "law" and a "rule of law" originating directly out of the people, out of the *Rechtsgemeinschaft*, which is here conceived as rooted no longer in the *Volksgenossen* (fellow countrymen) but in the *Rechtsgenossen* (fellows under the law). The legal dimension, then, is the necessary form of the political dimension as an expression of the will of a self-conscious nation: "Law and power," Koellreutter writes, "are thus substantial-

[7] Not Spengler's idea of *Kulturnation* but his idea of state forms the subject of another essay by Koellreutter. On Spengler, see Section 8.1. in this tome.

[8] Quoted in Koellreutter 1933, 35.

ly different and yet bound up by a mutual relation" (Koellreutter 1933, 73–4; my translation). In this way Koellreutter theorizes a National Socialist rule of law, but without disremembering law's ordering, regulative function.

"The National Socialist state," writes Koellreutter, "falls within the rule of law in the proper sense of the term because in it the ideal of the state and the idea of law arise out of the same source, namely, the people, and the German people as a political entity give expression to their innermost essence in the framework of the National Socialist understanding of law and the state." Koellreutter even works out a Nazi theory of legal certainty, a classic tenet of liberal bourgeois society: The individual in this case, under Nazi rule of law, winds up having "the feeling that the use of law within the ordering of national life unfolds in accordance with precise and certain norms, in such a way that the citizen knows what to expect when it comes to the legal regulation of different cases" (Koellreutter 1935, 11ff.; my translation).

The state and the law are for Koellreutter two different essences, but their source is the same: It lies in the people's life, a life that realizes itself politically and juridically, and so the national rule of law, which in Germany displaced the liberal rule of law, is for him the one and only rule of law.[9]

9.8. Anton Baehr and the Fight against Catholicism

Anton Baehr, virtually unknown today, deserves to be remembered only for his book *Katholische Solidarität und Volksgemeinschaft* (Catholic solidarity and the people's community: Baehr 1939), a rejection of Catholicism that in this work presents itself as an obvious and necessary consequence of the Nazi ideology grounded in the principles of blood and soil. Baehr discusses St. Augustine and Thomas Aquinas without bringing any general prejudices to his analysis—if we discount his view that St. Augustine reflects a racially chaotic and bastard race, whereas Thomas Aquinas is even judged to be a German, having managed to reconcile the individualistic spirit of Christianity with the communitarian one of the Germanic race[10]—but he does take a stand against Catholic dogmatism qua dogmatism, almost unaware that the greatest dogmatism is precisely that of Nazism, which he defends and represents.

Contra the Catholic dualism of the two souls of the individual, the political soul and the religious, Baehr asserts that

[9] Other works by Koellreutter which are relevant for legal philosophy are Koellreutter 1932, 1934a, 1934b, 1938.

[10] "Whereas Saint Augustine, the representative of original Christianity, absolutized the superstructure in contraposition to nature, through the contraposition he set up between *Civitas Dei* and *Civitas Diaboli*, Thomas Aquinas has [...] provided a philosophical foundation for the attempt at compromise made by the Christian Germanism of the medieval world" (Baehr 1939, 89; my translation).

man is in his total personality a unity. He is not so from a religious standpoint and a political one. The people's community finds its reality in the unity of its political nature, precisely in the unity of its community and in that of its guide [*Führung*] [...]. A people cannot be divided into a political department and a religious one, not without effecting a breakup of that people as an idea representing the unity of life. (Baehr 1939, 35–6; my translation)

The authors Baehr looks to are Friedrich Nietzsche, Paul de Lagarde, H. S. Chamberlain, and Alfred Rosenberg. Religion is for him a "matter of nature," having nothing to do with history: Much less, therefore, can it depend on a supposed revelation. Christianity has caused great harm to civilization by insulating the soul's relationship with God from the individual's community, thus turning that relationship into an entirely private and individual affair: "Every people has its own gods, in which it sees embodied the ideals of its life, in just the same way as every people is one of a kind. Religion in antiquity has a mission to carry out with the people and not a mission of love for the entire world" (ibid., 39; my translation). The unity of the people is expressed not only in the relation between religion and politics but also in that between religion and law. Christianity is for Baher a "slavish morality" that has ruined the Germanic peoples even more than Judaic Marxism has. Christianity—the individualistic product of a racially bastard epoch (ibid., 45)—has introduced a dualism between church and state and has brought to Germany the idea of a religious spirit independent of race. The Catholic church is for him no more than the deleterious effect of the racial chaos which came with the demise of civilizations rooted in racial purity, and specifically the demise of the Greek polis and then of the Roman empire. It follows that law cannot be bound by a relation to the state but only to a people conscious of its being a race. Corresponding to the individualism of dogmatic theology is the despotism of the Church as a political institution filling the void of moralistic abstraction. The Church's natural law is none other than the cloak behind which acts the clerical theocracy, which dissolves every authentic community in the name of despotism, on the one hand, and individualism, on the other.

The deepest significance of Baehr's work lies in his having clearly spelled out the more heartfelt and concealed strains of the Nazi mentality even as it took shape in the years ensuing the regime's rise to power. The reduction of the individual to a sheer element of the racial totality is crystal-clear in Baehr even from a legal standpoint:

Corresponding to the totality of life is the totality of the legal order. Neither sovereignty, however, rules out the other. The political constitution of the *völkisch* community claims the whole of humankind for itself down to its ultimate reality. The totality of the people's community [*Volksgemeinschaft*] has no place for any other order. (Ibid., 158; my translation)

The legal order of the German people's racially determined community finds its only authentic "source" in the Führer's will as an immediate and outright expression of the German people. Not incidentally, the book ends with a criti-

cism of Othmar Spann's organicist universalism (see Section 8.2 in this tome), which in Baehr's view cannot be likened to the Nazi worldview, because Spann envisions a spiritual community, a relation between the individual and society, whereas Nazism, "in its doctrine of races, has brought 'the spirit' down to earth, from its empty heights to the substantive soil of a racially determined nature [*artbestimmten*]" (ibid., 216; my translation).

Chapter 10

THE DEVELOPMENT OF GERMAN-LANGUAGE LEGAL PHILOSOPHY AND LEGAL THEORY IN THE SECOND HALF OF THE 20TH CENTURY

by Hasso Hofmann

10.1. Introduction

The text material from five decades is very voluminous and highly diverse. In order to achieve even the semblance of an overview, it is necessary to attempt a distinction between periods, as the usual classification according to philosophical "schools" or "main tendencies" would not be appropriate. After World War I, the Western bourgeois world with its humanities, grown from the cultural tradition, had been shaken, but not destroyed, and therefore it was possible to revive the great lines of intellectual tradition. There was neo-Kantianism with its different varieties, phenomenology and neo-Hegelianism, the older Marxism and the beginnings of legal sociology, and neo-Thomism, in addition to positivism in political theory with the attendant so-called "opposition in the spirit of the humanities" (*geisteswissenschaftliche Opposition*). After the unimaginable breakdown of civilization and rupture of tradition, however, at least in Germany after 1945 everything was initially different. Was it possible, after Auschwitz and faced with ruined landscapes, to take up the threads of abstract theories of legal philosophy of the past – and to what end? The general consciousness was absorbed by the shattering experience of mass injustice legally sanctioned and perpetrated. Therefore, the focus of legal thought was on injustice committed by law. This was the central *paradeigma*—a term that indicates not only model and archetype in Greek, but also a cautionary example—of West German society as it reformed itself, and thus also of legal philosophy. It may seem trivial to remark that only from this vantage point is it possible to understand the phenomenon that has been called the "renaissance of natural law" after 1945. However, it must be pointed out that this leads us to a new criterion for classifying very diverse theoretical attempts. In view of the short life of that renaissance of natural law, the question arises which new problem replaced and superimposed itself on the previous one, and why – especially since the waning of existential philosophy did not give way to a new school of philosophical interpretation of the world that dominated the intellectual landscape. It is possible to discern a broad palette of catchwords, ranging from *Analytical Legal Philosophy* to *System Theory*, from *Argumentation Theory* and *Legal Hermeneutics* to *Renaissance of Legal Positivism, Utilitarianism, Return of the Philosophy of Justice* and *Proceduralization of Legal Thought*, all of them pointing in various directions. However, continuous "main schools"

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can hardly be reconstructed from these, due to overlapping, rapid shifts in the focus of attention and the lack of reference to a philosophical system or school, instead of mere individual elements of the philosophical tradition. Ralf Dreier's 1995 overview *Hauptströmungen gegenwärtiger Rechtsphilosophie in Deutschland* (Main trends in current legal philosophy in Germany: R. Dreier 1995) confirms this analysis more than it refutes it.[1]

10.2. The Shock of Mass Injustice Perpetrated by Law

10.2.1. "The Renaissance of Natural Law": Christian and Existentialist Natural Law

10.2.1.1. Christian Natural Law

The so-called "renaissance of natural law" of the post-war years was first and foremost a renaissance of the Catholic tradition of natural law. However, it consisted not only of the revival of an old, Aristotelian-Thomistic school of thought, but developed as part of Catholic social teaching, as represented strongly in West Germany after 1945 by political Catholicism, a movement which had attained a strong influence, as the moral integrity of the church was considered to have been maintained (see Wieacker 1967, 600ff.; Kühl 1998, 604ff.; Wehler 2008, 369ff.).[2] In this strongly political sense, this slogan of the "renaissance of natural law" had already been used once, at the beginning of the 20th century, and it was no coincidence that it had been in a French context (Charmont 1927).[3] After all, at the time, French reform Catholicism had argued for social equalization, expanding the Aristotelian and Thomistic concept of justice by using the term "social justice," coined around 1848. This impulse gained political impact towards the end of the 19th century, mainly through the "Solidarism" movement (Charmont 1927, 144ff.; Wildt 1995, 1008ff.). In post-war Germany, of course, the focus was no longer on the hardships of the proletariat in an industrial society, but the misery—far exceeding basic material needs—of a demoralized society in a devastated country that had been occupied, divided and disenfranchised by foreign forces. In an essay on the "Rebirth of Natural Law" which an expert contemporary witness published in the *Theologische Rundschau* in 1951, the introduction reads:[4]

[1] A brief overview of the most important theoretical concepts can be found in Herget 1996. Another instructive overview of the general history of philosophy is offered by Martina Plümacher (1996).

[2] Very instructive on the overall topic of the "renaissance of natural law" is U. Neumann 1994, 145ff.

[3] On the coining of the term "social justice" by Count Antonio Rosmini-Serbati, and on the history of the term's use Hofmann 2008a, 45ff.

[4] On the following observations, see also Foljanty 2009, 214ff.

> One of the most urgent problems after the breakdown caused by World War II is the question how a new and lasting legal consciousness may be developed and how a new order of human coexistence may be possible, in which tyranny and force are banned, as are anarchical disorder and an extremism of liberty […]. The issue at stake is the right law […]. (Schrey 1951, 21; my translation; cf. 154–86, 193–221)

This description of the situation also demonstrates that during the earliest years of its existence, the 1949 *Grundgesetz* (Constitution) of the Federal Republic of Germany was not perceived as an order for the future which would stand the test of time. Detailed answers to the question of what the new order should look like were provided by Catholic theologians—remaining true to their "party line" despite all their attempts at modernism, as the Austrian Benedictine padre Albert Auer assured his readers in the preface to his book *Der Mensch hat Recht—Naturrecht auf dem Hintergrund des Heute* (Human beings have rights: Natural law seen against the current background,[5] Auer 1956) in 1956. The monumental *Handbuch der Gesellschaftsethik, Staatsethik und Wirtschaftsethik* (Handbook of social ethics, state ethics and economic ethics) by the theologian Johannes Messner, professor of ethics and sociology at the University of Vienna, published in 1950 as *Das Naturrecht* (Natural law: Messner 1966), met with heightened interest and saw several new editions (cf. Funk 1952). Messner develops his definition of natural law, which he sees as ultimately derived from the creator-god defining the purpose of being, "as an order of individual and social competencies, the foundation of which is human nature and its individual responsibilities" (Messner 1966, 304; my translation, cf. 225), in a work encompassing more than 1200 pages, contemplating it historically, systematically and in great details. The work, first published in English during his exile in the United Kingdom, is based on numerous earlier social-philosophical studies as well as his political experiences in Austria during the period of the Dollfuß cabinet, i.e., it was not conceived with a view only to the post-war situation. What is typical for this period, in which the law was in a "derelict state" and in dire need of repair, is less the content of the work than the extraordinary interest it aroused. On the other hand, wherever the focus was on the question of the "right law"—always posed with reference to the perverted Nazi laws—the discussion in legal philosophy concentrated on two aspects: the reason for the validity of natural law, and its priority over positive law created by the state (see U. Neumann 1994, 145ff.). The reason for this obvious attack on legal positivism lay in the theory (debatable as it might be)—formulated by Gustav Radbruch and taken up by many (sometimes gratefully, as an excuse)—that it had been legal positivism ("law is law") which had left German jurists "helpless against laws with arbitrary and criminal content" (Radbruch 1956b,

[5] *Translator's note*: "Der Mensch hat Recht" is a case of wordplay, which may mean both "Human beings have rights" and "Human beings are right."

352; my translation).[6] Therefore, Werner Maihofer (whose work shall be explored in greater detail shortly) simply used the alternative *Naturrecht oder Rechtspositivismus?* (Natural law or legal positivism?: Maihofer 1962a) as the title for his commendable collection of important documents pertaining to the "renaissance of natural law." Catholic authors were able to base their answers on the Stoic and Christian hierarchy of norms—*lex aeterna, jus naturale* and *jus positivum*—using the Aristotelian and Thomistic theory of natural purposes as their point of departure.[7] One example from 1948 is Georg Stadtmüller's brochure *Das Naturrecht im Lichte der geschichtlichen Erfahrung* (Natural law from the perspective of historical experience: Stadtmüller 1948). The author claimed that the "age of a positivistic understanding of law" had "ended," welcoming "the rebirth of eternal natural law" (ibid., 33; my translation). According to him, natural law is part of the law of ethics, independent of human insight and will (ibid., 45), curbing positive law as "its insurmountable boundary" (ibid., 51; my translation), consistent with the hierarchical order of the three levels of norms, i.e., "1. Absolute norms per se (*lex aeterna*), 2. human insight into these norms (conscience), and 3. the implementation of these norms in positive law" (ibid., 39; my translation). For the "basic ethical norms" of the second level, he falls back once again on the familiar maxims, ancient but meager in content: *Suum cuique, neminem laedere, pacta sunt servanda* (ibid., 46ff.).

The situation for the protagonists of Protestant social ethics was incomparably more difficult. After all, the primary Christian dualism of God's realm, will and mercy on the one hand and the fallen human being, subject to secular rule and with his ability to gain insight ruined, on the other—envisioned by Luther as existential—leaves no room for a natural law comprehensible to natural reason (Ilting 1978, 245ff.). Radically abandoning it, therefore, might lead back to a positivism "justifying itself from the Christian's basic religious decision" (Wieacker 1967, 602; my translation). However, there remained the possibility of seeking orientation in Biblical instruction, an endeavor pursued by Erik Wolf (1902–1977), professor of legal philosophy and canonic law in Freiburg (see Wolf 1948).[8] In this precarious situation, some authors sought redemption in Thomism, thereby following historical examples. Among them

[6] For early critical comments, see Rosenbaum 1972, 143ff.; doubtfully Franz Wieacker (1965, 8; my translation): "[...] whether the balance of iniquity was not tipped more heavily by the violation of existing laws." Bernd Rüthers's monograph (Rüthers 2005) should have rendered Radbruch's theory obsolete.

[7] Hofmann (2008b, 92ff.) provides the central references from St. Thomas Aquinas' *Summa Theologiae*.

[8] Later, Wolf no longer considered love (*caritas*) as the limit of human law, but as the foundation of existential renewal through a "law of charity" (Wolf 1958). A counterpart of this effort is Günther Küchenhoff's attempt to view traditional natural law—which had been increased through the Biblical commandments of love, "baptized," so to speak—as a "law of love"(Küchenhoff 1948, 69ff.).

was the jurist Hermann Weinkauff, who was very influential intermittently and whose work will be discussed extensively in Section 10.2.4. At this point, it will suffice to quote a confessional essay by Weinkauff which he published in the journal *Zeitwende* in 1952 under the title *Das Naturrecht in evangelischer Sicht* (Natural Law from a Protestant Perspective: Weinkauff 1962):

> The physicality of human beings, and the belief that they are created in the image of God, as well as their placement within the orders of the preordained creation, all these explain both the primal legal order—as it is autonomously valid and demanding and as it binds our conscience—and the fact that the human law-giver cannot dispose of or manipulate it; furthermore, it explains the limits of any legal order devised by humans, which ends where the order of creation and the human personality begin. (Ibid., 210; my translation)

On the other hand, Weinkauff took Lutheran tradition into account, continuing thus:

> The fall of creation and human finiteness and temporality explain the peculiar fragmentation of any human legal order, the necessity of making laws compelling [...], and even the shattering of human law, its incessant change, its revolutionary upheavals, its constant danger of degenerating into an empty, even unjust mere order of force, its inability to provide a clean solution for social and national tensions. (Ibid., 213ff.; my translation)

The Graz-based logician Ota Weinberger (more on him in Section 10.3.3) counts Weinkauff's theory among the theories of natural law he labels "weak," as they do not offer a complete foundation for law, but merely formulate weak and generally plausible preconditions and only sketch the outlines of consequences (Weinberger 1980b, 326ff.). Weinkauff's biographer Herbe concurs with this evaluation, speaking of a "conglomerate" of parts of Catholic moral theology, the reformatory views of Emil Brunner (1943) and Erik Wolf (see above) and "profane legal philosophy, as outlined by 'Scheler and Hartmann's value ethics'" (to be discussed forthwith) (Herbe 2008, 163; my translation).

10.2.1.2. Existential Natural Law

After a world had collapsed in Germany, it seemed obvious to seek out solid ground by taking recourse to a sacred tradition of immutable concepts of order. However, this view towards the past was but one aspect of the matter. In addition, there was the forward-looking challenge of creating a new order from the power of natural law, an existential decision in the spirit of freedom. This, however, remained a marginal aspect. An "existentialist natural law" was far removed from the Catholic Church's doctrine of natural law, and it was impossible to implement the newly revived political Catholicism in terms of legal dogma and practice, and therefore it failed to find a place in legal politics.

An excellent documentation of this aspect of post-war philosophy appeared in Erich Fechner's (1903–1991) *Rechtsphilosophie* (Legal philosophy:

Fechner 1962), described as "sociology and metaphysics of law," in 1956, where he described the "nature of law." Fechner wrote his dissertation in philosophy under Max Scheler and also studied and completed a doctoral thesis in law, subsequently teaching legal philosophy, legal sociology, as well as labor and social law in Tübingen interrupted by army service and being taken prisoner of war from 1943 to 1945. Fechner (1962, vi) claimed that the ontological core of his legal philosophy, influenced by Heidegger's existential philosophy, had "already taken shape during the war and in the unforgettable days of imprisonment under the clear sky of France (where a harsh form of asceticism was combined with the possibility of intellectual activity)." His experience of the spontaneous establishment of order in the prisoner-of-war camps and on the "black market" served to illustrate what jurists call "the nature of things" (ibid., 154; my translation). This concept plays an important role in the context of the renaissance of natural law in post-war legal philosophy. This has been discussed extensively in Section 10.2.1.1. In Fechner's case, it is treated in the context of the analysis of objectivity (the "integration into being" or *Seinseingebundenheit*) of the factors influencing laws. Following the philosophy of Scheler and Hartmann's theory of levels (*Schichtenlehre*), Fechner differentiates between real and ideal forces shaping laws, i.e., biological, economic, political and sociological factors on the one hand, and reason, values and religious experience on the other (ibid., 87ff., 130ff., 155ff.). Since the real-life situations the law touches upon are always influenced by supra-individual ("objective") ideal factors as well, however, "the search for objective foundations of law that are integrated into being and removed from human arbitrariness" reveals a "colorful and differentiated picture." This means that the human being stands between certainty and uncertainty in law. Therefore, Fechner falls back on existential philosophy, which deals specifically with this human uncertainty (ibid., 223). Thus, Fechner's legal philosophy is ultimately a philosophy of decision-making, an aspect that could be derived (with some effort) from the existential philosophy of Martin Heidegger and Karl Jaspers (ibid., 244ff.). Inasmuch as real and ideal factors leave room for the formation of law and where recognized criteria are lacking or have disintegrated, these rare and narrow spaces of "true (existential) legal uncertainty" witness "magic moments of legal life" which make existential decisions unavoidable (ibid., 251). "Although it may not be oriented towards given criteria, it is determined with regard to the future, in which the subjective brings forth something objective. Every creative decision which reveals new elements and thereby creates obligations brings forth a piece of natural law" (ibid., 261; my translation). It is a natural law in which human beings "dare to test the durability of what is new" in a context largely unknown to them, a natural law which grows through ever-renewed efforts, and "only proves itself right in and after the deed, which – being subjective in its origins and objective in its goals – only exists when it is risked" (ibid.; my translation). According to Fechner, such de-

cisions have a metaphysical dimension; after all, they require a prior decision about the "meaning of human existence" (ibid., 278; my translation).

Even if Fechner emphasizes that this question arises frequently in law, his legal-philosophical attempt to comprehend the "essence of law" in an existentialist fashion not from its genesis, but from its ultimate goal (Hofmann 2010, 166), can only be understood as the echo of an extreme historic experience, as a response to a situation in which the risk of a new, collective design for existence had become unavoidable.

Another concept oriented decidedly towards the future, the non-doctrinaire, Marxist alternative that Ernst Bloch (1885–1977) offered with his legal philosophy *Naturrecht und menschliche Würde* (Natural law and human dignity: Bloch 1961) took the external shape of a brilliant review of the history of legal and political philosophy, in which he sought to discern traces of the future from the past (cf. Gramm 1987, 30ff.). The work—written mainly during his exile in North America and underpinned by his philosophy of hope (Bloch 1954–1959), which his critic Helmut Schelsky called the "Marxist existential philosophy of a member of the youth movement" (Schelsky 1979)—was published in 1961 in West Germany. It could not appear in the GDR, where Bloch had held a chair for philosophy in Leipzig since 1948, after Bloch—who had even been awarded the GDR's National Award in 1955—had fallen out of favor there and had been forbidden to lecture in 1956. Having moved to West Germany in 1961, he held an adjunct professorship in Tübingen and received the Peace Prize of the German Book Trade in 1967.[9] In the style and attitude of an Old Testament prophet, Bloch speaks eloquently and thunderingly of the "future realm of freedom," that all-encompassing, class-less "concrete order, with freedom as its only goal and content" (Bloch 1961, 310; my translation). The realm of freedom grows "by anticipated influence" (ibid.; my translation), but it cannot be conceived in institutional terms. For it is only the "space" of "the independence of everybody with everybody that has become possible," i.e., it bears no "resemblance of a state" (ibid., 259; my translation). Both state and law will die away (ibid., 253ff.). It is especially the bourgeois state under the rule of law that must perish: "With the bourgeois state ruling by law over the poor and the rich—an ideological, ultimately deceptive formal instrument—it is impossible to enter socialism" (ibid., 164; my translation). In the event of success, however, one of the signs of socialism would be "that the purified banner of human rights has been raised again" (ibid.; my translation). According to Bloch, the fact that human rights do not disappear together with the rule of law, but (can) enter into socialism—albeit with a different function ("purified") as mere warning signals— follows from the ambiguity of the so-called *Überbau* or superstructure, which on the one hand reflects the circumstances of the bourgeois (or any other) stratified society, but on the other

[9] See Section 10.6.3 for greater details.

hand—and this applies both to human rights and to natural law—also points far beyond its class-bound development (ibid., 199ff., 203ff.) as a "noble power anticipating something better" (ibid., 237; my translation). Thus, a core of the "postulation of human dignity" remains as a cultural "heritage" of the formerly revolutionary natural law (ibid., 232): "Abolishment of all conditions in which the human being is alienated, becoming a commodity alongside inanimate objects […] with zero value in and of itself" (ibid.; my translation). In socialism, the distance between human rights (the "subjective and public rights") and the "objective rules" decreases, but it is possible to "bring it to a head through great mistakes" (ibid., 253; my translation)—a cautionary reference to Stalinism (cf. Christensen 1987, 144ff.).[10]

In the midst of the Marxism discussion in West Germany, dominated as it was by the sterile polemics of the "cold war," Bloch's dedicated emphasis on the critical and emancipatory side of Marxism supported a certain differentiation, which had already begun with the discovery of the young, "humanistic" Marx when Siegfried Landshut had begun publishing his *Early Writings* in 1953 (Marx 1953). Bloch had the strongest impact on the legal philosophy of Maihofer. Werner Maihofer (1918–2009), professor of criminal law and legal philosophy in Saarbrücken, a politician for the liberal FDP specializing in legal matters, Federal Minister of the Interior from 1974 to 1978, published his habilitation thesis entitled "Recht und Sein—Prolegomena zu einer Rechtsontologie" (Law and being: Prolegomena for an ontology of law) in 1954, choosing an ambitiously parallel title to Heidegger's *Being and Time* of 1927 and reviving the great topic of the 1950s, natural law and the nature of things, while adding an existential and ontological analysis of the complex social connection between people to Heidegger's considerations. This will be discussed in depth in Section 10.2.3; see also Section 2.4.1 in Tome 2 on this volume. In the meantime, Maihofer pays homage to other authors. Maihofer's contribution to the *liber amicorum* for Erik Wolf in 1962 (*Konkrete Existenz. Versuch über die Philosophische Anthropologie Ludwig Feuerbach*, Concrete existence: Essays on Ludwig Feuerbach's philosophical anthropology) marks the transformation of his philosophy (Maihofer 1962b, 246ff.). Following this new path, Maihofer wrote about "natural law as existential law," i.e., as the human being's right to an existence which is dignified and worth living (Maihofer 1963). His studies of Ludwig Feuerbach and the young Marx (Maihofer 1968) as well as Bloch's influence made Maihofer consider not only the "nature of things," but, with it, in dialectic unity also the "destiny of man" (Maihofer 1962b, 20; my translation). Lacking an animalistic definition of human nature, natural law thus acquires a new meaning, as a "pre-conception of the historic self-determination of man" (ibid., 21; my translation). This, however, is not bare-faced existen-

[10] See Ralph Christensen (1987, 219ff.) on the problem of subjective rights and the rule of law according to Bloch.

tialist decisionism, but indicates the constant transcending of reality towards a "better world" (ibid., 39; my translation), following the "guideline of a dignified human existence worth living in conjunction with other human beings" (ibid., 37; my translation). The point of departure is the definition, backed up by historic experience, of what is human and what the basic rules of interpersonal relations, which cannot be abandoned or undercut without leaving the level of humanitarianism, are (ibid., 44). This indication of historically evolved material legal ethics, parallel to Bloch's cultural Marxism, distinguishes Maihofer's existentialist natural law from what Erich Fechner wrote a few years previously in his existentialist legal philosophy. Furthermore, this is also the basis of Maihofer's introduction of dynamics into the concept of natural law: "Natural law: To us, this is the term denoting the constant need for evolution and revolution of human relations in daily life, towards the outline of a truly humane society among men" (Maihofer 1963, 50; my translation). Maihofer's receptivity for Bloch's writings reached its high point in his contribution on *Demokratie und Sozialismus* (Democracy and Socialism: Maihofer 1965b) in the *liber amicorum* published to commemorate Bloch's 80th birthday in 1965. There, Maihofer waxed enthusiastic that only the principles of the French Revolution of 1789 and the Russian Revolution of 1917 would be able to bring about "the future liberal, class-less society of citizens of the world and human beings in this, our only world" (ibid., 67; my translation).[11]

10.2.2. A Legal Philosophy of Values and the "Radbruch's Formula"

10.2.2.1. The Phenomenological/ Ontological, Sociological and Psychological Justification of Law through Values

Born of the misery of its time, the "renaissance of natural law," that striving for a solid, immutable foundation for law and normative certainties based on it and removed from human arbitrariness, had its center clearly distanced from the law of reason of the enlightened subject—in Catholic natural law of the Aristotelian-Thomistic tradition, but it also pursued another ancient path toward insight: *Wesensschau* (perceiving or seeing the essential being)— ultimately rooted in Platonic ethics. Its modern form was psychological phenomenology, as formulated mainly by Max Scheler (1874–1928) in his non-formal value ethics, which adopted Edmund Husserl's (1859–1939) phenomenology

[11] It should be pointed out that the short book *Existenzialismus und Rechtswissenschaft* (Existentialism and jurisprudence: Cohn 1955) published in 1955 in Basel by Georg Cohn, Member of the Permanent International Court of Arbitration, has nothing to do with the existentialist legal concepts discussed in this chapter. Instead, this is a late contribution to the "free-law movement's struggle against the 'jurisprudence of concepts' and its 'logical methods'" (Hofmann 2009, 301ff.; my translation). Going beyond even the free law theory, Cohn (1955) proposes a variety of decisionism of individual, concrete decisions, without any additional rules.

as its point of departure. It promised objectively valid ethical criteria: Instead of Kant's formal ethics, it propagated material or non-formal values, i.e., ones with a fixed content, as immutable entities that could be experienced by intuitive perception (Scheler 1954, 1980, 2007). Nicolai Hartmann (1882–1950) had also developed similar non-formal value ethics (Hartmann 1962). However, his ontology had an even stronger influence on a world which had come undone: The revival and dualistic development of the old Aristotelian theory of levels of reality, i.e., a tiered order of real levels or layers of being, ranging from the inorganic to the organic and mental to the spiritual and the ideal level, encompassing the "objective spirit," language, art, science and ethical and aesthetic values (Hartmann 1949a; 1949b).

An excellent documentation of the strong influence non-formal value philosophy exerted on the unsettled jurists of post-war Germany is provided by the "attempt to reestablish natural law" first published by Helmut Coing (1912–2000), professor of civil law and legal history in Frankfurt, in 1947 under the title *Die obersten Grundsätze des Rechts* (The highest principles of law), successfully expanded soon thereafter (1950) in his *Grundzüge der Rechtsphilosophie* (Outlines of legal philosophy: Coing 1985). Based on an intuitive "perception of values" (*Wertschau*) (ibid., 116), a feat whose possibility he derived mainly from Scheler and Hartmann, he recognized justice as the central value of law, flanked by the complementary values of reliability, faithfulness, truthfulness and trust, as well as personal dignity and liberty for the social and political area, and furthermore the values of family, state and church, which give rise to institutions (ibid., 29ff., 36ff.). From these values, he extrapolated legal principles in the sense of guidelines (ibid., 57). Apart from Scheler's works (1954; 2007) and Hartmann's theory of levels, Coing also made general reference to Wilhelm Dilthey's *Geisteswissenschaft* or human science as well as to the philosopher and sociologist Georg Simmel (1858–1918) (Simmel 1989b, 1994) and Helmuth Plessner (1892–1985) (Plessner 1961, 33ff.), confirming his fundamental conviction, derived from these authorities, "that man is characterized both by the capability of objective perception and exploration of the world, and by the ability to grasp and implement spiritual values" (Coing 1985, 129; my translation). While the "implementation of values" might be the point of human existence, he also claimed that reason, ever imperiled, is not its determining power (ibid.)—a concept that is extraordinarily typical for the time. Regarding social order, the central issue for Coing was whether there are "value contents that transcend time, manifested in legal precepts" (ibid., 203; my translation). The solution suggested was to derive exigencies from the essential values, and to retain them as principles pertaining to the elements that typically recur throughout human existence (ibid., 206ff.). This leads to a natural law acting as a "criterion to judge positive law" (ibid., 214; my translation), the latter losing its moral binding force in the event of a contradiction: In extreme cases, he argued that judges are not allowed to apply it for reasons of justice (ibid., 211, 291).

The highly respected legal historian Heinrich Mitteis (1884–1952) went especially far with his statements on natural law. In a lecture at the (East) Berlin Academy in 1948 entitled "Über das Naturrecht" (On natural law), published by the (East) Berlin Academy's publishing house and licensed by the Soviet Military Administration, he propagated the following thesis: "Natural law is the actually applicable law […] Natural law trumps positive law" (Mitteis 1948, 38; my translation). His reasoning was that natural law was the expression of the legal idea, aimed at "the highest values," as a critical instance above law. The ultimate and highest value, however, "in which the legal idea finds its central object," the highest value "recognized by man," was the personality, meaning "the personality as part of the community," which consisted of "connected personalities" (ibid., 34; my translation). Their differences formed the basis of "solidarity" (ibid., 35). Mitteis did not elucidate any practical legal consequences.

On the one hand, the assumption of absolute values met with sharp criticism early on (see Weischedel 1956; Würtenberger 1950, 98ff.).[12] It was subsequently summarized by Ernst-Wolfgang Böckenförde, who argued that the justification of laws through values lacks a rational foundation of arguments that would stand up to discourse,

> both with regard to the definition of values, the insight into values and to the intensity of a value's validity, and the establishment of a system of preference among values, which is the only thing that could lend theory of values any practical utility. (Böckenförde 1987, 12ff.; my translation)[13]

On the other hand, non-formal value ethics remained very much present in legal writing, at least in the form of hypotheses and quotations: A phenomenon comparable to the "quotational" use of Karl Marx' writings in the GDR's real-socialist literature of scientific justification (see Paul 1988, 329ff.). This recourse to "values" was simply a cipher for the rejection of legal positivism, which was declared the root of all legal evil: This also simplified coming to terms with the country's most recent history. As Gustav Radbruch had written in 1946, it had been positivism that had "made German jurists helpless against laws with arbitrary and criminal content" (Radbruch 1956, 352; my translation). Larger-scale theoretical concepts, however, had to pay heed to these scientific objections and therefore try to do without such metaphysics of values.[14] Thus, Heinrich Henkel (1903–1981), professor of criminal law in Hamburg, still based the argumentation of his *Einführung in die Rechtsphilosophie* (Intro-

[12] For a general overview, see Luf 1980, 127ff.

[13] The most extensive philosophical criticism of value philosophy can be found as early as 1937 in the writings of a member of the *Wiener Kreis* (Vienna Circle) Victor Kraft (V. Kraft 1951).

[14] Due to their deeply religious foundations, the two volumes of Karl Brinkman's textbook on legal philosophy (Brinkmann 1960, 1975), however, were quite untouched by such philosophical criticism.

duction to legal philosophy: Henkel 1964), put out as a textbook by a leading legal publisher in 1964, on a "theory of values," but only in the sense of an "objective relationism of values" (ibid., 148ff., 236–60; my translation). This indicated no more than a hierarchical system of social valuations (ibid., 246ff.). As a living order, this system was to be changeable, but founded on a broad basis of "lasting values." The social order of values resulted in such "building blocks for law making and the application of law" (ibid., 257; my translation). Upon further examination, however, these "real factors" of legal decision-making are revealed as mere "orientation points," as sketches of "preferential tendencies." Thus, the metaphysical theory of values in law ends up a kind of legal sociology.

However, besides the phenomenological/ontological and the sociological, there was a legal-psychological approach to the concept of values. This aspect was formulated in 1957 by Arthur Kaufmann (1923–2001). Kaufmann, Radbruch's most important and influential student and, like him, a scholar of criminal law, was a constant observer and a highly influential protagonist in the development of West German legal philosophy: First as a professor in Saarbrücken, followed by decades in Munich (see A. Kaufmann 1991, 144ff.). During the phase when the "renaissance of natural law" began to wane, he wrote: "The history of our most recent past has shown us with the exactitude of a scientific experiment that values too are realities which do not cease to exist or exert an influence because they are relativized or denied" (ibid.; my translation). After all, experience had shown that "the forced consolidation (*Gleichschaltung*) of justice and the state's written laws" can lead to "nihilism of values," making it possible to "justify" even the murder of mentally ill persons and the gas chambers of Auschwitz (see A. Kaufmann 1984e, 3). Taking this experience of absolute in-justice (without which, according to the philosophical maxim of Heraclitus, man would not know the name of justice)[15] as a point of departure, according to Kaufmann it becomes apparent that these "values" are actually "supreme principles," whose function is "not so much to define the content of a given positive law, but rather in the regulatory function of excluding absolutely unethical and unjust laws" (ibid., 15; my translation; cf. Hofmann 2008). The claim that we concur in primal experiences of absolute injustice, however, changes the focus on the issue. The concentration on the possibility of achieving consensus for such a justification for law makes the discussion of justice and injustice relatively independent of the various philosophical justifications of natural law, i.e., all theories regarding the "nature" of human beings, the natural world and law (see Ellscheid 2004, 148ff.).

[15] "Were there no injustice, men would never have known the name of justice" (Heraclitus 1957, 31).

10.2.2.2. The Heritage of Neo-Kantianism: The "Radbruch's Formula"

Outstripping the attempt to find normative certainties in a Platonic world of eternal values by far, the relativistic evaluation of law, as developed before World War I by Gustav Radbruch (1878–1949), an expert on criminal law and a very important legal philosopher, was a far more sustainable approach, following in the wake of the value philosophy of the Southwest-German school of neo-Kantianism concentrated in the province of Baden.[16] According to this approach, the "legal idea" which provides the orientation for any legal term, is made up of three components which contradict but cannot be separated from each other: The first is expediency with regard to the subject and method of equal treatment, the second is the stability of law attained through the positivism of law, and the third is the idea of justice (see Radbruch 1956a, 168ff.), which may be absolute and generally valid, but remains merely formal, and therefore—in a display of cultural-philosophical relativism—requires the infusion of content from liberal, democratic, socialist or conservative ideologies. After the years of the reign of terror, with his famous "formula," in 1946 Radbruch took recourse to the antinomy of legal stability and justice, writing:

> The conflict between justice and the stability of law should be resolved by giving precedence to positive law, reinforced by statute and political power, even when its content is unjust and inexpedient, unless the contradiction between positive law and justice reaches such an unbearable extent that the law must cede to justice, being 'wrong law.' (Ibid., 353; my translation)

And he continues: However,

> where justice is not even strived for, where equality, which lies at the core of justice, has been consciously denied in the passing of positive laws, there the law is not merely 'wrong law', but indeed it is no law at all […]. Measured by this standard, entire swaths of Nazi law making never attained the dignity of being valid laws. (Ibid.; my translation)

The criminal-law expert Radbruch clearly aimed this wording at the critical issue in many criminal proceedings of the post-war era, i.e., the question whether the formal validity of Nazi laws could be used to justify felonious atrocities. It is logical that this concentration on the problem of the validity of laws led to the revival of the "Radbruch's formula" after Germany's reunification, when GDR border patrol soldiers who had shot people attempting to escape the GDR at the German Wall (the so-called "*Mauerschützen*" or "Wall marksmen") were tried before criminal courts and invoked the GDR's Border Law (*Grenzgesetz*) in their defense. Both the German Federal Court of Justice as well as the Federal Constitutional Court fell back on Radbruch's arguments when confirming the verdicts against the accused.[17]

[16] For greater detail, see Hofmann 2009, 301ff. On Radbruch's formula see also Sections 1.1.3.2, 9.1, and Chapter 2 in Tome 2 of this volume.

[17] Cf. instead of many H. Dreier 1997, 421ff.; most recently Vest 2006.

Because he had originally strongly emphasized the element of legal stability attained by positivism in law, Radbruch had been considered a positivist. After the publication of his "formula," general opinion was that he had converted to natural law, especially since during those post-war years, he explicitly repeated the old insight that there was a "higher law" above the written laws, "a natural law, a divine law, a law of reason—in short, a law beyond laws, measured against which injustice remains injustice, even if it takes the shape of a law" (Radbruch 1962, 2; my translation).[18] However, taking into account Radbruch's general concept of law, which had always been complex, the issue is not that easy to decide. Rather, on the one hand we are dealing with a certain shift of emphasis within the concept of law, while on the other, the issue is the experience that in extreme situations, the formal concept of justice, related as it is to the idea of equality, is transformed in content into a negation of concrete injustice. One might label this moral protest against injustice committed by the state a conversion towards natural law. However, Radbruch with his value-oriented legal philosophy had never been a positivist earlier either, in the sense of the simplistic "law is law." What was new was his distinction not only between applicable and "wrong" law, but his addition of a category for ostensible law, which is actually non-law because it has perverted the idea of the law.

10.2.3. Phenomenological Recourse to the "Nature of Things"

Given the background experience of injustice committed by law, Kaufmann and Coing, and later even Henkel, introduced another "natural law" criterion of written law, in addition to the postulates of eternal rules of the order of creation and an unchangeable set of values: The "nature of things."[19] In itself, this was not a new topos. Suffice it to recall the first sentence in the first chapter of Montesquieu's *The Spirit of the Laws*: "Laws, in their most general signification, are the necessary relations arising from the nature of things." The classic legal phrasing was coined by Heinrich Dernburg, a scholar of the pandects (1829–1907): "The circumstances of life bear their measure and order within, albeit more or less developed. This order inherent in things is called the nature of things" (Dernburg 1892, 87; my translation). Gustav Radbruch took up this topic in 1948. Presumably, this too was part of his endeavor to overcome positivism ("law is law"), which he considered the reason for the helplessness of the legal profession towards the evil spirit of the Nazi regime (see Radbruch 1948, 166 ff.; 1956b, 352).[20] This, however, was only the case for the executive, if at all. After all, the worst excesses in the legal system resulted

[18] On Radbruch's complex concept of law and its changes, see Kühl 1998, 605ff.

[19] The context between natural law and the nature of things is the topic of a dissertation by Gerhard Sprenger (1976), supervised by Werner Maihofer.

[20] On Radbruch's theory of the nature of things in greater detail, see Maihofer 1965, 52ff.

from the ideological abuse of positive law by way of "unlimited interpretation" (cf. Rüthers 2006). With his legal concept of the "nature of things," Radbruch means the analysis of a real-life situation to be assessed, and its reconstruction according to a legal idea. By paring away anything superfluous, this ideal reconstruction causes an ideal type of law to emerge in reality: A value. Thus, this concept offers an "ultimate means" of interpreting laws and filling lacunae in the law, but must never contradict the spirit of the law. Therefore, according to Radbruch, the nature of things can only somewhat alleviate the precipitous dualism between "ought" and "is," between value and reality, but never eliminate it completely.

Like Radbruch, Hans Welzel (1904–1977), professor of criminal law and legal philosophy in Bonn, considered the idea of the legal omnipotence of the law-giver the "original sin of legal positivism," holding up "innate limits of positive law" against it (Welzel 1962b, 334ff.; my translation). He considers these to be the "ethical autonomy of the human being" (i.e., Kant's term of human dignity), but mainly and above all in the "logical structures of reality" (*sachlogische Strukturen*) that supposedly "appear at points throughout the entire material of law" and "sketch out" a certain provision for the law-giver. This, however, is to be understood only descriptively, sociologically, not in a prescriptive sense. The consideration of these "logical structures of reality" should not affect the validity of a provision (which is always subject to the decision of the law-giver) but only its effectiveness, the question of whether it achieves its goal. Welzel's legal philosophy, as expressed mainly in his major work *Naturrecht und materiale Gerechtigkeit* (Natural law and material justice: Welzel 1962a), however, goes far beyond the recourse to "logical structures of reality" in law (ibid., 231ff.). On the one hand, it condemns positivism and all ideologies which aim to reduce the human being to its vitality and all legal questions to questions of power. On the other hand, it also rejects the ossification of historically changeable social orders by natural law and dismisses the idea of a system of eternal material principles of law. At the same time, however, Welzel insists upon an "eternal content of truth of natural law." By this, he means mainly profane natural law, especially the Enlightenment's law of reason. He expressly rejects attempts—current in the 1950s as well as today—to "pick fruits that have grown on the tree of reason from the tree of knowledge." According to Welzel, four truths of natural law remain valid: (1) the experience of an unconditionally valid conscience, i.e., the experience of an obligation, a "duty transcending existence"; (2) the recognition of human beings as responsible persons; (3) the "state of order," i.e., a certain structure and regularity of social action; (4) a "concordance" of all directives of social life, however tension-filled such concordance may be. From all this follows an ever-new natural-law "obligation of positive law to ensure that the struggle for the right formation of social relations remains an intellectual struggle and does not end in abuse or even the destruction of human beings by human beings."

Helmut Coing—his intuitive "perception of values" (*Wertschau*) has already been discussed— was also of the opinion that without attention to the factual regularities of the various areas of life, "a just order" could "never be created" (Coing 1985, 189ff.; my translation). According to him, the authority of the law must necessarily suffer, for example, when, after the war during the time of the so-called "pent-up inflation," the law forced the fiction of the value of money to be upheld and suppressed a "legitimate desire to receive a true counter-value for goods sold" by penalizing the barter of goods. Neither on the whole nor in detail would this lead to an "insight into a cohesive order," as for example Thomas of Aquinas had taught, classically. Establishing the structures of social life "does not liberate us from the task of interfering ourselves, imposing values and order." The fragmentary character of the structure of things becomes even clearer, according to Coing, when two different areas of life, such as politics and religion, collide: At this point, an "ethical decision" based on values becomes indispensable.

Werner Maihofer (1918–2009), a professor of criminal law and liberal politician who was Federal Minister of the Interior in Germany from 1974 to 1978, went an essential step further in 1958 by declaring the "nature of things" a source of law and a concrete natural-law yardstick of material justice for the law-giver and judiciary (Maihofer 1965a, 83ff.). This was based on his theory that the "ought" can be derived from the "is," both for general situations from the analysis and reconstruction of their factual regularities, and for individual, special situations, such as a purchase, as a "legal situation, from analysis of the natural expectations and interests, claims and obligations in the social roles and circumstances constituting the concrete situation" (ibid., 83; my translation). According to Maihofer, the existential and ontological analysis of such complex occurrences between the subjectivity of the human being and the objectivity of the world, in which being and meaning are combined in an "objectivation," shows the "existential structure" of mutual "reference and equivalent," the "value structure" of "expectation and interest," just as much as the "duty structure" (*Sollensstruktur)* of "claim and obligation" (ibid., 20ff.; my translation). The historic change of natural interests and obligations in certain roles and situations is not a valid objection against the historic inevitability of their concrete and current power of validity, their recurrent and ever-current historic objectivity, "the actual existence as a father or brother, as a husband or son, as a judge or doctor" (ibid., 82; my translation). All these statements are based on Maihofer's habilitation thesis *Recht und Sein* (Law and being; published in Freiburg in 1954), in which he tried to comprehend the social connection between human beings existentially and ontologically, strongly influenced by Martin Heidegger's fundamental phenomenological ontology *Sein und Zeit* (Being and Time; published in 1927) in his nomenclature, method and language. If the historicity of natural law and the nature of things is apostrophized as a "history of objectivity in existence and meaning" here, one must bear in mind that there

already were more profound analyses available since the days of Rudolf Stammler (1856–1936) (Stammler 1888, 1ff.; 1902; see Section 1.3 in this tome). Furthermore, basing this historicity of natural law and the nature of things on the "historicity of the actuality of being-as" (Maihofer 1965a, 83; my translation) is little more than a fashionable garnishing of a dead end in legal philosophy. After all, the factual results of upgrading that traditional juristic figure of argumentation, the "nature of things," to an ontological category, are far too meager.

The same is true of Ottmar Ballweg's "theory of the nature of things," which remains entirely in the realm of the approximate (Ballweg 1960). There, the result is as follows: "The nature of things is the objectively discernible, factual-logical structure of reality; the law is an essential constituting element of the character of order that corresponds to its being" (ibid., 67; my translation). What exactly this "essential constituting element" was to mean remained open, whether pertaining to fact or law. There is a notable lack of convincing exemplary concretizations here. In addition, the open recourse to Carl Schmitt's "concrete concept of order" remains questionable, due to the latter's proximity to Nazi ideology (ibid., 39 n. 9, 52 n. 29).

The most sophisticated treatment of the subject in terms of philosophy was written by Arthur Kaufmann, whose lecture *Analogie und 'Natur der Sache' – Zugleich ein Beitrag zur Lehre vom Typus* (Analogy and the 'Nature Of Things': Also a Contribution to the Theory of Type: A. Kaufmann 1965) marked a certain final point in the discussion. Following juristic prudence, he seeks a middle path between Radbruch's position (nature of things: A manner of thought) and Maihofer (nature of things: A concrete source of law), along the lines of the scholastic model of the *analogia entis*. Accordingly, thinking in terms of the "nature of things" is "pre-logical" thinking to him, necessary for each act of establishing law and judging, in order to bring the legal idea respectively legal regulation and real-life situations, i.e., the "ought" and the "is" into a state of "equivalency," i.e., an analogous relationship, by way of continuous comparison (ibid., 44ff.). This implies the equation of unequal elements "according to a criterion that proves itself essential" (ibid., 20; my translation). This leads Kaufmann to a "typological school of thought," whereas the normative type "represents the middle ground between the legal idea and the real-life situation," "around which ultimately all legal thought revolves" (ibid., 38; my translation). This may be true for the law-giving process and the application of law and may be particularly apposite for legal hermeneutics; however, the statement hardly sums up legal thought per se.[21]

Günter Stratenwerth had already returned the concept of a nature of things to the level of legal hermeneutics—which will be discussed in greater detail—in *Das rechtstheoretische Problem der "Natur der Sache"* (The problem of the "nature of things" in legal theory: Stratenwerth 1957). He conceives of the ori-

[21] Cf. also the afterword of the 2nd edition (A. Kaufmann 1982).

entation towards the nature of things simply as a means for jurisprudence to liberate itself from the lacunae, ambiguities and contradictions of the law, by taking the value aspects of the law as the point of departure and thus viewing its regulations as the appropriate consequence of certain basic principles and forming these into one dogmatic entity (ibid., 30ff.). Thus, he emphasizes the practical legal importance of the topos, contrary to any theoretical use of the term as an ontological justification of a system of norms by means of evidence of metaphysical value-structures in the object of a regulation. These fundamental differences in usage led Ralf Dreier (R. Dreier 1965) to recommend foregoing the term altogether in his dissertation analyzing the terminology.

10.2.4. The End of the "Renaissance of Natural Law": The Constitution of the Federal Republic of Germany as an "Objective Order of Values"

Born of the misery of the post-war period in Germany, the so-called renaissance of natural law appears as a kind of "coping literature" (Hilgendorf 2005, 28; my translation). Therefore, it ultimately succumbed less to scientific criticism than that it lost its foundation and resonance as the establishment and stabilization of the new political and legal order proceeded.[22] The steep and constant economic growth experienced at the time was another contributing factor. The so-called "economic miracle" (*Wirtschaftswunder*), caused by the export boom after the Korean War (1950–1953) (Wehler 2008, 48ff., 67ff., 153ff.), allowed the idea of the social obligations inherent in property (*Sozialbindung des Eigentums*), which had played a major role in Catholic social teaching, to fade. "Socialization," which a representative work of the natural law renaissance published in 1956 diagnosed as the "trend of the time" (Auer 1956, 15; my translation) was no longer seriously under discussion in West Germany, a fate shared by the "Ahlen Program" of the Christian Democrats, which had postulated the nationalization of mining and heavy industry in 1947, in the spirit of Christian socialism (Rosenbaum 1972, 108ff.).

In the jurisdiction of the West German high courts, however, the reborn idea of natural law soon developed a certain life of its own.[23] Recourse to natural law not only served the legal coping with the Nazi regime's atrocities, although this was the initial focus. In addition, the Federal Court of Justice believed that natural law allowed a distinction between a higher and lower category of constitutional law, including the possibility, claimed by the Bavarian Constitutional Court, of the existence of "unconstitutional constitutional law"

[22] Early criticism by Wilhelm R. Beyer (1947), and Wilhelm Weischedel (1956). On the end of the natural law renaissance see Ulfrid Neumann (1994, 145ff).

[23] On this subject, selected from a wealth of literature: Hermann Weinkauff (1960, 1689ff.), who, however, overemphasizes the tendency; more completely Kristian Kühl (1998, 620ff.); most recently and extensively Daniel Herbe (2008, 175ff.).

due to a violation of "law predating the constitution"; it also claimed for itself the ability to recognize an order of families dictated by creation.[24] One of the lasting contributions of the judiciary was the derivation of a "general personality right" (*allgemeines Persönlichkeitsrecht*, which protects private writings and a person's image, and also justifies the awarding of claims for immaterial damage, *contra legem*) from Art. 1 and 2 of the *Grundgesetz* (Constitution), derived from the natural-law protection of the human personality.[25] The right of a nation to exist and to determine its own fate was also justified by natural law.[26] What proved to be rather ephemeral, however, was the recourse of the Grand Panel (*Großer Senat*) for Criminal Cases of the Federal Court of Justice to a supposedly immutable moral law, which had been used to justify the conviction in 1954 of a married couple which had allowed its daughter's fiancé to spend the night with her. Supposedly, this qualified as "procuration," since intercourse between adults engaged to each other should be classified as "fornication"; after all, the binding nature of the "norms of moral law" was based

> on the given order of values, which must be accepted, and the obligations ruling human coexistence. These are valid, no matter whether those to whom they are addressed, with the expectation of being obeyed, truly obey and accept them or not. Their content cannot change because general opinion about what is valid changes.[27]

Arthur Kaufmann called this decision "monstrous" (A. Kaufmann 2004, 81). Another interesting opinion of the court is that natural law, by way of the equality principle and guarantee of property, also protects civil servants' claims to wages and pensions, even against the provisions of the Constitution.

One of the most influential figures for this practical implementation of natural law was Hermann Weinkauff (1894–1981): After a career in the Bavarian

[24] Cf. BGHZ 11 App. 34ff. (40): Opinion dated September 6, 1953. In *Entscheidungen des Bundesgerichtshofes in Zivilsachen*. Vol. 11. Ed. Members of the Federal Court of Justice and the Federal Prosecutor's Office, 34–81. Berlin and Cologne: Carl Heymanns Verlag (1954). Cf. also BayVerfGH 2, 45 (49); 3, 28 (48f.): Decisions of the Bavarian Constitutional Court dated June 10, 1949 and April 24, 1950. In *Sammlung von Entscheidungen des Bayerischen Verwaltungsgerichtshofs, mit Entscheidungen des Bayerischen Verfassungsgerichtshofs und des Bayerischen Dienstgerichtshofs für Richter*. Vol. 2 (1949), 46–9; Vol 3 (1950), 28–53. Munich: Schweitzer Sortiment. Cf. also BGHSt. 4, 385 (389ff.): Opinion dated April 28, 1952. In *Entscheidungen des Bundesgerichtshofes in Strafsachen.* Vol. 4. Ed. Members of the Federal Court of Justice and the Federal Prosecutor´s office, 385–96. Berlin and Köln: Carl Heymanns Verlag (1954).

[25] Cf. BGHZ 13, 334; 24, 200; 26, 349: Decisions dated May 25, 1954; May 10, 1957; February 14, 1958. In *Entscheidungen des Bundesgerichtshofes in Zivilsachen*. Vol. 13 (1954), 334–41; Vol. 24 (1957), 200–14; Vol. 26 (1958), 349–59. Berlin and Cologne: Carl Heymanns Verlag.

[26] BGHZ 13, 265 (292 ff.): Resolution of the Joint Senate dated May 20, 1954. In *Entscheidungen des Bundesgerichtshofes in Zivilsachen*. Vol. 13. Ed. Members of the Federal Court of Justice and the Federal Prosecutor's Office, 265–319. Berlin and Cologne: Carl Heymanns Verlag (1954).

[27] BGHSt. 6, 46 (52 ff.): Resolution of the Joint Senate dated February 17, 1954. In *Entscheidungen des Bundesgerichtshofes in Strafsachen*. Vol. 6. Ed. Members of the Federal Court of Justice and the Federal Prosecutor's Office, 46–62. Berlin and Köln: Carl Heymanns Verlag (1954).

court system, he was named *Reichsgerichtsrat* (Imperial Court Counselor) in 1937, became President of a Regional Court (*Landgericht*) in 1946 and President of the Higher Regional Court (*Oberlandesgericht*) in Bamberg in 1949, made his first statements on natural law during his time as an elected member of the state synod of the Evangelical-Lutheran State Church of Bavaria (1947–1950), went on to become the first President of the newly constituted Federal Court of Justice from 1950–1960, and received an honorary doctorate from the University of Heidelberg in 1961 (cf. Godau-Schüttke 2005). He caused considerable stir when the Grand Panel for Civil Cases of the Federal Court of Justice, which Weinkauff chaired, openly rejected a legal opinion passed by the Federal Constitutional Court. The Federal Constitutional Court had judged at the end of 1953 that any civil servant status (*Beamtenverhältnis*) had ended on May 8, 1945, the day of Germany's capitulation, because the Hitler regime had purposely destroyed the *Berufsbeamtentum,* or professional civil service system, with its neutrality from Party affiliations, by making a personal oath of allegiance to Hitler part of the terms of employment.[28] This decision had negative consequences for many civil servants' rights to wages and pensions—as a former *Reichsrichter* or Imperial judge, Weinkauff, was one of them. In an unprecedented and unique statement, the Federal Court of Justice harshly criticized the Federal Constitutional Court's reasoning. In its opinion, the Nazi regime had "not destroyed or even touched the institution of professional civil service." The chastisement of the judgment culminated in the accusation that the Federal Constitutional Court had made "not a legal, but a historic judgment of value" on this central issue, and in the explicit refusal to follow its judgment in this point.[29] In cases regarding the civil service, the Federal Court of Justice's natural law decisions reached another high point under Weinkauff's leadership: The civil servant's right to receive "a livelihood befitting his station" from his employer was held to be part of the civil servant's property, and this right to property was protected by human rights, before the Constitution and above all laws.[30]

Only under the legal-political perspective of a competition among institutions, of the struggle surrounding the unclear position of the Federal Consti-

[28] BVerfGE 3, 58 (the so-called *Beamtenurteil* or "Civil Servants' Case"): Decision dated December 17, 1953. In *Entscheidungen des Bundesverfassungsgericht*. Vol. 3. Ed. Members of the Federal Constitutional Court, 58–161. Tübingen: Mohr (1954).

[29] BGHZ 13, 265 (299, 301): Resolution of the Joint Senate dated May 20, 1954. In *Entscheidungen des Bundesgerichtshofes in Zivilsachen*. Vol. 13. Ed. Members of the Federal Court of Justice and the Federal Prosecutor's Office, 265–319. Berlin and Cologne: Carl Heymanns Verlag (1954). The Federal Constitutional Court later rejected this criticism just as vehemently and confirmed its legal opinion. See in this regard BVerfGE 6, 132 (167ff.): Decision dated February 19, 1957: In *Entscheidungen des Bundesverfassungsgericht*. Vol. 6. Ed. Members of the Federal Constitutional Court, 132–222. Tübingen: Mohr (1957).

[30] BGHZ 11 App. 81: Opinion dated June 8, 1952. In *Entscheidungen des Bundesgerichtshofes in Zivilsachen*. Appendix to Vol. 11. Ed. Members of the Federal Court of Justice and the Federal Prosecutor's Office, 81–5. Berlin and Cologne: Carl Heymanns Verlag (1954).

tutional Court with its new competencies within the court organization of the young Federal Republic of Germany,[31] is the full relevance of a decision of the Federal Constitutional Court revealed, which has been said to mark the actual "baptism" of the Federal Republic (Roellecke 2000, 632ff.) by giving rise to a "rebirth of the legal order from the spirit of the basic rights" (Wahl 2004, 746; my translation). This is the so-called "Lüth" decision, named after the plaintiff, who had called publicly and repeatedly for the boycott of a new film by the director of an Anti-Semitic Nazi propaganda film, and had been ordered to cease and desist pursuant to the *Bürgerliches Gesetzbuch* (Civil Code), as his actions were deemed a violation of morality. This decision, published in early 1958, marks the beginning of the process of "constitutionalization" of the entire legal order of the Federal Republic of Germany, i.e., its orientation towards the Constitution as a "system of values."[32] Especially in the section on basic rights, the Federal Constitutional Court sees an "objective order of values" which prevents a statement protected by the political freedom of opinion to be persecuted as immoral under civil law. This order of values increases the validity of the basic rights and "radiates" into all areas of law and the judiciary system – as a "system," obviously meant to be exclusive. Thus, according to the Constitution, it is now the exclusive and final province of the Federal Constitutional Court to declare laws null and void because of violations of higher-ranking laws.

This jurisdiction on the system of values received major support from the commentary on Art. 1 Section 1 of the *Grundgesetz* (Inviolability of Human Dignity) by Günter Dürig (1920–1996), professor of constitutional law in Tübingen, who thereby exerted an extraordinarily strong influence on legal theory and practice of the young Federal Republic of Germany. Dürig interpreted human dignity as a moral value in the spirit of Christian natural law and its values, which the constitutional law-giver had also turned into a legal value forming the "foundation for a whole system of values"—independently of its subjective, individual bearers—unfolded in the various basic rights of the constitution (cf. Dürig 1956, 117ff.).[33]

After the Federal Constitutional Court had extended its competencies to include the judicial review of laws beyond the protection of the rights of individuals, thus occupying the "central role in the structure of institutions" (Wahl 2004, 763; my translation), and the situation had stabilized, the Federal Con-

[31] Extensively on this subject, see Jörg Requate (2008, 36ff., 43ff., 50ff.).

[32] BVerfG 7, 198 (205): Decision dated January 15, 1958. In *Entscheidungen des Bundesverfassungsgericht*. Vol. 7. Ed. Members of the Federal Constitutional Court, 198–230. Tübingen: Mohr (1958). See also Thomas Henne and Arne Riedlinger (2005). A recent contribution on the "constitutionalization" of the legal order of the Federal Republic of Germany is by Jörn Ipsen (2009, 314ff.).

[33] This essay formed the basis of Dürig's commentary of Art. 1 by Theodor Maunz and Günter Dürig (1958). On its criticism, see Hofmann 2008, 47ff.

stitutional Court at least conceded to the wide-spread scholarly criticism of its decisions (cf. Goerlich 1973) inasmuch as it gave up the use of the expression "value system" and its attendant pathos, and by semantically emphasizing the constitutional core statement of the Lüth case, the "most spectacular innovation of German constitutional law since 1945" (Wahl 2004, 746; my translation), more strongly; thus holding that the basic rights, such as the freedom of opinion, constitute not only a protection of subjective and individual rights, but also play an important objective role in structuring the community, the state and society as a whole (H. Dreier 1993; 2004, 89ff.). Thus, the Constitution now caps and permeates the entirety of the Federal Republic of Germany's laws and has taken on the role of supra-legal natural law. One might say with Erich Fechner (see Section 10.2.1.2) that the liberal and democratic structure of the Constitution, proven as it is through the test of time, is a kind of "evolved natural law."[34]

10.2.5. Natural Law Revisited: Fending off the 1968 Revolution

As early as 1963, Maihofer had described the danger inherent in society's "losing itself in mere, complacent maintenance of what had been achieved […] after the reorientation during the years after 1945" (Maihofer 1965b, 47; my translation). His warning was justified. Students began to rebel against the generation of their parents and the order the latter had restored. The movement found one of its temporary icons in Herbert Marcuse (1898–1979). This was due to Marcuse's criticism of the "late bourgeois" affluent society, derived from Hegel's dialectics and Karl Marx's philosophy, together with Marcuse's utopia of a liberated society (Marcuse 1965, 1966, 1967).

Directed expressly against Herbert Marcuse and the "New Left," who maintained that there was a right to violent and revolutionary resistance against the existing social order, the Austrian René Marcic (1919–1971), professor of political theory, constitutional law and legal philosophy at the University of Salzburg, published his *Rechtsphilosophie: Eine Einführung* (Legal philosophy: An introduction, Marcic 1969, 11, 29ff.) in 1969. He wished to demonstrate that society can develop without violence, that democracy and the rule of law are forms of political coexistence "designed for continuity, development, unfolding, constant change, for flowing permutations, so that any social transformation is controlled by law and thus takes place in a non-violent, peaceful fashion" (ibid., 31; my translation). The law can only accomplish this if it is an order based on unity encompassing all people. Thus, both legal philosophy and Kelsen's *Reine Rechtslehre* arrive at "the methodological postulation of the unity of the legal view of the world" (ibid., 162; my transla-

[34] On the concept of the attainment of legitimacy through the test of time, see Hofmann 1977.

tion). To Marcic, "law as a whole" seems meaningful when the pre-positive order of law, the law of being (*Seinsrecht*) and the historic, positive law are able to be "ascribed" by degrees "to a common principle: Being as the original norm." Therefore, he seeks to "expose the law of being as the ontological and logical basic rules underlying positive law," that is, in a rather Austrian fashion,[35] to "use the method of the Pure Theory of Law […] is to underlay positive law with the law of being, without leaving the field of the Pure Theory of Law" (ibid., 135; my translation). First of all, this accentuates the formal question of the context of validity (*Geltungszusammenhang*). Coherence of content is achieved later through normative didactic passages about human nature, human dignity and the common good (ibid., 262ff.). These, in turn, are based on Aristotelian and Thomistic tradition, in short: Catholic natural law.

Marcic's book did not achieve a widespread effect. Not only did it seem too sketch-like, but—despite the contemporary reference to the student revolt—it was not in keeping with the times. The scientific weaknesses of the "renaissance of natural law" had become all too obvious in the meantime.

10.3. The Modernization of Scientific Theory during Times of Reform

10.3.1. Times of Reform—Questioning the Scientific Character of Jurisprudence

Starting in the late 1950s, the invocation of the traditional German bourgeoisie with its authoritarian concept of the state which had dominated the years of reconstruction began to lose its power (Herbert 2003, 7ff., 25ff.). The country's institutions had been democratized. Its firm integration, both in terms of politics and international law, into the Western bloc provided an anchor during the "Cold War" (Hofmann 2003, 373ff., 382ff.). This Western alliance of the Federal Republic (*Westintegration*), a decidedly new element in German history, was now followed—more or less as a matter of course—by an inner orientation towards the West, from the liberalization and modernization of society which brought with it the disintegration of traditional milieus, to the pluralization of lifestyles and all the way to a certain cultural "Americanization," despite all the restorative ("occidental") tendencies noticeable in anti-Communist cultural life (Görtemaker 1999, 253ff.). The first to register these tendencies towards modernization and liberalization was the sociologist Ralf Dahrendorf (1929–2009) in his 1965 book *Gesellschaft und Demokratie in Deutschland* (Society and democracy in Germany: Dahrendorf 1965, 10), bearing in mind that in the author's words, "democracy" indicates a liberal form of state rather than an egalitarian society. This process of adaptation, never easy to begin with, was

[35] See however the sharp criticism by the Viennese professor of constitutional law Günther Winkler (1969, 22ff.).

complicated further by the rising of a new youth movement, complete with the attendant exaggerations and radicalization. Any deficit in liberalism and openness—and some of these were ancient and ingrained indeed—appeared to the younger generation to be the remains of "fascism," and thus the fault of their parents. Ultimately, the active and successful publicity work of the "1968ers" convinced the general public that they, the 1968ers, had initiated the wave of modernization, whereas in truth it had been many years in coming and they merely surfed its crest (Wehler 2008, 277ff., 310ff.). Historical scholars have called this fundamental change of circumstances *Umgründung der Republik*, i.e., the "re-founding and changing of the Republic" (Görtemaker 1999, 475; my translation). A more concrete term resulted from a more focused political examination: *Reformzeit* or "time of reforms" (Conze 2009, 311ff.; cf. Görtemaker 1999, 516ff.). This refers mainly to the years from 1966 to 1974: Those of the (first) Grand Coalition between the Christian Democratic Union of Germany (CDU) and the Social Democratic Party of Germany (SPD) and the (first) term of office of Chancellor Willy Brandt. In our context, the great economic and financial acts of legislation are important, but even more so the reforms of criminal law that were enacted between 1969 and 1974, which streamlined criminal law, liberalized especially sexual crime legislation and eased restrictions on abortions. The modernization discussions of the 1960s also resulted in the great reform of marital and family law, which finally went into effect in 1976 (cf. Conze 2009, 370ff., 402ff.).

At the time, the field of philosophy was faced with the challenge of catching up on Anglo-Saxon theoretical developments, many of which had been promulgated by German emigrants (Topitsch 1965, 13–4). The process was comparable to that which had restored the cultural achievements banned after 1933 to the education system's canon, beginning in the late 1950s. At the center of the philosophical discussion was "analytical philosophy" (see Plümacher 1996, 77ff., 87ff., 127ff.). This had begun with the neo-Positivism of the "Vienna Circle" surrounding Moritz Schlick and Rudolf Carnap and influenced by Ludwig Wittgenstein as well (Hacker 1996), which strove to solve (or dissolve) philosophical problems through linguistic criticism (see V. Kraft 1950). The older school employed formalized logic for this purpose, while the younger relied on the analysis of colloquial language and its own logic (cf. E. Savigny 1993). For this anti-metaphysical renunciation of things, especially those things and situations that are merely thought up, in favor of the statements, terms, principles and axioms of the sciences, the term *Linguistic Turn*, has become common; it was introduced in 1967 by Richard Rorty (1931–2007), a student of Rudolf Carnap and Carl Hempel who made reference to Gustav Bergmann's work (Rorty 1967). Rorty's philosophy also combined all the terms that were characteristic for this development: Linguistic critique, logic, rhetoric, hermeneutics and pragmatism.

These, therefore, were the guiding elements of the catching up taking place in legal philosophy in Germany. It is typical for the history of our sci-

ence that these terms have come to indicate sub-disciplines of the theory of law, or legal theory (*Rechtstheorie*: R. Dreier 1981a, 17ff.). Instead of the *values* of law, this focuses on structural analysis of legal *norms*, both in detail and in the larger context (ibid., 20; Nawiasky 1948, 1ff.). In opposition to classical legal philosophy and to the "renaissance of natural law," legal theory created a kind of rebirth of legal positivism 25 years after the end of the war, emerging very decidedly as a theory of positive law and finding its main expression in analytical jurisprudence. Alongside its founding fathers, Jeremy Bentham and John Austin, today Hans Kelsen and Herbert Lionel Adolphus Hart are considered its most important protagonists. Kelsen's theory (1934), especially his *Reine Rechtslehre*, had originally not found much positive resonance outside of Austria. The interest aroused by H. L. A. Hart's (1961) analytical "concept of law," however, led to a slowly awakening interest in Kelsen as well (Koller 1988, 129ff.). In 1972, the "Hans Kelsen Institute" was founded in Vienna as a Federal Foundation.

Since a realistic theory of law had competed with the positivistic theory of law since the days of the free law movement (Hofmann 2009, 317ff.), it was in the "nature of things," so to speak, that the new upswing of the analytical theory of law also caused a new blossoming of legal sociology. (There was even an attempt to create an empiric "legal anthropology": see Pospisil 1982).[36]

It is worth noting that a *Jahrbuch für Rechtssoziologie und Rechtstheorie* (Yearbook of legal sociology and legal theory: Luhmann et al. 1972) has been published since 1970. Its second volume, edited by Hans Albert, Niklas Luhmann and others in 1972 and dedicated to *Legal Theory as the Basic Science of Jurisprudence*, lists the following areas: Epistemology of law, logic of law, terminological and systematic theory of law, decision and information theory of law, linguistic and argumentational theory of law, in addition to which it also deals with the relationship between legal theory and legal dogmatics and that between legal theory and legal politics. The journal *Rechtstheorie* (Legal theory), also founded in 1970, was publicized by its highly symptomatic subtitle as a "Journal for the Logic, Methodology, Cybernetics and Sociology of Law."[37] In 1971, Günther Jahr and—no surprises here—Werner Maihofer edited a volume entitled *Rechtstheorie* with various "contributions to the discussion of fundamentals," according to its subtitle (Jahr and Maihofer 1971). A 1971 anthology edited by Arthur Kaufmann (1971), also entitled *Rechtstheorie*, offered "Legal Theory as an Analytical Theory of Science," as "Critical Reflection," as "Proto-Juridics" and as "System Theory" rather adding to the impression that

[36] From the large number of *theoretical* anthropologies of law, suffice it to mention: Lampe 1970, Broekman 1979b, van der Ven 1981, Zement 1983.

[37] A subtitle that was incidentally changed in 2005 to read "Journal for Logic and Legal Methodology, Legal Information Science, Communication Science, Norm and Action Theory, Sociology and Philosophy of Law."

here was a theory in search of its subject: Was it to be justice or the law, the legal norm, dogmatics, interpretation, application or legal argumentation? Invariably, the term "theory" indicated a scientific approach free of metaphysics and—if not the entire redefinition of jurisprudence as a social science (Rottleuthner 1973)[38]—at least a certain openness towards the social sciences, in other words: Modernity. Obviously, the self-esteem of legal scholars had seriously suffered. Thus, Dieter Grimm (1937–), an expert in constitutional law, legal theory and subsequently a judge at the Federal Constitutional Court, began his preface to a 1973 anthology edited by him and trendily entitled *Rechtswissenschaft und Nachbarwissenschaften* (Jurisprudence and related sciences: Grimm 1973) by stating: "This book is an expression of the waning self-confidence of jurisprudence" (ibid., 7; my translation). Referring to similar phenomena at the beginning and end of the 19th century (Brockmöller 1997, 47ff., 238ff.; Hofmann 2009), the Würzburg-based professor of criminal law and legal theory Eric Hilgendorf (1960–) has spoken of the "renaissance of legal theory between 1965 and 1985" (Hilgendorf 2005; my translation).

On the whole, the "rapid rise" of questions of legal theory (which went far beyond the precursors mentioned by Hilgendorf) "could only be compared in its breadth with the renaissance of natural law after 1945," as a critical observer rightly remarked at the time, under the title *Rechtstheorie ohne Recht?* (Legal theory without law?: H. Schneider 1972, 108ff.; my translation).[39] In brief, during the "time of reform," the central topic of legal philosophy, i.e., "legal injustice and law transcending written laws," was pushed aside in favor of the critical examination of the scientific character of jurisprudence and the metaphysics-free definition of its subject. Therefore, the main objective was to achieve a scientific—i.e., non-speculative—term for law, which appears only as language and therefore requires interpretation. The classical methodology of legal interpretation, as developed by Friedrich Carl von Savigny and his followers, which involved the examination of a law's wording, context, systematic positioning, evolutionary history and objective (Raisch 1995, 103ff.), was replaced by an "argumentation theory" and—as a subsequent counterpoint—new "legal hermeneutics."

10.3.2. The Analytical Theory of Law and of Legal Argumentation

10.3.2.1. Legal Theory

If, consequently, there was a "calling"—to use Savigny's term—for philosophy during this "time of reform," it led to the philosophy of science (*Wissen-*

[38] A critical evaluation by Naucke (1972).

[39] See also K.-L. Kunz 1977, which includes a fundamental critique of the culturally misguided reception of the analytical model of legal theory.

schaftstheorie). In fact, science had found a new frame of reference, beyond philosophy, in the monumental work *Probleme und Resultate der Wissenschaftstheorie und Analytischen Philosophie* (Problems and results of the philosophy of science and analytical philosophy) by the Austrian-German philosopher Wolfgang Stegmüller (1923–1991), appointed professor in Munich in 1958. Following Hempel and Carnap, the first volume, published in 1969, emphasized the pivotal role of the examination of linguistic logics undertaken by analytical philosophy for the philosophy of science as a theory of scientific statements (Stegmüller 1969). In 1973, the first half-volume of Part IV extended the mission of the philosophy of science,—i.e., the transcendental philosophy of scientific insight—to include the meta-theory of rational action (Stegmüller 1973). Complementary reflections on this entire school of thought were provided by the Tübingen-based philosopher Walter Schulz (1912–2000), with consideration of the background of the history of Western philosophy (Schulz 1972, 68ff., 76ff.). He explained the development of the philosophy of linguistic analysis with the historical problems of Logical Positivism which had occupied the "Viennese Circle," demonstrating how the extension of linguistic analysis to colloquial language leads to the revocation of the original exclusion of any ethical problems.

This is the scientific platform from which the most important work of latter-day positivistic legal philosophy since Hans Kelsen's *Reine Rechtslehre* issued forth: The epochal work by Oxford don H(erbert) L(ionel) A(dolphus) Hart, *The Concept of Law* (Hart 1961). In German-speaking jurisprudence, however, Hart's legal thinking was only received with great hesitation. One exception was Horst Eckmann's 1969 monograph on the concept of law in Hart's legal theory (Eckmann 1969). This state of affairs changed after Hart's book was published in 1973 by Suhrkamp in Frankfurt am Main under the title *Der Begriff des Rechts*. One of the scholars principally responsible for its dissemination has been Norbert Hoerster (1937–). After studying law and philosophy in Germany and the USA, he completed his habilitation thesis in philosophy—under the benevolent eye of W. Stegmüller—in Munich (Hoerster 1971) and held a chair for legal and social philosophy at the University of Mainz from 1974 onwards, without also teaching a dogmatic subject (i.e., an area of civil, criminal, or public law), as was the custom in German legal faculties. This institutional anomaly was due to the attempted reforms that had propagated the advancement of the so-called legal "basic subjects" of legal theory and legal sociology, in contrast to the conventional training of young jurists, which was limited to the three core areas of civil, criminal and public law. After Hoerster had already translated three essays by Hart, published with his preface under the programmatic title *Recht und Moral* (Law and Morality) in 1971 (Hart 1971), he followed his author further, propagating a concept of legal positivism cleansed by linguistic analysis. Against all claims of natural law and polemic distortions, he insisted upon a strict terminological and

definitional separation between law and morality (*Trennungsthese* or "separation theory"), i.e., a scientific definition of law without any attributes of justice, and upon the exclusively linguistic analysis of legal terms, which leaves room for the simultaneous recognition of the possibility of rational moral (but *only* moral) criticism of the law's content.[40] Thus, this 'true' legal positivism, based upon the philosophy of science, claimed neither that the law is identical with the commands of any law-giving authority, nor that there is an obligation to obey any given law. The persuasiveness of this rehabilitation of legal positivism (or rather: Of one form of legal positivism) was buttressed further by the simultaneously spreading insight that the verdict passed by Radbruch and others, according to which it had been legal positivism that had made the German legal professions helpless against the perversion of the legal system under the Nazi dictatorship, was not tenable. Indeed, the utter deterioration of the system was only due in a relatively small part to specific Nazi law making and strict compliance with such laws, but rather to the unrestrained and unscrupulous ideological interpretation, instrumentalization and overwhelming of the existing laws (cf. Rüthers 1968).

Incidentally, without yet knowing Hart's work, Martin Kriele (1931–), who went on to become professor for political theory and public law in Cologne, had also turned to the method of linguistic analysis in his 1963 dissertation, arguing against relativism as the consequence of the somewhat faded natural law. Specifically, under the title *Kriterien der Gerechtigkeit* (Criteria of Justice: Kriele 1963), he examined the linguistic meaning of the terms *gerecht/ungerecht, recht/unrecht* and *billig/unbillig*, i.e., "fair," "unfair," "just," "unjust," "equitable" and "inequitable," as used in general speech. A reaction to the contemporary problems of legal philosophy similar to Kriele's came from Werner Krawietz (1933–), whom the politics of reform later allowed to become professor exclusively of the basic subjects of legal sociology, legal and social philosophy in Münster, and who was also co-founder of the journal *Rechtstheorie* (Legal theory), in his doctoral dissertation in 1967; however—being oriented rather towards the "reality of law"—he saw the task of any theory of law, beyond traditional legal philosophy, in the clarification of the relationship between positive law and social reality, or, more specifically (and this made him a prime example of the contemporary "planning euphoria" encompassing society as a whole): In the examination of the ways that law determined social circumstances. His dissertation was entitled: "Das positive Recht und seine Funktion—Kategoriale und methodologische Überlegungen zu einer funktionalen Rechtstheorie" (Positive law and its function: Categorial and methodological considerations on a functional theory of law, Krawietz 1967).

Given the broad popularity of the term "legal theory," Ralf Dreier (1931–), who had taken over the newly-created chair for the *General Theory of Law* in

[40] As summarized in Hoerster 1989.

Göttingen, another result of the modernization movement, was able to sum up the situation of jurisprudence in his inaugural lecture in 1974 by saying: "Legal philosophy is dead, long live legal theory!" (R. Dreier 1981a, 17; my translation). This, however, did not mean any clearly defined integral theory of law or jurisprudence, but the colorful multitude of theoretical attempts and concepts we have just witnessed, ranging from legal linguistics, legal sociology and legal anthropology to the theory of methods and argumentation and all the way to the logic, information science and cybernetics of law (ibid., 40). Dreier conceived of the general theory of law as a theory of legal *dogmatics*. While the latter was to penetrate the terminology and establish a system for the law of a legal community (ibid., 37 n. 32), the task of legal theory was to examine the empirical and theoretical information provided by "neighboring disciplines," especially legal sociology, booming at the time, with regard to their relevance for jurisprudence, i.e., dogmatics (ibid., 25). Accomplishing this task, however, required a "substantial basic and framework legal theory," "containing verifiable statements about the structure and function of law as a social phenomenon" (ibid., 26; my translation). Regarding the traditional question of legal philosophy, that of the "right" law, in 1974 Dreier saw only two possible levels of developing theories, in order to arrive at a scientific answer: Either a theory of argumentation or a "non-formal legal theory embedded in a non-formal social theory" (ibid., 29; my translation). However, Dreier himself voiced doubts "whether legal theory could be pursued in a scientifically legitimate fashion as a social theory of law" (ibid., 26; my translation).

However, some neo-Marxists, such as Oskar Negt (1934–), professor of sociology at the Technical University in Hannover, were convinced that this was the only possible scientific approach (Negt 1975, 10ff.).[41] With only Marx's and Engels's writings as a basis, Negt wished to establish a "materialist theory of law encompassing the given social formation" using "the legal norms created in the context of production" (ibid., 34; my translation). After all, Marx and Engels did not create a separate legal theory, and according to Negt, "legal theory as it occurs in the socialist transformational society" had "lost its frame of reference […] in its narrow guise of a justifying science," that frame of reference being "the specific relationship between production, the state of development of society's productive forces and the character of the intended or actual revolution" (ibid., 31; my translation). In order to extrapolate an "autonomous socialist position," however, he considered it essential to "avoid the alternative between emotional […] anti-communism and simple identification, even over-identification with 'real socialism,'" through "analysis and political examination of the reality of transformational societies, especially the question—so decisive for the German left—of the conditions of development of

[41] See also the contributions in the same volume by Paul (1975, 72ff.), and Böhler (1975, 92ff.); and furthermore the references quoted below in Section 10.6.1.

socialism in the GDR" (ibid., 29; my translation). Since a Marxist theory of law needed to serve as guidelines for action as well, it should also encompass "a systematic examination of the actual steps" leading to the "gradual dying of the state" and the "overcoming of law," the ultimate goal being self-administration by the workers (ibid., 58ff.; my translation). This program remained unchanged throughout. The rest consisted of the social romanticism of the early 1970s:

> Only because work has become the prime need in life, meaning that the most important form of self-realization available to individualism merges with a largely self-determined regulation of social coexistence […], legal form is losing ground, inasmuch as it is based on varieties of forced labor […]. Only the associated producers, who abolish the political rule of humans over humans, can […] ultimately overcome [the iniquities of a bourgeois society] by disposing of society's wealth as they see fit. (Ibid., 67; my translation)

In this atmosphere, the term of alienation also attracted renewed interest. In 1970, the methodologist Friedrich Müller (1938–)—we will soon examine his legal hermeneutics— dedicated a slim monograph to that category of political theory as it occurs in the works of Rousseau, Hegel and Marx (F. Müller 1985). It began with the sentence, "Marxism remains the philosophy of our times" (ibid., 5; my translation) and ended with thoughts on the possibility and necessity of a contemporary counterpart for Marx's *Capital* (ibid., 86ff.; my translation). Fifteen years later, a second edition was published. Its additional eight new chapters provided a profound and detailed observation of the topic in the development of Marxism, Leninism, Stalinism and socialism, including Bloch's criticism of the latter. During its course, a certain skepticism arose: "A systematic abolition of alienation cannot be observed in socialism" (ibid., 79; my translation). Moreover, outside the realm of economics, an "end of alienation by the state, law, bureaucracy […] is even further removed from reality in the states that call themselves socialist than in the bourgeois ones" (ibid., 190; my translation). And yet: "The great fundamental movement towards democracy and socialism first sensed by Rousseau has continued unabated, and has grown […] Stalinism was unable to discredit it permanently" (ibid., 182; my translation). However, it is "not the convergence of capitalism and socialism" (which—as the reader will recall—Werner Maihofer had dreamed of) "that appears to be the direction of this movement. Instead, it looks to be a convergence of various forms of socialism, the democratic and the 'real' ones" (ibid.; my translation): Thus Friedrich Müller's perspective in 1985. Shortly thereafter, real socialism imploded. Our author returned to methodology. And we shall follow him.

10.3.2.2. Legal Argumentation Theory

Critical theories regarding the concept of law and jurisprudence must necessarily also concentrate on the application of law to individual cases, i.e., the

legal decision and its underlying reasoning in the context of a given legal system and with a view to its written laws. Corresponding to a similar tendency observed in international discussion, this complex of problems also appeared in the foreground of German-language discourse in the 1970s and early 1980s, the period we are here examining. The topic of the symposium of the German Section of the International Association for Philosophy of Law and Social Philosophy (IVR) held in Munich in 1978, "Argumentation and Law," was symptomatic for this development, as were the contributions at the international symposium hosted by the Austrian Section of the IVR together with the Institute for Legal Philosophy at the University of Graz in 1979, and those published in Supplement 1 of the journal *Rechtstheorie* in 1979 under the title *Argumentation und Hermeneutik in der Jurisprudenz* (Argumentation and hermeneutics in jurisprudence). On the one hand, the problem resulted from the insight, gaining currency since the late 1880s, that the old dogma of positivistic legal subsumption, according to which a judge should be able to logically derive his judgment from the written law, was untenable; on the other hand and more importantly, however, from the attempt to avoid the alternative of an irrational decision handed down by a judge when deciding an individual case. Thus, a solution was sought in the theory of a decision that might not be wholly determined by the written law, but certainly oriented towards it, that was reasonable and just, and in any case rationally understandable. The instruments appropriate to this goal were (and continue to be) logic on the one hand and, on the other, linguistic critique or—more practically or pragmatically oriented—*topics* in the Aristotelian sense (*Topik*), rhetoric and discourse theory.

The broadest effect was first achieved by the revival of *topics*. A slim volume first published in 1956 by the Mainz-based legal philosopher Theodor Viehweg (1907–1988) entitled *Topik und Jurisprudenz* (Topics and jurisprudence: Viehweg 1974) proved to be groundbreaking (see also Section 23.3.1 in Tome 2 of this volume). It touched a nerve of its time by turning against the only superficially objective solution of legal problems by supposed derivation from a given system of norms and concepts, and by pleading for decisions that were problem-oriented, appropriate and providing ground for consensus, by considering all relevant criteria and following the classical *topics* of Antiquity introduced by Aristotle and Cicero. Between 1962 and 1974, therefore, the book saw four further editions. The prescription of an all-inclusive discussion of arguments related to the given problem further promoted the study of the prerequisites and rules of legal argumentation, especially since the mere collection of *topoi* obviously did not lead very far. Thus, in later editions of his programmatic book and in other works in 1977 and 1978, even Viehweg himself argued for a further development towards a "contemporary rhetorical argumentation theory" (ibid., 111; my translation). The rhetorical perspective emphasized the situation of speech and the necessary relationship between situation and argumentation. Traditional methodology was thus transformed into

a legal communication theory. In the terminology of Charles William Morris (1946), who distinguished between "syntactics" as relations between symbols, "semantics" as relations between symbols and meaning, and "pragmatics" as the situational context of the use of symbols, it is therefore "pragmatic." This situational and dialogue-oriented conception goes some way towards preventing the foreshortenings and distortions that jurisprudence is prone to, due to the dominance of the systematic and semantic aspect which arises from the assumption that words constantly have the same meaning, from the ontologization of legal ideas and from the reification of legal matters.[42]

One outstanding publication was the dissertation of Robert Alexy, a student of Ralf Dreier, submitted in Göttingen: *Theorie der juristischen Argumentation* (Theory of legal argumentation: Alexy 2006a).[43] Its main theory, which posits legal discourse as a "special case of general practical discourse," is based upon, but also sets itself off against Jürgen Habermas's "consensus theory of truth" (more upon which later) and the "theory of practical counseling" of the so-called Erlangen School of the philosophers Lorenzen and Schwemmer. Alexy himself described his point of departure as a critical acceptance of the intentions of legal *topics*. After all, he shared its assumption "that even where no compelling justifications can be given, it is not necessary to leave the field to irrational decision-making," and "that the concept of rational justification is intimately connected with that of rational discourse" (ibid., 43; my translation), yet he strove to avoid its shortcomings. Such shortcomings he saw in "the underestimation of the importance of written law, dogmatics and precedent, in the inadequate penetration of the deeper structure of arguments, and in the insufficiently precise definition of the subject under discussion" (ibid.; my translation). Therefore, reverting to the aforementioned philosophical theories serves to define criteria for a rational discussion. Thus, the discussion is expected to yield correct results inasmuch as it refers to ideal conditions under which all reasonable persons would have to agree. Assuming that legal discussions too are subject to this assumption, such a theory of discourse becomes necessary in this respect. In legal discourse, however, "not all questions are open to discussion. Such discourse is limited" (ibid., 262; my translation), leading to the abovementioned theory of a "special case." In detail, Alexy names the limitations as "the binding nature of written law, the necessary regard for precedent, the context of the dogmas established by institutional jurisprudence," as well as "the limitations established by the rules of legal procedure," inasmuch as the subject of the discourse is not purely jurisprudential

[42] From the multitude of publications on this subject, at least the following should be mentioned: Seibert 1973, 54ff., Clemens 1977, Podlech 1977, Struck 1977, C. Westermann 1977, Schreiner 1980, Gröschner 1982, Haft 2007, U. Neumann 1978 and 1986, Hilgendorf 1991. See also the overviews provided by Schlieffen (2001, 175ff.) and Launhardt (2005).

[43] On Alexy's theory see also Sections 1.5.4.1, 10.3, and 25.4 in Tome 2 of this volume.

(ibid., 34; my translation). These restrictions may reduce the assumption of the correctness of legal results. Unlike in general practical discourse, "nobody assumes that the normative statement which is suggested or handed down as a judgment is reasonable per se, but only that it can be reasonably justified within the framework of the applicable legal order" (ibid., 264; my translation). The question of a reasonable legal justification then leads back more or less to traditional methodology.

In the early 1980s then, the pendulum swung back. Hans-Joachim Koch, professor in Hamburg, and Helmut Rüßmann, professor in Bremen, both of them also higher court judges, published their *Juristische Begründungslehre* (Theory of legal reasoning: Koch and Rüßmann 1982) in 1982; In it, they concentrated fully on judicial decision-making, rejecting Alexy's approximation of discourse theory in order to derive rules for legal argumentation as "superfluous and dysfunctional," since the idea of a discourse "which anyone who considers himself a concerned party may join, in order to express and describe his interests and ultimately have a say in any decision taken" (ibid., 371; my translation) had no relation whatsoever to the situation found in a court of law. Instead, the two authors dedicated themselves painstakingly to the refinement of the traditional model of deductive reasoning. What is remarkable is the attempt to achieve interdisciplinary depth through

> logic for the discussion of justification structures of legal arguments; linguistic philosophy and logic for the description of problems of the interpretation and application of laws as well as the further development of laws by the judiciary; meta-ethics as a sub-specialty of analytical philosophy for the discussion of whether legal judgments can be justified; the philosophy of science and statistics for the examination of arguments of empirical science used in legal judgments. (Koch and Rüßmann 1982, 2; my translation)

This multitude of far-reaching aspects serves to illustrate the breadth of the discussions about legal theory taking place at the time. However, it is too voluminous to be examined here in depth with the exception of the exploration of formal logic by jurisprudence, which will be described briefly in the following chapter. The importance accorded to this discipline at the time may be illustrated by the fact that Koch and Rüßmann (ibid., 31ff.) considered it necessary to give readers of their *Theory of Legal Reasoning* an introduction to logical connectives, predicate logic and deontic logic.

10.3.3. Legal Logic

The term "legal logic," a permanent fixture in legal parlance, does not describe a particular formal discipline, but usually stands for legal methodology and argumentation theory, thus including legal *topics* and rhetoric as well. As early as 1918, Eugen Ehrlich, a protagonist of the "free law school," stated that the only thing "legal logic" had in common with "real" logic was its name: In

reality, it was "no logic at all, but a technique, for it does not aim to provide a touchstone for the methods of applying law, but is merely such a method itself, which must first be examined for its correctness" (Ehrlich 1966, 299; my translation).[44] The German-language attempts to arrive at such a touchstone by employing "real" logic hark back to *Logische Studien zur Gesetzesanwendung* (Logical studies in the application of laws: Engisch 1943) by Karl Engisch (1899–1990), the major criminal law expert and legal philosopher who taught in Heidelberg starting in 1934 and in Munich after 1953. His logical analyses of the so-called syllogism of justice concentrated on the analysis of the minor premise and the "logic of fact-finding." "Traditional logic" seemed sufficient to him as the formal basis of his analyses. His *Studien* first appeared in 1943, but quickly saw two further editions after the war, in 1960 and 1963. A similar success was enjoyed by *Juristische Logik* (Legal logic: Klug 1966) by Ulrich Klug (1913–1993), a professor of criminal law in Cologne and a critical politician specialized in legal matters, who, incidentally, maintained an intensive scientific correspondence with Hans Kelsen from 1959 to 1965 (Kelsen and Klug 1981). Klug's *Juristische Logik* first appeared in 1951, the second edition in 1958, and 1966 saw the much-quoted expanded third edition (a fourth was published in 1982).[45]

This work opened a new chapter in the discussion of methodology. To Klug, "legal logic" is defined as "the theory of the rules of formal logic to be employed in the application of law" (Klug 1966, 6; my translation). In our context, its outstanding characteristic is not so much the mathematical procedure of representing logical terms and their relations using symbols and formulas and calculating them according to algebraic rules, but its critical function of revealing incompleteness, i.e., ambiguities, in the conventional syllogistic method of deduction. This pioneering insight was followed by a multitude of publications on this same subject.[46] Ultimately, an "introduction to the logic, semiotics and method of empirical sciences" summed it up: The protagonists of "real" logic were out to "annex" jurisprudence—traditionally considered an "art"—to the "sciences" (Herberger and Simon 1980, VII).

Naturally, a major element in this context is the discussion of *deontic logic*, i.e., the logic of statements of "ought" or norms, which cannot reasonably be called true or untrue. But how, then, can generally valid conclusions be drawn in this field, if general validity depends on the truthfulness values of the premises employed?[47] One of the attempted solutions was to modify the concept

[44] On Ehrlich's view see also Section 3.3 in this tome and Sections 1.1.4.1, and 22.3.1 in Tome 2 of this volume.

[45] Quotations in the text follow the 3rd edition of Klug 1966.

[46] Cf. Schreiber 1962, E. Schneider 1965, Weinberger 1970, Lampe 1970b, Tammelo 1971, Keuth 1972, Kutschera 1973, Lenk 1974, Tammelo and Schreiner 1974 and 1977, Rödig 1979a, Bund 1983, Joerden 2005.

[47] The so-called "Jörgensen Dilemma" by Herberger and Simon (1980, 180).

of the values of truthfulness in such a way that they could also be associated with norms; another was to combine every norm with a so-called "norm statement," i.e., a statement about the validity of this norm that itself was potentially truthful.

Another, fundamentally different route was taken by Ota Weinberger, with great consistence and widespread resonance: He differentiated categorially between descriptive (theoretical) and prescriptive (practical) statements.[48] Born in 1919 in Brünn (known today as Brno), he suffered persecution and oppression as a Jew and democrat, and decided not to return to his homeland after attending a symposium in Vienna in 1968. From 1972 to 1989 he directed the Institute of Legal Philosophy in Graz, having completed his habilitation thesis in logic. The subject of his dissertation, submitted to the legal faculty in Brno (which was to be closed down shortly thereafter), had already been an attempt to formulate an independent "Grundlegung der Sollsatz-Logik" (Fundamentals of a Logic of Statements of "Ought"). The version that was submitted in 1956 to the Czechoslovak Academy of Sciences was published in 1958 in German as part of its Proceedings: *Die Sollsatzproblematik in der modernen Logik* (The problem of ought statements in modern logic: Weinberger 1958). If, however, it is correct that such categorial differentiation excludes the translation of statements of fact into practical statements (norms) and of norms into statements of fact, it is necessary to use the means of formal logic to construct a separate normative logic which exceeds mere translation. In the course of this operation, all elements must be carefully analyzed linguistically with regard to their descriptive or prescriptive/evaluative meaning. On the basis of these "semantics differentiated by insight," (Weinberger 1988b, 54; my translation) normative logic deals mainly "with the structure of normative statements, the logical relations between normative statements and statements of fact, as well as normative-logical deduction" (ibid., 59; my translation). The examination of the relations between normative statements and statements of fact adds a "theory of the justification of norms" to the "centerpiece of normative logic" (i.e., the theory of the structure of normative statements and normative-logical deductions), a justification theory dealing with decisions of the will and elements of rhetorical argumentation (arguments of plausibility), beyond their logical foundation (cf. Krawietz 1980, 426ff; Weinberger 1988b, 205ff.).

Thus, Weinberger expanded his legal logic by the theory of the justification of norms, with an eye to the reality of legal practice; he applied a similar treatment to his theory of law. While he uses the theory of the levels of the legal order—in the sense of the Pure Theory of Law developed by the Vienna School (Adolf Merkl, Hans Kelsen) and the Brno School (Franz Weyr, Adolf Procházka), (Walter 1964, Öhlinger 1975) with which Weinberger grew up, so to speak—as the "fundament of the structural theory of law" (Weinberger 1988b,

[48] On Weinberger, see also Section 18.3.2 in this tome.

108; my translation), he complements it with the sociological consideration of the reality aspects of law. He calls this consistent embedding of his normativistic analyses of law into the context of social and political action and of society's institutions *institutionalistic legal positivism* (Weinberger and MacCormick 1985, 4, 131). The proximity to H. L. A. Hart's theory is obvious (ibid., 126).

It remains to be stated that the elaborate instruments of legal logic have only rarely been used to clarify concrete legal problems on a larger scale. Two exceptions that deserve mention are Adalbert Podlech's *Gehalt und Funktionen des allgemeinen Gleichheitssatzes* (The content and functions of the general principle of equality: Podlech 1971) or Jürgen Rödig's *Die Theorie des gerichtlichen Erkenntnisverfahrens* (The theory of the judicial process of knowledge: Rödig 1979b). These, however, remained isolated swallows that failed to make a summer. Too great was the discrepancy between theoretical effort and practical benefit.

10.3.4. Systems Theory

The central political catchword of the reform period was "planning." As a matter of course, progressive social science at the time considered "reform politics during late capitalism" a problem of "political planning of complex social processes" (Scharpf 1973, 135ff.). The notion that it was possible to shape society in an ordered, rational way took hold in almost every aspect of life, beginning with the family and extending to education, urban development, land use, economic development, energy supplies and traffic, all the way to protecting and conserving nature. "Planning," as the Freiburg-based professor of constitutional law Joseph H. Kaiser proclaimed in 1965 in his preface to a series of a six-volume anthology on this topic, "is the great trend of our times. Planning is a *key term* for our future, currently pervading the general consciousness" (Kaiser 1965, 7; my translation). In an exalted tone, Kaiser's preface continues (ibid., 15; my translation): "The plan is the localization of utopia. A utopia that combines political will and the power of its realization meets its *topos* in time and space, and thereby becomes a plan." The political success of this "planning euphoria" is documented by a multitude of planning laws and governance regulations. Soon enough, jurisprudence developed a system of types of state planning, according to their subject, scope and level of binding effect. The theory of administrative discretion was expanded to include the dimension of "the freedom of planning design" (*planerische Gestaltungsfreiheit*). Given the explosion of goals and purposes described in planning laws, the extension of the administration's decisionary discretion was the only point of introducing the memorable term "final control programs" (*finale Steuerungsprogramme*), in contrast to the traditional, conditional decision-making programs following the pattern of if-then, which occasionally suggested a fundamental difference in the normative-logical structures. In any case, the neces-

sity of estimating the consequences of planning decisions for the future led to an increased jurisprudential interest in prognostics and in the consideration of possible consequences when making and evaluating legal decisions (Lübbe-Wolff 1981). This, in turn, resulted in the postulation of increased empirical social research. And this coincided with the demand for an in-depth reform of legal education, following the overall concept of *social engineering* (Roscoe Pound). The desire to displace dogmatic training in civil, criminal and public law in favor of social sciences, however, had another reason, a political one, based on the emancipatory ideas of the so-called critical social theory (cf. Wassermann 1970; Requate 2008, 161ff., 259ff.). We shall return to this point.

Another measure of the extent to which the idea of planning held sway at the time was the fact that Friedrich Tenbruck (1919–1994), a cultural sociologist in Tübingen who had completed his doctoral thesis in 1944 on Kant's *Critique of Pure Reason*, saw himself compelled to publish a study in 1972 with the highly ambitious title *Zur Kritik der planenden Vernunft* (On the critique of planning reason: Tenbruck 1972). The meaning of all this for the development of legal thinking was never illustrated more pointedly than by social theorist Niklas Luhmann (1927–1998). The creator of a systems theory which became philosophically relevant due to its universal outlook, and which considers society not ontologically as a comprehensive sum of all parts, but functionally, as a closed operational process of social communication, and is among the most successful and popular theories in the German-language region, had studied law and worked as an administrative civil servant before encountering Talcott Parsons and his structural-functionalist systems theory during a study visit to Harvard University. After completing his dissertation (1964) and habilitation (1966), he taught from 1968 to 1993 in Bielefeld as a professor of sociology. In 1973, he gave a lecture at the World Congress of Legal and Social Philosophy in Madrid which was devoted to the "functions of law" and posed the question of function with a view to the chronological aspect of past and future, of normative stabilization and planned change of social circumstances: *Die Funktion des Rechts: Erwartungssicherung oder Verhaltenssteuerung?* (The function of law: Securing expectations or controlling behavior?, Luhmann 1974a, 31ff.). The pointed question was whether the constant change of legal norms brought about by changes in society did not "change the function of law itself or even the meaning of normativity" (ibid., 32; my translation). If the conviction gains currency that judgments must ultimately be justified by their consequences (Podlech 1970, 185ff.), i.e., that in case of doubt consequences are the only valid criterion by which to judge law, in the end the future will judge justice and injustice, and the importance of forecasting the consequences of decisions increases in the present. Thus, the relevance of social sciences for jurisprudence became a central topic, at least in Germany (see Lautmann 1971). As Luhmann wrote in his provocatively drastic analysis of the intellectual situation in the early 1970s,

it is considered progressive to affirm the relevance of social sciences, and conservative to deny it. This political dichotomy replaces the dichotomy of justice and injustice. The main fear is that the law might be antiquated, not that it might be unjust. The attempts at reform focus on education. Jurists are to be educated to criticize society, and to change it wherever possible. (Luhmann 1974a, 34; my translation)

Thus, what was at stake was no less than the "meaning of 'ought'" and the differentiation between justice and injustice, which provided a structure for the entire legal system. Therefore, Luhmann opposed the rejection of legal dogmatics and pleaded for an "extension of the relevance of dogmatic considerations" (Luhmann 1974b, 55; my translation). Contrary to the tendency to "reduce complexity" in the outside relationship with its environment, in this situation the legal system must become more complex internally, while maintaining the closed nature determined by its structure of "ought." Only in this way, thus Luhmann, would the law be able to "bridge […] greater discrepancies between past and future" (Luhmann 1974a, 59; my translation), meaning that plans and behavioral rules for the future could be "controlled […] normatively," i.e., according to the model of justice and injustice, "with consideration of the past and present." This leads to a plethora of questions and problems which Luhmann's systems theory, however, can only describe, but not solve (ibid.). Luhmann's antithesis of past and present seems all the more characteristic of the *Zeitgeist* of the early 1970s, as "time" had played only a minor role—as a mere "ordering factor" in the decision process—when Luhmann adopted the matching terms of the conditional and the goal-oriented program, when characterizing the development from police state to rule of law, a few years earlier (Luhmann 1968, 58ff., 162ff., 172ff.).

Beyond inducing a certain healthy insecurity, resulting from the perception that jurisprudence and sociology arrived at completely different descriptions of the same situation, Luhmann's legal sociology—as he acknowledged himself—is only occasionally and coincidentally useful to jurists (Luhmann 1986, 44ff.). Thus, it only fulfils a critical function by exposing the "nature" of legal institutions through the conditions of their substitutability with functional equivalents (Dubischar 1983, 79). However, it is as pointless to lament the consequence of the lack of normative elements in Luhmann's purely descriptive systems theory as it would be to lament that a *football* stadium offers no games of *Fußball* (soccer).

In his late work *Das Recht der Gesellschaft* (The law of society: Luhmann 1993), Luhmann repeated and confirmed his point of view on a higher level of abstraction. In reviewing the decades of reform, he explicitly positioned his systems theory—which had been developed further in the meantime through the inclusion of the concept of *autopoiesis*, the self-differentiation of communication systems—against all linguistic, logical, hermeneutic, rhetorical, institutional and similar theories of law and reflective theories of law (ibid., 11ff., 18, 36). His main objection was that all legal theories retained the "inside perspec-

tive" of law, and thus considered the concept of the norm as basic and indispensible. His legal sociology, on the other hand, remains "wholly on the level of what sociology can state as fact." Among these facts, a norm merely lends a definite form to expectations that can be objectively observed. Thus, the point is not to transfer sociological theorems to the area of law, but to establish a theory of society, with its law as a partial system. According to Luhmann, the systems theory of law is addressed to "science itself, and not the legal system" (ibid., 31ff.; my translation).

Werner Krawietz offered a fundamentally different systems theory in his *Recht als Regelsystem* (Law as a System of Rules), a collection of essays from 1970 to 1982, in which he focused instead on the "classical topics and problems of jurisprudence, such as the identification of rules as law, the interpretation, application and development of law as well as the legal formation of terms and systems," thus attempting to complement analytical legal theory and legal sociology with "legal realism as a critique of meaning" (*sinnkritischer Rechtsrealismus*) (Krawietz 1984b, XIff.; my translation).

10.3.5. The Hermeneutical Counterpoint: Understanding Meaning Instead of Objective Structural Analysis

As analytical philosophy, whose effects we have traced at least in outline, began to spread, it met with opposition early on. This sparked a controversy which has entered the annals of German sociology as the "positivism dispute" (*Positivismusstreit*). The debate sprang from the lectures given by Karl R. Popper and Theodor W. Adorno at the Conference of the German Society of Sociology in Tübingen in 1961, on the "logic of social sciences" (Adorno et al. 1971, 103ff., 125ff.). In the following dispute, which lasted until the Society's 1969 congress in Frankfurt and whose protagonists were Jürgen Habermas (1929–) and Hans Albert (1921–) (ibid., 155ff., 193ff.), the original question, which had focused on the philosophy of science, increasingly shifted towards a political dispute between neo-Marxist social theory, criticizing the ruling authorities on the one hand, and social technology, which supposedly stabilized and legitimized the existing power structures, on the other (Habermas 1971b, 142ff.). In 1963, Habermas sketched the original issue in *Analytische Wissenschaftstheorie und Dialektik* (Analytical philosophy of science and dialectics: Habermas 1971a), his contribution to the *liber amicorum* for Adorno, roughly as follows (ibid., 156ff.): Analytical theory only recognizes a formal concept of the system as an interdependent relationship between functions which are understood as variables of social behavior. Therefore, theories are merely formulas for order based on constructs, and must be measured against experience. The process of "controlled observation of physical behavior, taking place in an isolated field under reproducible circumstances, by randomly interchangeable subjects" (ibid., 159; my translation) is therefore basically the same in nature

and cultural sciences beyond all value judgments. The insights of sociology—always conditional—are not applied directly to practical life issues, but merely offer technical advice regarding a rational choice of means to achieve goals. The dualism between the scientific collection of facts and the decisions that affect and shape life is viewed as irresolvable. In contrast, Habermas's dialectic theory insists upon the difference between natural sciences and sociology, and, in opposition to a functionalistic definition of system, upon a "dialectic concept of totality" (ibid., 156; my translation). The totality of the social circumstances of existence, of course, can only be grasped by "hermeneutic anticipation," which must "prove its correctness during the course of the explication" (ibid., 161; my translation). This circle cannot be broken; it must be "thought through dialectically in connection with the natural hermeneutics of social life" (ibid., 158; my translation). History is another area dialectic theory approaches hermeneutically; however, it is not content with "subjective hermeneutics aimed at understanding meaning," but deciphers the objective context of meaning of the historic situation with a view to the interests of social reproduction, so-to-speak "behind the backs of the subjects and institutions" (ibid., 164; my translation). The decisive factors in this process are the tendencies of historic development. "Society reveals itself […] only in what it is not" (ibid., 165; my translation): Thus Habermas.

It is no coincidence that this self-reflection by the Frankfurt-based "Critical Theory," with its central goal of understanding the meaning of the overall social context and its laws of motion, mingled with the widespread resonance Hans-Georg Gadamer's (1900–2002) 1960 *Wahrheit und Methode* (Truth and method: Gadamer 1965), with its questioning of the very possibility of understanding, was enjoying. Gadamer too tried to overcome the modern philosophy of subjectivity by interpreting understanding as a non- and supra-individual, all-encompassing and universal process taking place in the medium of language. According to Gadamer too, the hermeneutic circle cannot be resolved, but instead it is an "ontological structural element of understanding" (ibid., 277; my translation). Moreover, in the inevitable application of understanding to one's own life practice and to the self-encounter in the set text (ibid., 312ff.), hermeneutics is not a method, but, in a measuring of remembered truth against the here and now, a practical philosophy providing orientation in the world. It is the "anticipation of perfection" (ibid., 278; my translation), which leads all of Gadamer's understanding, that returns in Habermas's "hermeneutic anticipation" of the totality of the social context of life. For our topic, it is mainly important that Gadamer considered legal hermeneutics to have "exemplary importance" inasmuch as it concretized the law by mediating between general laws and the individual, special case (ibid., 35ff., 307ff., 312ff., 489ff.). He even went so far to label "the re-definition of the hermeneutics of the human sciences through legal and theological hermeneutics" a current philosophical task, one he highlighted in his text (ibid., 294).

Thus bilaterally sensitized towards the topic of "hermeneutics" at a time of more or less dramatic changes and insecurity, German legal scholars produced a sudden outburst of contributions on legal hermeneutics from the mid-1960s to the early 1970s. These went back to an older tradition founded by Schleiermacher and opposed analytical philosophy by concentrating—as classical jurisprudential tradition would have it—on individual judicial decisions within the framework of a given legal system; at the same time, they also rejected the critical social theory with its claim of totality. When Arthur Kaufmann, an inveterate registrar of any new tendency, published an essay in 1975 significantly entitled *Durch Naturrecht und Rechtspositivismus zur juristischen Hermeneutik* (Via natural law and legal positivism towards legal hermeneutics: A. Kaufmann 1984a, 79ff.), this was already a small retrospective of the just-experienced "beginning of the development" of new legal hermeneutics (ibid., 86; my translation), for which he himself had already provided inspiration ten years previously in his plea for a "typological manner of thinking" when applying law according to the "nature of things" (cf. Section 10.2.3). Trusting in the "insight" of "recent philosophical hermeneutics," Kaufmann abandoned his own ontological concept of law as fixed, objective relations, and followed Gadamer's circular philosophy of understanding instead. According to Kaufmann, this was the only way to overcome the methodological dualism between "is" and "ought" and the identification of law with its written norms. Kaufmann's new standpoint is very important, symptomatically, and can be defined by three theses: 1. Law is only the possibility of justice, and requires completion by outside elements. 2. Law must be concretized in its given historical situation. "Correct law," therefore, is not a fixed entity or state, but something which "*takes place historically* in a never-ending process" (ibid., 81; my translation). 3. Understanding the text is thus "a practical, creative *action*" (ibid., 85; my translation).

A somewhat more differentiated view of legal hermeneutics was provided in *Vorverständnis und Methodenwahl in der Rechtsfindung* (Pre-understanding and choice of methods in the application of law: Esser 1972*)* by Josef Esser (1910–1999). This is easily understood when considering that the scholar of civil law, unlike the criminal law scholar, deals not with a comparatively simply structured system of sanctions for socially detrimental behavior, but instead with a highly differentiated complex of model solutions for conflicting interests. According to Esser, the exemplary importance of legal hermeneutics lies in the fact that the hermeneutic circle appears here as a "circle of application" (*Anwendungszirkel*) (ibid., 139; my translation), inasmuch as the jurist defines the understandability of the text according to its possible application. In other words, the "questioning of the norm" depends upon a "decision-related pre-understanding of the conflict situation," which defines the general, non-individual "horizon of expectation" for the judicial decision. Esser sees the interpreting judge as a mediator between this social understanding of law

of those involved, a horizon of expectation that may thus be new, and the "legal system's dogmatic tradition of order" (ibid., 140; my translation). Since this tradition, however, is only understood "depending on time and society," as Esser emphasizes with reference to Gadamer and Habermas, the "interpreter's dogmatic attitude" is ultimately hitched to the "general changes in consciousness" (ibid., 141; my translation). Apparently, the objective changes this effects are certain common, pre-positive ideas of justice and reason; these, however, only become apparent through a hermeneutic anticipation of the whole (ibid., 23).

The state of consciousness of the stakeholders, which Esser described as ultimately decisive for the interpretation and application of law, had changed—increasingly obviously—in one other respect since 1958. This was the year in which an extraordinarily consequential process had begun, sparked by the so-called "value order decisions" (*Wertordnungsrechtsprechung*) of the Federal Constitutional Court, which had been established in 1951. By calling the "objective value order of the basic rights" a "value system" in its well-known "Lüth Case," a value order that must be "valid for all areas of law" and inform all the state's activities, the Court gradually achieved a complete "constitutionalization" of the entire legal system (cf. Section 10.2.4). This establishment of a comprehensive and—due to the authority of the country's highest court—exclusive horizon of legal meaning soon encompassed the whole of jurisprudence. This spreading of a certain "Constitutional Court positivism" (Schlink 1989, 161ff.) is comparable to the blossoming of legal positivism which followed the establishment of a central law-giving body in Germany in the shape of the *Reichstag* in 1871. One might say that the "anticipation of the meaning as a whole," previously oft-postulated by legal hermeneutics, subsequently materialized at least in a first step as an anticipation of the Constitution's meaning as a whole. Two impressive milestones of this "constitutionalization" of legal thought are provided by two habilitation theses which appeared almost at the same time in the mid-1960s. One of them, written by Friedrich Müller (1938–) in Freiburg and published in 1966, is entitled "Normstruktur und Normativität" (The structure of norms and normativity: F. Müller 1966) and is devoted to the clarification of the relationship between law and reality in hermeneutics. The other was authored by Martin Kriele (1931–) in Münster and published under the title "Theorie der Rechtsgewinnung" (The theory of the finding of law: Kriele 1967, i.e., the interpretation and authoritative application of laws) in 1967. The element that unites both, beyond the central issue of the interpretation of laws, is indicated by the subtitles: It is the primary problem of the interpretation of the Constitution. While Müller begins with the traditional contrast between norm and fact, he does not wish to overcome it theoretically, but instead to resolve it "hermeneutically" by the intellectual process of interpreting the norm, in such a way that he adds a mediating level between the normative arrangement of the law and the real-life situation it is

aimed at, a mediating level that is "hermeneutic," i.e., affecting the process of interpretation and application, but is not real or objectively comprehensive. It serves as a kind of case-specific definition of the elements concretized in the law, and thus it belongs to the positive norm—constituting what Müller called the "norm structure"—without, however, participating in the regulating character of the norm with its comprehension of the objective problem structure, i.e., without pertaining to the true normativity of the norm. Indeed, the norms of the Constitution, which are mostly open and often incomplete and cannot be executed in and of themselves, must usually be made operational through the assignment and adaptation of real-life situations which they apply to.

> As a typological intermediate level, the norm area (*Normbereich*) identifies a potentially real structural area of real, individual cases that might be subsumed under the regulation. Topical hermeneutics uses the intermediate level of a typical concretization of the program (*Normprogramm*) and the area of the norm to connect 'the case' with 'the norm,' both of which are not isolated endpoints of the application, but integral parts of it. (F. Müller 1966, 191–2; my translation)

The hermeneutical "progress" presumably consists of the fact that first of all, this mediation does not circle around the pre-judice that conveys meaning but must also be overcome, but moves around the poles of norm program and norm area in an elliptical fashion (ibid., 186ff., 196); and secondly, that the *topics* become the postulation of a typology ordered according to case groups (ibid., 189). This process, however, does not reduce those aspects requiring justification, but rather increases them, in the sense of a more finely honed and sophisticated interpretation. The clearest trace of the constitutionalization of legal thought is evidenced by the paradox that the so-called norm area is viewed as a hermeneutic part of the norm—which is therefore not identical with its literal wording—but that the topical interpretation, on the other hand, is not supposed to exceed that wording on any account, for reasons of the rule of law (ibid., 147ff.). In his general *Juristische Methodik* (Legal methodology: F. Müller 1997) which Müller developed from the beginnings described above and which no longer confined itself to the constitutional realm, this anchoring in the constitution—which was our point of departure—is clearly stated:

> Since questions of methodology are factual questions, the problems of methodology today cannot be separated from the specific nature of this Constitution, from its subject areas and from the fate of this constitutional order as part of the history of the Federal Republic of Germany so far. (F. Müller 1997, 208; my translation)

Furthermore, regarding the sore point of the supposedly insurmountable interpretational limit of the wording of the Constitution, it is now sensibly understood only as a "relational limit": The binding nature of the law is "realized in the process of *creation* of the legal norm" (ibid., 238; my translation). On the one hand, the judge is "originally" bound by the applicable text of the lawgiver's norm. "On the other hand, he [must] establish its case-deciding *mean-*

ing first, as the 'normativity' of the legal norm." In this process, however, he is not free, but "bound by the standards of an argumentative culture" sanctioned by the constitutional state (ibid.). The content of these statements, however, might also be summed up as follows: "A judge does not violate the wording of a law as long as his interpretation remains within the boundaries of recognized interpretational standards." Whether this is preceded by the sentence "A judge is bound by the wording of the law," or "A judge is not bound by the wording of the law," seems fairly irrelevant to the observer. Moreover, Müller leaves the question of the European dimension of the interpretation of the constitution open. (Incidentally, this is an area to which the Bayreuth-based professor of constitutional law Peter Häberle (1934–)—like Müller, a student of Konrad Hesse, professor of constitutional law in Freiburg and judge at the Constitutional Court—has dedicated much of his output for many years).

What remains to be added is that Müller originally used the terms "hermeneutics" and "hermeneutical" in such an inflationary manner that categorizing his 1966 work as part of the newer school of legal hermeneutics seemed to suggest itself. The second edition, which appeared in 1984 as Part 1 of a *Strukturierende Rechtslehre* (Structuralizing legal theory: F. Müller 1994), however, wishes to be read as a "theory of norms" or "legal (norm) theory." Furthermore, it is no longer labeled as "legal hermeneutics," but explicitly as a "jurisprudential norm theory" (ibid., 11; my translation). Therefore, the terms *hermeneutic* and *hermeneutics* are replaced by *methodological* and *methodology*, or more frequently *norm-theoretical* and *norm theory* or *legal (norm) theory* (cf. ibid., 244ff.). To give just one example: In the first edition, explicit reference is made to Gadamer and the subject of discussion is an "understanding of hermeneutics" which asks "how a legal regulation may be appropriately concretized"; in the second edition, the Gadamer quotation has been omitted, the term "hermeneutics" has been replaced by "methodology," and the essential question has been specified: "how a legal regulation may be concretized rationally, while still attached to the norm in accordance with the rule of law and democracy, i.e., as demanded by the constitution" (ibid., 66; my translation). The addition of a second part, intended to demonstrate practical utility—"The static structural model of the legal norm is complemented by a dynamic, developing model of concretization" (ibid., 1; my translation)—makes the entire construct into a theory of law which structures law by differentiating between norm, normativity, norm text, norm program, norm area and norm structure. Thus, today it considers itself not only a rationalization of legal methodology for the decision of individual cases, but—in explicit competition with Kelsen's "Pure Theory of Law"—as a "post-positivistic," non-formal concept which is supposed to "lend scientific structure" to the content and formal aspects of positive law (ibid.). In this manner, his method claims to combine "legal (norm) theory, methodology and dogmatics" and also constitutional law. Thus, Müller ultimately joined those efforts at legal theory that aimed for the scien-

tific modernization of legal thought after the end of the so-called renaissance of natural law and the philosophy of values.[49]

Like Müller, Martin Kriele attempts to "open up the legal thought process in constitutional law to the rational control of jurisprudence" (ibid., 16; my translation). And like Müller, Kriele too makes this attempt consciously "under the conditions of the rule of the Bonn *Grundgesetz*" (ibid., 158; my translation), with a view to the method used here "*on the whole*" (ibid., 155; my translation). The rational basis for the non-formal content of this operation is the rationality which has "expressed itself […] in the history of progress of our legal and constitutional system" (ibid., 185, 336; my translation). This basis derives its "clarity and plausibility" from the "overall context of a political theory oriented towards constitutional history" (ibid., 337; my translation), like the one that Kriele introduced himself in 1975 under the title *Einführung in die Staatslehre* (Introduction to political theory: Kriele 2003). "If, however, constitutional law in the democratic constitutional state can only be understood *on the basis of the historic conditions of the European tradition of reason*, then it follows that it can also only be developed further on the basis of this understanding" (ibid., 338; my translation). This means that not all the value judgments necessary for the process of legal interpretation and application of laws can or need to be derived from the *Grundgesetz* itself. After all, neither the law maker nor the constitution-giver can monopolize all legal evaluations (ibid., 6). Consequently, the possible literal meaning as the supposedly insurmountable limit of constitutional interpretation plays no role in Kriele's hermeneutics. Only this: "Wherever the law-giver or constitution-giver has made decisions, these are binding" (ibid., 160; my translation) and this bears repetition: The "decision," not its literal wording.

Incidentally, Ralf Dreier's constitutional theory with its much-discussed "incorporation thesis" (*Inkorporationsthese*) shows great similarity with Kriele's. Dreier ultimately did not follow any of the three paths he had identified in his inaugural lecture in Göttingen in 1974 (see Section 10.3.2.1). Instead of pursuing legal theory further as a theory of legal dogmatics or as argumentation theory, or working on the development of a non-formal legal theory as part of a non-formal theory of society, he turned towards an integrative theory of law, i.e., one that encompassed structural, normative and social elements, as opposed to only legal dogmatics, for which he saw the "return to the tradition of political enlightenment and especially to Kant" as characteristic (R. Dreier 1981b, 8 ff., 180ff.; my translation). However, there is no tendency whatsoever here towards forming a neo-Kantian school. Agreeing to a great extent with Kriele's legal and political theory, which was inspired by the Anglo-Saxon legal tradition, he emphasizes that legal and political theory as well as legal and moral theory belong together (ibid., 14), thus rejecting the positivistic "separa-

[49] Müller's theory is discussed excellently by Bernhard Schlink (1976, 94ff.).

tion hypothesis" and propagating a "definition of law that has been modified (in the weak sense) in terms of legal ethics, and is therefore appropriate to the subject and problem" (ibid., 14; my translation). However, it only claims validity where the conditions of the rule of law are fulfilled. After all, only under those conditions does positive law already "incorporate" principles of morality and justice, by way of the constitution (ibid., 193). As examples—with a view to the rational and legal ideals of Enlightenment—he lists the basic rules of the German constitution regarding human dignity, liberty, equality, the division of powers, republicanism and democracy. For the problem of the obligation to obey laws, this amalgamation of Kantian tradition and "Radbruch's formula" results in the general principle "that one should obey the constitution, supposing that such constitution fulfils the criteria of the rule of law, and also obey the laws passed according to the rules of such constitution, supposing that these are not in evident conflict with the principles of morality and/or justice" (ibid., 197; my translation).

10.4. The Welfare State in Crisis: The Rehabilitation of Practical Philosophy and the Return of the Idea of Justice

10.4.1. Crisis Symptoms and the "Rehabilitation of Practical Philosophy"

In 1975, a German translation of a Harvard professor's book was published which had caused a stir in the USA in 1971 and had gone on to inspire philosophical discussion around the world: John Rawls's *A Theory of Justice* (Rawls 1975). It is not surprising to find that the "main structures of the concept of justice" are developed here in opposition to the great utilitarians, ranging from Hume to Bentham to John Stuart Mill: What is surprising is *how* it is accomplished. Admittedly, criticism of classical utilitarianism had become widespread even in the Anglophone countries. Moore, Hare, Toulmin and other meta-ethicists, however, criticized it from a standpoint of linguistic analysis, operating with the contrast between "is" and "ought," the difference between descriptive and normative statements and the accusation of a "naturalistic false conclusion" (E. Savigny 1993, 166ff.; my translation). Rawls, however, simply leaves this "English variation of the German 'value judgment dispute' (*Werturteilsstreit*)" (Lasars 1982, 38; my translation) in sociology aside, returning instead to Kant and the "social contract theory" (Rawls 1975, 15), which he translates into the language and concepts of modern game and decision theory. Thus, this renewal of the philosophy of justice was not seeking a yardstick by which to measure legal norms or judicial decisions, nor did it lead to an imperative for all protagonists of legal life or an appeal to virtue; instead, it discussed the qualities of a fair social system for the distribution of goods and the possibility of consensus regarding the social constitution of a community. The extraordinary popularity the work enjoyed in Germany may have had something

to do with the liberation it promised from so many more or less formal theories, and its return to traditional, familiar, "old-European" philosophy. As a return to Kant, it also signaled a movement towards political philosophy, i.e., the unity of the philosophy of law and state, which had last been taken for granted by German Idealism. By returning to Kant and reviving the idea of the social contract, this new philosophy of justice also rejected the Marxist Hegelianism of the "New Left." Thus, it ran parallel to a thought process that was also already noticeable in the new legal hermeneutics, and which has been called the "rehabilitation of practical philosophy" in the traditional sense (Riedel 1972, 1974). Its attempts to restore the reputation of a unified philosophical treatment of morality, law and state had begun in the field of philosophical history, with Joachim Ritter's 1960 essay on the foundations of practical philosophy in Aristotle's work (Riedel 1974, 479ff.). Now, this recourse to the classical tradition of philosophy was aimed both against Existentialism's mere individualistic analysis of human existence and against all varieties of neopositivism (Riedel 1972, 10). Once the battle-lines had been drawn up, terms that had been abandoned as particularly unhistorical and unrealistic during the 19th century, such as the original state or the social and government contract, enjoyed a revival of interest as "elements of an *a priori* normative construct."[50] Thereby, legal philosophy also lost some of the character of a specialized, more or less formal philosophy of jurists which it had acquired. Rawls turned legal philosophy into a subject that was once again of interest for general philosophers.

However, there was another, more deep-seated reason for the strong resonance Rawls's theory inspired: During this period, the crisis of the social state began which has lasted until the present and occupies us to this day, also in theory. It began with characteristic symptoms: In 1975, the Federal government's new debt increased by 46.1% over the previous year, and the number of unemployed reached more than 1 million, after years of full employment. Base unemployment increased, and there seemed no end to further debt. The so-called oil-price shock, a true economic slump followed by severe recession, and the currency turbulences connected with the breakdown of the global monetary system of Bretton Woods were severe blows for the Federal Republic of Germany, which was growing into an economic world power. In addition, there was regrouping within the economic sectors as the country turned into a service economy—in short, the "end of the modern era of industrialism" (Conze 2009, 517; my translation; cf. Doering-Manteuffel and Lutz 2008, 34ff.)—and all these factors eroded the foundations of the social security systems. Furthermore, demographic changes played a major role. Beginning in the 1970s, the percentage of social security contributions to the gross national product rose just as massively as the level of social spending in public budgets.

[50] See also the anthology by Alfred Voigt (1965), part of the programatically titled series *POLITICA*.

"The dream of perennial prosperity was dead" (Conze 2009, 468; my translation). Since social pressure could no longer be alleviated by spending surplus contributions, it was time to consider the issues of distributive social justice.

Thus, the strong reverberation of a book by a political scientist demanding democratization of the economy and its re-ordering through socialization in the name of the constitutional clause guaranteeing the social state came as no surprise: Hans-Hermann Hartwich's voluminous work *Sozialstaatspostulat und gesellschaftlicher status quo* (The postulate of the social state and the social status suo: Hartwich 1970), published in 1970, saw two further editions during the following eight years. At the same time, the awareness of ecological destruction, the increasing shortage of resources, the population increase and the enormous prosperity gap between the rich and poor countries grew even beyond national borders.

Even before the major impulse with which Rawls propelled legal theory and legal philosophy rather abruptly in the direction of a renaissance of political philosophy, a similar, albeit not nearly as widely noticeable voice had been registered in the German-language region. It hailed from a world of greater continuity and a political conscience that had grown over a long time. Thus, the Swiss scholar Hans Ryffel (1913–1989) brought the "close connection between law and state" as the outstanding elements of political thought back into focus. Without falling prey to any form of metaphysical speculation, his "philosophy of law and state," conceived as a philosophical anthropology of politics (Ryffel 1969; my translation), wishes to separate the theory of neo-positivism and linguistic analysis from the "pre-conceived notions" with which they reject "the question of the basic structure of human reality and […] the law and the state, or the question of absolute rightness or even rightness in general," considering them "supposedly unscientific and pointless" (ibid., 11; my translation). Then, he immediately clarifies that any return to the question of rightness must proceed from the assumption that today, it must be answered "in a democratic manner" (ibid., 13; my translation). After all, after the downfall of preordained absolute systems of order, the criteria for rightness may lie within the human possibilities of self-realization (ibid., 308ff.), i.e., in human autonomy (ibid., 433), which also forms the core of political democracy (ibid., 441). This pluralization of metaphysical holistic and ultimate interpretations excludes any formulation of absolute rightness which would be binding beyond the individual. Still—and this is where Ryffel's democracy theory differs from Kelsen's—this thought of absolute rightness is essential, because only this transcendental precondition of a common human cause enables ever-searching individuals to struggle for what is right and obliges them to engage in dialogue. Declaring the criteria of rightness themselves as relative, and not just his attempts at phrasing the opposite, necessarily leads to self-destruction or to violent dogmatization (ibid., 273ff., 294). No one may lay claim to occult knowledge, everyone must state his reasons, but may also voice his criticism as

in science, thus in politics and law (ibid., 275, 447). In law, too, all concepts and insights are preliminary and subject to unlimited criticism by all. Only the political system of democracy is able to combine autonomy and an obligation to follow the state's laws

> if (1) what is right is not dogmatized by any party, (2) everyone, or at last their representatives, together determine the fundamental norms (laws), (3) everyone has equal access to state office and functions, (4) specialized knowledge is fully taken into account and (5) open criticism and control by everyone is guaranteed. (Ibid., 441; my translation)

The common good of a modern state organized in this manner consists in guaranteeing the development of all its citizens (at least in a minimal way) as a "welfare state" (ibid., 468). Ryffel sees the actual goal of development, however, beyond the welfare state which creates the concrete conditions for dignified human liberty, in the self-responsible existence of all, free of direct influence from the state, apart from the necessary establishment of boundaries (ibid., 475).

One very significant example for the transformation of the problem towards the question of the right and just law, in the sense of a just order of social life as a whole, is the shift of emphasis in Arthur Kaufmann's work. Although the concept of justice did not play a special or even outstanding role, neither at the beginning of his legal-philosophical path— characterized by himself as "ontological legal objectivism," born from the epochal shattering of legal consciousness (A. Kaufmann 1984b, VII)—nor after his "metamorphosis" (again, his own term) into a practitioner of legal hermeneutics (ibid.; 1984c, VII), this now changed. Between 1984 and 1989, no less than three pieces authored by Kaufmann appeared which name the concept of justice in their titles: *Theorie der Gerechtigkeit* (Theory of justice: A. Kaufmann 1984d), *Gerechtigkeit – Der vergessene Weg zum Frieden* (Justice: The forgotten path to peace, A. Kaufmann 1986), and *Prozedurale Theorien der Gerechtigkeit* (Procedural theories of justice: A. Kaufmann 1989). And in 1992, he dedicated the second edition of his final lecture *Rechtsphilosophie in der Nach-Neuzeit* (Legal philosophy in the post-modern era: A. Kaufmann 1990) programmatically to "all legal philosophers who never cease to confront the true problems of legal philosophy, especially social justice […]." That was exactly Rawls's point. Thus, Kaufmann's merely formal categorization of Rawls's philosophy of justice as one of the procedural theories of justice is not far-reaching enough.

10.4.2. Political and Social Justice

None less than the great analyst H. L. A. Hart confessed: "No book of political philosophy since I read the great classics of the subject has stirred my thoughts as deeply as John Rawls's *A Theory of Justice*" (Hart 1989, 230, 348–50). Obviously, this was an experience shared by many. Only three years after its publi-

cation, about 60 English-language reviews had appeared. In Germany, one of the first scholars to study Rawls's work (even before the German translation was published) was Otfried Höffe (1943–), who went on to become professor of philosophy in Fribourg, Switzerland, and later in Tübingen (Höffe 1975, 187ff.). His preoccupation with the work was a lasting one. However, it was obviously not Rawls's egalitarian and liberal theory of a just distribution of goods, not the justification of the liberal social state under the rule of law, but Rawls's methodological recourse to the law of reason which Höffe—the philosopher who had recently (1971) completed his habilitation thesis in Munich on the practical philosophy of Aristotle, following the trend towards a rehabilitation of practical philosophy—considered a reactivation of classical political philosophy and a demonstration of its current possibilities. Thus encouraged, in 1987—now in the politically rather dampened atmosphere of the Kohl era, when history seemed frozen in Arnold Gehlen's *posthistoire* (Welsch 2008, 17ff.)—Höffe published his voluminous "foundations of a critical philosophy of law and state" entitled *Politische Gerechtigkeit* (Political justice: Höffe 1987). The work— appearing a good ten years after the supposedly final fragmentation of legal philosophy into multiple varieties of diverging legal theories—deals with the "ethical idea of law and state" as the basis of the justification and limitation of law and state (ibid., 11; my translation). A comparable tone had not been struck in Germany since the triumph of positivism in constitutional law: About 100 years earlier. Höffe audaciously undertakes to establish a "fundamental philosophy of the political" (ibid., 33; my translation) in the form of a theory of justice (ibid., 35), thereby taking back for general philosophy what had been lost to jurists and jurisprudence's legal philosophers since the days of Rudolf von Jhering, when "jurisprudence of concepts" (*Begriffsjurisprudenz*), realism inspired by the social sciences, legal positivism and later—reflexively fragmented—legal methodology arose and began to dominate the field.

Accordingly, the author begins by first providing a philosophical critique of "positivism of law and state." Having shored up the possibility of a supra-positive critique of law and state through an anti-critique of the natural law critique (ibid., 88ff., 109)—Kant looms somewhat unclearly in the background—and having destroyed the "myth" of *only one* legal positivism (Hoerster 1989), Höffe proceeds to prove his hypothesis. It claims that "law in general" requires a "basic layer of justice" (Höffe 1987, 171ff.; my translation) without which a social order cannot even be defined as a legal order. This law-defining element is the distributive (i.e., not just collective) advantage that the order brings to all its constituents. Whether explicitly or implicitly, this is a point conceded by all the legal positivists quoted as examples. The proof is easy to follow in the case of Hobbes's *Leviathan*, one of his main examples, but it fails in the case of the second main example, Kelsen's *Pure Theory of Law*. Of course, it is easy to accept that the famous statement *non veritas sed auctoritas facit legem*, with which Hobbes subjected the claim of the proponents of *com-*

mon law to have their rights recognized to the law-giving authority of the king, was based on the representative authority of the sovereign, grounded in law, although the statement was frequently distorted into a bogeyman of positivism (cf. Hofmann 2008d, 19ff.). The sovereign has absorbed the will of everyone, and therefore demands submission from all and, in exchange, protects all, thus conveying a "distributive advantage." The salient point of Höffe's criticism of Kelsen is Kelsen's apparently provocative hypothesis in his *Pure Theory of Law* that "any random content (might) be law" (Kelsen 1934b, 201; Höffe 1987, 153; my translation). Höffe's counter-hypothesis is: The claim that the content of legal norms is arbitrary is only valid under the condition that this legal order assumes as given the law-defining element of justice, i.e., collective security. And indeed, Kelsen characterizes collective security as a basic function of any legal order (Kelsen 1934b, 38ff.). However, he states explicitly that this recognition of the peace-keeping function of law does not imply "the assignment of a value of justice" and therefore cannot serve to distinguish between robber bands and states in the sense of the famous Augustine question "Justice removed, what are states but great bands of robbers?" (*Civitas Dei* IV 4), which Höffe quotes extensively. After all, even among robbers, robbery and murder are prohibited as a matter of course. Otherwise, "there would be no community, no 'band' of robbers." Although originally, Höffe discussed the "legal form of social coercion" as opposed to other forms of social coercion," Part 2 of his work, which explores "anarchism" (which, however, remains without a concrete historic profile), sets out to prove "that coercion of humans by other humans is permissible at all" (Höffe 1987, 192; my translation). Since the extensive reasons for social cooperation, following Plato and Aristotle, justify a society, but not a community employing coercion, this leads to the question of the avoidability or unavoidability of human conflicts that necessitate coercive force. The "proof" consists in the all-too-familiar "thought experiment": The idea of a natural state according to Hobbes's model (ibid., 289ff.). The result is predictable: The freedom from rule leads to unlimited despotic rule of humans over humans (ibid., 341). In order to demonstrate that political justice is "the basic principle of a free community" in the crowning third part of his work, Höffe aims to demonstrate "that a free coexistence guided by rules is […] superior to spontaneous self-regulation; then, that the institutionalization of rules in general […] and ultimately, that their institutionalization as a legal system of state is even more advantageous for all involved" (ibid., 381; my translation). These assumptions seem plausible to a jurist; however, one has a hard time following the argument of the proof. According to Höffe, the state's institutionalized coercive force guided by the rule of law results from the collectivization of the rights to exercise force which supposedly accrue to the individuals as universal human rights of coercion from their reciprocal renouncement of liberties (Höffe 1991). A public coercive force resulting from private barter? Incidentally, towards the end the author concedes self-critically that one might

argue against his legitimation theory that it only justifies a minimal state "confined to protecting its citizens against violence, theft, fraud and guaranteeing the enforcement of contracts, and therefore blind to the specific problems of the 19th and 20th century" (ibid., 469; my translation). Indeed, that exactly is the case.

It was the reunification of Germany which led once again to renewed interest in the topic of social justice, and thus the core of Rawls's theory of justice. After all, the political and constitutional end of the country's division turned the differences between two social systems into an urgent social problem of the just division of goods and obligations within the country. Studies in social psychology undertaken during that period illustrate this point very impressively (Montada 1996). Wolfgang Kersting (1946– , professor of philosophy in Kiel since 1993) has devoted intensive thought to Rawls's distributive justice. The pertinent works by Kersting, who delivered his habilitation thesis in 1982 in Hannover (which, according to the preface, attempted "an extensive philosophical rehabilitation of Kant's legal philosophy"), aim for a goal that is equally grand and distant: A legal philosophy of the democratic social state (Kersting 2000a). The point of departure is his criticism of the so-called difference principle in Rawls's theory of justice. Following the postulate of equal liberty for all, this second principle of justice states that social and economic inequalities can only be justified if they are beneficial to the least-advantaged members of society. This principle is institutionalized by a distributive system that assigns goods not according to the needs or wishes of individuals, but with a view to their belonging to certain groups or classes. Despite this, Rawls "is celebrated quite undeservedly as the philosopher of social democracy and welfare-state capitalism" (Kersting 1997, 239; my translation). For at most, his theory is one of the just distribution of advantages within the community of cooperating individuals, or more concretely: Of those in possession of employment. Indeed, Rawls designs a just system of the distribution of goods within a cooperative community of citizens acting rationally and economically, even if they are unskilled laborers or only marginally employed (Hofmann 2008a, 56ff.). Outside the field of mutually advantageous cooperation, Rawls's theory is inapplicable. The unemployed, unemployable, elderly, sick and disabled have no place in it. As an individualistic and egalitarian justice principle of mutual advantage, it fails to cover this area of genuine solidarity within the social state. This is the point Kersting's argumentation proceeds from. He seeks a theoretical justification for the extension of distributive justice to the larger community of solidarity of the social state. To this end, he puts forward three main arguments: One concerned with the rights of liberty, one with the theory of contracts and one with ethics and ethos. The first is based upon the famous *numerus clausus* decision of the Federal Constitutional Court of 1972, which caused quite a stir at the time with its mere consideration of deriving an original, actionable entitlement (like the creation of university places) from a right of liberty (like the right to choose

one's profession and educational institution freely).[51] In the meantime, though, neither the Court nor scholars of constitutional law have drawn this consequence. Only the right to a guaranteed minimum subsistence, including humane accommodation, has been recognized (H. Dreier 2004). However, this right has been derived not from the idea of liberty, but human dignity. Kersting's argumentation, on the other hand, goes beyond these "welfare provisions of the social state" and aims for "freedom provisions of the social state" instead (Kersting 2000b, 21ff.; my translation). In his opinion, the "obligation to establish a social state" necessarily follows "human rights and liberty, which carry the obligation to establish the rule of law" with the consequence that the social state— which is beholden not only to guarantee mere subsistence, but is oriented towards the person who "wishes to lead an independent and self-responsible life"—must guarantee an "adequate non-formal subsidiary possibility of individual liberty" for "those who cannot provide for themselves," regardless of the cause of such inability (ibid., 24ff; my translation). At the same time, with this rather Kant-inspired argumentation, the author turns against those discourse theorists—whom he considers followers of Rousseau—who, according to the illiberal precedence of public before private autonomy, see the problem of the justification of the social state and the guarantee of entitlement rights only under the aspect of enabling citizens to participate in the discourse. According to Kersting, this concept means that if a citizen refuses to engage in communal matters, the consequence should be the denial of services (ibid., 26ff.). Kersting's second argument consists in an extension of the contract model in Rawls's theory of the original choice of a just order of distribution, even if Rawls himself has long given up this contractual element—a fact yet to be discussed here. Since every one of the individuals choosing a constitution must take into account the possibility of becoming unemployed or unable to provide for himself and his dependents for other reasons, according to Kersting they will "agree upon a procedure that nationalizes charity, i.e., a rule that obliges the constituted community to extend to those members of society in need of help the support they need to cover at least their basic needs" (Kersting 1997, 241ff.; my translation). Even if this contract-theory argument is not as far-reaching as the one regarding the rights of liberty, it still obliges the constitutional state to pursue an active social policy, which necessarily affects economic policy. The third argument resembles an appeal to the "community of citizens" and their willingness to help each other, which is founded on their "political identity" (Kersting 2000a, 396ff; my translation). Plausible consequences are the postulates of "basic services ensuring a dignified and integrated lifestyle in case of need," a proactive labor market policy, because labor is not only an economic value, but also "a good with a value for the citizen's ethics," as well as

[51] *Amtliche Sammlung der Entscheidungen des Bundesverfassungsgerichts* (Official collection of decisions of the Federal Constitutional Court), Vol. 33: 303.

"equal development opportunities" for all, but without egalitaristic compensation services from the state to "correct natural differences in talent and ability and different social milieus" (ibid., 7ff., 390; my translation). Specifically, the author has the solidarity-motivated support of families with children in mind. What remains unclear is how the creation of equal development opportunities can coexist with the maintenance of different social milieus. However, of course the main question is what to base the "political togetherness" and the "social and historical identity" upon which form the foundation of the community's solidarity. The issue is the stabilization of the constitutional state through social ethics. According to Kersting, this can only be delivered by a "communitarian democracy" (Kersting 2000b, 484ff.). Thus, against the atomism of the liberals, Kersting joins the "communitarians," who begin with the given communality and go on to seek the ethical endpoint of a political community not in the constitution or in an order of justice, but whose "hopes for integrative politics" are founded upon "the element of political practice which engenders communality" in a deliberative democracy (ibid., 485). With this return to the key term of active participation, we appear to have reverted to the Rousseauism of the discourse theorists, which Kersting had set out to chastise. And indeed, our author now explicitly pledges allegiance to a Rousseau-derived spirit of communitarian democracy, albeit not as an embodiment or even institutionalization of the General Will, but as a necessary supplement of "constitutional patriotism." After all, political discourse in a communitarian democracy denies the restricting separation made by discourse ethics between the universal questions of justice, which are open to consensus in principle, and the particular questions of the good life; it engages in rational discussion even if there is no possibility of achieving consensus, and transcends the antagonism between universalism and sectionalism by recognizing the morale of solidarity, internally graded into levels from friendship to the large group of the national state (ibid., 486ff.). Even if the name is not mentioned, it is clear whom Kersting is arguing with here: It is Jürgen Habermas with his distinction between moral and ethical discourse. This too shall be discussed at a later point.

Incidentally, the above-mentioned topics of support for families, children and education as well as group solidarity indicate how varied the question of social justice has become. Thus, in the case of the social security systems, today generational justice plays a large role in the issue of health insurance, as its conceptual basis, the "inter-generational contract," is no longer valid due to the changes in demographic development following the drop in birthrates intensified by the introduction of the pill. Should the needs of future generations not be included in our concept of social justice; should environmental advantages and burdens not be distributed with geographic fairness? The discussion of these problems has long begun and has shown with sobering clarity that one unified principle of social justice can no longer serve as a solution (cf. Hofmann 2008a).

10.4.3. Results of the Renewal of Practical Philosophy: Principles of Legal Ethics and the Procedural Concept of Law

10.4.3.1. Developing Principles of Legal Ethics

In response to his critics, Rawls relativized his theory of justice (cf. Hinsch 1992). In this process, it moved closer to Rousseau's differentiation between a constitutional level of state organization and an operational level of law-giving. The first principle of justice, i.e., the liberty principle, is now taken to refer to the essential institutions of the constitution, while the second (the so-called difference principle) appears rather more as a regulatory principle of simple law-giving. The principle of constitutional freedom thus lends a preliminary justification to the results of a fair process of decision, without claiming general consensus for this – with the difference principle providing the non-formal criteria of control. Because of the complexity of economic problems, reasonable differences of opinion always remain an option in this context. With the explicit recognition of ideological pluralism, the area of application for the consensual theory of justice shrinks, encompassing only the institutions of the liberal, democratic and constitutional state and the culture of its societies. Rawls has since conceded or clarified (as one may have it) that this alone is his framework, and that his theory is not a unified philosophical concept, such as Hobbes presented, nor an all-encompassing philosophy of history and society on the basis of a defined anthropology like Rousseau's, nor a consolidated practical philosophy or moral theory like Kant's. Thus, the new contractual thinking—reduced to a methodological principle—ends with the attempt to create an intrinsic, moral and normative systematization of the mental and institutional circumstances of Western societies, thanks to the mutual recognition of free and equal persons and the formulation of a mechanism of equalization which encompasses and integrates all the pluralistic differences: The overlapping consensus.

Exploring the work of his teacher H. L. A. Hart, Ronald Dworkin (1931–2013) developed a model of legal-moral discourse which complements Rawls's political liberalism of constitution and law-giving, concentrating on the judicial application of law to the individual case (Dworkin 1984). His point of departure is the situation of the judge who must come to a decision even when the law, although materially applicable, is unclear, inappropriate, inconsistent to the point of contrariness or incomplete. In such cases, the judge is obliged to fall back on legal principles providing judicial orientation as the main distributive principles of rights and obligations, extending these while taking into account the fundamental values of the community in the context of all the legal rules, procedures, principles and recognized theories. In short: In difficult questions of law, "political morality […] which is presupposed by the laws and institutions of the community," rules (ibid., 215). In terms of legal theory, this

means that any given legal order does not consist only of rules that are either applicable or inapplicable, but also contains rules or principles that determine the direction of a decision (for example, "nobody should benefit from his own wrongdoing"), the scope of which, however, can only be determined by individual cases (ibid., 54ff., 130ff.). Unlike legal norms, these principles cannot be declared valid according to certain legal "rules of insight," as postulated by Hart (1961, 142ff., 215ff.), but, according to Dworkin, must be justified philosophically according to their "moral" derivation and nature (Dworkin 1984, 247). If one compares this with the dense development of German legal thought, it is fair to say that here the continued dogmatic development of the basic rights and the principle of the social state, continuously inspired and refined by the extensive activities of the Federal Constitutional Court, furthered the "political concept of justice" which, according to Rawls, "formulates the fundamental political and constitutional values (for everyone)." In terms of legal philosophy, this process is underpinned by Ralf Dreier's "incorporation theory" (R. Dreier 1981b, 193ff.; cf. Sections 10.3.2.1 and 10.3.5) mentioned above and the relativization of the so-called "separation theory" (cf. Section 10.3.2.1; Hoerster 1989, Osterkamp 2004), and supported—from the other end, so to speak—by the proof that elements of legal ethics are indispensable for the interpretation of basic rights (exemplary is Mahlmann 2008).

Dworkin's distinction between rules and principles was taken up in parallel by Robert Alexy in his *Theorie der Grundrechte* (Theory of constitutional rights: Alexy 1985b, 71ff.). Yet, unlike Dworkin, he considers the principles (such as freedom and equality) as imperatives of optimization, and again unlike Dworkin, he also aims to establish a comprehensive, non-formal (i.e., influencing the content of decisions) theory of basic rights, at a high level of abstraction and in terminological, analytical and systematic terms. The results, however, remain modest. Since a "hard" theory, which would mandate a fixed solution for every single case involving basic rights, is impossible to establish, at least the argumentation regarding basic rights is to be structured rationally. According to Alexy, his theory of principles (*Prinzipientheorie*) fulfils these conditions as "a value theory that has been cleansed of untenable assumptions," inasmuch as it "contains a bundle of basic rights-related principles, which it puts into a loose order by establishing *prima facie* antecedence between them, favoring the principles of legal freedom and legal equality" (ibid., 18, 520; my translation).

In contrast to Alexy's analytically influenced theory of principles, a work by the Viennese legal scholar Franz Bydlinski (1931–) on *Fundamentale Rechtsgrundsätze* (Fundamental principles of law: Bydlinski 1988) published at almost the same time offers a voluminous list of highly differentiated principles of legal ethics, which—as the subtitle indicates—constitute something like the "*legal-ethical constitution of society*." With the self-confidence of one who has gathered plenty of experience in "quotidian legal work," Bydlinski attacks the positivistic "separation theory" and all merely descriptive *theories* of law, aim-

ing to prove the "indispensability of a fundamental dimension of legal ethics in legal thought" (ibid., VII, 128ff.; my translation; Larenz 1979).[52] He also claims that it must be differentiated from the dimension of constitutional-law reflection (Bydlinski 1988, 70ff.). This may be immediately plausible for Austria with its positivistic legal tradition, but it is less so for the jurisdiction of the German Federal Constitutional Court and the reflections upon basic rights of a "constitutionalized" way of legal thinking that arose from and expanded this jurisdiction. Bydlinski's moral point of departure, which is also the maxim of his thoughts, is the equal consideration of every human being and the consequences arising from it: Personal dignity and the protection of life (ibid., XII, 171ff.). According to this guideline, he arrives at and justifies three categories of very detailed fundamental legal principles: These are (1) universal and positively applicable, derived from the legal idea (justice, stability of the law, expediency); (2) rationally advisable and partially positively applicable; as well as (3) merely rationally advisable, but not positively applicable (ibid., 133ff., 291ff.). Incidentally, his extensive examination of Rawls's theory of justice (ibid., 93–114) demonstrates once again the intensity and breadth of the effect characterizing this impetus towards the renewal of practical philosophy.

10.4.3.2. The Procedural Concept of Law: Discourse Theory

The enormous resonance enjoyed by Rawls's philosophical claim to authoritative distinction between *just* and *unjust* was also due to an amplification resulting from a parallel development in Germany. Here, at the same time, Jürgen Habermas expounded his theory that practical discourse could decide the question of normative rightness with the same authority accruing to theoretical discourse in questions of truth (Habermas 1984, 127ff.; cf. Steinvorth 1999, 17ff.).[53] As is well-known, his discourse theory culminated in the two-volume work *Theorie des kommunikativen Handelns* (Theory of communicative action: Habermas 1981). According to this, even principles of justice cannot be decided by philosophers, but only by those affected. Thus, what guarantees the reasonability banning the danger of relativism is not the yardstick of objective idealness, but the establishment of its highly demanding ideal intersubjectivity of the discourse on questions of truth and rightness. Unlike Rawls's theory of justice, Habermas's discourse theory, aimed at overcoming the subjective philosophy of consciousness of modernism and determined by the model of

[52] Karl Larenz (1903–1993), professor of civil law and legal philosophy in Munich, had also pursued the same idea of mediation "between the legal idea as the ultimate reason for the normativity of law and concrete regulations of positive law" through "a closer definition of the content of the legal idea, in view of possible regulations" through the legal-ethical insight of the principles of right law (Larenz 1979, 23ff.).

[53] On Habermas's theory see also Sections 10.4 and 25.3 in Tome 2 of this volume.

finding truth, also concerning questions of normative rightness, may not lead directly to a political philosophy. However, from the start Habermas and his sharp criticism of society exerted a strong political influence. Let it suffice to recall his 1961 Marburg habilitation thesis *Strukturwandel der Öffentlichkeit – Untersuchungen zu einer Kategorie der bürgerlichen Gesellschaft* (The structural transformation of the public sphere: An inquiry into a category of bourgeois society: Habermas 1962), a work which continued Carl Schmitt's critique of parliamentarianism from the 1920s, complete with its story of decline, thereby preparing the ground for the so-called "extra-parliamentary opposition" (*Außerparlamentarische Opposition*) to a certain extent (cf. Kennedy 1986, 380ff., H. Becker 1994, 132ff.). The work enjoyed an extraordinarily wide circulation and had soon advanced to cult status among the student movement of 1968. Habermas only turned to legal philosophy relatively late, during the mid-1980s. During this time, his formerly critical and rather disinterested attitude towards law and his critical and distanced position towards the democratic constitutional state began to change. He may also have been inspired by some young legal scholars' ambitious attempts to use the mechanisms of justification of claims of validity—which he had outlined in his theory of communicative action and discourse, derived from a "consensual theory of truth"—for legal argumentation and thus for the interpretation of law. Regarding the legal, especially the procedural framework conditions, legal discourse had to be classified as a "special case" of general practical discourse. Viewed in broad daylight, though, its specific circumstances leave very little of general practical discourse intact.

This "special case theory" originally developed by Robert Alexy (cf. Section 10.3.2.2, Alexy 2006a) and reshaped by Klaus Günther (1957–), professor of criminal law and legal philosophy in Frankfurt, who distinguished between its reasons and application and added the hypothesis that legal argumentation is a special case of moral *application* discourse (Günther 1989, 182), was taken up and examined critically by Habermas in his broadly sweeping *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Facticity and validity: Contributions to a discourse theory of law and the democratic constitutional state, Habermas 1992; translated into English as *Between Facts and Norms*, Hamermas 1996a). Its fifth chapter, bearing the classic title *Unbestimmtheit des Rechts und Rationalität der Rechtsprechung* (Indeterminacy of law and rationality in jurisdiction), is dedicated to proving the correctness of the discourse-theoretical approach to that same central topic of legal theory (ibid., 10, 238ff.). The centerpiece is an intensive examination of Dworkin's hermeneutics, which, however, is judged to be inadequate in its monological approach (ibid., 248ff.). Habermas criticizes the insufficient degree of abstraction of the special-case theories, claiming that they suggest a "misleading subordination of law to morale – misleading because it has not been liberated entirely from natural law connotations"

(ibid., 286; my translation). His discourse theory of law, on the other hand, wants to demonstrate that legal forms of argumentation and communication are directly "*embedded* in the legal system" from the outset ("innately," ibid., 287; my translation) and "refer to laws democratically passed." Therefore, the decisive confrontation is that between moral argumentation on the one hand and legal and political discourse on the other. Thus, there is no categorial difference between law-giving and its application. Instead, in principle the system of subjective rights that forms the foundation of the legal order, i.e., those basic rights "which citizens have to grant to each other in order to achieve a legitimate regulation of their coexistence by means of positive law" (ibid., 151; my translation), is interpreted and applied in the same manner in the democratic process of law making as in the process of judicial application of laws (ibid., 287). If, however, both processes are ruled by the same logic and therefore court procedures function no differently than minor acts of law making, there is no longer any rational reason to assume that laws have a formal binding nature and that legal form has a value in and of itself. What is abandoned is the constitutional guarantee of formal equality, in other words, the meaning of the universality of the law (Lieber 2007). It should also be noted that the use of the terminological opposites of factuality and meaning— sometimes employed in a rather careless manner—leads to a short-circuit when that terminological tension is identified with the contrast between the two *normative* principles guiding any judgment, namely the stability of the law and individual justice (Habermas 1992, 241ff.), as both of them express behavioral expectations, even though they express them in a contrary manner. Examples for the rather flexible use of the title-giving terminological pair can also be found elsewhere: At the communication-theory point of departure, this contrasting pair indicates the factuality of the communication process and the ideal content of its pragmatic preconditions and its results, which seek the rational consent of those involved. In this meaning, the terminological pair serves as a bridge for the introduction of law into discourse theory, inasmuch as legal theory also deals with the "determination of the relationship between factuality and validity" (ibid., 22; my translation). However, the normative implications of the terms law making and law enforcement—this brings to mind Kelsen's simple example of the payment claims made by robbers and by tax collectors—remain unconsidered here, just as the multifaceted term of validity (in lieu of many, Alexy 1994) remains unexplained, due to a tacit reduction to the dimension of legal-ethical meaning. Thus, the conceptual antithesis of the title may be identified with the contrast between social reality and norm (conventionally: "is" and "ought") (Habermas 1992, 109, 517), but just as easily with the contrast between positivity of law and the claim to rational acceptability (ibid., 57) or democratic legitimacy (ibid., 163), even of the idealism of constitutional law and the materialism of a capitalistic legal order (ibid., 60). Habermas claims that the tension of factuality and validity is "concentrated" in the fact

that the political basic rights to exercising communicational liberties in public must necessarily be institutionalized in the form of subjective rights of private arbitrariness (ibid., 164).

Similar objections have been raised against the treatment of common judiciary discourse as well as against Habermas's interpretation of constitutional jurisdiction (ibid., 292ff.; cf. Lieber 2007, 197; Möllers 2009, 259ff.). Inasmuch as constitutional jurisdiction can turn directly against laws passed by the democratic law-giver, as is the case in Germany and the USA, Habermas views it with great skepticism, slightly reminiscent of the attitude of a French *citoyen* who fails to understand, in view of the famous *Déclaration des droits de l'homme et du citoyen*, that simultaneous declaration of individual and national autonomy, how a handful of judges should be able to decide about the general will of the nation reflected by the law. Habermas sharply criticizes the much-censured high-handedness with which the Federal Constitutional Court controls the law maker through its decisions on whether laws are compatible with the constitution (*abstrakte Normenkontrolle*), measuring them against a constitution which the Court has misinterpreted as an order of values. "By allowing itself to be led by the idea of realizing material values inherent in the constitution, the Constitutional Court transforms itself into an authoritarian body" (Habermas 1992, 315; my translation). In contrast to some constitutional law scholars, however, Habermas of course does not draw the conclusion from this that the only way to counteract the "value order decisions" is to emphasize the original libertarian meaning of the subjective guarantees embodied by the basic rights. After all, he claims, today private autonomy is not only endangered by the state, but also by economic and social bastions of power, and furthermore it is dependent on the possibilities of its being exercised effectively and politically. Since, however, "only the *procedural conditions of the democratic genesis of laws* can [guarantee] the legitimacy of laws that have been passed" (ibid., 320, 517; my translation), the Constitutional Court should examine the questionable content of norms mainly "in the context of the communicative preconditions and procedural conditions of the democratic law-giving process" (ibid., 320; my translation). The problem of the legitimacy of constitutional jurisdiction is given a "turn towards democracy theory" through such a "*proceduralistic concept of the constitution*" (ibid., 321; my translation). After all, according to Habermas, only a democracy theory can support a concept of procedural justice of the process of political decision-making (ibid., 324) since the core of the realization of rights is always about a reference to the original meaning of the system of subjective rights, i.e., "to guarantee the citizens' private and public autonomy *uno acto* by ensuring that every legal action can also be understood as a contribution to the political and autonomous definition of the basic rights, in other words, as elements of a constitution-giving process meant to be permanent" (ibid., 494; my translation). Moreover: Only through a continuous interpretation of the constitution, taking place on all levels of

law-giving, does Habermas concede that such a thing as a constitution can have permanence. As a democratic process which encompasses all levels of jurisdiction, this continuous process of constitutional interpretation is based "on the foundation of anarchically unleashed communicative liberties" (ibid., 228; my translation). And moreover: "In the delirium of this liberty, there are no fixed points except democratic procedure itself—a procedure whose meaning is already decided by the system of rights itself" (ibid., 229; my translation). The above-mentioned objections, therefore, are aimed against the fact that Habermas's criticism interprets the procedure of *abstrakte Normenkontrolle* as a procedure of radical or ancient democratic revision, which must take that idiosyncrasy of the democratic decision-making process into account. Incidentally, the "fixed points" which the jurist wishes for make a surprise reappearance when he discusses the majority principle. "Generally, majority decisions," one reads (ibid., 221; my translation), "are limited by the minority protection inherent in the basic rights." Obviously, this means more than mere procedural guarantees. So there we have it, after all: Basic rights do provide protection from the tyranny of the majority.

Towards the end of his work, Habermas (1992) extends the above-quoted "proceduralistic concept of the constitution" to law as a whole. In the last chapter, he discusses three "paradigms of law": The paradigm of the rule of law, the paradigm of the social state and his own legal paradigm, the procedural one, born of the critique of the two others (ibid., 468ff.). The expression "legal paradigm" is the modern guise of a social model that opens an interpretational perspective to the theory of a concrete legal order (ibid., 468ff., 472, 527). Thus, according to Habermas the paradigm of the rule of law relates to a certain idea of civil society, is based on *formal* legal equality, which makes it socially blind, while the paradigm of the social state with its system of *material* claims tends to forget the original promise of human dignity and emancipation, shows a paternalistic tendency and is thus democratically blind in a certain sense. "The complementary blindness of the legal paradigms of the social state and of liberalism stems from their common mistake of equating the legal constitution of freedom with 'distribution,' and to align it with the model of the equal distribution of […] goods" (ibid., 505; my translation; cf. ibid., 528). The "proceduralistic" or "procedural" legal paradigm is to lead out of this dead-end street by "continuing" the project of the social state "on a higher level of reflection" (ibid., 494; my translation). Unlike the liberal rule-of-law paradigm and that of the social-state, it does not imply an ideal society, but broaches not only the issue of the insufficiency of private autonomy and the dangerous ambivalence of social engineering, but also the context "between forms of communication which guarantee private and public autonomy simultaneously *as they arise*" (ibid., 532; my translation). Essentially, this means the "continuous combination and mutual enabling of legally institutionalized and non-institutionalized sovereignty of the people" to use a phrase by Ingeborg

Maus (1992, 203ff.) quoted approvingly by Habermas (Habermas 1992, 532). Somewhat more concretely, the idea is that from the "civil society," with its multiple associations and cooperations, and the political public, "streams of communication" and journalistic influences arise, which are "transformed into communicative power through democratic procedures," which is then, in turn, transformed by law into administrative power (ibid., 532ff., 187, 399ff.). Slogans such as expanded citizens' participation, taming and constitutionalization of the power of the media, criticism of the nationalization of political parties, introduction of grass-roots procedures for the nomination of candidates and party-internal discussion, the entrenchment of plebiscitary elements in the constitution and others may serve as illustration (ibid., 533). In 1993, Jörg Paul Müller (1938–), professor of constitutional law and legal philosophy in Bern, undertook a systematic exposition of these moments from the perspective of democracy theory and ethical discourse, published under the title *Demokratische Gerechtigkeit* (Democratic justice: J. P. Müller 1993, 145ff.). On the whole, Habermas's procedural legal paradigm speaks of a certain Rousseau-like longing for immediacy, authenticity and self-responsibility, despite the inevitability of parliamentary representation. A further characteristic is his attempt to remedy the democracy deficit of the German rule-of-law tradition by persistently championing his hypothesis of the same origin of the rule of law and democracy, private and political autonomy, of human rights and the sovereignty of the people thanks to the development of democracy from the mutual permeation of legal form and the discourse principle, i.e., the shaping of law and the formation of opinion and will through discourse and the exercise of civil rights. Indeed, the triumph of the idea of the rule of law in Germany began with the suppression of the democratic movement, and thus it developed a certain compensatory function. This proved itself again after 1945 amidst the ruins left by the lack of democratic practice (similar observations could be made in Spain after the end of the Franco dictatorship and in other transformational societies). However, the chronological coincidence of the reconstruction of the constitutional state with certain restorative tendencies in West-German society also gave rise to several ideological misinterpretations.

In attempting to evaluate the results of recent practical philosophy for legal philosophy, there can be no question regarding its contribution to clarifying the content of fundamental principles of legal ethics. The same cannot be said for the procedural-legal concept propagated by discourse theory. The reason for this is a fundamental deficit in the argumentation with which Habermas attempts to reconcile subjective private liberties with the citizen's autonomy (Habermas 1992, 111), thereby attempting to clarify the inner cohesion between human rights and the sovereignty of the people (ibid., 157). According to Habermas, "the substance of human rights" is contained "in the formal conditions for the legal institutionalization of that kind of discourse on opinion and public will in which the sovereignty of the people assumes a le-

gal shape" (ibid., 135; my translation). Seen by daylight, this takes Rousseau's democracy of the *polis*, developed for small areas and groups, and develops it further to suit large political collectives. What is interesting here in terms of legal theory is that Habermas sees the "logical genesis of rights" in this melding of the legal forms resulting from subjective freedom and the democratic process, a genesis which takes place in a "circular process" of the establishment of subjective rights, the legal code and the "mechanism" of democratic lawmaking "from the same source" (ibid., 154). If one examines the legal code in isolation, it is established through "the right of equal subjective freedom of action, together with the correlates of participation rights and the guarantees of legal recourse" (ibid., 159; my translation). Without these rights, that "logical" circular process obviously does not work, and therefore, without these rights—and that is the salient point—there can be "no legitimate law" (ibid.). Legitimate law is therefore liberal and democratic law and, according to the discourse principle, reasonable law. Thus, the procedural concept of law allows us to distinguish between legitimate, democratic, reasonable law and illegitimate, undemocratic and unreasonable law. But what about such defective law? Is it, perhaps, not law at all? Yet, if it is: What status does it have? Is it binding upon the members of that legal body politic? And if so: Why? What about laws whose genesis, while generally democratic, shows flaws or deficits? Obviously they are binding, otherwise the recognized right of the Constitutional Court to examine their compatibility with the constitution would be meaningless. But what is the basis of this—at least preliminary—binding nature? Should the very first discourse not deal with the question of submission to a legal order? Philosophy's procedural, discourse-theoretic "legal paradigm" falls behind the state of the discussion in constitutional theory and legal philosophy. Ultimately, the question remains: Where is the elementary differentiation between justice and injustice in this?

10.5. *Globalization*, or: Arriving at World Society

10.5.1. The Constitutionalization of International Law and the Universalism of Human Rights

In 1995, legal philosophy had cause to celebrate, commemorating the 200th anniversary of Kant's popular treatise *Zum ewigen Frieden* (Perpetual Peace: Kant 1968, 193ff.).[54] It was celebrated with a multitude of publications; most of them were philosophical, but some dealt with the law of nations, or international law (Hackel 2000, 220ff.). Beyond the piety of philosophical history and the interest in Kant's political philosophy revived by the "rehabilitation of practical reason," there were timely reasons for this too. The breakdown

[54] On this general topic see also Cavallar 1992 and 1998, 137ff.

of the Eastern bloc, that victory of the liberal, democratic West in the "Cold War" against "actually existing socialism," inspired hope for a new international order of peace. In addition, there was the push for European integration as a consequence of Germany's reunification, a development which led to the signing of the Treaty on European Union in Maastricht in 1992. Furthermore, the process of increasing interdependence of economy and information, politics and culture right across the planet invaded public consciousness: This began to be called "globalization" during the 1990s, a term which quickly spread in an inflationary manner. As Germany had thus "arrived in a world society" (Schlink 2009, 569; my translation) where—as Kant had already foreseen (Kant 1968, 216)—"a violation of laws in *one* place on earth is felt *everywhere*," it seemed obvious to examine once again Kant's project of a world-wide order of peace, and to view his idea of world-wide civil rights from the angle of universal validity of human rights. For a brief moment, some of the *enthusiasm* was felt without which, according to Kant, "the most exalted idea" of man's destiny cannot be imagined: "To imagine oneself as a member of the world's society of citizens (*Weltbürgergesellschaft*), with which one is compatible according to the law of citizenship" (Hofmann 2008b, 88; my translation).

Mainly, interest was focused on the "Second Definitive Article" of the treatise on peace: "The law of nations shall be founded on a *federation* of free states" (Kant 1968, 208; my translation); after all, this deals directly with the relations between states. In addition, this section of the text contains a special interpretational challenge, inasmuch as Kant—presumably for the only time in his entire oeuvre—explicitly favors the second-best solution, i.e., a federation of states instead of a world republic, for reasons that remain rather intransparent, and thereby revises his earlier standpoint (Brandt 1995, 138ff.). The problem lies in the unification of peace and freedom. Giving priority to peace, according to Kant, means preferring the universal monarchy of a unified world population, yet this carries the danger of despotic rule. Giving priority to freedom, on the other hand, leads to the idea of an all-encompassing world republic, if one follows the system-engendering analogy of the natural state between individuals and between nations, of the founding of states and the order of peace. However, this has no chance of realization, since the states are unwilling to give up their claim to sovereignty. Presumably, Kant's optimistic appraisal of the consequences of the French Revolution led him to assume that if a powerful and enlightened people can turn itself into a republic, "this gives a fulcrum to the federation with other states so that they may adhere to it […] and thus secure freedom under the idea of the law of nations. By more and more such associations, the federation may be gradually extended" (Kant 1968, 211ff.; my translation; cf. Gerhardt 1995, 18ff.). To him, the peace treaty of Basel between the Prussian monarchy and the revolutionary French Republic signed in April 1795 may have seemed like a signal of the possibility of "change" through "rapprochement" in the law of nations.

Otfried Höffe marginalizes the idea of development—the truly forward-looking point of the treatise on peace—and points out the contradiction between the Second Definitive Article with its founding of the law of nations upon a "federation of free states" and Kant's premises, which called for a "republic of republics" as the foundation of international law (Höffe 1995, 115).[55] After all, without a certain measure of coercive force employed by the state, permanent peace could not be imagined, neither within a single state nor between states. This exigency, however, does not necessarily lead to Kant's alternative of either the complete waiver of sovereignty or the maintenance of full sovereignty. Instead, according to Höffe, the world republic could be imagined as a state with very few sovereign rights, strictly limited to guaranteeing the safety and self-determination of the individual states (Höffe 1995, 131). Such a legal "stratification model" (*Mehrebenenmodell*) corresponds to recent transnational and international development, which has made great strides, especially in the European Union.

The philosophers Reinhard Brandt (1937–) in Marburg and Volker Gerhardt (1944–) in Berlin consider the treatise on peace a highly political text and judge Kant's plea for a league of nations to be more than "half-hearted" or a "compromise solution." Thus, only this form of maintaining the multitude of states provides the postulate of world citizenship described by Kant in the Third Definitive Article with a specific legal function. For in the construct of the league of nations, the relationship between the individual and his state is defined by constitutional law and the relationships between peoples are defined by the law of nations. What is left open, however, is the relationship between the individual and foreign states. This is the gap which world citizenship fills (reduced by Kant, however, to a visiting right: A barb against European colonialism), making the league of nations a complete legal order (Brandt 1995, 139ff.; Gerhardt 1995, 102ff.). From the perspective of political theory, the character of Kant's treatise on peace mirrors the constellation of problems at the end of the 20th century: It seems to mark the transition away from a concept of politics referring exclusively to the state, and "towards a concept of politics which counts the economic, cultural and legal interdependence of states among the conditions of peace for any political action" (Gerhardt 1995, 222, 232; my translation).

Following this line, against the backdrop of recent developments of international law, other authors—such as Peter Koller (1947–), professor of legal theory in Graz (Koller 1996, 222ff.; 1999, 236ff.), Wolfgang Kersting (1946–), professor of philosophy in Kiel (Kesting 1996, 182ff.) and Julian Nida-Rümelin (1954–), professor of philosophy in München (Nida-Rümelin 1996,

[55] The idea of a subsidiary, federally structured world republic, responsible for a global legal framework order responsible to the principles of justice, was further developed by Otfried Höffe (1999).

245ff.)— argued against Kant's alternative (either world state or league of nations) citing the possibilities of institutional peacekeeping through structural governmental cooperation with divided competencies, below the level of a world state. Like Kersting, Koller, for instance, discussed the possibility of federally structured communities of states organized in subsidiary levels, which could have supranational organs with limited authority to pass laws and employ coercive measures (Koller 1996, 236). Koller also pointed out that there are not only pragmatic, but also moral reasons for a plurality of states, e.g., the mobilization of social solidarity and enabling of different cultural lifestyles. In addition, he has also emphasized the connection between a global order of peace and the international protection of human rights (ibid., 237, 239ff.).

This discussion sheds light on the other current aspect of the anniversary treatise, inasmuch as it invites the reader to understand Kant's right of world citizenship as a subjective right of citizens under a world citizens' order, and to relate it to our idea of universal human rights. This is an aspect studied intensively by Jürgen Habermas, who of course saw—in keeping with his main hypothesis of the order-engendering meaning of subjective rights—the actual, innovative core of the treatise on peace in Kant's world citizenship (*Weltbürgerrecht*) (Habermas 1996b, 7ff.; 1999, 192ff.; 1998, 168ff.; 2004, 113ff.). In this, he sees the "transformation of international law—as a right of states—into world citizen rights as rights of individuals" (Habermas 2004, 123; my translation). However, the recognition of universal human rights beyond this point encounters two fundamental difficulties. These result from the ambivalence of human rights per se. Regarding their content, they are moral norms, i.e., they mainly formulate obligations and demand universal applicability for "any being with a human face," while in formal terms, they are subjective entitlements, which require a local law-giver to turn them into positive law for a particular legal community. In terms of legal institutions, our task is therefore to establish a global order "in which," as Art. 28 of the Universal Declaration of Human Rights of the United Nations proclaims, "the rights and freedoms set forth in this Declaration can be fully realized." Complementarily, objections to the universal *moral* validity of human rights must be refuted *philosophically*. Traditionally, among the main arguments against the universalism of human rights are their Euro-centrism and their political instrumentalization ("human rights imperialism"). Such objections are founded, of course, in historic development. However, their genesis also demonstrates how the concept of human rights has overcome such self-contradictory limitations resulting from their development conditions and political instrumentalization, time and again, through self-reflection. The reservations against the European individualism reflected by human rights universalism have many different reasons. Thus, dictatorships in Asian developing countries try to justify violations of the basic rights to a free judiciary system and of civil rights by claiming to give preference to collectively interpreted social and cultural basic rights, in order to guarantee de-

velopment. This, however, is not a normative, but merely a political argument to justify authoritarian, paternalistic public welfare. Viewed in normative terms, the "Confucian" critique of a legal order built mainly on subjective rights is not entirely unfounded, given its dangers for established social relations in a culture oriented towards consensus. Indeed, the "possessive individualism" of traditional and neoliberals fails to recognize the "contrary *unity* of processes of individualization and socialization" (Habermas 1998, 188; my translation). Ultimately, however, this is about the allegation that culturally the community takes precedence over the individual, and that a strict division of law and morality is impossible, for cultural reasons. This is flanked by the fear that the individualism inherent in human rights individualism might secularize existing ways of life by separating political rule from traditional religious or cosmological world-views. This is first countered by Habermas with the statement that the rights of liberty, protecting as they do the individual from moral paternalism, protect a religious lifestyle as much as other individual lifestyles. His main argument, however, is the hypothesis that regardless of the conditions of its development, the criticism levied against European individualism is not inescapably connected to it, like an accoutrement embedded in its cultural genesis, but must be viewed as an effect of a process of social differentiation and economic modernization which has long reached the cultures of East Asia and even some African ones.

> From the Asian countries' point of view, the question is not whether human rights as part of an individualistic legal order can be combined with one's own cultural traditions, but whether the traditional forms of political and social integration have to be adapted to the hard-to-reject imperatives of an economic modernization that is desired on the whole, or whether they can be maintained against it. (Habermas 1998, 185; my translation)

This "modernization theory" is easily recognizable as an economic reiteration of the traditional development pattern commonly assumed in the history of ideas, hypothesizing that the concept of human rights is constantly expanded, such as Lutger Kühnhardt (1987), to name just one example, proposed in 1987, displaying little sense of history, and which also colors Habermas's text.[56] Even this brief sketch shows what a great argumentative burden it is to prove—as Habermas sets out to—that the universal validity of human rights is the only element bestowing legitimacy on political rule around the world. For that is the result when universal human rights are interpreted as that order of subjective law which brings forth both the rule of law and democracy. Therefore, a more humble argumentation strategy promises greater effect, in the interest of concrete measures of protection for the oppressed, a strategy that is oriented towards the historic tiers of subjective rights and the frontiers that these indicate, so that elementary protection rights are its foremost inter-

[56] For criticism of this concept, see Hofmann 1999 and Bielefeld 2008, 98ff.

est (Hofmann 1999; 1995a, 51ff.).[57] These are based on the evidence of human vulnerability and are supported by a universal minimal moral consensus (Hofmann 1995b, 27ff.; Kersting 2000c, 229ff.; Gosepath 2008, 195ff.). The justification of the rights to life and physical integrity, to protection from arbitrary incarceration and from exploitation does not require a universally accepted theory of private and democratic self-determination.

10.6. The GDR in Retrospect

10.6.1. Variations on Marxist Legal Theory

There never was, there never could be scientific exchange or "discourse" between legal theorists in East and West Germany. Of course, this was mainly due to the "Iron Curtain" which separated Germany during the time of the "Cold War." In addition, the fundamental difference in world views, continuously fuelled by polemics, made any free and reasonable dialogue impossible, especially since the legal theorists in the GDR—like all other scientists—were under the direct control of the Socialist Unity Party of Germany (SED) (R. Dreier et al. 1996). Even the budding interest in Marxist legal theory as a modern social science (see above, Section 10.3.2.1), which arose during the period of reforms and the modernization of scientific theory in West Germany, failed to bridge the abyss. Karl A. Mollnau, director of the department of legal theory at the "Institute for the Theory of the State and Law" of the GDR Academy of Sciences, immediately discovered a subtle—and therefore especially dangerous—"anti-Communist barb" in the orthodox Marxism of Oskar Negt (1975, 10ff.) and Norbert Reich (1973). Indeed, the scientific study of original Marxist legal theory would have had to turn against the law of actually existing socialism, and would have exposed legal theory in the GDR as a mere "science of justification" (*Legitimationswissenschaft*) (Mollnau 1974, 41ff., 49ff., 54). The additional accusation of a covert revival of the merely reformist ("revisionist") "jurists' socialism" of Anton Menger (Hofmann 2009, 327ff.) as a "counterweight" was aimed against Werner Maihofer's emancipatory and critical attempts to create a better, more humane law (Mollnau 1974, 35, 38ff., 67 n. 82). As we have already seen, Maihofer's inspiration for this idealistic transformation of Marxist class struggle into legal reforms had been Ernst Bloch, whose thinking (possibly in a rather too harmless interpretation) seemed to Maihofer to open the possibility of bridging the gap between liberal democracy and liberal socialism. In this spirit, he ended his contribution on *Demokratie und Sozialismus* (Democracy and socialism: Maihofer 1965b) in

[57] Hofmann proposes a fourfold differentiation between the form of declarations of feudal liberties, the moral content that goes back to antiquity, the catalyst of the law of reason, and the revolutionary political instrumentalization.

the *liber amicorum* for Bloch's 80th birthday in 1965 in a rather effusive vein, presenting the "insight" that it had only been the principles of the French Revolution of 1789 and the Russian Revolution of 1917 together which were able to achieve "the future liberal, classless society of world citizens on this, our only planet Earth" (ibid., 67; my translation). At that point, however, the bridgehead on the other side had long since been razed. Bloch, who had been banned from teaching as early as 1956, had emigrated to West Germany in 1961. Following common GDR practice, Mollnau never mentioned his name again.

The fact that Marxist legal theory did not present a unified picture, and indeed could not present one, was ultimately due to Marx himself. His statements on law, never consolidated into a consistent theory, began with a "critique of law." It aimed to unmask the ideal claims for justice made by law through the social and economic analysis of the entirely biased concealment of the ruling class interest as "ideology." In this process, his analysis follows the categorical, humanistic imperative to "overthrow all relations in which man is a debased, enslaved, forsaken, despicable being," as he writes in *Kritik der Hegelschen Rechtsphilosophie* (Critique of Hegel's legal philosophy: passage from Marx 1953, 216; my translation). The phenomena of law (written laws, judgments, dogmas, theories) are not analyzed as ideal structures or independent units of meaning, but are examined in their developmental context of society as a whole, and explained from the viewpoint of the structure of their material basis. However, this form of historical materialism is first of all a heuristic process of insight criticizing ideology, serving to unmask all relationships of power obscured by legal forms, and helping to radically change them (Paul 1988, 334ff.). In this central point, Marx himself had undergone a fundamental change of mind, having repeatedly returned since the mid-1840s to a fixed model of explanation which regarded any social phenomenon as dependent on the process of evolution, advancing like a force of nature. This law of history is an economic one, and is demonstrated by the dialectics of productive forces (*Produktivkräfte*) and production relations (*Produktionsverhältnisse*). This is the reason for the class structure of society and its institutional and ideological superstructure, as well as for the class struggle, all the way to revolutions. The "economic law of motion of modern society"—which Marx claims to have "revealed," like a physicist, according to the Preface of the first edition of *Das Kapital* (Capital)—one-dimensionally declares law, like all other social phenomena, to be a product of material production relations, thereby stripping the "superstructure" of any independent meaning and the relationship with the actual base of its dialectic tension. The salient point, however, is that the dialectic critique of law is transformed into an aspect of positivistic "historical materialism," which claims the status of an objective science, representing an all-encompassing causal knowledge of the social process, and promises to provide all necessary explanations of social phenomena through mere deduc-

tion. It was especially the Marxist Ernst Bloch who criticized this reductionist movement away from Hegel's idealistic "mystifications" towards the materialistic ones of history. And Hermann Klenner, the most prominent Marxist legal theorist of the GDR, published a critical review in 1991 in which he held that Marx "may not have denied, but he certainly marginalized the influence of the spiritual (and thus also the legal) process of life on the development of mankind" in this transition from idealism to materialism. "Thereby, he abetted legal-nihilistic patterns of thought and action, with fatal consequences for theory in the hands of dogmatists and for practical life in the hands of dictatorships" (Klenner 1991, 444; my translation).

This leads to the so-called "further development" of Marxist legal theory by Soviet Marxism of the Leninist and Stalinist style, which was, in truth, a transformation into a political instrument of the supposedly continuing class struggle through the "scientific" justification of the "dictatorship of the proletariat," executed by the Central Committee of the Communist Party. This development was propelled by a disagreement about the right direction to take among Soviet-Marxist scholars of law, of whom Evgeny Pashukanis should be mentioned as a proponent of the Marxist left and Andrey J. Vyshinsky for the Stalinist right (Pfaff 1968; Paul 1974, 139ff.).[58] The subject of the debate was the question of the "applicability" of Marxist legal theory to the victorious October Revolution. Now that the "realm of freedom" had dawned, should law and state not lose their meaning and "die off"? On the other hand, how could the factual perpetuation of state and law, that supposedly merely ideological superstructure, be explained in a Marxist fashion after the base had been revolutionized? To the orthodox Marxist Pashukanis, law, justice and jurisprudence were expressions of bourgeois legal thinking, and thus their continuance counterrevolutionary, indicating the perpetuation of class rule and repression; furthermore, he considered unscientific the assumption of a specifically proletarian revolutionary law. Pashukanis, however, lost the debate, and paid for his mistakes with his life, which ended in the cellars of the Soviet secret police. The great victor over this "illness of legal nihilism" was Andrey J. Vyshinsky, a Member of the Academy and state prosecutor from 1924 to 1938. He had turned the tables by countering the assumption that law would die off after the proletarian revolution with his invention of a law that would only then begin to blossom: "law of the transition period, socialist law, created by the dictatorship of the proletariat." This was based on the interpretation of the transition period—which Lenin had already introduced in theory—as a special socio-economic formation, an independent period of socialism with a new type of specifically "socialist" law (new in world history), whose "socialist nature" was defined by Stalin in no uncertain terms to be threefold: State ownership of the means of production, an egalitarian mass society under the absolute rule

[58] On the Pashukanis-Vyshinsky debate see also Section 17.3 in this tome.

of one single party, and centralized state control. Within the framework of the "Marxist-Leninist general theory of state and law" thus established, Vyshinsky was able to formulate a supposedly universally valid concept of law which the "progressive" theorists of the GDR, founded in 1949, submitted to as well. Thus, the young Hermann Klenner begins his propagandistic treatise of 1954, *Der Marxismus-Leninismus über das Wesen des Rechts* (Marxism-Leninism on the nature of law: Klenner 1954), with that definition (ibid., 8) and returns to it at the end in the "enhanced" version of the *Moscow Legal Dictionary* of 1953—the remarkable, but uncommented "progress" consisting in the fact that Vyshinsky's "rules of conduct, passed by way of law making" have become "rules of conduct" "fixed by the power of the state"—i.e., liberated from any formal procedure and the discipline this would bring:

> Law is the totality of those rules of conduct (norms) which express the will of the ruling class and are fixed or sanctioned by the power of the state, and whose observance and application is safeguarded by the state's coercive power, in order to strengthen and develop the social circumstances that are advantageous and suitable for that class which exercises the social leadership of the state. (Klenner 1954, 88; my translation)

Klenner also gives the reason for Vyshinsky's authority: During the 1930s, he had managed "to unmask and destroy the Trotskyist vermin at the legal frontier with their bourgeois and fascist legal nihilism," of course, under "Stalin's guidance" (ibid., 8; my translation). Between these definitional alpha and omega points of Stalinist Soviet Marxism, the supposed class structure of law is spelled out in embarrassing detail. One example shall suffice: Thus, it was posited that the highway code had class character because it served the goal of road safety in the interest of the ruling class. This was also the case for the GDR; for the accidents thus prevented wasted "the working man's money." Moreover, the recent highway laws in West Germany showed "that there, Capitalist motorcar drivers follow the American model and are allowed to treat pedestrians as an annoying obstacle, which is best proven by a look at the accident statistics" (ibid., 39; my translation). There is no concept of legal theory here to develop. The sprinkling of Marx quotations is mere decoration. And concerning problems, terminology and argumentation, all that remains is simple positivism.

10.6.2. The Babelsberg Conference and its Consequences

An occasion to rethink the social function of law and the meaning of civil rights arose two years after Stalin's death, when his successor Khrushchev revealed part of the crimes of the Stalinist system of violence at the 20th Party Convention of the Communist Party of the Soviet Union (CPSU) in 1956. During the ensuing unrest within the system, some younger staunch Marxists hoped especially that now jurisprudence and legal practice could be liberated

from Stalinist deformation, in the name of the original Marx and true socialism. A critical point was the definition of law as a mere political instrument, or as a measure of state action, with the resulting questions of the legal position of the individual and of a body of administrative judiciary decisions based on subjective rights. All attempts at reform in East Germany, however, were immediately, decisively and mercilessly crushed by the ruling SED under Walter Ulbricht. The specially organized and carefully scripted "scientific" conference held in early April 1958 at the German Academy for Constitutional Law and Jurisprudence "Walter Ulbricht" in Babelsberg served as a forum for the public and explicit condemnation of anyone suspected of "revisionism," i.e., bourgeois, formalistic legal thought (see *Staats- und rechtswissenschaftliche Konferenz in Babelsberg am 2. und 3. April 1958, Protokoll*, 1958; Eckert 1993; Berlin 1994, 59ff.; Mollnau 1991, 236ff.; Caldwell 2003, 57ff.; Klenner 1992, 612ff.; 2005, 291ff.; Güpping 1997). For the legal scholars thus chastised, party-internal disciplinary measures followed, including ousting from academic chairs and lecturer positions. The intimidating effect, fully intended, was enormous. The main organizational consequence was the abolishment of administrative law as an area of law and as a discipline of scientific jurisprudence. The draft for Walter Ulbricht's keynote lecture on "Die Staatslehre des Marxismus-Leninismus und ihre Anwendung in Deutschland" (The political science of Marxism-Leninism and its application in Germany) had been written by Karl Polak (1905–1963) (see Howe 2002). In 1933, Polak had delivered his doctoral thesis in Freiburg/Breisgau under the guidance of Erik Wolf, entitled "Studien zu einer existenzialen Rechtslehre" (Studies toward an existential theory of law: K. Polak 1933)—a modest attempt to "dissolve" the "concreteness" of law through Heidegger's existential analysis[59]—before emigrating to the Soviet Union, escaping discrimination because of his Jewish background. After moving to the post-war Soviet zone of occupation, where he was involved in the drafting of the GDR's constitution as director of the legal department of the Communist Party of Germany (KPD) and the Socialist Unity Party (SED), he started teaching in 1949 as an adjunct professor at the legal faculty in Leipzig and became a founding member of the GDR's *Staatsrat*, or State Council, in 1960. His theories dominated legal thinking in actually existing socialism in Germany almost until the end of the GDR: "The applicable legal norms are […] invariably only an expression of existing circumstances, they do not exist outside of the state's power, but instead are a function of this power. Therefore, they can never be designed as its yardstick or, even more, restraint" (K. Polak 1948, 55; my translation). "The term '*Rechtsstaat*' (rule of law, or constitutional state) is […] completely devoid of meaning" (ibid., 57;

[59] There is a certain irony in the fact that two years later, Polak was to accuse Carl Schmitt of "close imitation of Heidegger's fashionable existential philosophy" (K. Polak 1968, 53ff., 70 n. 4; my translation).

my translation). The importance of human rights in 1789 lies only in the fact that they were "revolutionary catchwords," not in their entirely bourgeois content, which supported the development of capitalism. In truth, "socialism [is] […] the concept that realizes human rights; and human rights are […] only realized to the extent in which socialism becomes reality" (ibid., 59–60; my translation).

The Babelsberg Conference was particularly harsh in its judgment of the legal philosopher Hermann Klenner. After studying law in Halle, Klenner, born in 1926, had been appointed lecturer in 1951 and professor in 1956 at Berlin's Humboldt University. His writings had been suspected of attempts to de-Stalinize jurisprudence (a science to whose Stalinization he had previously "contributed not insignificantly," as we have already seen: Mollnau 1993, 35). Klenner's essay in the anthology commemorating the 40th anniversary of the October Revolution (1957), *Zur ideologischen Natur des Rechts* (On the ideological nature of law: Klenner 1957), did indeed contain "offensive material" (ibid., 84, 87, 93, 97, 100). In his comparison of bourgeois and proletarian revolutions, the "Great October" is not the only one to emerge in a shining light. According to Klenner, law is a yardstick for the reality content of the great design, Marxism the heir to bourgeois Enlightenment and Vyshinsky's criticism of Pashukanis "exaggerated" and "distorted." An added barb presumably lay in the fact that Klenner had left no doubt about his intellectual superiority to the Party leaders. Klenner lost his chair and was ordered to redeem himself through practical service as a village mayor in the Oderbruch area; however, in 1965 he was allowed to return to scientific life as a professor at the Academy of Economy in Berlin-Karlshorst, and in 1967 he became director of a working group on political and legal theory at the Academy of Sciences. During the rollback after the crushing of the "Prague Spring," he again lost this position, but was given the possibility of working at the Academy's Institute of Philosophy. This was a kind of "leave of absence" which Klenner used to launch an immense journalistic output. In this manner, he became a spokesman of jurisprudence in the GDR during the 1970s and 1980s, representing the GDR at scientific congresses and before the UN Commission on Human Rights (Güpping 1997, 170). Since he enjoyed travel privileges, he attended the conferences of the International Association for Legal and Social Philosophy in West Germany since 1966, where he had friendly relations with Werner Maihofer, who dedicated a two-volume *liber amicorum* to him for his 70th birthday, which he edited together with Gerhard Haney and Gerhard Sprenger (Haney, Maihofer and Sprenger 1996).

Klenner's first major publication after his "banishment" was *Studien über die Grundrechte* (Studies on basic rights: Klenner 1964) in 1964. Because of the ongoing competition with the Federal Republic of Germany and its "bourgeois constitution," the topic was politically explosive. This fact, combined with the author's personal experience, make it understandable that the text,

with its political slogans, toes the party line: It remains an interesting historical document, but in terms of jurisprudence, it is worthless. Some samples shall suffice as illustration: Socialist basic rights are proclaimed to be "state means of controlling the mobilization […] of the masses on their way to their self-liberation" (ibid., 54; my translation). Thus, individual liberty is not realized by the individual, but "through the state" (ibid., 98; my translation). There is no "liberty of the citizen from the state" in socialism; that would spell "arbitrariness and anarchy" (ibid.; my translation). In more concrete terms: Since the state has become a "lever of progress" in socialism, a Western-style right to freedom of opinion would constitute "irresponsibility of the individual towards the development of society, and thus his own, clad in the shape of a legal norm" (ibid., 114; my translation). The point of the freedom of opinion in socialism is not a plurality of opinions, but the crystallization of the one "*correct* opinion" (ibid., 113; my translation). Consequentially, this one correct opinion of Marxist legal theory also underpins the critique of "bourgeois legal philosophy" which Klenner published in 1976 under the title *Rechtsphilosophie in der Krise* (The crisis of legal philosophy: Klenner 1976). Since Marxist legal theory—unlike all other legal philosophies—did not "mirror" the interests of a class of exploiters, according to Klenner, it had a "scientific character throughout" and thus refused to join "the game of dialogical pluralism" (ibid., 20ff; my translation). Instead, it set out to expose the flowering of legal philosophy in the Federal Republic of Germany from the early 1960s to the mid-1970s as a "fake flowering," i.e., expression and element of a lasting crisis of capitalism (ibid., 9). Therefore, legal philosophy was obliged to offer a justification theory for the exercise of bourgeois power in an "apologetic and demagogical function," but also to contribute in a "direct administrative and controlling manner" (ibid., 15ff.; my translation). The second remark is obviously aimed at the blossoming of methodological literature, already discussed above. Its supposed connection with "imperialism," however, remains in the dark. Klenner then proceeds to measure legal *topics*, system theory and legal hermeneutics, but also—somewhat anachronistically—Kelsen's pure theory of law and finally, extensively and sharply, Maihofer's realistic jurisprudence, by this one ideological yardstick. Unsurprisingly, given the goal, the result owes less to scientific differentiation than to ideological leveling. At least, however, readers in the GDR were able to learn something about the ongoing legal-philosophical discussions in West Germany, especially since the volume contained excerpts from original texts by Viehweg, Kelsen, Luhmann, Arthur Kaufmann, Hassemer, and Maihofer (ibid., 135ff.). During Stalinist times, such would presumably have been unthinkable. Now, the censor's office judged the additional inclusion of two decisions of the party conference of the DKP (a West German successor organization to the KPD after the latter had been banned by the Federal Constitutional Court, a party which, however, was almost completely ignored in West Germany) to be sufficient.

There are several—objective—reasons for Klenner's tackling the problem of human rights again by writing a further book in 1982 (Klenner 1982). Upon joining the United Nations, the GDR had signed the UN Charter in 1973. Of course, however, in no way did this result in an internal implementation of the protection of human rights according to international law, as they are generally understood. In the meantime, though, political and moral pressure mounted in 1975 when the GDR signed the Helsinki Accords of the CSCE, which included a commitment to respect human rights and basic liberties, including the freedom of thought, conscience, religion and conviction. In 1977, the new US President Jimmy Carter began his worldwide human rights campaign. Suddenly, Klenner's Stalinist, brutally anti-liberal answer of 1964—that in socialism, the freedom of the individual is realized through the state—was no longer sufficient. The defense of the real-socialist position now consisted primarily in declaring the concept of human rights to be historical and relative, secondly of a polemic against its supposed abuse in West German domestic politics and by the imperialistic and interventionist foreign policy of the USA, as well as thirdly, and finally, in a new, much more differentiated attempt to "socialize" the concept of human rights. Only this last aspect is of any interest here. In a fourth argument, first of all the class standpoint is affirmed: (1) Basic rights under socialism are not a class-neutral concept of freedom and equality, not a freedom of laissez-faire (ibid., 130ff.); (2) therefore, at the same time socialist basic rights are basic obligations (ibid., 135); (3) socialist basic rights are products of the socialist revolution and society, and therefore (irrespective of possible continuities) derived from them, individually. Paraphrased in "bourgeois terms," this means: There is no original basic right, and no system of basic rights. In politically clear terms: There is no common heritage of the constitutional state (ibid., 131). (4) According to socialist understanding, human rights justify a revolution, but not a counterrevolution (ibid., 132). This is followed by a correction of the Stalinist hypothesis of the realization of individual freedom by the state which is clear, but comes much too late: "The self-determination of individualism is not an alternative to, but the condition of the self-determination of a people (and vice versa). Civil rights do not destroy a state's sovereignty, but strengthen it; in its turn, state power of socialist quality requires and guarantees functioning civil rights" (ibid.; my translation). Therefore, Klenner opines that the system's main direction of development points to "the further expansion of basic rights and an increase in their level of realization" (ibid.; my translation). He cites three indicators for this: (1) Instead of leveling individual interests and needs, the need for and even "enjoyment of individuality should be protected" (ibid., 133; my translation); (2) against his previously held conviction, it is not law that "shapes" human beings, but "with the help of law, man also shapes himself" (ibid., 134; my translation); (3) the theory of the socialist unity of "state and people, society and individual" and the resulting uselessness of the differentiation between objective and

subjective rights has been revealed as "untenable." Therefore, violations of basic rights by the state are imaginable. In order to redress such violations—this supposedly being merely a question of expedience—apart from the petition system, judicial control could be employed, but not exclusively, since Montesquieu's theory of the division of powers could not be binding for any socialist, due to the socialist principle of democratic centralism. At least, this reference to Montesquieu's theory of the division of powers sounds somewhat more respectful than his previous assessment of it as "paltry," made at a time when Klenner was still out to disqualify Montesquieu's theory of the division of powers politically, by formally reducing it to a "legally regulated division of competencies," in order to protect anti-liberal "democratic socialism" (Klenner 2002, 97ff.; my translation).

Be that as it may, all this has long become history from which legal philosophy can reap no lasting insight. The case is different for the great number of Klenner's works on the history of legal thought, which are marred only by repeated relapses into ancient and somewhat stale polemics, due to the frustration of the disillusioned ideologue. In these writings, he used Marxism in its original, heuristic function as a path to insight that is critical of ideologies, sometimes somewhat idiosyncratically, but certainly fruitfully. A recent anthology of his essays, published in 2009 under the title *Historisierende Rechtsphilosophie* (Historicizing legal philosophy: Klenner 2009), is an impressive witness to that.

10.6.3. Remigrants from the West

We have already discussed Ernst Bloch's Marxist rehabilitation of natural law as a promise for the future traceable in the past; the same goes for the echo which *Naturrecht und menschliche Würde* found but only in the West. For in 1961, when the book was published in Frankfurt/Main (and the Wall was being built in Berlin), Bloch, the famous author of a great philosophy of hope (*Das Prinzip Hoffnung*, The principle of hope: Bloch 1954–1959), had long fallen from grace in the GDR. To East German Marxism, Bloch's metaphysical proclivities and his exploration of the relations between Christianity and socialism were not acceptable (see Münster 2004).

Born in 1885 as the son of a Jewish railway employee in Ludwigshafen, which he experienced as a workers' city in contrast to the feudal-bourgeois Mannheim on the other side of the Rhine, after graduating from a humanistic *Gymnasium,* or high school, he studied philosophy with the minor subjects of physics, German literature and music, first with the philosopher and psychologist Theodor Lipps in Munich and later with the philosopher and psychologist Oswald Külpe in Würzburg, who represented a critical rationalism in epistemological terms. As early as his 1908 doctoral thesis on Rickert and modern epistemology, Bloch examined "that which has not yet become," fore-

shadowing his later utopian thinking. After the end of World War I, Bloch joined the KPD and lived in Berlin as a freelance author during the 1920s, but also traveled extensively, in the spirit of the anti-bourgeois *Wandervogel* movement. Shortly after Hitler seized power, he was expatriated for political reasons and emigrated to Switzerland. From 1936 to 1938 he lived in Prague. His public defense of Stalin's brutal cleansings led to the termination of several friendships, for example with Theodor W. Adorno. Shortly before German troops invaded Prague in 1939, his family managed to escape to the USA, where Bloch—adhering to the German language—wrote *Das Prinzip Hoffnung* and *Subjekt-Objekt* (Subject and object), a study on Hegel, and where news of his appointment to a chair of philosophy at the University of Leipzig reached him in 1948. With great hopes for a new, humanistic development in German society, he moved to the newly founded GDR the following year, where he also became a member of the Academy of Sciences and received the GDR's *Nationalpreis* or National Award in 1955 as a kind of state philosopher of the GDR. However, such harmony was bound to be short-lived. After all, the first volume of his opus magnum *Das Prinzip Hoffnung* had been available since 1954. It made obvious that Bloch was anything but a dogmatic Marxist, and was instead deeply attached to his humanistic ideas of freedom. At the same time, however, the revelations of the 20th Party Convention of the CPSU in 1956 had led to a wave of repression, fuelled by the fear of the ruling party, exacerbated by the experience of the workers' revolt in 1953. The wave gripped not only Bloch, who was forced to accept emeritus status in 1957 for political reasons (and not because of his age) and no longer allowed to lecture, but also a circle of his critical students.[60] When the Wall was built in 1961, Bloch failed to return to the GDR from a vacation in the West, and accepted a guest professorship in Tübingen.

One reason for the Party's criticism of Bloch was a lecture he gave in 1956 on the occasion of the 125th anniversary of Hegel's death, which was interpreted as an attack on the foundation course in social sciences, containing a derogatory remark ("*Schmalspur*," indicating low quality). The main motivation, however—similar to the Klenner case—was a fear of "bourgeois" legal thinking, i.e., mainly the abandonment of the concept of class struggle, and in addition, the defense against anything viewed as idealistic metaphysics and covert religious teachings. All this was exacerbated by fury at any demonstration of intellectual superiority. These motives are named more or less explicitly in a 1957 anthology documenting the witch-hunt against Bloch instigated by the SED leadership at the Institute of Philosophy of the University of Leipzig: *Ernst Blochs Revision des Marxismus. Kritische Auseinandersetzung marxistischer Wissenschaftler mit der Bloch'schen Philosophie* (Ernst Bloch's revision of

[60] Among them was Gerd Irrlitz (1935–) for example, who went on to become a professor of philosophy in Berlin.

marxism: A critical study by Marxist scientists with Bloch's philosophy, Horn 1957). The 14 contributors arrived at a "unanimous condemnation" of Bloch's philosophy of hope and lamented—highly significantly—its "pernicious influence." The tone was set by the first article, an impressive example of the Party's philosophical simplemindedness: *Ernst Blochs Hoffnungsphilosophie: eine antimarxistische Welterlösungslehre* (Ernst Bloch's philosophy of hope: An anti-Marxist theory of global salvation, Gropp 1957; cf. Gramm 1987, 138ff.).

The GDR career of another prominent remigrant from the West, Arthur Baumgarten, on the other hand, was outwardly smooth. His biography made him nearly unassailable: He had voluntarily given up his chair in Frankfurt in 1933, accepting personal losses as a consequence, had emigrated to Switzerland, where he morphed from a liberal to a socialist, had participated in the founding of the Swiss Communist Party (*Schweizer Partei der Arbeit*) and had left Switzerland in 1948 for the GDR, which, however, he was free to leave at any time, thanks to his Swiss passport (cf. Naucke 1989, 136ff.; K. Polak 1963, 553ff.; Klenner and Oberkofler 2003; Irrlitz 2008; M. Kaufmann 2009, 87ff.). Furthermore, since he had remained a member of the Swiss Communist Party and had not joined the SED, he was not subject to its party discipline. Arthur Baumgarten, born in 1884 as the son of a university professor in Königsberg, Prussia (today Kaliningrad), grew up in Tübingen and studied law there and subsequently in Geneva, Berlin and Leipzig. He wrote his doctoral dissertation in Berlin, supervised by the head of the "modern" (meaning: Sociological) school of criminal law, Franz von Liszt (cf. Hofmann 2009, 317). That very same year, 1909, without having submitted a habilitation thesis, he was appointed adjunct professor of criminal law and legal philosophy in Geneva, and became a full professor in Cologne in 1920. From there, he moved on to Basel in 1923. In 1929 he was appointed professor in Frankfurt am Main, where he gave an inaugural lecture ("Die Jurisprudenz im Kreise der Geisteswissenschaften": Jurisprudence among the humanities) advocating consequent empiricism in the spirit of the *Modern School* (Klenner and Oberkofler 2003, 17ff.), having repeatedly and intensively studied and published on questions of methodology (Baumgarten 1978b; 1927). That same year, he also published his *Rechtsphilosophie* (Philosophy of law: Baumgarten 1929), for which he had already laid the foundations during the 1920s. His point of departure was the conviction that legal philosophy was only possible in the context of a scientific—and to him, this meant metaphysical—philosophy of life. He conceived of it—a kindred spirit to the American empiricist, pragmatist and panpsychist William James (1842–1910), who was quite unknown at the time in Germany—as an infinitely optimistic, universalistic development philosophy of social solidarity. Therein, the realization of transcendental happiness appears as the goal of any existence, and universal happiness as the ultimate goal of the course of the world (ibid., 44ff.). According to this, God is nothing "but the universal spirit into which souls have developed, meaning that God himself

belongs to the future" (ibid., 46; my translation). The consequence for legal philosophy is that there can be no true legal order in the world as long as there is no world state. From this follows the high importance he ascribes to international law.

After Hitler had seized power, Baumgarten immediately gave up his chair before any outward pressure was applied, thus heeding his conscience, and emigrated to Switzerland with his wife, who was from Bern, waiving all claims to pensions and annuities. There, the former Basel professor was appointed to a chair for legal philosophy and general legal theory that had been created especially for him at the University in Basel. His sweeping philosophy of morality, law and history, *Der Weg des Menschen* (The way of mankind: Baumgarten 1978a), published the same year, demonstrated that the author too had long since begun his journey "from liberalism to socialism," as he himself was to describe it later (Baumgarten 1967). This 1933 work once again sketches the development of human culture as a path for humanity towards ultimate happiness, a state "in which everyone's deepest longing of the heart is fulfilled" (Baumgarten 1978a, 81; my translation; cf. 283). This is a "metaphysical goal" (ibid., 289; my translation): The "realm of the universal spirit" (ibid., X; my translation; cf. 80, 328). To Baumgarten, empiric-pragmatic epistemology and metaphysical eudaimonism in ethics do not exclude each other—in this he follows William James—as "the presentiment of a transcendental, superhumanly perfect state" remains no mere dream for those to whom that presentiment "has become a real experience" (ibid., 77; my translation). In concrete terms, common development must take the course of a global reform of the private economic order, and therefore also of international law. On the way towards the social economy that he considers unavoidable, the "experiment of Bolshevism" is an "epoch-making event in the history of the world," the "economic counterpart of the French Revolution." Although the Russian Revolution had employed many barbaric measures, he held that its idea was "profound and true" and would "ultimately emerge victorious" (ibid., 566; my translation). This conviction inspired Baumgarten to study the Russian language and to travel to the Soviet Union in 1935. Upon his return to Switzerland, he "immersed himself in the writings of Marx, Engels, Lenin, and also of Stalin," as he described it, and now "stood on the threshold of Marxism" (Baumgarten 1967, 35; my translation). With his *Grundzüge der juristischen Methodenlehre* (Foundations of legal methodology), published in 1939, he meant to "win the progressive bourgeoisie over to the transition from capitalism to socialism" through his excursion into social sciences, as he stated in retrospect in 1967 (ibid.). Indeed, in its volubility, even the Christian-metaphysical-socialistic book on the *Way of Mankind* in 1933 had already demonstrated a marked rhetorical and persuasive character. In 1944, Baumgarten was involved in the founding of the *Schweizer Partei der Arbeit* (Swiss Party of Labor). This led to his exclusion from Basel University life. The festivities for his 60th birthday

were not organized by the University, but by Basel's Workers' Association. The Swiss security authorities began to observe his activities.

After 1945, Baumgarten wished to return to Germany. There, he thought, "a new order of society" should be established, a "socialist one or an anti-fascist and democratic one that […] develops further into socialism" (ibid., 41ff.; my translation). His lectures in Southern Germany to this effect, however, were not well-received, unlike the reception he was given at his guest lectures in (East) Berlin and Leipzig. In 1948, he was appointed rector of the Brandenburg State University (*Landeshochschule*) in Potsdam. Having subsequently been appointed professor for legal philosophy and international law at Berlin's Humboldt University in 1949, he also became the director of the Institute of Political and Legal Theory there, was awarded the GDR's National Award in 1951 and became president of the German Academy of Political and Legal Sciences in Potsdam-Babelsberg in 1952.

In this capacity, he opened the infamous "Babelsberg Conference" in 1958 (which we already discussed in the previous section). Having publicly thanked the Soviet Union for crushing the Hungarian people's revolt in 1956 shortly before, and thus proven his party loyalty (Baumgarten 1956, 959), he must have appeared to its leadership as an unsuspicious party follower. As was the custom, Baumgarten began his speech with self-critical statements about the faults of the Academy's work. His recommendations for improvement, however, show that he truly and naively believed in the scientific nature of the event, and had no idea of its true objective. He earnestly declared that the main requirements for Marxist science were "independence, spontaneity, freedom of thought" (Baumgarten 1993, 42; my translation). Since the entire enterprise was so glaringly opposed to these postulates, the organizers did the only thing they could, from their point of view: They simply failed to reprint Baumgarten's opening speech in the official (!) proceedings of the conference. Even in the GDR, Baumgarten adhered to the heritage of legal culture he had brought with him, contrary to the nihilistic contempt for the normative character of law and subjective rights of the citizens displayed by the protagonists of real socialism: He advocated the constitutional state, the principle of legality, human and civil rights, the division of powers and an administrative judiciary, independence of judges and the principle of *nulla poena* as indispensable legal construction techniques, even in a socialist society.[61] He rejected the Marxist hypothesis that law was merely a reflection of the class struggle (Irrlitz 2008, 153). Any influence on the literature of political and legal theory in the GDR cannot be substantiated. The writings he published in the GDR after the age

[61] After the fact, Klenner and Oberkofler (2003, 30ff.) confirmed this. The panegyrics for his 100th birthday, however, still sounded very different: See *Vom Liberalismus zum Sozialismus* (From liberalism to socialism: Baumgarten 1984). A differentiated and striking portrait of Baumgarten's scientific statements in the GDR is offered by Irrlitz (2008, 52 ff.).

of 60 (Baumgarten 1954, 1957, 1972), of course, bear no comparison to the works he published before 1945, in the prime of his life. Ultimately, because of his international reputation, Baumgarten fulfilled the function of a mere figurehead for the GDR. In the West, only his early works on criminal law continued to be consulted (Naucke 1989, 146). During the 1920s, however, he was perceived as an important representative of metaphysical legal philosophy (ibid., 140; M. Kaufmann 2009, 98). And indeed, this was original and creative, distinguished by an unusual breadth of its scientific horizon. However, his brusque rejection of Kantianism, Hegelianism and phenomenology, and even more perhaps the religious foundation of his eudaimonistic metaphysics of "transcendental evolutionism" combined with his radical empiricism—complete with his confidence in the experimental method of psychological self-observation as propagated by William James—set certain limits to the effect of this rather idiosyncratic legal philosophy, even before the break in 1933. And after 1945, during the period of the "renaissance of natural law," Baumgarten's faith in progress—truly resembling Condorcet's—would have appeared entirely outmoded, had the view not been obscured anyway by the "Iron Curtain" and the dominant atmosphere of anti-communism.

Thus, Arthur Baumgarten lived a divided life, with two separate biographies: a very German life. And his work documents the deep rift that went through intellectual life in Germany, including legal thought, after 1945.

Part Two

The Southern European Countries and France

Chapter 11

LEGAL PHILOSOPHY IN ITALY IN THE 20TH-CENTURY

by Carla Faralli[*]

11.1. Aspects and Crises of Philosophical Positivism

Italian philosophy—and so also, by reflection, Italian legal philosophy—offers a quite composite picture in the period stretching from the latter half of the 19th century to the 20th century: The dominant trend, at least until the first decade of the 20th century, was that of philosophical positivism.[1]

By a nearly unanimous consensus, philosophical positivism is considered to have had its inception in Italy in 1865. This is the year that Pasquale Villari (1827–1919) inaugurated his academic activity in Florence with a prolusion that would become famous, *La filosofia positiva e il metodo storico* (Positive philosophy and the historical method: Villari 1866), where positivism is presented not as a new *system* but as a new *method*, one that eschews absolute knowledge and ultimate grounds and instead turns to facts and to the laws by which they are governed.

[*] I wish to thank Filippo Valente for translating this chapter into English.

[1] The term *positivism* may give rise to some confusion because, as is known, there are at least two ways in which it can be used, in reference to *philosophical* positivism or to *legal* positivism.

Guido Fassò (2001, 176–78) observes that the term *positive* in *philosophical positivism* refers to that which is given by experience as a fact. As will be commented later on, the jurists who drew inspiration from philosophical positivism accordingly developed a historico-sociological method of studying the legal phenomenon, a method grounded in observation.

The term *positive* in *legal positivism* instead refers to that which is posited or established by a sovereign authority (the *ius positum* as distinguished from the *ius naturale*). Thus jurists committed to legal positivism have studied positive (or formally valid) norms on the basis of a formalist method close to natural law and Kant that had little to do with philosophical positivism.

One who in exemplary fashion used the term *positivism* confusingly is Alf Ross, among others, who suggests the name *quasi-positivism* for 19th-century German legal positivism, this in the context of a discussion underscoring the movement's ties to natural-law theory, so much so as to propose that we regard the same movement as a sort of natural-law theory. Further complicating the matter, and in a highly questionable move at that, Ross sought to coopt the expression *legal positivism* so that it would designate the legal realist conception of which he viewed himself as an exponent. See Ross 1963; compare the observations that Pattaro (2005) makes in the first volume of this *Treatise*.

To remove all ambiguity, I make it clear from the outset that the term *positivism* will always be qualified in this chapter by the modifier *philosophical* or the modifier *legal*, depending on context.

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In the years following Villari's essay, philosophical positivism consequently took root in Italy not as a definite school of thought but as an attitude, one that can be described as antimetaphysical and realistic. An effort was begun to go back and identify the precursors of this attitude in the history of Italian culture, and they were found in Galileo Galilei and Giambattista Vico, and more recently in Gian Domenico Romagnosi and Carlo Cattaneo.[2]

The salient characteristic of this first generation in the development of Italian philosophical positivism appears to be its rejection of dogmatism and a striving for system. The idea, in other words, was not to set a new philosophical creed against the old systems, but to offer a critical-scientific approach to the moral, social, and historical sciences, this by analogy to what the Galilean approach did with respect to the natural sciences.

A turning point for Italian philosophical positivism came in the 1880s. The symbolic watershed year was 1881, when Roberto Ardigò was appointed professor of history of philosophy at the University of Padua, and when a journal was founded in Milan at the initiative of Enrico Morselli (1852–1929): It was titled *Rivista di filosofia scientifica* (Journal of scientific philosophy) and it would last for ten years (until 1891), during which time it gathered the most significant contributions of Italy's philosophical positivists, becoming the movement's official organ.

These two events paved the way for the development of philosophical positivism, a system that had gained a foothold in transalpine Europe several years before, taking on different shades and colours, and acting as an ideological beacon guiding much of the bourgeois intelligentsia. Italy was a latecomer in this regard: Its backward industrial fabric, and more generally its sluggish modernization process, did not work in favour of a philosophical positivist movement, which accordingly did not give rise to any original developments and was substantially eclectic, looking to the different European positivisms, albeit with a specific proclivity for Herbert Spencer's evolutionism and a lesser sympathy for Auguste Comte.

As Norberto Bobbio observes with his customary incisiveness, "positivism in Italy was a philosophy with no roots in society; and for all the fervour of its neophytes and the prestige of their fountainhead, Ardigò, it wandered about without a home" (Bobbio 1990, 9; my translation).[3]

[2] In an address delivered in Pisa in 1864 commemorating the third centenary of the birth of Galileo, the same Villari (1884) argued the view that in the history of Italian culture one can detect a realist, scientific, and positive strand spanning from Galileo to Vico. For an overview of Italian philosophical positivism, see Papa 1985, Faralli 1993, Di Giovanni 2007, Bentivegna, Coniglione, and Magnano San Lio 2008.

[3] This 1990 work—*Profilo ideologico del '900* (Outlines of 20th-century ideologies: Bobbio 1990)—was first written in 1968 for the *Storia della letteratura italiana* (History of Italian literature, Vol. 9, devoted to the 20th century: Cecchi and Sapegno 1969) and has gone through several expanded and updated editions.

This phase in philosophical positivism would not last much, however, since evolutionism soon revealed itself to be a *metaphysics* rather than a method: It led to superficial syntheses of scientific knowledge and to a widespread effort to establish evolutionist connections unsupported by empirical findings or by any deep investigation.

From the last decade of the 19th century to the first of the 20th, the crisis of philosophical positivism as both a system and an ideology became increasingly apparent. Contributing to this crisis were external factors that historians of philosophy have variously found to lie in the rise of Marxist culture (tending to move away from the ideology of philosophical positivism), the irrationalistic wave, the neocriticist reactions, and above all the advent of idealism. But the reasons for the crisis were primarily internal, to be sought in the involution of the positivist philosophy—its turning in on itself and its shutting out of external influences—with its fascination for grand syntheses and its inability to tackle the concrete problems that reality lays before us.

And so, using Bobbio's effective metaphor, "idealism in truth killed a moribund creature, not granting it the benefit of a slow agony" (ibid., 10; my translation).

11.1.1. The "Humanist-Historicist" Soul of Philosophical Positivism in the Legal Domain[4]

This course of events that philosophical positivism went through is reflected as well in the philosophy of law: Here, too, philosophical positivism was initially embraced as a new method by which to approach the legal phenomenon, a historico-sociological method reprising and assimilating motifs deriving in part from Vico—depicted as the precursor of philosophical positivism for having sketched out a theory that could be brought closer to sociology—and in part from the historical school, viewed as having anticipated philosophical positivism mainly because, in contrast to certain abstract Enlightenment ideologies, it conceived law as an aspect of a people's life and culture, and so as proceeding in tandem with the evolution of such life and culture.

Two thinkers by whom this orientation is paradigmatically represented are Giuseppe Carle (1845–1917) and Luigi Miraglia (1846–1903).

The former expounded in his chief work, *La vita del diritto nei suoi rapporti colla vita sociale* (The life of the law in its relation with social life: Carle 1880), a philosophy of the history of law where he filled with a rich stock of

[4] Eugenio Garin identified two "souls" or veins in philosophical positivism: On the one hand was a "humanist-historicist" soul, drawing inspiration from Villari's 1865 "manifesto" and geared toward applying the historical method to the human sciences; and on the other hand was a naturalistic soul, which was instead geared toward applying evolutionism (see Garin 1980).

historical material the scheme drawn from Vico's *De uno* (Vico 1974). The latter, also following the lead of Vico, came to the conviction that law should be the object of a science at once historical and philosophical, and he accordingly folded a copious amount of ethnological material into his *Filosofia del diritto* (Philosophy of law: Miraglia 1885).

But the best fruits of this effort to stay true to philosophical positivism, received as entailing a commitment to leave behind the traditional themes of metaphysics and to adhere exclusively to observable and documentable data, came from those authors who devoted themselves to comparative-historical inquiries into ancient law, as was the case with Biagio Brugi (1855–1935)[5] and Pietro Bonfante (1864–1932),[6] or to sociological, psychological, or ethnological inquiries laying the groundwork in Italy for the development of the social sciences, which had never flourished—"eking out," as Bobbio remarks, "a meagre existence in the looming shadow of the sterile and presumptuous philosophy of the Italian schools" (Bobbio 1990, 10; my translation; cf. Treves 1983a, 1983b)—but which were now being encouraged in their development by philosophical positivism itself, and which accordingly came to be regarded as capable of usefully contributing to an understanding of the factors accounting for the development and transformation of law.

I will bring two examples in this regard, with reference to psychology and ethnology.

[5] Brugi was trained in Pisa under Filippo Serafini (1831–1897), a follower of the German historical school, and spent a period specializing in Germany under the guidance of Savigny's last direct pupils. Brugi regarded the historical school as having specifically anticipated the positivist method in three respects: By drawing a full and real distinction between law, on the one hand, and the statutes, on the other; by accounting for legal phenomena on the basis of their connection to all other aspects of a people's conscience and social life; and by looking to history as the force explaining the way legal principles evolve (see in particular Brugi 1883).

In his many works (in which regard see Marino 1980) Brugi offered significant examples applying the historico-sociological method. Proceeding from the premise that every legal fact is a social fact, and that law *does not* and *cannot* resolve itself into pure formal logic, he argued that jurists must pursue two lines of inquiry, with a historical investigation, on the one hand, and a direct observation of facts, on the other; in so doing, they must avail themselves of all the sciences that study the law, society, and the state in their natural relations, for only the social sciences can enlighten the jurist.

[6] From the very outset in his *Storia del diritto romano* (History of Roman law), Bonfante (1923b) says that the evolutionary principle originated with the historical school, and only later was it applied in other areas of study, such as biology, sociology, and economics.

In his inquiries into the origins of property, obligation, family, and inheritance, he used a method which on several occasions he called "organic" or "naturalistic," and which, in his own words, consists in "inquiring with the legal institutions themselves to discover the secret of their own origins and of their own most obscure phases," this by singling out their structure and function. Indeed, as he argues, "the development of legal institutions is inherent in their always adapting their own structure to serve new functions [...]: Outworn institutions die out when the function they serve is no longer useful, and new functions can give birth to new institutions" (Bonfante 1923b, 9; my translation; cf. Bonfante 1917).

As is known, the psychological approach in the legal sciences traces back to John Stuart Mill and Johann Friederich Herbart, and indeed it was the latter's disciples—Georg Waitz, Hermann Steinthal, and Moritz Lazarus—who originated the scientific approach in psychology, an approach whose main exponent was Wilhelm Wundt.[7] In Italy, it was above all Vincenzo Miceli (1858–1932) who upheld the importance of this approach in philosophy of law, convinced that "a discipline must take an approach that in some way reflects the nature of the phenomena it is concerned with, the object of its study, and since legal phenomena owe their nature primarily to the facts of psychology, the philosophy from which to approach such phenomena must prevalently be psychological" (Miceli 1903, 23; my translation).[8]

For Miceli, the first and fundamental task of the philosophy of law as a positive discipline was to link law to social phenomena, so as to seek therein its own explanation and its reason for being; only in this way would the philosophy of law be able to rise to the level of those disciplines whose basis lies in an objective observation and constatation of facts. Like every other social phenomenon, law can only be traced to a single psychological phenomenon—that of belief—which in a certain way makes up the warp and woof of social relations, and by operation of which the rules governing the conduct of individuals in society are determined.

Belief operates at every level in the life of law, regardless of how it manifests itself: As custom, as statutory law, or in the form of rights and duties. Custom, for example, is nothing if not a habit that gains the status of law in virtue of a belief that that mode of conduct is obligatory; statutory law presupposes a belief in a constituted power legitimately empowered to enact law; compliance with the law is grounded in the belief that noncompliance will be punished by the powers in charge, and to the extent that this belief should waver—whether because punishment is not regularly dispensed or because the culprits cannot be found—so will compliance with the rules of law dwindle.[9]

It was not just the philosophy of law that embraced the psychological approach in Italy, owing especially to the work of Miceli, but also (in a lesser

[7] On Wundt, see also Section 3.6 in this tome.

[8] Miceli taught constitutional law at the University of Perugia, where from 1889 to 1901 he also taught philosophy of law, succeeding to the chair held by Icilio Vanni. He subsequently also taught at the Universities of Siena, Palermo, and Pisa. Among his most relevant works on the psychological approach to legal philosophy are Miceli 1899, 1902, 1905, and 1914.

[9] It is worth noting that claims akin to Miceli's remarks about belief can also be found in Scandinavian legal realism, especially in the work of Alex Hägerström: See Chapter 13 in Tome 2 of this volume.

degree) to that of Icilio Vanni (1855–1903),[10] Alessandro Levi (1881–1953),[11] and Alessandro Groppali (1874–1959):[12] The approach can be seen reflected as well in private and public law, especially in criminal law. The principles of philosophical positivism in general, and of the psychological approach in particular, informed what came to be called the positive school of criminal law, this in contrast to the so-called classical school, whose working ideology was firmly grounded in natural-law theory.[13] For the exponents of the positive school—such as Cesare Lombroso (1835–1909),[14] Enrico Ferri (1856–1929), and Scipio Sighele (1868–1913)[15]—a criminal is such by reason of external causes of an anthropological, psychical, or sociological nature. Thus, in *I nuovi*

[10] In a 1900 essay (Vanni 1900) summarizing the orientations already expressed in other works, Vanni argued that the sociopsychological investigation cannot be severed from a historical study, since legal institutions are a product of generative forces that lie and operate at deep strata, and they come to surface only upon completion of a process that is essentially psychical. Just like other rules of conduct, legal norms are an expression of ideas and feelings, for which reason if we are to trace out the formation of law we must also look to the psychical activity of those forming a community. The problems presented to psychology are those of determining in what sense the law is to be understood as a product of the social consciousness, in what ways and forms this consciousness acts on the law, and how legal institutions relate to their respective idealities. If psychology is to solve these problems, Vanni thought, it will have to chart the course of a rigorous realism, accompanied and supported by an observation of historical data and by a keen legal sense, so as to avoid the risk of indulging in metaempirical flights of fancy and conjure up a world inhabited by collective psyches, or by souls animating races, groups, and crowds.

[11] Alessandro Levi was trained under Biagio Brugi, from whom he gained an appreciation of the role the psychological method plays as a support in the historical study of law. In a 1907 address delivered at a conference of the Italian Philosophical Society, Levi (1908) made the case that a modern philosophy of law seeking to know what the law *really* is—or what its concept and its ideal are—should never move beyond the boundaries of experience: For a deeper understanding of the *concept* of law, we must remain anchored to experience itself; likewise, its *ideal* cannot be investigated without taking history into account or, for that matter, without resorting to "that fundamental discipline which is psychology."

[12] Alessandro Groppali rested his entire legal philosophy on the idea that law "is a psychocollective phenomenon, in that it can at once be considered as the resultant of various conflicting social forces and as the average product of the ideas, emotions, and passions common to a given group of individuals" (Groppali 1906, 233–4; my translation).

[13] The main representatives of this school are Giovanni Carmignani (1768–1847), Francesco Carrara (1805–1888), and Pellegrino Rossi (1787–1848).

[14] Lombroso is considered the founder of criminal anthropology, with his three-volume work Lombroso 1876 (republished as Lombroso 1887 under a different title), where he expounds his so-called physiognomic theory. He worked from the premise that we should study not so much the crime itself as the criminal, considering that the crime is nothing but the manifestation of a criminal makeup inherent in certain individuals having specific psychosomatic features. These features will thus have to be anthropomorphically studied so as to figure out the link that ties them to different crimes.

[15] His best-known work—*La folla delinquente* (The criminal crowd: Sighele 1891)—resonated widely not only at home but also abroad: Four editions of it came out in Italy, the last one in 1910 under the title *I delitti della folla* (The crimes of the crowd); and it was translated into five languages, namely, French (1892), Spanish (1893), Russian (1895), Polish (1895), and German (1897).

orizzonti del diritto e della procedura penale (New horizons in criminal law and procedure: Ferri 1881),[16] Ferri spoke not of a criminal's moral responsibility but of social and natural responsibility, and he accordingly understood punishment not as a device by which to punish intentional wrongdoing but as society's physical reaction to an act that has shaken up its order, in precisely the same way as illness is an organism's reaction to the behaviour that threw it off balance.

The other example previously mentioned concerns legal ethnology, a discipline associated with such eminent thinkers as Jakob Bachofen, Lewis Henry Morgan, Henry Sumner Maine, and Albert Hermann Post, all of them sources that Giuseppe Mazzarella (1868–1958) looked to as he set out to write an impressive corpus of contributions on the history of primitive peoples, and especially on the history of ancient Indian law, a study that barely finds any other parallel in Italian culture.[17]

Mazzarella presented his own ethnographic work as a methodological response with which to overcome the perceived limits of Post's thought. Indeed, it was Mazzarella's view that, as much as ethnological research in law found its highest achievement precisely in Post's work—owing both to the sheer amount of material his work is based on and to the advances it made in furthering our understanding of law's genetic-evolutionary process—Post confined himself to giving a merely *descriptive* account of this process, never attempting to investigate the causes and the principles of legal phenomena.

It was with a view to remedying this shortcoming that Mazzarella introduced a new method, which he called stratigraphical, proceeding from the basic premise that every legal system can be resolved into simple social practices reflecting shared ideas and feelings: Just like any other living organism, institutions accrete by incorporating new, irreducible elements, and they change

[16] Another well-known work by the same author is *Sociologia criminale* (Criminal sociology: Ferri 1929). Ferri was not just a theorist but also a prominent man of politics who joined the Italian Socialist Party; so, too, in 1919 he was appointed President of the Royal Commission for the Reform of the Criminal Laws, and in 1921 he published a criminal-code project that attracted wide support.

[17] As Mazzarella himself points out in his autobiography (Mazzarella 1939), his research can be divided into four phases.

The first of these, spanning from 1899 to 1902, is marked by the study of institutions such as the ambilian marriage, trial by ordeal, and lending. His fundamental works from this period are Mazzarella 1899 and 1902, in addition to a few essays published on the *Rivista italiana di sociologia*.

The second phase, spanning from 1903 to 1908, is marked by three essays on the loan in ancient Indian law, also published on the *Rivista italiana di sociologia*, as well as by Mazzarella 1908, where his stratigraphical-analysis method is fully fleshed out for the first time.

In the third phase, spanning from 1909 to 1912, he worked out new methodological tools and carried forward his research on Indian law (in which regard, see Mazzarella 1909).

In his fourth and final phase, from 1913 on, he published his fundamental works: Mazzarella 1902–1909, 1922, and 1902–1938, along with many essays intended to introduce a lay audience to the research developed in his major works.

by virtue of certain of their components becoming extinct or being replaced. Which is to say that institutions have a lifecycle, unfolding over the course of what Mazzarella calls their genealogical period.

The stratigraphical method thus makes it possible to figure out the make-up or composition of a legal system and the function of its every constituent, as well as to trace out and predict its evolution. Mazzarella shared with most positivist philosophers the conviction that every institution's and every legal system's evolutional process unfolds on the whole as a regular and continuing progression, for which reason the social and legal formations that historically succeed one another grow more and more complex and become increasingly sophisticated at regulating individual and collective life.

Many of the previously mentioned investigations—whose guiding idea lays in correctly applying the method of philosophical positivism, and which, in the words of Eugenio Garin, represented the movement's "humanistic and historicist" soul—often failed to proceed beyond a preliminary draft stage, and failed as well to find much application; and even in Italian philosophy of law, what would end up prevailing was the other side of philosophical positivism, the one that Garin always called its naturalistic soul, namely, evolutionism.

11.1.2. Evolutionary Philosophical Positivism

The most rigorous applications of evolutionary philosophical positivism, drawing inspiration from the most representative philosopher of Italian positivism, Roberto Ardigò, are to be found in the work of Raffaele Schiattarella (1839–1902) and Salvatore Fragapane (1868–1909).

It was Ardigò's view that in the whole of reality—whether it be physical, social, or psychical—an evolutionary process unfolds moving from the "indistinct" to the "distinct": In society, this evolution proceeds from the indistinctness of prepotency to the distinctness of justice, where justice is nothing other than the exercise of power through positive law.

Positive law, in turn, is drawn into a continual struggle with natural law, which for Ardigò consists in the entire complex of what he calls "social idealities," understood as society's needs and aspirations, with respect to which positive law is always backward. And it is precisely this ongoing struggle between positive law and natural law, a struggle described by Ardigò as the "process toward the good," that makes it possible for positive law to evolve.[18]

In 1885, in *I presupposti del diritto scientifico* (The presuppositions of scientific law: Schiattarella 1885), Schiattarella sets out the canons of the evolutionary method in the philosophy of law, arguing that just as in biology and the other sciences we must distinguish science from philosophy, so must we do the

[18] Ardigò's most important works on matters of legal interest are Ardigò 1901 and 1908.

same in law. "In zoology as in botany," he observes, "the naturalists are wont to follow one or the other of two methodical processes: They will either study the genesis and evolution of organic forms [...] or they will give an analytical description of the species, just as we find them today, nice and ready" (Schiattarella 1885, 134ff.; my translation). The former method (genetic-evolutionary) is philosophical, while the latter (descriptive-analytic) is scientific. Where law is concerned, "the single steps of established law are studied with respect to their special and determining reasons," and they form the subject matter of legal science, while the philosophy of law is concerned with the genesis and the evolution of law. *Philosophy* of law cannot be confused with the *history* of law, which instead is concerned with the historical succession of legal institutions, "investigating their particular reasons, their particular circumstances, and their particular relations" (ibid.; my translation), this in contrast to the philosophy of law, whose inquiry proceeds not by analyzing the particular but by way of the general laws of evolution.

Revealing himself to be equally rigorous in observing the dogmas of evolutionary philosophical positivism was Fragapane: He, too, like Schiattarella, drew a distinction between science and philosophy. "Scientific research," he remarks in *Obbietto e limiti della filosofia del diritto* (Object and limits of legal philosophy: Fragapane 1897), "collects data from experience, arranges such data to form a hypothesis, and prepares a philosophical synthesis—the final, *a posteriori* result of any scientific research" (ibid., 13; my translation). Coherently with this general conception of the relation between philosophy and science, the philosophy of law is regarded by Fragapane as "the philosophy of the legal phenomenon, the synthesis of the relative phenomenological cognitions" (Fragapane 1899, 164; my translation):[19] It must proceed in its inquiries from the very facts of law and from the legal formations that have their place in society, and must therefore become a genetic-evolutionary study of such facts and formations.

In Fragapane's theorizing, then, as well as in that of all the positivist philosophers committed to an evolutionary approach, the philosophy of law as a "general science of all social phenomena" (Fragapane 1896, 126; my translation) was supposed to bring about an understanding of the origin and historical evolution of law. But without the support of any actual experimental or historico-comparative inquiry, it fell short of these ambitions, offering no more than a superficial construction of syntheses modelled on *a priori* schemes informed by the tenets of evolutionary theory. "Those who preach experimental research—direct, inductive, descriptive, and comparative—in an attempt to ar-

[19] In this context, and in others like it that follow, the term *phenomenology*, from Greek fainomai (to become manifest, to appear), designates a sociological type of research concerned with describing legal phenomena. Hence, the term should not be taken to refer to phenomenological philosophy.

rive at an exact understanding of social phenomena, do no more than to seek yet more evidence of evolution," wrote Fragapane (ibid.; my translation), cautioning scholars in his own time against an erroneous use of the idea of evolution, a use which (it bears mentioning) he himself did not manage to keep away from. "Such an application of a general philosophical hypothesis to the particular scientific explanation of a complex of phenomena is entirely illegitimate" (ibid.; my translation).

These words come not from a critic of philosophical positivism but from one of the strictest observers of its dogmas. And yet it seems to me that no words are more apropos if we are to understand the shortcomings of evolutionary positivism in the field of law, namely, its recognizing for the philosophy of law no more than a phenomenological task, all the while resolving the discipline into that brand of social metaphysics which was evolutionary sociology: These factors combined bring to light the speculative poverty of the approach and its inadequacy in understanding the legal phenomenon.

11.1.3. Critical Philosophical Positivism

By way of an answer to the inward-turning attitude of evolutionary philosophical positivism, there sprang up among legal scholars a number of programs that were critical in outlook and revealed, within the movement itself, the need for a new way forward: Part of legal philosophy thus cast off the evolutionary schemes and sought new avenues in an attempt to overcome all forms of dogmatism and recover the most fertile insights of the method of philosophical positivism.

This need to move beyond naturalistic-sociological determinism found expression in the thought of Icilio Vanni, who from the start, in 1888, in *Prime linee di un programma critico di sociologia* (Outlines of a critical programme in sociology: Vanni 1888), declared himself convinced of the need to impart a critical direction to sociology, for only out of a marriage between philosophical positivism and criticism could a scientific philosophy emerge worthy of its name.

For Vanni, if an alternative was to be found to the evolutionary method by taking up different insights from first philosophical positivism, the way to do so lays in Sumner Maine's historico-comparative method.[20] Vanni pointed to this method underscoring what set it apart from evolutionism. Evolutionism proceeded from the basic assumption that human activity is pretty much the same everywhere across time (this owing to the substantial uniformity of

[20] Vanni (1892) anticipates the critical reading of Maine's work that would later be offered by historiography, which rejected the view of Maine as a typical exponent of the English evolutionary school. Vanni thus brought into the foreground other themes that run through Maine's work, such as his aversion to overly rigid conceptual systematizations, his rejection of all manner of apriorism, and his appreciation of historicity as an inherent value of law.

the human intellect, and this led to a universal history, the outcome of logical operations more so than of historical analysis). The historico-comparative method instead made it possible to shed light on the history of every particular group and to consider legal institutions in view of their historical formation, in such a way as to definitely break the bond tying the study of history to absolute notions, gratuitous hypotheses, and infertile abstractions.

The crisis of philosophical positivism comes through clearly as well in a conception destined to end in fortune, a conception that Vanni put forward setting out the tasks of legal philosophy.

In *Lezioni di filosofia del diritto* (Lectures on the philosophy of law: Vanni 1904), Vanni proceeds from the premise that the philosophy of law must, as a philosophy, concern itself with the three basic problems of knowledge, being, and action,[21] and that it must accordingly investigate three research areas, the first (critical research) aimed at clarifying and determining the concepts used by legal science; the second (synthetic or phenomenological research) aimed at studying law in its evolution, and so at singling out the laws underlying the development of law; and the third (deontological research) aimed at investigating everything the law *should* ideally be. This last line of research Vanni understood as also serving a practical function, its task being to determine the ends of human action in society.

It is clear that this conception took Vanni beyond the boundaries of philosophical positivism, for which, as we have seen, no form of inquiry was legitimate except that described as phenomenological, or sociological. He thus opened the philosophy of law to a broader, more diversified range of investigation—critical and deontological research—absent which phenomenological research would, in his judgment, reduce itself to a passive and sterile observation of what has happened and continues to happen.

Another voice criticizing evolutionism, even as he was declaring himself to be faithful to philosophical positivism, was that of Alessandro Levi, who in Padua studied under Roberto Ardigò and Biagio Brugi.[22] After the demise of a certain flat and presumptuous positivism that reduced philosophy to a mere summary of scientific data, Levi thought, anyone looking to do any positive philosophy of law anymore would have to investigate law as a psychosocial

[21] The question of the tasks of legal philosophy had emerged in Vanni 1894, which prompted the blistering reaction of the orthodox positivist Salvatore Fragapane (1897, 126ff.), levelling at Vanni the charge of taking a dogmatic, uncritical stance, since none of his assumptions are provided with any justification—and yet the very basis of any criticism lies in experience.

[22] Despite some disagreement on the overall assessment of Levi's thought, commentators are of one mind in recognizing in it an initial, thoroughly positivist phase that draws inspiration from his teachers, Ardigò and Brugi. Some hold that Levi's philosophical positivism "fades" into neo-Hegelian idealism, while others make him out to be an exponent of neo-Kantianism. Labels aside, Levi's theory is the typical expression of a critical moment in Italian culture, which was looking for new avenues to explore once the positivist experience had run its full course.

phenomenon, a phenomenon wholly embedded in society as to its origin and development and as to its value and facts. Levi argued that the philosophy of law must essentially be invested in critically investigating the experience of law in its every aspect, clarifying its sources and its content; in other words, the philosophy of law must be configured as "a theory of legal knowledge, that is, as a gnosiology of law."

These premises became for Levi the basis from which to proceed in treating some aspects of the life of the law—some of them broad, others less so—in an enterprise initially undertaken with the four essays collected in *Saggi di teoria del diritto* (Essays in legal theory: Levi 1924): This is something which he further pursued with the two editions of *Istituzioni di teoria generale del diritto* (Main concepts in the general theory of law: Levi 1934), the first published in 1934 and the second in 1937, and which would finally be set down in a definitive and systematic way in *Teoria generale del diritto* (The general theory of law: Levi 1950), published in 1950 but actually thirty years in the making, or close to that.

Among all the problems presented by the reality of law, those that Levi was most drawn to were the ones connected with the sociality of law vis-à-vis its statuality, meaning its status as an issue of the state. These are problems he solved by arguing for the juridical nature of every social system. Indeed, the fundamental concept for an understanding of law was identified by Levi not with legal *norms* but with legal *relationships*, and he argued that wherever a relationship exists among persons, that is, wherever a social aggregate exists, there also exist norms complementarily regulating their behaviour, such that any *social* system is thereby a *legal* system.[23]

This thesis, which seemed paradoxical to jurists closely adhering to legal positivism, found support in Santi Romano's *L'ordinamento giuridico* (The legal order: S. Romano 1917), which we will return to later on in this chapter (see Section 11.4).

The work of Vanni and Levi exemplifies the phase in which philosophical positivism was already past its prime and on its way to extinction, in the late-19th and early-20th centuries, a phase expressly described by its own exponents as "critical positivism." But as one of these exponents, Alessandro Groppali, cautions us, "we must be careful about this word, *positivism*, for we can easily be misconceived about it: The word refers to anything which counts as positive knowledge, and which as such stands in direct opposition to any sort of ideology, be it metaphysical, theological, teleological, conjectural, or hypothetical" (Groppali 1902, 5; my translation). The philosophy of law, Groppali went on to say, cannot turn its back on the task "that was and forever will be entrusted to it," namely, the task of "searching for the permanent essence of

[23] This thesis, previously sketched out in Levi 1911, was systematically developed in the second of the four essays on legal theory previously referred to (Levi 1924), an essay eloquently titled *Ubi societas ibi ius*.

law and pointing out the means by which to make law progress over time in harmony with increasingly elevated idealities of justice." This lent legitimacy to the deontological line of inquiry identified and advocated by Vanni, an inquiry that also concretized in the commitment to civic engagement of many jurists leaning toward philosophical positivism, who considered law a tool of innovation in the effort to solve social problems at large, and solve in particular the conflicts and contradictions distinctive to Italian society after the country's unification in 1861.

So, in summary, the history of late philosophical positivism in the study of law unfolded on two contrary fronts. On the one hand, the approach was characterized by lively discussions that, in tending to reject the warping, the derailing, and the hidden metaphysics ushered in by evolutionism, also saw an effort to revive philosophical positivism's original call to adhere to history and to the reality of facts. But at the same time, to use the words of Bernardino Varisco, "the number of those who worked at digging a grave for the philosophical positivistic approach was growing larger by the day" (Varisco 1905, 320; my translation).

11.2. The Reaction against Philosophical Positivism

Over the course of the first decade of the 20th century, in the philosophy of law as well as in philosophy at large, philosophical positivism spent itself under the thrust of a series of factors, which as we saw earlier were both internal and external, both cultural and political. As Bobbio remarked, "the polemic against antihumanistic determinism, against fallow naturalism, against gross sociological simplifications, against a naive worship of brute facts, against reducing humans to their environment came in tandem with a polemic against the reformist ideas that unsettled the established order, against the dreaded democratic expansion of the power base, against the new social classes' upward mobility, [...] against democracy and socialism" (Bobbio 1990, 14–5; my translation), in a word, against those very ideas that had been taking hold among the more engagé positivist philosophers of law.

Coalescing in the reaction against philosophical positivism were different movements whose common ground lay almost exclusively in their opposition to the deterministic and mechanicist naturalism of philosophical positivism. Among these movements, those that wound up being most influential in Italy were neo-Kantianism and, even more so, neo-Hegelian idealism, which quickly established its dominance and would last until midcentury.

11.2.1. Neo-Kantianism

At a time when philosophical positivism was still the dominant force in Italy, three works by Giorgio Del Vecchio (1878–1970) contributed to the final

downfall of this current in the philosophy of law.[24] As was previously observed, legal philosophy in Italy had already been brewing with antipositivist elements that had not found an outlet through which to develop, but with these three works—*I presupposti filosofici della nozione di diritto* (The philosophical presuppositions of the notion of law: Del Vecchio 1905), *Il concetto del diritto* (The concept of law: Del Vecchio 1906), and *Il concetto della natura e il principio di diritto* (The concept of nature and the principle of law: Del Vecchio 1908a)[25]—there began in Italy with Del Vecchio, in parallel to what was going on in Germany with Rudolf Stammler (see Section 1.3 in this tome), a movement that wound up turning on its head the framing of the philosophical problem of law, and that would then be developed into a radical extreme with the neo-Hegelian idealists. Law, in other words, came to be considered not from the standpoint of the object, as a phenomenon which thought comes to know passively, but from the standpoint of the subject, that is, in relation to the activity of human thought, an activity understood as being to a greater or lesser extent creative.

Taking issue with philosophical positivism—which in its most rigorous form, as we have seen, resolved the philosophy of law into a phenomenology of law (or a sociology of law: see footnote 19 in this chapter)—Del Vecchio took up from Vanni the threefold scheme within which to set out the tasks of law, and so he too identified for law three tasks, consisting in logical research, phenomenological research, and deontological research.

Logical research, for Del Vecchio, is meant to preliminarily establish whether it is possible to determine the concept of law: "Is it possible," he asks, to come to "an objective determination, that is, to a universally valid one, of what law is? And, if so, what are the methodological conditions of law, that is, *how* is law possible?" (Del Vecchio 1905, 12; my translation).[26]

In Kantian fashion, Del Vecchio held the universal concept of law to be logically prior to empirical legal phenomena, not in the sense that the concept is innate, but insofar as the universal is the condition for coming to know the particular: In Kantian terms, it is the transcendental condition. The concept of law, in other words, is for Del Vecchio the *a priori*, transcendental form of the experience of law, and is accordingly defined along Kantian lines as "the objective coordination of possible actions among multiple subjects, or

[24] On Del Vecchio see also Sections 1.1.3.1 and 5.1 in Tome 2 of this volume.

[25] The three works just mentioned were reprinted in a single volume under the title *Presupposti, concetto e principio del diritto* (The presuppositions, concept, and principle of law: Del Vecchio 1959). But long before that reprint, in 1914, they had been collected into a single volume in English under the title *The Formal Bases of Law* (Del Vecchio 1914) as part of the prestigious Modern Legal Philosophy Series. The volume was reprinted in New York in 1921 and 1969.

[26] Cf. Del Vecchio 1903. This work was translated into nine languages (including Japanese) and became an important conduit through which Italian legal-philosophical culture could find an international audience.

persons, in accordance with an ethical principle *determining* such actions, in such a way that they cannot be impeded" (Del Vecchio 1906, 62; my translation; cf. Del Vecchio 1903). From this definition Del Vecchio, proposing to remain on a formal level, deduced what he called the "differential traits of law," essential among which is its coerciveness, and he also deduced all the fundamental legal concepts proper to the theory of law, which thus found itself embedded within logical research, the first of the tasks entrusted to the philosophy of law.

Phenomenological research was instead configured by Del Vecchio as lying somewhere between the philosophy of history and the sociology of law. It consists in tracing out in broad outline the historical development of law, purporting to show how positive legal systems tend to gradually approximate an ideal of justice, in that there progressively emerge and concretize over time the essential prerogatives of the human person.

Lastly, deontological research, concerned with what law *should* be, takes *justice* as its object. Del Vecchio transitioned in this regard from an initial Kantian position to a Thomistic brand of Catholic natural law, by moving away from a formal concept of a person toward a more content-laden one, all the while arguing for the inadequacy of a purely formal definition of justice.

As early as 1920, in the inaugural address Del Vecchio delivered at the University of Rome, where he had transferred from the University of Bologna, he spelled out what he took to be the "general principles of law," meaning those principles that, under Article 3 of the *Preleggi* (general provisions) to the Italian Civil Code of 1865, the judge must base his decision on wherever the law is silent and there is no way to resort to analogy: These were identified by Del Vecchio as consisting of "those principles of natural legal reason which act as basic cornerstones in defining any human and social relationship" (Del Vecchio 1958c, 269; my translation).

Three years later, in *La giustizia* (Justice: Del Vecchio 1923),[27] Del Vecchio argued that justice formally construed amounts to no more than legality, and that it accordingly expresses no values, this in contrast to the expectations of human beings, who experience the law in such a way as to accord absolute weight to the need for values in the law itself.

In taking up the ideal perspective of a just state (a state framed according to justice), Del Vecchio identified the first principle of such a state as consisting in its mandate to protect the natural rights of the individual (or rather, of the person), and he accordingly rejected any theory situating the state above or beyond the legal limit defined by its inherent raison d'être, which is to bring forth justice, in that only from this mandate can the state draw its authority. In fact, any state that should act contrary to justice is for Del Vecchio nothing

[27] This is another work that found an extraordinarily welcome reception abroad: It, too, would be translated into nine languages.

short of a "criminal state" (Del Vecchio 1962). Justice is thus upheld by him as "valid and effective even in the face of a legal system that is positively in force" (Del Vecchio 1923, 168; my translation): Whenever such a state should irreparably contradict the basic need for justice, wherein lies the basis of its validity, then it becomes legitimate to "uphold natural law against any positive law that should deny it" (ibid.; my translation).[28]

A central role was played by Del Vecchio in founding, in 1921, the *Rivista internazionale di filosofia del diritto* (International journal of legal philosophy). As the presentation explains, the journal was conceived as "an exchange forum for philosophers and jurists, since they both too often ignore each other, almost as if to purposely display their mutual incomprehension, whereas both would stand to greatly benefit from casting off their old mental habits and unwarranted mistrust, thereby establishing a certain commonality in their work and an active exchange of ideas as concerns the life and the fundamental problems of law" (Del Vecchio 1921, 1; my translation).[29]

We will later see (in Section 11.3.1) what role the journal played as part of the broader effort to move toward this goal.

Also neo-Kantian was the theory put forward by Adolfo Ravà (1879–1957). Indeed, Ravà drew on Kant's distinction between categorical and technical imperatives to frame an account of ethical norms having absolute validity, as opposed to norms to be followed only in view of a specific purpose we have set for ourselves. Ruling out the hypothesis that law should belong with the former type of imperative—because law would otherwise not admit of any distinction from morals, thereby shedding all autonomy, as well as because the coerciveness proper to law is incompatible with the absolute validity of categorical imperatives—Ravà concluded that law cannot be anything if not a technical norm, that is, a norm framed in view of a given, nonabsolute end.

[28] The question of natural law emerges in numerous works. Among those specifically devoted to the question are Del Vecchio 1949, 1958a, and 1958b.

[29] For almost fifty years Del Vecchio was the lifeblood of the *Rivista internazionale di filosofia del diritto*. He initially edited the journal along with Widar Cesarini Sforza, Antonio Pagano, and Roberto Vacca, but this period only lasted until 1938, when the Italian Ministry of Popular Culture decided to suppress the journal in pursuance of the Fascist government's racial policy, since Del Vecchio was Jewish.

But thanks to Amedeo Giannini—who stepped in as editor alongside Felice Battaglia and Giuseppe Capograssi—the journal started anew in 1939 with a second series that would last until 1943, when the war forced it on a hiatus. Only in 1947 did publication resume, with a third series under the editorship of Giorgio Del Vecchio in collaboration with Felice Battaglia, Norberto Bobbio, Giuseppe Capograssi, and Benvenuto Donati. A fourth and still-running series was started in 1968, when age forced Del Vecchio to give up his role as editor.

He also founded in 1936 the *Società Italiana di Filosofia del Diritto* (Italian society for legal philosophy), serving as the society's president until 1938, the year that the Fascist regime intervened: This role as president he went back to only in 1947, when he was definitely brought back into the university.

In Ravà's best-known work, *Il diritto come norma tecnica* (Law as a technical norm: Ravà 1911), law is accordingly defined as "the complex of those norms prescribing the conduct which the participants in society must necessarily have so that society itself may exist" (ibid., 34; my translation).

Our recognizing the technical nature of law does not detract from the moral worth of law's end. "Morality," Ravà comments, "guides, illuminates, and dominates the entire life of the law, which consequently cannot be entrusted to anything other than a moral organism" (Ravà 1914, 5; my translation). This organism is the state, accordingly conceived as an "organ of law."[30]

We can see, then, that neo-Kantian philosophy of law in Italy did not stop at a formalistic position; on the contrary, it tended to fill its formalism with content. For Del Vecchio, as we considered, this content was that of natural-law theory—an approach that Italy took a renewed interest in, especially in the post-war period (as discussed in Chapter 5, Tome 2 of this volume)—whereas Ravà took this content to be that of an "idealistic" morality, as he himself described it, though without any allusion to neo-Hegelian idealism (discussed in the next section) but rather in a Fichtean sense, considering that Ravà was a great student of Fichte.

11.2.2. Neo-Hegelian Idealism

For about half a century, idealism held sway as the dominant philosophy in Italy, this through the work of two philosophers, namely, Benedetto Croce (1866–1952) and Giovanni Gentile (1875–1944), both of whom drew inspiration from Hegelian thought, though each in his own way.

As far as the philosophy of law is concerned, however, the theoretical contribution made by the two aforementioned fountainheads of Italian idealism was quite limited, this because both denied, however much using different arguments, that law and reflection on law could be recognized as having any autonomy.

Benedetto Croce, as is known, wrote many works of philosophy, history, literary criticism, and aesthetics that resonated widely in Italian culture, so much so that with the advent of Fascism they became the de facto source to look to for the entire movement opposing Fascism from a liberal standpoint. To the question of law Croce specifically devoted a short work published in 1907 and significantly entitled *Riduzione della filosofia del diritto alla filosofia dell'economia* (Reduction of legal philosophy to the philosophy of economics: Croce 1907),[31] with themes and theses taken up

[30] Ravà 1914 and Ravà 1911 have been collected into a single book (Ravà 1950). Other works by Ravà are published in Ravà 1958.

[31] A second edition of this work (Croce 1907) came out in 1926 with an appendix where objections are discussed and the theory is clarified.

two years later in *Filosofia della pratica* (Philosophy of the practical: Croce 1909).[32]

The starting point for his reflection on law lies in his view that the Spirit accounts for the whole of reality. And even though the Spirit is a single entity, this unity does not thereby rule out distinctions: First comes the distinction between theoretical and practical activity, the former concerned with *knowing* and the latter with *willing*, and then each of these two areas is in turn broken down depending on whether the object of activity is the individual or the universal. We thus have a fourfold scheme giving, in theoretical activity, two distinct moments consisting in knowledge of the individual (the aesthetic moment) and knowledge of the universal (the logical moment) and, in practical activity, willing of the individual (the economic moment) and willing of the universal (the ethical moment).

As a volitional and not a cognitive activity (consisting not in knowing but in willing), law belongs in the practical sphere, wherein it does not, however, enjoy any autonomy of its own. Indeed, as was just mentioned, the sphere of practical activity divides into the two moments of economics and ethics, and since this sphere has no other moments apart from these two, there is no choice for law but to resolve itself into either economics or ethics. So, once it is ruled out that law can partake of any ethicality—because there can be *immoral* legal actions, as well as because the distinction between law and morals has been established for centuries—and once law is determined to consist in willing a particular end, then it finds itself being absorbed back into the sphere of willing the particular (particular volition), that is, back into economics. It follows, then, that once law is thus denied any autonomy, the philosophy of law must be reduced to a philosophy of economics.

As was mentioned earlier, this thesis, set out in the short 1907 work, would be taken up two years later in *Filosofia della pratica* (Philosophy of the practical: Croce 1909), where Croce discusses at length the question of law. He denies there is anything "distinctively juridical" about law: Every law follows as such the same system, and so it makes no sense to treat juridical law separately from other laws.

Law is defined by Croce as a volitional act having as its content a series or a class of actions (Croce 1909, 346), and as such—as the volition of a *class* of actions—it consists in an abstract and hence an unreal volition (precisely because it consists in willing something abstract, namely, a class). Only where volition

[32] This is the third volume of Croce's *Filosofia dello Spirito* (Philosophy of the spirit), composed of four volumes: *Estetica come scienza dell'espressione e linguistica generale* (Aesthetics as science of expression and general linguistics: Croce 1902); *Logica come scienza del concetto puro* (Logic as the science of the pure concept: Croce 1905); *Filosofia della pratica: Economia ed etica* (Philosophy of the practical: Economics and ethics: Croce 1909); and *Teoria e storia della storiografia* (Theory and history of historiography: Croce 1917).

consists in willing a single action is it a real volition, and it is carried into effect by applying the law.

Law is located by Croce in the same position within the practical spirit as that which "pseudoconcepts" (as he calls them) occupy within the theoretical spirit. Indeed, pseudoconcepts are understood by Croce as classificatory schemes aiding memory in the task of providing real data with an orderly arrangement: "These very pseudoconcepts," he writes, "once they become an object of volition and are changed from schemes into laws, carry out an analogous function in the practical spirit, making it possible for the will to *will* in a certain direction, where *useful* action is then encountered, a kind of action that is always individualistic."

Law, then, is always, in any of its forms, necessary to action, the reason being that, however much law may be an unreal volition, it is "preparatory to synthetic and perfect volition," which takes place through the single act, this in the same way as the pseudoconcepts the sciences avail themselves of do not constitute authentic knowledge but serve the function of "supporting memory" and "aiding thought in finding its way in the multiform spectacle of the world" (Croce 1909, 352; my translation).

Also finding a place within the frame of Croce's historicism is the subject of natural law: Croce rejects the idea of a natural law as a universal code, eternal and immutable. And he further argues that natural law must not only give up its antihistory but must also cease to be law—at which point, however, it can no longer be distinguished from ethics.[33]

"So-called treatises of natural law," he finds, "are in this case nothing other than treatments (sometimes commendable ones) having *ethics* as their subject." In ethics, natural law overcomes its generality of content and its legalistic generality, thus becoming a principle of action rather than merely an abstract and unreal preceptual system (Croce 1909, 340; my translation).

The other Italian neoidealist philosopher, Giovanni Gentile, was initially a friend of Croce and worked with him. But with the 1913 publication of *La riforma della dialettica hegeliana* (Reforming Hegelian dialectics: G. Gentile 1913), a theoretical rift was opened that grew increasingly bitter with the advent of Fascism, a movement for which Gentile provided theoretical backing, and of which he therefore came to be considered the official theorizer. Indeed, it was he who penned the entry "Fascism" signed by Benito Mussolini and published in 1932 in the *Enciclopedia italiana*, where Fascism is presented as a spiritualistic, ethical, religious, historical, and anti-individualistic conception upholding "the state as the true reality of the individual." (Gentile and Mussolini 1932; my translation).

[33] In 1947, in response to a questionnaire about the theoretical problems that might have been raised by an international declaration of human rights, Croce argued that it would be impossible for such rights or needs to be expressed as anything other than *historical* rights proper to our own epoch (Croce 1952, 133–5; an English translation of this work can be found in Croce 1949).

In the 1913 work just mentioned, Gentile criticized Croce's theses, specifically objecting to his dialectic of distinct moments, in response to which Gentile set out to recover the unity inherent in the life of the Spirit. For Gentile, this unity can be recovered under the principle that the Spirit is real only in its moment of activity (whence the name *actualism* for his philosophy), and so that only the *thinking* Spirit is real: That which is thought, the *object* of thought, has no reality outside the *act* of thinking. Accordingly lacking reality, then, are God, nature, values, and the empirical selves (that is, all particular persons): None of these entities can attain any reality except through the Spirit that thinks them, thereby making them *be*.

Just as there is no real moment outside thought in action, or *thinking* thought, so is there no will outside the act of willing, that is, outside a *willing* will. In the same way as that which is thought is nonbeing with respect to thinking, so that which is willed is unreal with respect to the will in action.

In his work specifically devoted to law, *I fondamenti della filosofia del diritto* (The foundations of legal philosophy: G. Gentile 1916),[34] Gentile frames in terms of will the distinction between law and morality, holding that while morality is a *willing* will, law is a *willed* will, namely, an abstract and hence unreal will. The will, in other words, is real only as a willing will, that is, only when it *makes* law or when, in complying with the law, it likewise *wills* the law as law in actuality: In either case the will is a will in actuality, and this makes it into morality. So the will is either morality—as a will in actuality—or it lacks reality: Law is thus never real, for it is never a *willing* will but is only the abstract moment of the will.

For Croce and Gentile alike, then, law has no reality and cannot be an object of philosophy in its own right. And as we have seen, this common conclusion is something the two thinkers come to taking different paths, Croce resolving law into economics and Gentile into morality.

The attitude espoused by the two fountainheads of Italian idealism exerted a negligible share of influence on Italian legal culture in the first half of the 20th century: Philosophy, which jurists looked on as vaporous and diaphanous, high-flown and vaniloquent, went off on a tangent where it increasingly lost touch with the concrete experience of law; and legal science, for its part, increasingly took on the very empirical traits for which philosophers had faulted it, resorting to Croce, who as we saw accounted all science, in whatever form, to be merely conventional, empirical, and classificatory, and hence devoid of any value for the attainment of knowledge.

[34] This work is now published as Volume 4 of G. Gentile 1961.

11.3. The Demise of Idealism

11.3.1. Idealism and the Esperienza Giuridica *(the Experience of Law)*

The legal philosophers who studied under Croce and Gentile firmly rejected the extreme consequences these two thinkers had come to by reasoning from idealist premises, and so it was that this younger breed of philosophers set out to recover the object of study proper to their discipline (legal philosophy), an object so uncompromisingly eradicated by their spiritual fathers. The underlying premise now became that the experience of law constitutes a historical reality not amenable to being purged by any dialectic, and the period between the two world wars, that is, the 1920s and 1930s, accordingly saw in Italy an idealist attempt to recover a sphere of autonomy for law. Thus, on the one hand, a critical response took shape that challenged the philosophy of both Croce and Gentile—the former criticized for arbitrarily and artificially partitioning the Spirit into distinct moments of activity, and the latter for resolving the entire activity of the Spirit into an undistinguished morality—but at the same time the effort was very much to claim autonomy for the reality of law, arguing that some of its elements are irreducible and so that law cannot be resolved into other realities.

This critical revision of Croce's and Gentile's conceptions, involving as well a reflection on legal philosophy and legal science, revolved in large part around the *Rivista internazionale di filosofia del diritto* (International journal of legal philosophy), which as mentioned earlier was founded in 1921 by Giorgio Del Vecchio with the express purpose of becoming "an exchange forum for philosophers and jurists."

In 1922, Ermanno Cammarata (1899–1971) published in this journal an article titled *Su le tendenze antifilosofiche della moderna giurisprudenza in Italia* (On the antiphilosophical tendencies of modern Italian legal science: Cammarata 1922): It would be the start of a long and lively debate. For Cammarata, writing from an idealist perspective, "philosophy cannot be anything but self-consciousness, and since no reality is conceivable outside the Spirit itself, so the philosophy of law is self-consciousness of that ideal process whereby the Spirit takes shape as law." The primary function of legal philosophy so conceived is to train and refine "that historical sense which acts not as a formula or scheme to be applied to this or that individual problem, but as a criterion informing and even vivifying all the so-called social sciences": The sense in question is that of "the historicity of the reality of law, and the great need for it becomes evident today in the face of what seems to be the highest accomplishment in the study of law, namely, the dogmatic criterion" (ibid., 243; my translation).[35]

[35] Other works by Cammarata on the subject of formalism and dogmatics in law are Cammarata 1925 and 1936, now collected in Cammarata 1962.

The following year the eminent jurist Francesco Carnelutti (1879–1965) replied in the same journal with an article titled *I giuristi e la filosofia* (Jurists and philosophy: Carnelutti 1923), arguing that what is to blame for the inability of jurists and philosophers to understand each other is this "mixed breed we call philosophy of law." As much as jurists do not show a great deal of deference to philosophy when it concerns itself with law, they do hold philosophy in high regard when it is purely and authentically such; and yet Carnelutti drew from this observation the conclusion, all things considered, that jurists, "on account of their average stature," would do better to keep away from philosophy, since philosophy is "a thing too elevated for them to just dabble in it, treating it only in bits and pieces" (ibid., 189; my translation).[36]

The debate set into motion by Cammarata and Carnelutti seemed to set things up for a "doctrine of double truth," positing a philosophers' law on the one hand and a jurists' law on the other; but in time, as philosophers found themselves increasingly committed to bringing law closer to the concreteness of history, the debate drew the philosophers closer to the jurists, who in turn were engaged in an effort to relax the rigid formalism they had acquired from German legal positivism, an approach that was causing them to lose sight of the socio-historical reasons accounting for the norms they studied. Perhaps no one better than Widar Cesarini Sforza exemplified this effort among legal philosophers, and no one better than Tullio Ascarelli did so among jurists.

Proceeding from the philosophy of Croce, Widar Cesarini Sforza (1886–1965) published in 1929 a book titled *Il diritto dei privati* (The law of private citizens: Cesarini Sforza 1929), where he distinguished two conceptions of law: an objectivist one, where law is understood as a complex of norms enacted by authority of the state, and a subjectivist one, where law is instead understood as a complex of relationships among persons. "The legal relationship," he writes, "is truly the primitive cell and the irreducible core of every social reality." There is therefore no social reality that is not at the same time a legal reality, and this holds from the most comprehensive level, where legal relationships are directly regulated by the state's public laws, down to the level where legal relationships are established among private citizens acting on their own accord in those subject areas that neither the public laws of the state nor customary law regulates.[37]

At about the same time, the jurist Tullio Ascarelli (1903–1959) was among the first to take a stand against the then-dominant conceptualism, pointing out the need to study the actual reality of law, underscoring law's role as in-

[36] The debate sparked by Cammarata's article on the *Rivista internazionale di filosofia del diritto* drew other jurists and philosophers into that forum. Among them were Levi (1923), Bonfante (1923a), Miceli (1923), Maggiore (1926), and Perticone (1927).

[37] Cf. Cesarini Sforza 1929, 1931, 1934, and 1939 (this last work went through several revisions).

strumental to society's economic needs, and recognizing the creative function of legal interpretation.[38] Ascarelli's criticism of legal formalism proceeded on two closely connected fronts: He objected to the dogma of legalism where the question of the sources of law is concerned, and to the dogma of legal logicism on the matter of legal interpretation. As to the first front, he took up early on the study of business law, and that led him to frame the relation between law and society as one of dependence of the former on the latter. As to the second front, he always considered interpretation to be a *creative* activity—one through which law is *created* rather than just declared—and he thus ascribed to it a function as a necessary bridge between the *corpus iuris* and the changing reality.

The subject of legal interpretation is also one to which Max Ascoli specifically devoted a 1928 essay titled *L'interpretazione delle leggi* (The interpretation of law: Ascoli 1928), where Ascoli, pointing out the importance of antiformalist currents in Europe, argues that interpretation is "creation in any event," and that "no norm can have any concreteness except one enacted under the cloak of interpretation, and that among those who play a role in the world of law, only interpreters can account themselves to be legislators" (ibid., 52; my translation).

As much as the authors just briefly considered may be credited with giving the initial impetus for this process of reconciliation between legal science and legal philosophy, what made it possible to actually carry the project through to completion in Italy was the mediating work of Giuseppe Capograssi, whose theory of the *esperienza giuridica* (the experience of law) tied together, however much from a uniquely personal standpoint, the loose ends of a development that, as we saw, had been a long time in the making.[39]

Capograssi (1889–1956) developed an extraordinarily broad conception of law, understood not only as a rule or norm but also as an activity, or as experience. Hence the idea of the experience of law, an experience which Capograssi

[38] Most of Ascarelli's work has been collected in Ascarelli 1952, under a title (*Studi di diritto comparato e in tema di interpretazione*: Studies on comparative law and legal interpretation: Ascarelli 1952) that brings into focus the author's two main interests, namely, comparative law and legal interpretation. Comparative law was for him across *space* what the history of law was over *time*, and so the study of different legal systems addressed the same antiformalist concerns that pervaded his entire thought. A comparative study was recognized by him as that moment which brings out the way different legal institutions relate to their socioeconomic and moral premises, thus enabling us to grasp the concrete experience of law in its crucible.

[39] Capograssi's work can be divided into three phases: There is an early phase, in his youth, in the late 1910s and early 1920s, which resulted in two works, these being Capograssi 1919 (largely influenced by Saint Augustine) and Capograssi 1921 (where the prevailing influence is instead that of Vico); there is then the mature phase, during which his original conception was expounded, this in his three most celebrated works, namely, Capograssi 1930, 1932, 1937; and there is finally a third phase, in the 1940s and early 1950s, marked by a deep moral reflection on the evils of war and totalitarianism, as can be appreciated in Capograssi 1952.

took to include concrete experience at large, in its full breadth, and which ultimately can be identified with the whole of human experience.

The concept of the experience of law—a concept deliberately framed in loose and inchoate terms—effectively brings out the intractability and indeterminacy of the legal phenomenon, which poses insurmountable challenges for any theory attempting to reduce it to something simpler, as had paradigmatically been the case with legal positivism. And in fact the conception put forward by Capograssi captured the imagination of Italian legal culture, contributing to open it to livelier and more concrete ways of understanding law.

11.3.2. The Post-war Reaction

With the end of World War II and the fall of Fascism, so did idealism slide into that irrelevance which would bring about its eventual demise: Already crippled by the charge of having been the philosophy of Fascism, idealism was now coming under harsher and harsher criticism. This reaction took several forms, and idealism itself split into two currents, precisely as had happened with Hegelian idealism: On the one hand there emerged a Marxist line of thought—though its impact on legal philosophy was not too influential—and on the other there developed spiritualism.

Exemplifying this last current is Felice Battaglia (1902–1977), who initially adhered to neoidealism, especially in the shape it had been moulded into by Gentile, but would soon depart from it, arguing that only in relational life as supported by legal norms can there be any historicity and concreteness. It follows that law figures as an "original moment of the spirit" and so cannot be resolved into any simpler spiritual form: Law endows the makeup of the spirit with authentic concreteness, in such a way as to entail, first, alterity, understood as the relation through which we each interact with others like us; second, sociality, understood as an irreducible bilateral relationship among people; and, third, the person, understood as an absolute ethical value.[40]

It is Antonio Rosmini[41] that Battaglia looked to, colouring his thought with existentialist overtones, and in this way Battaglia came to regard the person as the metaphysical and absolute core of law: It is in the value of the person as a divine image that law is grounded, and it is from that source that law in turn derives its own value. The true expression of the value of the person is

[40] Battaglia's essential texts on law are Battaglia 1931 and his well-renowned course on the philosophy of law (Battaglia 1940–1942), a work that went through several revised and expanded editions. Some minor writings are collected in Battaglia 1972.

But law is a subject also discussed in his works on moral and political philosophy, both: the former include Battaglia 1957, and the latter Battaglia 1939.

[41] Rosmini (1797–1855), a Catholic priest open to the liberal ideals of the Risorgimento (the movement that led to the unification of Italy), figures among the main Italian thinkers of the 19th century.

given by the fundamental human rights. Condensed in these rights is the true meaning of the person, and since they concern every human being, they must be universally recognized and guaranteed. Battaglia argued on this basis for a process toward the internationalization of human rights, regarded by him as the only tool by which to guarantee respect for the person. "Human rights," he comments, "become effective when, apart from receiving recognition within domestic law, they also find a peaceful international organization watching over them. It does not suffice to proclaim them and write them into domestic law: There need to be organs and tools by which to protect them under an agreed upon constitution of all nations" (Battaglia 1946, XXX–XXXI; my translation).[42]

For Battaglia, this internationalist turn was called for not only on philosophical grounds but also for historical reasons tied to the experience of Fascism and the catastrophe that had befallen Italy with World War II—precisely the same reasons that concurrently led to the rebirth of natural-law theory, both Catholic and otherwise (see Chapter 5, Tome 2 of this volume).

Yet reaction against idealism came in another form, too, much more explicit and polemical than the ones previously considered: It was called neo-Enlightenment, a secular and rationalistic current of thought offering an alternative to both Catholic spiritualism and Marxism.

One of its protagonists was Norberto Bobbio, who observed that neoenlightenment was not so much a philosophy as an attitude and a way of thinking about the problems of humans and their history. The scholars who shared this mode of thought were a diverse bunch by training—indeed we find among their number thinkers like Nicola Abbagnano (1901–1990), whose background was existentialist; Giulio Preti (1911–1972) and Enzo Paci (1911–1976), whose allegiance was to phenomenology; and Ludovico Geymonat (1908–1991), who came from a neoempiricist experience—but they were all joined by a deep aversion to any manner of philosophical gibberish, as well as by a commitment to a cultural and constructive effort on which basis to actively intervene in a society such as was found in post-war Italy, in deep need of change.

These authors are in large part responsible for enabling Italy to look abroad and take in legal and philosophical currents of wide international scope, and this opening also involved the philosophy of law, which until the first half of the 20th century in Italy had to some extent been impervious to the influence of foreign cultures and traditions, with the single exception of Germany's.

[42] This is the second edition, updated by Battaglia himself (originally published in 1934).

11.4. Legal Positivism and Analytic Philosophy

Throughout the first half of the 20th century, the main reference point for Italian jurists was, as we saw, the formalist legal positivism coming out of Germany.

Few discordant voices emerged, but one of them was that of Santi Romano (1857–1947), who in his previously mentioned work, *L'ordinamento giuridico* (The legal order: S. Romano 1917),[43] developed an antiformalist, antinormativist theory built around the concept of an institution, a concept taken up from Maurice Hauriou but with different inflections.[44]

Romano judged "inadequate and insufficient" those conceptions on which law is thought to essentially consist in a system of rules or norms, and in contraposition to such conceptions he set out a conception of law as an order. The legal order makes up a "living whole" comprising not only norms but the underlying will, power, and force through which norms are brought into being: A legal order can thus be equated with an institution understood as a "social entity or body." As Romano puts it, "Every legal order is an institution and, conversely, every institution is a legal order: The equation between the two concepts is necessary and absolute."

Like other institutionalists, however, Romano does not offer anything like an exhaustive definition of an institution. He does note that while every institution is a social entity or body, not all social bodies are institutions. Thus, for example, even though a line of people queuing at a service window or the complex of people who play a certain game make up organizations in "a diffused state," they do not make up institutions proper. But as much as these limitations on the concept of a social body would call for a criterion to be established by which to say which forms of coexistence are institutional and which are not, Romano offers no such criterion and falls into the vicious circle that other institutionalists have fallen into as well, essentially saying that an institution is legal when it is legal.

This shortcoming notwithstanding, Romano's institutionalism did play an important role, which consisted in having called into question the dogma of the statuality of law and having upheld the principle of the plurality of legal systems.[45] As Romano himself comments, such plurality is evidence of the cri-

[43] This work met with great fortune, for it was translated into Spanish (1963), French (1975), and German (1975). There is no English translation, to be sure, but that is made up for by the extensive and accurate exposition of his thought found in Stone 1966, 516–45. Another important work that Romano wrote on the theory of law is S. Romano 1947.

[44] On Romano see also Section 8.8 in Tome 2 of this volume. On Hauriou see Section 12.2 in this tome and Section 1.1.4.2 in Tome 2 of this volume.

[45] An interesting contribution in the matter of legal pluralism comes from Antonio Pigliaru (1922–1969). In Pigliaru 1959, the Sardinian jurist lays out the normative system in effect among a pastoral people of the Barbagia region of Sardinia: This was a customary system based on an oral code that, far from interlacing with that of the Italian state, stood in contrast to it.

sis of the modern state, a crisis that "involves precisely the tendency of social groups to each form for itself an independent legal circle."

Fascism, by contrast, emerged as an ethical state (we saw how it came to be so conceived owing to Gentile), and as such it coopted all intermediate communities, absorbing them into itself, at the same time as it made an instrumental use of the legal-positivist principle that sets out the supremacy of the law of the state, using this as a tool by which to reinforce power and curtail individual freedoms.

This idea is echoed in the words of Alfredo Rocco (1875–1936), who figured among the most influential jurists of the Fascist period, and who also rose to prominence as minister of justice. "For Fascism," he wrote in 1925, "the preeminent problem is that of the law of the state and that of the duty of the individual and the classes. The rights of individuals are no more than a reflection of the rights of the state [...]. As is the case with all individual rights, so is freedom a concession of the state" (Alfredo Rocco 1938, 1103; my translation).

Infused with these ideas, Alfredo Rocco wrote the fundamental Fascist laws of 1925 and 1926, and he arranged for the drafting of the codes of criminal law and criminal procedure enacted in 1930. These were in large part the work of his brother, Arturo Rocco (1876–1942), an exponent of an approach to criminal law that came to be called technico-legal and adhered to legal positivism in its the strictest form, thus taking a critical attitude to the positive school of criminal law (see Arturo Rocco 1910). And so, as much as it would be a mistake to conclude that legal positivism was the legal theory of Italian Fascism, it certainly is the case that the legal-positivist reduction of the entire law to the law of the state proved useful to Fascism in view of its goals.

Despite the criticism from natural-law theory and antiformalism, legal positivism in Italy outlived Fascism. But this is something it did sloughing off the state-centred conception of German derivation and opening up to Kelsen's refined revision of legal positivism. And even though it was not until the 1950s that Kelsen's thought became influential in the Italian debate on legal philosophy, when Norberto Bobbio became its foremost interpreter and popularizer, some of Kelsen's writings had begun to circulate as early as the 1920s and 1930s, especially through the initiative of Renato Treves.

Renato Treves (1907–1992) studied in Turin under Gioele Solari, taking an initial interest in the neo-Kantianism of the Marburg School, which as is known had a profound influence on Kelsen.[46] Treves met Kelsen during a "memorable" study trip to Germany in 1932 (a trip he was urged to take by his teacher, Gioele Solari) and forged with Kelsen a relationship through which he would become the Italian translator of Kelsen's *Reine Rechtslehre*.[47]

[46] On the Marburg School, see Treves 1934a; on the influence the school had on Kelsen, see Treves 1934b.

[47] The earliest translations of Kelsen's work began to circulate in Italy in the latter half of the

Kelsen's pure formalism is something that Treves had always kept at a distance, having developed his own a conception of law as a complex sociocultural phenomenon. Treves held that law cannot be reduced to the world of natural phenomena or to that of pure ideal values, and that it instead belongs to the sphere of culture—the sphere of life and human activity—where those values become effective and those natural phenomena become significant.[48]

These premises would lead Treves to found in Italy the sociology of law, understood as a social philosophy or as a doctrine of life and history, in contraposition to the philosophical-positivist conception, which as we saw reduced sociology to a naturalistic science and resolved into such a science the philosophy of law.[49] Kelsen himself did not deny the legitimacy and importance of a sociology of law so understood, and Treves continued to measure himself against Kelsen, taking Kelsen's thought into account in much of his sociological work.[50]

As earlier remarked, from the 1950s onward in Italy, Kelsen's name became closely bound up with that of Norberto Bobbio (1909–2004).[51] Like Treves, Bobbio also studied under Gioele Solari, and his early experiences unfolded

1920s: These were later collected by Arnaldo Volpicelli in Kelsen 1933b. Also published in 1933, in the *Archivio Giuridico Filippo Serafini*, is Treves's translation of Kelsen's essay *Methode und Grundbegriff der Reinen Rechtslehre* (translated as La dottrina pura del diritto: Metodi e concetti fondamentali: Kelsen 1933a). Treves then translated Kelsen's *Reine Rechtslehre*, a translation published as Kelsen 1952, with a second expanded edition (Kelsen 1967b) carrying in appendix Treves's translation of two essays by Kelsen, namely, *The Pure Theory of Law and Analytical Jurisprudence* (translated as La dottrina pura del diritto e la giurisprudenza analitica) and *Vergeltung und Kausalität* (translated as Causalità e imputazione).

[48] See Treves 1947. The text came out almost simultaneously in Italy and Argentina (Treves 1947a, 1947b), where Treves had emigrated to in 1938, the year the Fascist regime enacted its racial laws, and where he stayed until 1947, when he returned to Italy. Another fundamental text in this regard, completing the conception expressed in Treves 1947, is Treves 1954, where Treves sets forth the critical spirit informing his entire oeuvre, a spirit committing him to a rejection of all dogmatically imposed truths and an openness to all well-grounded and rigorously argued criticisms.

[49] In 1969, a chair in the sociology of law was established at the University of Milan, which was among the first in Italy to do so, and the course was entrusted to Treves. He wrote for it a cyclostyled book titled *Sociologia del diritto* (The sociology of law: Treves 1969), which formed the initial kernel of a text he would keep writing and rewriting through the rest of his life: After the handouts making up the 1969 coursepack came Treves 1977 (with a second edition out in 1980), and ten years later came a complete makeover, Treves 1987, though the reworking continued until the end of his days, so much so that a third edition came out posthumously in 1993 with further changes and qualifications. In 1974, Treves founded the journal *Sociologia del diritto*, which became, and to this day remains, a recognized forum among Italian sociologists of law.

I will not treat here the sociology of law or other disciplines akin to legal philosophy, such as political philosophy, for these disciplines have become completely autonomous from legal philosophy even as they remain closely bound up with it in many respects.

[50] Treves's relationship with Kelsen is documented in Paulson 1992.

[51] On Bobbio see also Section 9.3.1 in Tome 2 of this volume.

in a period when idealism and legal positivism were by far the two dominant forces in philosophy and legal philosophy, respectively, but as early as the 1930s he began to look at Transalpine currents such as phenomenology, existentialism, and antiformalist legal theories, with a specific interest in institutionalism.[52] And then, as mentioned, came his involvement as one of the intellectuals who in the post-war period contributed to laying out the neoenlightenment program, which grew receptive to the methods of analytic philosophy. It was these methods that at once aroused Bobbio's interest, who valued them for their pursuit of rationality coupled with a rejection of ultimate truths.

In 1950, Bobbio published under the title *Scienza del diritto e analisi del linguaggio* (Legal science and language analysis: Bobbio 1950) an essay that for analytic philosophers of law in Italy would take on the meaning of a programmatic manifesto. Its stated purpose was to call to the attention of jurists, and generally of anyone involved in scientific research, the contribution made by the new conception of science developed through the latest methodological approaches falling under the rubric of logical positivism, for this conception can afford a better understanding of the process by which the jurist does research, as well as it offers a new and more adequate way to go about framing the problem of legal science.

In light of this conception—effecting a shift whereby the scientificity of any discourse or research is made to depend not so much on its "truth" as on its "rigour," in the sense of its adhering to rules for the formation and transformation of sentences—Bobbio argued that legal science is fully fit to be considered a science proper. This, however, will require an effort to analyze legal language, on the three levels involving its purification, completion, and systematization, so as to make this language into a rigorous discourse, by clarifying the basic sentences of this discourse, defining and completing the rules for transforming such sentences, and ordering them into a coherent system.

On several occasions in the essays published from 1949 to 1954, and collected in *Studi sulla teoria generale del diritto* (Studies in the general theory of law: Bobbio 1955), one will find it stated that nowhere outside Kelsen's pure theory of law has a higher standard been achieved in the effort to make legal studies scientific, since Kelsen purged from his theory all scientifically unsolvable and legally irrelevant problems, and clearly distinguished the problems related to the *knowledge* of law from those relating to its *evaluation*.

From the early 1950s to the late 1960s, Bobbio proceeded on two fronts, on the one hand blocking out a theory of law—a formal theory modelled on Kelsen's, and so a theory that considers the *form* of law independently of its content and values—and on the other hand defending legal positivism from the charges levelled at it by natural-law theory.

[52] I should point out, among Bobbio's earliest writings, Bobbio 1934b, 1935, 1936a, 1936b, 1940, 1944.

Norberto Bobbio (1909–2004)

His commitment to a formal theory can be appreciated in the course handbooks *Teoria della norma giuridica* (Theory of legal norms: Bobbio 1958) and *Teoria dell'ordinamento giuridico* (Theory of the legal system: Bobbio 1960), as well as in numerous essays published from 1956 to 1968 and collected under the title *Studi per una teoria generale del diritto* (Studies toward a general theory of law: Bobbio 1970). His parallel commitment, in defence of legal positivism, can instead be found in the course handbook *Il positivismo giuridico* (Legal positivism: Bobbio 1968) and in *Giusnaturalismo e positivismo giuridico* (Natural-law theory and legal positivism: Bobbio 1965), collecting essays published from 1956 to 1964.

Bobbio's teachings gave birth to what is known in Italy as the country's northwestern analytic school of legal philosophy and general theory of law. The early exponents of this school studied directly under Bobbio—examples being Uberto Scarpelli (1924–1993), Giacomo Gavazzi, Amedeo G. Conte, Giorgio Lazzaro, and Mario Losano—and then there came a second generation, the students of the students, with scholars such as Mario Jori and Letizia Gianformaggio. What these scholars all have in common is, in Scarpelli's words, "a persevering mode of work, painstakingly proceeding point by point, step by step, and a passionate devotion to clarity and rigour, coupled with a close attention to language and form and a fondness for clear, possibly vivacious exposition" (Scarpelli 1982a, 188; my translation). These authors we will return to in the section on the contemporary debate.

11.5. The Crisis of Legal Positivism

Legal positivism flourished in the 1950s and 1960s in Italy along the previously considered line of development, an outcome of the fecund marriage between analytic philosophy and Kelsen's pure theory. It is in this context that, in the early 1960s, the work of H. L. A. Hart began to circulate: In 1964 came *Contributi all'analisi del diritto*, edited by Vittorio Frosini (Hart 1964); in 1965 came the translation of Hart's chief work (*The Concept of Law*), edited by Mario Cattaneo under the title *Il concetto di diritto* (Hart 1965); in 1966 the journal *Rivista di Filosofia* published *Il concetto di obbligo* (Hart 1966); and in 1968 came *Law, Liberty and Morality*, translated and edited by Giacomo Gavazzi under the title *Diritto, morale e libertà* (Hart 1968).

As Mario Jori has underscored, the reflection on Hart did not reach Italy unexpectedly from the outside but came as a contribution to a debate in which Italian legal philosophy had been actively participating for some time. This contribution stimulated and fuelled criticism regarding some aspects of analytical legal positivism, and it is in large part through such criticism that legal positivism would meet its demise (Jori 1987).

A symbolic date in this regard, marking the beginning of this decline, is 1966, when a roundtable was organized in Pavia by Bruno Leoni to discuss

two works that had come out the year before,[53] these being Bobbio's *Giusnaturalismo e positivismo giuridico* (Natural-law theory and legal positivism: Bobbio 1965) and Scarpelli's *Cos'è il positivismo giuridico* (What is legal positivism: Scarpelli 1965): As much as these were regarded as condensing fifteen years of alliance between analytic philosophy and Kelsen's pure theory, they already signalled the crisis that was to come.

In *Giusnaturalismo e positivismo giuridico* Bobbio distinguished three ways of understanding legal positivism—as an ideology, as a theory of law, and as an approach to the study of law—and declared that only in this last sense did he espouse legal positivism, as a value-neutral and scientific way to go about studying law. At the Pavia roundtable, however, he remarked that even in this last sense legal positivism was heading into crisis, a crisis he ascribed to the "wearing away of certain convictions that had made it possible to mark a clear distinction between law as it is and law as it ought to be, and so a separation between, on the one hand, de facto law—laid down once and for all, and preconstituted, so to speak, before the jurist observing it—and, on the other hand, an ideal, potential, or possible law that should rise atop positive law without thereby overshadowing it." In light of these remarks, Bobbio closed his talk saying, "I must recognize that legal positivism is in crisis not only as an ideology and a theory, as I myself have already conceded, but also as an approach to the study of law" (Leoni 1967, 73; my translation).

And two years later, in an article titled *Essere e dover essere nella scienza giuridica* (Is and ought in legal science: Bobbio 1967), Bobbio went to the extreme of turning on their head the theses he himself had defended in the 1950s: At that time, as we saw, he took the view that Kelsen's metajurisprudence was descriptive, but he was now finding that even Kelsen's model in reality offers a *prescriptive* jurisprudence, for it sets forth the behaviours to be had, and insofar as it prescribes, it cannot be counted as a science.

Scarpelli, for his part, got the legal-positivist model to move "from the universe of science to the universe of political activity."[54] Indeed, he argued that legal positivism resolves itself into the jurist's espousal of positive law understood as a system of valid norms—comprising norms of conduct and structural norms, the former primary and the latter secondary—laid down through the will of human beings, a system "not exclusively made up of general and abstract norms, a coherent system (or otherwise reducible to one), complete because exclusive, and coercive." In other words, legal positivism entails that we subscribe to a specific technique for the formation and expression of political

[53] The proceedings (Leoni 1967) collect reports by Bruno Leoni, Luigi Bagolini, and Alessandro Baratta and contributions by Guido Fassò, Mauro Stoppino, Giovanni Tarello, Mario A. Cattaneo, Amedeo G. Conte, Norberto Bobbio, Uberto Scarpelli, and Angelo Ermanno Cammarata.

[54] On Scarpelli see also Section 9.3.2 in Tome 2 of this volume.

will, a technique where political will is *formed* through procedures governed by positive structural norms and is *expressed* through general and abstract norms.

As Scarpelli remarks, "legal positivism is an aspect of the political technique designed to achieve social control through a regulated production of general and abstract norms." It is, in other words, an aspect of the political technique distinctive to the modern state; yet legal positivism does not just resolve itself into "the determination of a criterion for the validity of law," because accompanying this determination is "a legitimation of positive law."

The grafting of analytic philosophy onto Kelsen's legal positivism—a move that initially gave new impetus to his theory, enabling it to flourish in Italy—thus turned out over time to be a sort of Trojan horse in Kelsen's citadel, as Enrico Pattaro (1976) has effectively described this unfolding of events, for this grafting made it possible to see that implicit in legal positivism is a value judgment. And once it is determined that the positivist theory of law entails an ideological choice, the theory is thereby shown to be incompatible with a value-neutral approach such as that which guides analytic philosophy.

This newfound awareness led legal theorists in Italy to move gradually away from legal positivism as initially conceived, and to take either of two paths: While some held valid the epistemological premises of analytic philosophy, thereby working toward a theory of law as fact, others remained loyal to legal positivism, but recognizing that this does not afford an objective knowledge of law—recognizing, in other words, that this theory is not scientific but resolves itself into politics.

The former path was that taken by Bobbio, who in the late 1960s moved toward a functional, broadly sociological theory of law, amenable to being reconciled with the neoempirical model of the descriptive and explicative sciences. As he himself comments in his introduction to a collection of essays significantly entitled *Dalla struttura alla funzione* (From structure to function: Bobbio 1977), the formal theory of law, entirely given over to analyzing the *structure* of legal systems, has neglected to analyze their *function*. Yet law is not a closed, independent system but rather forms part of the broader social system considered as a whole, and as such it operates as a subsystem next to other subsystems (economic, cultural, political)—partly also overlapping with such systems and counteracting them—and what distinguishes it from these other subsystems is precisely its function within the whole. Hence the need for a functionalist theory of law, not set in opposition to a structural theory but building upon it. From the 1970s on, Bobbio mainly devoted himself with political philosophy, partly on account of circumstances—he was appointed to the chair in political philosophy at the newly established Faculty of Political Science at the University of Turin—and partly by conviction, having come to the conclusion that political theory must nurture and integrate the philosophy of law.

The second path was that taken by Scarpelli, who in the late 1980s, specifically in *Il positivismo giuridico rivisitato* (Legal positivism revisited: Scarpelli 1989) declared himself to be "a believer in the law and a quite repentant defender of positivism" (ibid., 10; my translation; cf. Scarpelli 1987): He argued for the need to single out principles capable of guiding legislation, hopeful that these principles—equated with the constitutional principles—could serve as a basis for creating a judicial apparatus by which to ensure that the law is interpreted in a unified fashion, through an (interpretive) activity carrying out a function similar to that once carried out by the codes and the statutes, which no longer seemed up to the task they had been entrusted with as the main tool of the modern rule of law, namely, the task of guaranteeing rationality and protecting the fundamental rights.

Over the same period, Scarpelli turned his focus to a study of legal ethics and metaethics. The work that best typifies this phase is *L'etica senza verità* (Ethics without truth: Scarpelli 1982b), an emblematic title, for it sums up the gist of the author's entire philosophy, "the overarching theme, the red thread, the backbone and premise" of all his inquiries into ethics, as Scarpelli himself points out in the preface to this work. Indeed, throughout his inquiries he always proceeded on the principle of the "great distinction" between the descriptive and the prescriptive.

A prominent place in this area of interest is reserved for his studies on bioethics.[55] Scarpelli outlined and defended a conception of it as a free and rational inquiry geared toward protecting individual freedoms, and he contributed to opening the Italian debate to a secular perspective on issues hitherto regarded as the exclusive province of Catholic culture.

11.6. The Postpositivist Debate

Over the last thirty or forty years, the Italian debate on legal philosophy has become increasingly internationalized and receptive to Anglo-American culture.[56] Two trends can be observed in the debate, for on the one hand we have witnessed the gradual withering away of the long-established schools and orientations—in fact, it was Scarpelli's assessment that the only surviving school as early as after the war, "the only school properly so called" (Scarpelli 1982a, 174; my translation), was the northwestern analytic school—and on the other hand there has been a broadening of the range of topics and areas of discussion. In addition to covering such traditional ground as the theory of norms

[55] Scarpelli's main writings on bioethics are now collected in Scarpelli 1998.

[56] The discussion in this section will be confined to those approaches and lines of inquiry that have drawn a considerable following, and will leave out the younger scholars whose work is still taking shape and whose contribution to the debate has not yet fully distinguished itself from that of their teachers.

and of the legal system, legal philosophers, not only abroad but also in Italy, have increasingly been concerning themselves with specialistic questions that see them play a role next to moral and political philosophers, sociologists, bioethicists, and computer scientists in facing the new challenges posed by information technology, as with Vittorio Frosini (1922–2001),[57] Mario Losano (1939–),[58] Enrico Pattaro (1941–),[59] and Giovanni Sartor (1959–),[60] as well

[57] Vittorio Frosini—the author of many historical and theoretical writings (including, importantly, Frosini 1962)—published in 1968 a book titled *Cibernetica, diritto e società* (Cybernetics, law, and society: Frosini 1968), making him among the first scholars in Italy to tackle the issues raised by the "cybernetic revolution" as applied to law and society. These issues were further dealt with in four later works, namely, Frosini 1981, 1988, 1991, 1998a.

Especially significant is Frosini's attempt to marry information science and legal hermeneutics, the basic premise being that information science facilitates the information process, and in so doing makes our interpretation of norms more complete and effective: See in this regard Frosini 1989.

[58] Mario G. Losano was a pupil of Bobbio whose research has mainly been devoted to German legal thought (with some now-classic works on Jhering), but also to North and South American legal thought, as well as to comparative law and the sociology of law (I should mention here Losano 1978 and 2002). In 1969, he published *Giuscibernetica: Macchine e modelli cibernetici nel diritto* (Legal cybernetics: Cibernetic machines and models in the law: Losano 1969), distinguishing practical and theoretical approaches in an effort to bring order to the different investigations that were cropping up at the time in law and computer science. The themes therein developed were then taken up in Losano 1985, the first introductory work to appear in Italy for a course in legal informatics, and here Losano develops the question of how computer science can be brought to bear on law: He does so by turning to social scientists who might want to apply the new technologies to their subject matter. The same themes are also taken up in Losano 1986 and Losano 1987, both of them concerned with the converse question of applying law to computer science. The now generally recognized distinction was thus established between legal informatics and information-technology law. See also Losano 1989.

[59] Enrico Pattaro has led the effort to make legal informatics a recognized academic discipline in Italy: He had the discipline officially introduced into the curriculum in legal philosophy, and through his decisive effort it also became a foundational course at law school with the university reform of 1999. Likewise, he founded the doctoral programme in legal informatics at the University of Bologna. Even more significantly, however, in 1986 he founded CIRSFID (Centre for Research in the History, Philosophy, and Sociology of Law and in Computer Science and Law), which is also based in Bologna, and to which he initially drew the world's leading experts in AI & Law. The idea was to invest in the intersection of legal philosophy and legal informatics, looking to make this a fruitful relation when it comes to drafting legal texts, analyzing normative language, and interpreting the law. In 1987, as part of his commitment to internationalize Italian philosophy of law, Pattaro founded the journal *Ratio Juris*, based in Oxford and published in English. Also speaking to the same effort is the role he has played in the IVR (*Internationale Vereinigung für Rechts- und Sozialphilosophie*), with his term as president from 1995 to 1999 and now as honorary president, and finally the present twelve-volume *Treatise*.

[60] Giovanni Sartor, a student at CIRSFID under Enrico Pattaro (see the previous footnote in both regards), has proceeded in his work by coupling logic with legal informatics, making this a platform on which to investigate how information-science models can be used to represent legal reasoning and legal knowledge, and how artificial intelligence can be brought to bear on law and on legislative technique (exemplifying these lines of research are, in particular, Sartor 1990 and 2005, the latter appearing as Volume 5 of this *Treatise*). So, too, he has recently also applied to law the ontologies of information science, along with game theory and social simulation.

as by bioethics, with Uberto Scarpelli, as previously mentioned, and Francesco D'Agostino (1946–),[61] and by the advent of the multicultural society.

Little has survived of the two movements into which late idealism had split, these being Marxism and spiritualism.

As for Marxism, we saw that even in the post-war period the movement did not bear much fruit for legal philosophy in Italy, and even though several thinkers did proceed from a Marxist perspective—this applies in particular to Domenico Corradini Broussard (1942–),[62] Eugenio Ripepe (1943–),[63] Danilo Zolo (1936–),[64] and Pietro Barcellona (1936–2013)[65]—they all moved away from that perspective, each developing his own position.

[61] The bioethical debate in Italy has often unfolded through an interchange, occasionally bordering on a clash, between a secular orientation and a Catholic one, each of which in turn forms not a single bloc but a collection of markedly distinct views. The main pillars of secular bioethics—largely attributable to Scarpelli, above, and set forth in a manifesto signed by Carlo Flamigni (1933–), Armando Massarenti (1961–), Maurizio Mori (1951–), and Angelo Petroni (1956–) (Flamigni et al. 1996)—can be summarized in broad outline as consisting in a commitment to respect individual autonomy (entailing that everyone has a right to choose in matters pertaining to their own health and life) and to respect others' religious convictions (all the while recognizing that religious faith does not ipso facto entail ethical solutions for nonbelievers), coupled with a commitment to promote the quality of life and guarantee equal access to the best medical care available. A newer focus of interest has emerged over the last decade at CIRSFID under the guidance of Carla Faralli: a focus on the new biomedical technologies, and in this way CIRSFID has also become a centre for the study of bioethics, in a multidisciplinary environment drawing on the expertise of jurists, philosophers, physicians, and psychologists.

Catholic bioethics is defended in Italy by an authoritative figure, Francesco D'Agostino, who as we will see shortly is a pupil of Sergio Cotta, and who, like his teacher, follows in philosophy an existentially inflected phenomenological approach. This approach informs D'Agostino's bioethics, which he rests on such foundations as the principle of the inviolability of life, recognizing corporeal and physical life as a fundamental value; the principle of freedom and responsibility, entailing a responsibility to treat the patient as a person, as well as the physicians' freedom not to satisfy requests they cannot in their own conscience morally accept; the principle of totality, under which it is legitimate to intervene in a person's physical life only if it proves necessary in protecting that person's unitary and indivisible totality of body, psyche, and spirit; and the sociality and subsidiarity principle, committing every one of us to *live*, this in virtue of our constitutive and ontological relationality, and by taking part in the fulfilment of fellow humans. On these questions, see in particular D'Agostino 1998, 2004, and 2012.

[62] Domenico Corradini Broussard has focused his interest on matters pertaining to the constitution of the subject and to the symbolic order, this through the study of thinkers such as Friedrich Nietzsche, Carl Jung, and Michel Foucault. See Corradini Broussard 1974, 1986, and 1988.

[63] Eugenio Ripepe has enriched his reflection on the state through the study of eminent elite theorists (such as Robert Michels, Gaetano Mosca, José Ortega y Gasset, and Vilfredo Pareto), and more recently he has devoted himself to the study of the constitution and its modification. See Ripepe 1974, 1982, 1987, and 2006.

[64] Danilo Zolo has coupled a theory of knowledge developed along empiricist lines (Otto Neurath) with Niklas Luhmann's systems theory, thus elaborating an epistemology with which to treat the complexity of social systems; this has enabled him to treat from a realist perspective the questions of democracy and citizenship, as well as the criticism of war and the governing of a cosmopolitan world society. See Zolo 1992, 2000, and 2004.

[65] Pietro Barcellona was a civil lawyer who over time has developed an interest in the theory and philosophy of law, as is evidenced by works such as Barcellona 1984, 1998, 2003, and 2007.

Catholic spiritualism, for its part, inspired the thought of Domenico Coccopalmerio (1940–)[66] and Francesco Mercadante (1926–).[67]

A more lasting influence was exerted by Giuseppe Capograssi's theory of the experience of law, especially so in the Padua milieu, where a number of thinkers were trained at the school founded by Enrico Opocher (1914–2004):[68] These thinkers are Francesco Cavalla (1939–),[69] Francesco Gentile (1936–2009),[70] Franco Todescan (1946–),[71] and Giuseppe Zaccaria (1947–),[72] and they each developed their own line of research as they went deeper into their mentor's processual approach to law (in the sense explained in footnote 68 of this chapter).

Likewise more enduring was natural-law theory, which in the post-war period found renewed interest and continued to thrive into the late 1900s as a reference point for several thinkers (see also Chapter 1 in Tome 2 of this volume).

Prominently figuring among these thinkers was Sergio Cotta (1920–2007), who in a way reminiscent of Heidegger and Husserl called ontophenomenology of law the conception he developed, a conception on which he rests the idea of a natural law understood as a set of principles failing to observe which we would find it impossible to relate to one another and coexist (see esp. Cotta 1981, 1991, 1997, 2004). Cotta's existentialist conception was developed in different directions by his students Bruno Romano (1942–),[73] Bruno Montanari (1947–),[74] and Francesco D'Agostino,[75] the last of whom devoted much of his research to bioethics, where he developed a personalistic-ontological perspective.

[66] See in particular Coccopalmerio 1988, 1989, 2004.

[67] See Mercadante 1974a, 1974b, 2004.

[68] Enrico Opocher developed a "processual approach to law" closely bound up with a "philosophy of values." The law is understood by him as a value insofar as law is in its every aspect lived and suffered in the subject's conscience. Even so, this experience of the law does not exhaust itself in a subjectivist perspective but also finds an objectivization in the legal process. Indeed, in controversy lies the core element around which the entire experience of the law revolves. The value of law lies in the ability to assert claims, that is, in its ability, through a legal process, to make explicit principles endowed with inherent characteristics whereby one's subjective position becomes valid for others, too, lastingly over time, and in this sense the same position acquires value. See Opocher 1977, 1984, 2005.

[69] Francesco Cavalla holds that his teacher's approach finds its most fecund and necessary development in the study of how dialectics can be brought to bear on litigation in court. See Cavalla 1979, 1991, 2007.

[70] Francesco Gentile has developed above all the themes of the irrationality and arbitrariness of power. See F. Gentile 1984, 2000.

[71] Franco Todescan has made his focus the history of legal thought. See in particular Todescan 1979, 1983–2001, 2013.

[72] On Giuseppe Zaccaria, see footnote 89 below.

[73] Bruno Romano's most significant works include B. Romano 1983, 2005, 2009, 2012, 2013.

[74] Bruno Montanari's most significant works include Montanari 1992, 1995, 2013.

[75] On Francesco D'Agostino, see footnote 61 above.

Husserl's phenomenology forms the foundation for the conception developed by Gaetano Carcaterra (1933–), who has taken exception to the imperativist and prescriptivist views of law, finding that the primary characteristic of all norms lies instead in their constitutivity, a concept he takes up from Austin and Searle's philosophy of language.[76]

The contemporary debate has continued to thrive through the work of those whose training was directly or indirectly received from Bobbio and Scarpelli, and who in one way or another followed legal positivism and the analytic method. Giacomo Gavazzi (1932–2006)[77] devoted his research to topics in legal theory such as the interpretation of norms, their coherence, and their antinomies; Amedeo Giovanni Conte (1934–)[78] explored deontic logic in its different aspects, and more recently social ontology and the theory of constitutive rules; Mario Jori (1946–)[79] proceeded from Hart's theory and in so doing developed an original method, so-called open normativism, considered to be the third way between strict normativism and realism; and Letizia Gianformaggio (1944–2004)[80] proceeded analytically to investigate the fundamental principles of law, with a focus on that of equality, as well as on that of gender, bringing feminist themes to the Italian legal-philosophical debate, which has been slow to take them up.

Two scholars whose work can be grouped with these lines of inquiry, but who directly belong to neither of the two schools that developed under Bobbio and Scarpelli, are Alfonso Catania (1945–2011)[81] and Luigi Ferrajoli

[76] See in particular Carcaterra 1974, 1979, 1991. The first part of this last work is devoted to the classic topics the author has covered in his research on the theory of law. The second and third parts are instead devoted to topics in moral philosophy (including bioethics), as well as to metaethical reflection on values and on the nature and structure of values. The discussion in these two closing parts connects to the earlier Carcaterra 1969. See also Carcaterra 2007.

[77] See Gavazzi 1959, 1967, 1970, 1993. Giacomo Gavazzi went deeply into certain aspects of Kelsen's thought and the new analytic methods (recall that he edited the Italian translations of Ross's *On Law and Justice* and Hart's *Law, Liberty, and Morality*, the former published as Ross 1965 and the latter as Hart 1968): His view is that Kelsen's theory must be cleansed, or purified, of unacceptable elements (first among which the concept of a norm), all the while accentuating its innovative aspects, such as the functionalist element. Indeed, according to Gavazzi, Kelsen's view does not preclude a functionalist perspective but rather *accommodates* it, albeit in a less than satisfactory way (Gavazzi 1984): The formal theory and the functionalist perspective are not incompatible; hence Gavazzi's proposal for a general theory of functions (Gavazzi 1984), meaning a theory having a formal basis and yet receptive to functionalist and sociological aspects on the model of Ross.

[78] See esp. Conte 1962, 1970, 1997, 1989–2002.

[79] The most significant works by Mario Jori include Jori 1976, 1980, 1985, 2010, and Jori and Pintore 2014. He has also translated Hart's *Punishment and Responsibility*, a translation published as Hart 1981.

[80] Letizia Gianformaggio was a pupil of Uberto Scarpelli, and his influence on her work is reflected not only in the analytic method she uses (in which regard see Gianformaggio 1973, 1986, and 1987) but also in her research on the basic legal values and principles, which she investigated from a gender perspective, and to which she devoted a number of essays, most of them now collected in Facchi, Faralli, and Pitch 2005.

[81] Alfonso Catania criticizes Kelsen from within, by drawing on Hart's thought. He is very

(1940–):[82] The former draws on Hart's theory to deepen the question of law's efficaciousness and make more "realist" the "purity" of Kelsen's system; the latter has always worked on an axiomatized theory of law, all the while taking up such questions as those of the fundamental rights and the principles of law, an investigation that has drawn him closer to neoconstitutionalism (on which see Chapter 10 in Tome 2 of this volume).

The crisis of legal positivism discussed in the previous section paved the way for the development in Italy of antiformalist theories and of legal realism.

"Realism, or sociological natural-law theory," as Guido Fassò (1915–1974)[83] defines his conception in a letter to Bobbio, is based on the idea of a natural law arising from the historical concreteness of society, a concreteness which reason interprets and which acts as a limit on the power of the state, and also as a guarantee in protecting human freedom: This conception looks to such sources of inspiration as the free-law movement (*Freirechtsbewegung*) and antiformalism, and expresses the need to "always bear in mind, beyond the formally valid norm, such substantively valid norms as reason grasps in its observation of social reality."

Also drawing inspiration from antiformalism is *Saggio sul diritto giurisprudenziale* (An essay on case law: Lombardi Vallauri 1975), published in 1967 by Luigi Lombardi Vallauri (1936–),[84] an exceptionally versatile author who would later confront issues in the politics of law and in bioethics, along with animal-rights and environmental issues.

Legal realism in a strict sense, for its part, is a movement that Luigi Bagolini had begun to call attention to as early as the 1950s (see Bagolini 1950), especially with an eye on Scandinavian realism, but not until Giovanni Tarello (1934–1987) came onto the scene was there an effort to delve deeper into this way of thinking about law. Having proceeded from the study of American le-

much with Kelsen in upholding the distinction between *Sein* and *Sollen* and underscoring the concept of a legal system as central to law, but he also attempts to render more "realistic" the system's "pure" aspect—this by inquiring into the problem of effectivity—for it is people's behaviour that in his view is essential to the concept of a legal system. See Catania 1976, 1979, 1983, 1987, 2000, 2004, 2008.

[82] See Ferrajoli 1970, 2000, 2002, 2007, 2013.

[83] Fassò started out working on themes taken up from Vico (Fassò 1949), and it is precisely from the study of Vico that he derived that sensibility to history (Fassò 1953, 1956) which characterizes his entire thought and which he develops with seamless continuity from Fassò 1964 to Fassò 1974.

[84] Luigi Lombardi Vallauri later devoted himself to studies in the politics of law, sketching out the view of a society that fulfils the Christian end, an end he describes as that of achieving fullness, "the perfect form imparted to the totality, the synthesis of everything that man is". Then, in his more recent works, this idea is extended to encompass "the nonreductive fullness of being, human and nonhuman alike, in its three dimensions, namely, the material-natural one, the historico-cultural one, and the personal-spiritual one". Hence his interest in medico-bioethical issues, as well as in animal-rights and environmental issues. His work in this second phase includes Lombardi Vallauri 1969, 1981, 1989, 2002 and Lombardi Vallauri and Castignone 2012.

gal realism, Tarello developed a realist theory of law resting on a twofold conception of norms conceived on the one hand as normative sentences—that is, as linguistic expressions suited to being normatively interpreted—and on the other as the normative meaning that may be extracted from each such sentence. What follows is a theory of interpretation understood not as a *cognitive* activity but as an activity *productive* of norms.[85]

American legal realism, however, did not play as much a role as did Scandinavian realism in giving birth to original conceptions in Italy.

The main exponents of this current are Silvana Castignone (1931–), Riccardo Guastini (1946–), and Enrico Pattaro (1941–).

Castignone had studied Hume before turning to legal realism, and the empirical approach so acquired, coupled with an espousal of the basic premises of legal realism, led her to lay emphasis on the analysis of legal and political language, this on the model of the "linguistic therapy" to which the Scandinavians subjected this language in the effort to detect and expunge such metaphysical residue as still found itself nested in it.[86]

Guastini was influenced above all by Alf Ross but did not subscribe to Ross's view that law can be reduced to a series of directives addressed to the courts. (This, for example, cannot be said of constitutional law, an area that Guastini importantly contributed to, especially as concerns the question of the sources of law.) But he does share with Ross the conception of interpretation as an *activity*, that of extracting norms from the legislator's provisions or from other normative activities.[87]

Pattaro studied under Fassò, taking up the criticism his mentor had directed at legal positivism. In light of an epistemology broadly informed by the analytic movement, he argues that "a theory of law coherently developed around a neoempiricist philosophy cannot be anything but a theory of law as fact." He developed on this basis a peculiar conception he termed normativist realism, recognizing on the one hand that law is a reality which ontologically is not unlike the reality of empirical facts, and on the other that it cannot be *reduced* to such facts (for which reason he describes himself as a non eliminativist reductionist).[88]

[85] On American legal realism, see Tarello 1962; on the theory of interpretation, see esp. Tarello 1974 and 1980.

[86] Silvana Castignone has translated the first (1939) edition of Karl Olivecrona's *Law as Fact* (a translation published as Olivecrona 1967), along with many of his essays, as well as those of the other Scandinavian legal realists. These essays are collected in three anthologies: Castignone 1981, Castignone and Guastini 1990, and Castignone, Faralli, and Ripoli 2000. Her most significant works on legal realism include Castignone 1974 and 1995.

[87] Riccardo Guastini has collected and translated many essays by Ross, including some little-known ones: See in particular the anthologies Castignone and Guastini 1990 and Febbrajo and Guastini 1982. Guastini's most significant works include Guastini 1982, 1985, 2004, 2006, 2008, 2010b, 2014.

[88] Enrico Pattaro's most significant works on Scandinavian legal realism and on the development of normativist realism are Pattaro 1966, 1968, 1974, 2005, 2010. He has translated the sec-

As clearly emerges from his own Volume 1 of this *Treatise* (Pattaro 2005), law is understood by him as a complex sociocultural and empirical reality whose components are at once linguistic (these being the *directives* of law, a term reminiscent of Ross) and nonlinguistic, consisting of behaviours and of psychical phenomena such as beliefs. For this reason law cannot be investigated from the standpoint of formalistic theory but must instead be approached from those broadly sociolinguistic inquiries that are concerned with language and behaviour, thus bringing into the study of law disciplines ranging from semiotics to the sociology of language, and from the anthropology of law to the sociology of law.

The theoretical developments just discussed—the emergence in Italy of several antiformalist and legal-realist currents—and the historical background of the crisis of justice did much to stimulate in Italy a debate on the interpretation of law.

This debate developed from an interaction between neoformalist positions, on the one hand, and neosceptical ones, on the other, examples of which are Mario Jori in the former case and Riccardo Guastini in the latter. Important contributions on the interpretive question have come from hermeneutical legal philosophers, such as Francesco D'Agostino, Giuseppe Zaccaria and Francesco Viola (1942–), who have looked to the Italian tradition that traces back to Emilio Betti (1890–1968), but who have more importantly drawn on the German models (with specific regard to Hans-Georg Gadamer and Josef Esser), and more recently they have looked to the Anglo-Saxon models (especially the work of Neil MacCormick and Ronald Dworkin). There are two complementary areas that in these authors have become a focus of interest: On the one hand is judicial interpretation and the relation between matters of fact and matters of law (with Zaccaria), and on the other is law as a social practice (with Viola).[89]

A peculiar approach in this regard is that of Alessandro Giuliani (1925–1997), who on the model of Riccardo Orestano (1909–1988) considered the historical study of law a constitutive aspect of the experience of law, proceeding on this basis to undertake important research on the theory of the trial as well as on judges and justice.[90]

Newer insights into the question of legal interpretation have come from the movement which flourished especially in the United States in the 1980s under

ond (1971) edition of Karl Olivecrona's *Law as Fact* (a translation published as Olivecrona 1972). He has also conducted research in the history of ideas, investigating legal pre-Enlightenment; the origin of the notion of a principle from Aristotle to Thomas Aquinas, going through Roman law; and the idea of "what is right," both in Homer (*to dikaion*) and Aquinas (*quod est rectum*). See Pattaro 1974b and 2005, among others.

[89] The main works these two authors have written on these topics include Zaccaria 1984a, 1984b, 1990, 1996, 2012; Viola 1990; and Viola and Zaccaria 2003, 2013.

[90] Alessandro Giuliani's most significant works include Giuliani 1957, 1961, 1971, and 1996, along with the series he coedited with Picardi (Giuliani and Picardi 1975–1994).

the name of Law and Literature, applying to legal texts the methods and tools that literary criticism uses to analyze and interpret literature, and accordingly proceeding from the premise that law is a narrative to be interpreted like any other literary story.[91] This literary approach to law had some precursors in Italy in the 1920s—with authors like Ferruccio Pergolesi (1899–1974), constitutionalist (see esp. Pergolesi 1927 and 1956), and Antonio D'Amato, a judge (see D'Amato 1936)—and it later found favour among legal philosophers, especially with Mario A. Cattaneo (1934–2010), who has devoted several studies to Dante Alighieri, Alessandro Manzoni, and Carlo Goldoni.[92]

It should not go unmentioned that Italy has a rich tradition in writing histories of legal philosophy: Dating back to the late 1960s are the three volumes making up Guido Fassò's *Storia della filosofia del diritto* (History of the philosophy of law: Fassò 1966–1970), a history which spans from Homer to American legal realism, from patristics to Soviet theory, and which in the updated 2001 edition (Fassò 2001) also covers the contemporary debate. This makes it the most comprehensive such history so far written in Italian, and to it I owe in part this very contribution.

[91] I should point out in this regard the Italian Society for Law and Literature (ISLL), founded by Enrico Pattaro in Bologna in 2008 (and based at CIRSFID) for the purpose of promoting research in Law and the Humanities and enabling an exchange among Italian and foreign scholars.

[92] Cattaneo was initially close to the analytical school—he translated and edited the Italian edition of Hart's *Concept of Law* (a translation published as Hart 1965)—but then prevalently devoted himself to studying the philosophy of criminal law from a historical and literary perspective. See esp. Cattaneo 1990a, 1990b, 1991, and 1995.

Chapter 12

20TH-CENTURY LEGAL PHILOSOPHY IN FRANCE

by Pierre Brunet, Veronique Champeil-Desplats, Eric Millard, Carlos Miguel Herrera, Jean Louis Halpérin, and André Jean Arnaud

12.1. Introduction (*by Pierre Brunet and Veronique Champeil-Desplats*)

The very expression "French philosophy of law" has long sounded like an oxymoron, and it still does. For academic reasons, as well as on account of some entrenched cultural strains, French legal scholars interested in studying the philosophy of law are far and few between, and, to be frank, it is not as easy to name a distinguished French philosopher of law as it is for other countries. A few exceptions, however, do fortunately stand out. The contemporary reader expecting the sorts of philosophical debates that have become familiar will probably be disappointed. The French scholars presented here are in the first place law professors, and none of them would have introduced themselves as philosophers. Indeed, some would have outright rejected that appellation.

The group of authors gathered here brings out a strong division between public and private law. Here, again for sociological, cultural, and academic reasons, those most interested in developing a legal science were public lawyers, while private lawyers distinguished themselves by developing a more dogmatic line of inquiry. Their work was technical, their thinking more like that of judges, lawyers, or lawmakers, and they were not as interested in building a strong legal science.

This is certainly true of public lawyers like Raymond Carré de Malberg, Maurice Hauriou, and Léon Duguit. It must be noted to begin with, however, that the distinction between public and private law was not as strong back then as it would later become. The reason is that public law was still a budding field at the end of the 19th century. And, in the second place, it must be added that these authors did not all agree on what shape a science of law should have. It is somewhat surprising and interesting to see that, while both Carré de Malberg and Duguit defended a "positivist" conception of law, they gave very different meanings to that word. Carré de Malberg was very serious about emphasizing the distinction between law and the science of law, or jurisprudence, and was equally emphatic about rejecting all ideas or concepts that were not "purely legal." This means that, from his point of view, it was irrelevant to try to investigate whether "rights" did refer to something in the real world, since it was sheer nonsense to imagine that "the state" could be referred to as anything other than a "legal person." Duguit, by contrast, never ceased to rail against what in his view ought to be seen as pure fictions and metaphysics. Fictions? Carré de Malberg did agree with him on that point. But he considered those

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fictions to be strictly legal ones, so there was no metaphysics to be concerned about. And it was the task of jurisprudence to describe the fictions of law. Then, too, as much as Duguit claimed to be a positivist and to resist the burgeoning Durkheimian sociology, it is not so obvious that he should be called a positivist in Carré de Malberg's sense.

As for Hauriou, he was much more inclined toward the metaphysical approach to law. His "theory of institutions" proved to be a great success, probably because many of Hauriou's readers saw their own assumptions reflected in it. And what about positivism through Gény's eyes? His positivism was neither as rigorous as Carré de Malberg's nor as sociological as Duguit's. But Gény perfectly illustrates what nonsense "antiformalism" was to those who, in this transitional period, wanted to do away with the old exegetical school and its fetishism for statutory law. An efficient strategy to this end was to justify positive law by proclaiming its agreement with "social needs." Hence, some legal scholars in France were working to slip ideas of natural law back into the debate under another name.

Another interest common to all of these scholars was the role of the state in the creation of law. It is now well known—going back to Norberto Bobbio's (1965) tripartite distinction among legal positivism as a theory of law, as an ideology about law, and as a method for legal science—that positivism in the first of those senses (as a theory of law) has been one of the foundational theories of the modern state, since it was distinctly aimed at reducing all sources of law to statutory law. This view is commonly referred to as "formalism." Despite the divergence between Carré de Malberg and Duguit, they did agree on one point: that all law was statutory law. On the other hand, Hauriou and Gény are no doubt the most interesting figures in the formalist tradition, since they were at once enticed by pluralism and leery of it. Gény used the term spontaneous law, while Hauriou preferred to speak of the law as an institution (at least in one of the meanings he gave this word). But both of them were afraid to venture beyond the door they had half-opened.

The hypothesis of legal pluralism was later developed by the no longer nascent but now mature sociology of law. That is true of the sociology of law practiced in France and in other French-speaking areas (though this is not to imply that nothing of the sort was being developed in legal sociology in other languages). And although, even in civil-law countries like France, legal sociology cannot be reduced to the pluralistic conception of the sources of law, it must be conceded that that still remains the most subversive conception that can be developed in this context. The fact is that the sociology of law has flourished because of the development of sociology in general, from Émile Durkheim and Marcel Mauss to Pierre Bourdieu.

An apparent paradox may be worth emphasizing, though. In French academic publishing, the sociology of law has gained much more traction than the philosophy of law. Anyone would agree that relationships between jurists

interested in philosophy and philosophers interested in law have always been more than turbulent. A sociological or at least an empirical investigation of law schools, philosophy departments, and the hiring policies of research agencies like the *Centre National de la Recherche Scientifique* (CNRS) could explain why. Things look quite different from the standpoint of academic teaching. Despite its influence, the sociology of law is not often present in the law schools; lectures and seminars in the sociology of law are rare, and its representatives come mostly from schools and departments of sociology. As much as lawyers have had, and still do have, great esteem for Jean Carbonnier, they have not been entirely convinced of the need to reform legal education and training in light of his call to explore the social sciences as a path to the analysis of law. Here, again, the positivist creed is sometimes used as a justification for maintaining a line of separation between "describing" the positive law itself and "describing" the social uses of it or the axiological assumptions behind the lawyers' thinking.

A big reason why French academic lawyers reject the designation of legal philosophers and legal theorists alike probably has to do with the conception of philosophy, widespread in France, as an enterprise to be viewed primarily through the lens of its history. It is no surprise that Michel Villey, a great historian of legal thought, has also been considered in France to be among the most famous French specialists in the philosophy of law. Although he developed his own conception of law, he was best known for his comments on the works of classical philosophers. The way he made Ockham responsible for the birth of legal positivism, and hence made positivism responsible for the decadence of legal philosophy, is meaningful.

For epistemological reasons, Carré de Malberg (and now Michel Troper) would certainly cast his lot with the legal theorists rather than with the legal philosophers. But this is another way of saying that the two thinkers are both positivists. Troper's view of legal theory runs exactly opposite to Villey's conception of philosophy as an activity reduced to the history of philosophy. Troper thus sought to shape his own theory of law, and in this respect he owes a lot to the American realists and the Italian analytical school. This is precisely the point. His analytical conception of legal theory led him to be much more interested in epistemological questions—in the conditions for a science of law—than in building any philosophical system. Just as Villey took Ockham as one of his targets, so Troper was doubtless taking aim at Kelsen' pure theory of law, so much so that he succeeded in giving a realist account of Kelsen's main thesis.

The following pages present authors who have been chosen because, in our opinion, they have laid the groundwork for what should be termed "French philosophy of law." In rough outline, this can be described as a school of thought whose main concern was to develop a scientific approach to law by drawing on sciences and disciplines other than law: Prominent among these

were sociology, history, and linguistics. Philosophy was certainly in there, too, but it cannot be said to have played as important a role.

12.2. Maurice Hauriou (1856–1929) (*by Eric Millard*)

Maurice Hauriou was a French legal scholar and legal philosopher. Liberal-minded, he was a strong believer in the principles behind the 1789 revolution and a vivid opponent of Colbertism. He was a fervent Catholic, deeply attached to the tradition of the Church and to Thomist philosophy. He never departed from an idealistic approach to law grounded in both the force of individual consciences and the existence of a transcendent conscience. Throughout his career he taught in Toulouse and is regarded as a defining figure of what is often designated as the Toulouse school.[1] He is remembered both as one of the principal classical dogmaticians of the nascent French administrative law and as a strong proponent of legal philosophy understood in a broad sense, i.e., as a social science concerned with legal technique, speculative philosophy, and history, not to mention sociology (at that time just budding) and even physics. His own theory changed direction over time and is not free of contradiction, making it sometimes difficult to follow and, of course, sum up his thought. Hauriou's major contribution to the theory of institutions inspired prominent legal scholars, such as S. Romano (1918), Schmitt (1928), Lourau (1970), and MacCormick and Weinberger (1986), but it also became an object of criticism on their part.[2] Like many anti-formalist approaches to the law, his theory begs the pressing question of the unity and plurality of the law.

12.2.1. The Institutional Hypothesis

Institutional analysis, as Hauriou conceives it, is first and foremost an epistemological vantage point that may be summed up in his famous epigram: "A little sociology entails a *departure* from the law; a lot of sociology entails a *return* to the law" (Hauriou 1893, 4; my translation, italics added).

Hauriou is concerned to transcend a descriptive approach to the law, elaborating an explanatory model capable of articulating the state and the law. His construction is grounded in two principles: that all ways by which to un-

[1] The *École de Toulouse* (or Toulouse school) includes all those legal scholars, mostly in administrative law, who to a greater or lesser extent espouse Hauriou's conception. The school was named for the city that is home to the university where Hauriou taught. It is by convention set in contrast to the Bordeaux school, named for the city and the university where Léon Duguit taught. The Toulouse and Bordeaux schools thus carry forward the legacies of Hauriou and Duguit, respectively.

[2] On Schmitt see Chapter 8 in this tome and Section 8.8 in Tome 2 of this volume. On Romano, see Section 11.4 in this tome and Section 8.8 in Tome 2. On Weinberger, see Sections 10.3.3 and 18.3.2 in this tome.

derstand the law are interconnected, and, no less importantly, that the law is grounded in the social medium. In contrast to formalist legal theories, Hauriou's approach is aimed at explicating the social dimension of the state and the law by relying on the concept of power. At the same time, his theory is intended to be *fully* juridical and not just a juxtaposition of juridical elements with nonjuridical ones for the sake of legal analysis.

Hauriou was strongly influenced by the vitalistic theories propounded by Henri Bergson (1859–1941). He studied thermodynamics and developed a strong interest in the principle of entropy, which he tried to import into his analysis of the law (see Hauriou 1899). Hauriou was well acquainted with the work of Émile Durkheim (1858–1917), who was himself deeply concerned with the issue of institutions, defined by him as follows: "One can call institution all the beliefs and all the modes of behaviour instituted by the collectivity [...]. Sociology is the science of institutions, of their genesis, and of their functioning" (Durkheim 1895, XXII–XXIII; my translation).

The purpose of Hauriou's sociological analysis is to challenge the thesis of the objective nature of the collective conscience, a thesis that constitutes the nodal point of Durkheim's theory. Contrary to Durkheim, Hauriou lays emphasis on subjectivism and introduces the concept of power, using it to replace that of the collective conscience.

Hauriou's theory of institutions thus introduces the idea of power into Durkheim's sociology and, drawing on Bergson, that of duration into legal theory. In short, as we will see in what follows, Hauriou's view is that power is what enables the law to exist and to unpack its effects over time.

The institutional theory sketched out by Hauriou as early as 1906 does not yet clearly articulate in full the concept of an institution (see Hauriou 1906); but by distinguishing between statutory law (*droit statutaire*) and disciplinary law (*droit disciplinaire*), shaping the group's organizational discipline, Hauriou lays the foundation for a broader approach to law.

It is instead the second moment in Hauriou's work which anneals around an institutional theory of the state (see Hauriou 1910). Hauriou distinguishes two claims in this regard. His first claim is that one cannot understand the concept of the state just by analyzing its purported legal personhood, that is, by looking at the state as a unitary entity. Before considering the state's unitary legal personhood, one must embrace a pluralistic approach, investigating the way various social forces (economic, political, etc.) come together and balance each other out in forming the state. Prior to the state, that is, before one can speak of the state's legal personhood, some equilibrium must be reached, or some measure of organized power. This equilibrium constitutes pre-state law. Hence the state is a construction shaped by such juridical elements as the institution, the market, and the contract. Hauriou demonstrates that the power-centered approach to law need not be systematically set in opposition to an approach based on consent. He explicates the foundation of the state on grounds

other than a social contract or a foundational myth, emphasizing instead the role of power and the crucial issue of its acceptance by citizens.

The third moment in Hauriou's work is his fundamental account of the concept of institution *per se* (see Hauriou 1986). Indeed, Hauriou elaborates a theoretical model which does not focus only on the state but also articulates the idea of the group as an organized whole.

Hauriou's approach can be summed up, in his own words, as follows:

> An institution amounts to an idea of an enterprise [*œuvre*] which takes shape and sustains itself over time in a social medium by juridical means; in order for this idea to take shape, a body invested with power is formed, a body starting from which various organs emerge; using different procedural means, the organs direct and regulate the members of the social group, who manifest their communion with one another and are concerned with implementing the idea. (Hauriou 1986, 96; my translation)

Thus, Hauriou's theory of institutions articulates three distinct elements: There is an endeavour, project, or enterprise (*œuvre*), that is, what has to be realized, or a raison d'être; there is the power wielded by an organized government; and there are the manifestations of communion that mutually engender one another and develop into a hierarchy within the institution. The idea of *œuvre* is the guiding principle of the enterprise and so of the action carried out in the social medium. Hauriou's analysis establishes an immediate causal link between the idea and its implementation: between reason and action. These two aspects are inseparable, in that no idea can exist as such, without entailing action, and no action can exist that is not the implementation of an idea. It follows that, just as the idea of *œuvre* cannot be equated with its purpose—for if it were it would remain exterior to the enterprise—so it cannot be reduced to its function, for if it were it would be tantamount to what has already been achieved: The idea of *œuvre* encapsulates at the same time, and with no possibility of separation, the purpose and the means by which to achieve that purpose. The idea of *œuvre* is intrinsic to the *œuvre* itself: It comprises a plan of action, of organization (namely, the means through which the action is carried out).

Moreover, the idea of *œuvre* is geared toward the future, to that which needs to be done but which cannot yet be determined. The idea of *œuvre* is thus the object of the enterprise: "It is through the idea, and within it, that the enterprise is objectivized and acquires a social singularity" (Hauriou 1986, 100; my translation). But there is more: The idea must undergo a transformation in order to evolve from an objective status to a subjective one, or so that it can become the object of a collective enterprise. Indeed, in Hauriou's view, objectivity precludes action: Action is necessarily human, and individuals must relate to this idea, whether by (actively) promoting it or (more passively) by subscribing to it. It is because this idea is objective that it can engender subjective action or acts of adhesion.

From the idea of *œuvre* flows directly the power of organized government, in that it is the purpose of organized government to promote and implement the idea. The subjective reaction that individuals have to the objective idea makes the idea effective, and in this way the enterprise can be said to have an objective status, that is, a social character. Hauriou's theory rests on two important principles: the separation of powers and representation. Moreover, in his view, these two principles govern all institutions: not only the state but also other institutions, whether public or private. Hauriou's conception of the separation of powers is clearly opposite to that of Montesquieu: For on Montesquieu's conception, the separation is structural, a framework that keeps instituted powers apart, while on Hauriou's it is temporal, instituting powers by the succession (and aggregation) of government and adhesion.

Most important in Hauriou's view is that institutions must sustain and bring forth their effects over time. To this end, Hauriou makes the following threefold distinction, which can be said to describe, in one sense, the three stages in the formation of an institution (diachronic analysis) and, in another, the three elements necessary to any "living" institution (synchronic analysis): the *intuitive* competence of an enforceable decision; the *discursive* competence of deliberative power; and suffrage, or the power to assent by vote. The intuitive competence of an enforceable decision (*la compétence intuitive de la décision exécutoire*) is the power of a minority that intuits an idea and takes action to implement it by way of a decision: In this way the idea becomes the idea of *œuvre*. The logic at work here is intuitive: It is the logic by virtue of which the intuiting of the idea by a minority is enabled to move to its implementation by a majority; its nature is foundational rather than contractual. Discursive competence (*la compétence discursive*) means that the idea, as intuited by the executive power, will have to scrutinized by way of rational debate: At this stage the idea remains in the hands of a minority of subjects, those who have become cognizant of it.

Finally, suffrage, or the power of assention (*suffrage ou assentiment*), is the process which allows the idea to move from the sphere of the minority to that of the majority. According to Hauriou, the group does not as such have the ability to take action; it can only react to the idea by accepting or rejecting it, once it has been debated or expressed in a form accessible to all. Owing to this temporal conception of the separation of powers, Hauriou avoids the traditional impasse associated with the notion of representation. In his view, a representative regime is an organization of power allowing the organs of an institution to express the will of the body which it constitutes.

The body exists, acts, and expresses its will solely through its organs. But this is true only insofar as it does so for its own purpose and not for that of its organs. This process makes representation possible, since representation is no longer construed as a relationship between persons (the representatives and those being represented) but as a relation between individuals and the idea

being represented. Otherwise stated, representation requires that the government and the members of the group share the same idea of the *œuvre* at issue, i.e., that they agree on the content of the idea that unites them, as a matter of fact, or ought to unite them, as a matter of principle: "A body is nothing without its organs, and it wants by (or through) them; but they will want for it, not for themselves; this difficult question is solved by the principle of representation, which rests entirely on the directive idea" (Hauriou 1986, 103; my translation, italics added).

Manifestations of communion by the members of the group and the organs of government alike, whether these manifestations concern the idea of *œuvre* to be achieved or the means that need be deployed to this end, play a crucial role in implementing the institution. The core element, again, lies in subjectivity, through which the members of the group adhere to the idea, understand and promote it, and in the end make it their own.

This communion evinces the existence of an immediate causal link between objectivity and subjectivity, the collective and the individual, the group and its members. Hauriou gives two examples of such manifestations: On the one hand are the popular uprisings that lead to the foundation of new political and social institutions when they emerge and engender immediate adhesion and the concomitance of the three powers (see Hauriou 1986, 105), and on the other is the acceptance by the members of the group of the rules that regulate the general functioning of the institution, i.e., the acceptance of the rules of the game (as when the minority accepts the majority's decision owing to the fact that power is exercised with a view to implementing the idea), in which regard, Hauriou remarks, "not all assembly meetings have the same sentimental display of the Tennis Court Oath, but in more dispassionate way they all enable a majority to vote what it claims to be the will of the union" (ibid.; my translation).

The three elements that make up an institution are articulated having regard to a fundamental principle that sustains and explains durability in the social medium: the principle of interiorization (*intériorisation*). This movement from objectivity to subjectivity is made possible by two successive phenomena that characterize the dynamics of institutions: incorporation and personification.

The idea is incorporated by the members of the group, who in turn implement the idea through acts of government and the different procedures available to them. This constitutes the intuitive minority government and is a first interiorization.

The idea is interiorized in a second way: It is personified. This happens when the manifestations of communion become apparent, that is, when the members of the group make the defining idea their own—when the idea is no longer external but, in Hauriou's words, "reflected in the individual consciences" (Hauriou 1986, 106; my translation). This latter moment leads to the birth

of an institution understood as a body proper. The government does not cease to exist, but the majority's adhesion replaces the minority's intuition: "The state is personified when it has reached the point of political liberty, through the citizens' participation in government" (ibid., 111; my translation).

According to the legal formalists, institutions are created by way of juridical acts: foundational documents, contracts, constitutional texts, and the like. Hence legal formalists subscribe to the idea that nonstate (private as opposed to state) institutions are necessarily created in a different way than is state, which is an institution created by stipulation. By articulating the constitutive elements of the institution, Hauriou deploys arguments of a very different nature.

Indeed, for Hauriou, the law cannot in any strict sense "create" anything; specifically, that cannot be the way an *institution* is created. In his view, law is neither a triggering force nor a force of action: It exists only in *reaction* to something. Creation depends on human action, whether individual or collective, and its product is necessarily effaced over time. Otherwise stated, action works against a major corruptor: time. Its driving force, its momentum wears off over time and ultimately disappears. In order for the group not to dissolve and the idea not to be corrupted by time, it is imperative that a force be deployed to counteract the corruptive effect of time—and this force, according to Hauriou, is the law. Hence, it is not that law creates institutions, but rather that institutions necessarily generate law through the instituted (*institué*), versus that which institutes (*instituant*), which tends to disappear over time: "Legal rules represent ideas of limits, not ideas of enterprise or creation" (Hauriou 1986, 127; my translation).

This approach can be appreciated in the twofold distinction Hauriou makes between *status-conferring* legal rules, which guarantee the group members' individual rights within the bounds of the institution, and *disciplinary* legal rules, which guarantee the group's cohesion by promoting organizational discipline, particularly as concerns the protection of fundamental rights and the provision of collective policing (see Hauriou 1906).

The question of the group is addressed by Hauriou in a manner converse to that of those who propound the subjectivist theory, in that he starts out not from the individual but from the *group*. The group exists within the individual, and there is no clear-cut demarcation between the group as an external entity and people as individuals. The objective idea is not likened to Durkheim's collective conscience or to the rule emanating from the social medium, as in Duguit, but is rather an objectification of subjective consciences.

Here the idea is *immediately* objective: It is directly common to all individuals, who are aware of it and make it their own. Hauriou's approach is inspired by a more general ontological approach, that of man as a social animal; but he transcends this approach, since his analysis also draws on social and human psychology, and that leads him to assert that human beings as such constitute

an institution. In Hauriou's view, then, the social character is first and foremost a psychological dimension.

12.2.2. The Aporia of Pluralism

The logic underlying Hauriou's institutional analysis very naturally raises the question of legal pluralism. By characterizing the state as an institution, and the institution as a theoretical model applicable to all organized groups, Hauriou rejects the specificity of the state relative to other organized groups: the specificity that lies in what classical theories of the state call sovereignty or law. Thus, by construing the law as a product of institutionalization, Hauriou articulates a model in which the state's normative order does not monopolize the juridical sphere.

In the first two stages of his institutional analysis, Hauriou develops a conception of the law that starts out, not from the state as a unitary construct, but rather from the elements that precede the state: hence the description of his theory as one of pre-state pluralism. Among the theoretical elements that characterize this pre-state moment, he identifies juridical elements such as institutions, which he now defines as "social organizations established in relation to the general order of things, and whose individual permanence is ensured by way of an internal equilibrium effected through a separation of powers from which a juridical situation ensues" (Hauriou 1910, 131; my translation). The state thus flows from institutions conceived as preexisting juridical situations, and an equilibrium is reached as a result of a plurality of juridical orders in competition. At the third stage of his analysis, as we have seen, Hauriou departs from a diachronic perspective, which views the state as an institution, and focuses instead on the ontology of institutions, so as to then generalize this instituting paradigm to the group as a cohesive whole.

The difficulty, then, is to rethink the relationships among institutions, whether or not these relationships as instituted. Hauriou's analysis raises several pressing questions—not all of which are addressed by Hauriou—in connection with the passage from the static analysis of a given institution to the dynamic process of institutionalization, namely, the dialectic among groups and the circumstance that each individual is not part of just one institution but belongs to several (the family, the state, a business, a union, etc.), and these may in the end come into conflict with one another. By reconstructing the juridical status of these various relationships and institutions (whether relevant or not, in Santi Romano's terminology: cf. S. Romano 1918), the *institué* tends to efface the movement of the *instituant*, which the theory must account for.

Hauriou's analysis thus brings into play two logics that, as Jean-Arnaud Mazères (1998) has demonstrated, he adopted by articulating two theoretical models in turn. The first one is metaphorical: The institution describes various groups including the state. The state is regarded *as*, or *likened to*, an insti-

tution, or it is treated as if it *were* one. Moreover several institutions, among which the state itself, exist synchronically, which means that none can develop to the detriment of the others. The elements that ordinarily characterize the state are thus effaced, and this is true in particular of sovereignty and the unity of the legal system: This gives place to what by contrast is a *plurality* of legal orders, thus calling for a critical reassessment of the prevalent ideological discourses on the state.

This metaphorical logic corresponds to Hauriou's theory of the institution as expounded by him in Hauriou 1986, a theory later taken up by Renard (1930) and then in large part by the critical materialistic analyses that can be associated with the concept of institution (see Sartre 1960 and Lorau 1970). But this legal pluralism leaves open the question whether the possible inter-institutional relations are consistent with its premises.

Hauriou's second (albeit chronologically first) logic is instead metonymic: The state is *composed* of institutions, meaning that the state historically evolved in a way that transcends the particular features of institutions, so as to become the only general institution, structurally paving the way for the effacement or subordination of particular institutions under the more general one. The concept of institution is thus twofold: it refers both to the primary, single and sovereign institution, namely, the state, and to the secondary institutions subordinate to the state.

So, starting out from a metonymic logic by which to analyze institutions *before* and *within* the state (the first and second steps in the institutional theory: see Hauriou 1906, 1910), Hauriou brings out a metaphorical logic (the third step), which investigates the state as an institution. But if the state is an institution like any other, there is no longer any place for sovereignty, that is, for the state itself. That is a concern to him (or at least the ramifications are), and he therefore winds up trying to ward off that scenario, however much unsuccessfully. So here is the aporia: When moving from the metonymic logic to the metaphorical one, Hauriou is unable to articulate inter-institutional phenomena without relying on a totalizing institution that for him can only be the state (and that leads him back to the metonymic logic); but at the same time his personal outlook prevents him from fully subscribing to a deconstruction of the state: This deconstruction is entailed by the metaphorical logic, but he sees it as a *negation* of the state. So in his last writings, Hauriou steps back and, so to speak, finds refuge in a rather strict and narrow view of the institution exclusively devoted to explaining the *origin* of the state (see Hauriou 1929, especially the first two hundred pages, mainly dedicated to a quasi-classical theory of the state, despite a constant reference to the institutional theory).

Returning to sovereignty and unity, Hauriou loses sight of pluralism; at the same time, he neglects the potentially novel use of his approach as a tool for deconstructing legal formalism. His approach thus remains conservative, rather than critical, in that, just where it might have conferred legitimacy on

groups, their role is replaced by that of the individual within the state. In short, he winds up offering a form of corporativism that could perhaps be revived by promoting certain communitarian approaches.

12.3. Léon Duguit (1859–1928) (*by Carlos Miguel Herrera*)

At the time that legal theory began to develop in France, Léon Duguit stood out as perhaps the foremost proponent of anti-formalism. Anti-formalism was of course promoted by other authors, too, but Duguit's work is especially original, and it undoubtedly accounts for the large audience he attracted both in France and abroad. Duguit was indeed an influential, if not the most influential, French legal thinker of his time, owing in particular to several visits on the American continent (Argentina and the United States) as well as in northern Africa (Egypt), not to mention Europe (Spain, Portugal, and Romania).

Much like Maurice Hauriou, Duguit vows allegiance to legal positivism, a conception he equates with a scientific analysis of the law (see Milet 2003). As early as 1899, he claimed that law is a "positive science, that is, a science of observation through and through" (Duguit 1889, 7; my translation), in that it conceives all phenomena solely as observable facts. His principal follower, Roger Bonnard, would later label Duguit's approach to law as "experimental positivism" (R. Bonnard 1926, 1929a). While Duguit was first and foremost concerned with laying down the epistemological foundations of his analysis, the positivism he advocates is of a particular kind, in that it emphasizes a sociological approach. Moreover, we will soon see that, notwithstanding the strong claims made by Duguit himself, an approach so construed can also be viewed as an offshoot of natural-law theory, albeit in an original sense.

12.3.1. Toward a "Realist" Epistemology

Duguit sets out his overall epistemological position in three short sentences: "Positive science observes facts; it is aimed at determining their constant relationships; these constant relationships are called laws" (Duguit 1889, 6; my translation). So, in his view, "legal science, insofar as it exists, does not pertain to a world apart from that of realities but rather *is* part of that world: Its objects are not fictions or abstractions but concrete facts" (Duguit 1901, 614; my translation).

And insofar as scientific progress is concerned with "the aspirations and needs of our epoch," it constitutes for Duguit a major social issue (as will be explained below). It is in this sense that Duguit's analysis can be said to be strongly normative; indeed, in his view a science of law (or at least of public law) "deserves to be so called only if it can account for the existence of a foundational norm, superior to the state per se, that posits both negative and positive duties."

Duguit's epistemology develops in two directions that, roughly speaking, can be designated as "negative" and "positive" (see Herrera 1997). Its negative branch is a critique of the metaphysical holdovers that continue to permeate legal thought. Indeed, Duguit denounces the persistence of a metaphysical, even a theological mentality that he descries "behind the manifestations of thought and human will [...], a thinking and willing substance, the soul" (Duguit 1921, vol. 1, 178; my translation). Duguit claims that this approach leads "lawyers and the legislator to place metaphysical substances behind all protected social activities so as to explicate the protection accorded to them" (ibid., 179; my translation). The best example of this substantialization, in his opinion, is the concept of a subjective right, which developed in the legal sphere as a result of the hypostasis of the notion of the soul. This hypostasis of the human soul leads to "a substantialization of its purported attributes" (ibid., 178; my translation). But, according to Duguit, "the indispensable postulate of any science" is that reality "in the social world, as well as in the physical world, can only be that which I can ascertain by direct observation; and all that which I thus ascertain I take as real. What is real is observable and what is observable is real" (ibid., 329; my translation). According to this positivist model one must, in short, "ascertain the facts, recognizing as true only those facts ascertained by way of direct observation, and must ban from the juridical sphere all *a priori* concepts, all objects of metaphysical or religious belief [...] that are not scientifically relevant" (Duguit 1927, XV; my translation).

Duguit's positivist approach was aimed at elaborating a legal theory that can account for the law's social dimension at a time when political and social transformations had discredited formalist accounts (in France) and personalist ones (in Germany). In one of his elegantly compact turns of phrase, Duguit sums up as follows the doctrines of law he advocates, which can be characterized as social, and to an extent even as socialist (as he himself sometimes describes his theory): These doctrines "start from society to arrive at the individual, from objective law to arrive at subjective law, from social rule to arrive at individual rights" (Duguit 1923, 6; my translation).

In Duguit's view, a scientific investigation of the law is necessarily sociological—which is why he asked that the schools of law be placed under the aegis of the schools of sociology (Duguit 1889). Sociology is understood by him in a broad sense as including *all* the social sciences; which leads him to deepen his understanding of political economy before setting out to study a discipline that was still in its infancy at that time, namely, constitutional law.

Law, as Duguit conceives it, is a branch of sociology, or, more precisely, as he writes in 1893, it is that part of sociology "which aims to formulate the laws of social interrelational phenomena" (Duguit 1893, 206; my translation): In an earlier statement, he had referred to the laws governing "the direction and the conservation of the social aggregate" (Duguit 1889, 18; my translation). According to R. Bonnard (1929a, 63), Duguit's view was original in that

he abandoned the organicist approach espoused in his early years (under the influence of Herbert Spencer), and he even abandoned Emile Durkheim's sociological approach by refusing to subscribe to the idea of a collective consciousness. However, Duguit is of the opinion that the social consciousness "always constitutes the irreducible part of human conscience" (Duguit 1893, 208; my translation), and he would never abandon a certain biologism, at least for the purpose of drawing a parallel whereby the "individuals who make up a social organism are subject to the law of that group" (Duguit 1927, vol. 1, 78; my translation), which law governs both the formation and the development of that group. The only difference from a living organism, for Duguit, is that individuals (as against social entities) act consciously (see ibid.). Charles Eisenmann is right to say that Duguit's conception of the law is quasi-biological (see Eisenmann 2002).

Duguit's appeal to sociology takes him one step further. For, in his view, "social solidarity" constitutes the very foundation of the law. The idea of "ascertaining the facts directly" made Duguit aware of the importance of solidarity understood as a "permanent fact, always identical to itself, the irreducible constitutive element of any social group" (Duguit 1927, 86; my translation). In elaborating his theory, Duguit thus remained immune from the political approach advocated by Leon Bourgeois (1851–1925), a radical political leader, future prime minister, and Nobel Peace Prize laureate who championed a doctrine he called "solidarist." He instead focused on Spencer's organicist view (society regarded as a living organism) and drew on Durkheim's conceptualization of solidarity. Relying on Durkheim's distinction between mechanical and organic solidarity, Duguit sought to demonstrate that "all societies are driven by solidarity; that the purpose of all rules that govern human conduct in society is to achieve solidarity; that human relationships have always been, and will always be, ones of similitude or division of labor; and hence that there is a durability to law and its general content" (Duguit 1923, 11; my translation).

In Duguit's view, solidarity "properly understood [...] does not lie in any permanent coincidence of individual and social purposes," in that humans cannot but seek to achieve solidarity (Duguit 1901, 615; my translation). Indeed, his avowed "objectivism" is connected with the idea that when a social rule imposes a legal rule on society itself, it does so through a traceable (and hence observable) route.

12.3.2. The Concept of Law

This sociological-legal epistemology enables Duguit to avoid what he considers to be the metaphysical notion of a subjective right and to elaborate an "objective" concept of law as a social norm. In Duguit's view, the relationships created by the positive law entail objective powers and duties exclusively. Thus,

strictly speaking, individuals can have no rights: They only have "social duties." Conversely, the state "has a duty to not preclude individuals from fulfilling their social duties and especially from freely pursuing their actions" (Duguit 1923, 213; my translation).

If individuals are subject to a rule under which they "must avoid doing what could harm social solidarity and must do whatever can promote and develop mechanical and organic social solidarity," the role of the jurist will be to determine "the rules of law best suited to the structure of a given society" (Duguit 1923, 11; my translation). That on which the law is built, is of course always factual in nature: "In effect, the law is a set of rules, but the rules ensue from practical necessities that are facts of the *Sein*" (Duguit 1927, 64; my translation). The social norm thus "exists solely owing to the fact that there exist human societies, made up of conscious individuals" (ibid., 70; my translation). Otherwise stated, "society and social norms are two inseparable facts" (ibid.; my translation).

This social-reality approach shapes the basic features of the legal rule. Accordingly, it "is not that the rule is superior to or preexists the group; rather, it is the rule which derives from the transient and changing real-life conditions of a given society, and which can be determined by an observation and rational analysis of its evolution and structure" (ibid., 71; my translation). Moreover, the social norm is "a law whose purpose is to coordinate the individuals who make up the social group: It does so by limiting their action and imposing certain acts, but leaving intact the substance of their willing power" (ibid., 80; my translation).

It remains to be determined how this rule, deriving from the social needs of individuals, becomes a *legal* rule. It is a natural social element that can be determined by observation, serving as a guideline for the transformation of a moral norm into a legal one, that is, into a social constraint. "A social, economic, or moral rule becomes a juridical norm when, for various reasons, in a given society, a mass of people becomes aware that the sanction attached to this rule can be enforced on a permanent basis by a social reaction within a more or less developed organization" (Duguit 1921, 41; my translation). People become aware that a legitimate use of force is needed to guarantee certain social norms, even though such coercion has no bearing on the ultimate purpose of law, which is to promote "cooperation and social solidarity."

As mentioned at the beginning, Duguit's analysis thus paves the way for a natural-law approach: Duguit maintains that enacted positive law "is obligatory only insofar as it is in conformity with *the* legal rule" (Duguit 1921, 170; my translation), by which he means the social rule of solidarity. Duguit remains an ardent advocate of the right to resist the oppression that flows from the naturalistic foundation of law, a foundation to which he more or less overtly subscribes, "insofar as no one has an obligation to obey a legal rule when it is contrary to the law," that is, in his view, contrary to the social rule of solidarity.

Indeed, if a law is imperative, it is "because it ascertains a legal rule, namely, a rule that is itself imperative" (Duguit 1901, 616; my translation).

Duguit's naturalistic trope comes through even more clearly in his analysis of the relationship between the law and the state. Duguit subscribes to a sort of legal pluralism (or rather, to a legal *dualism*), in that, in his view, "the law is not a creation of the state; it exists outside the state; the notion of law is totally independent from that of the state" (Duguit 1921, 33; my translation). It is the *corollary* of what is posited here that is important: The legal rule is imposed on the state, and this idea can be upheld only insofar as "the law is created exclusively by the state; that is, legal rules ensue from the state's formulation or acceptance of economic and moral rules" (ibid.; my translation). So, for Duguit, "the state is subject to a legal rule superior to itself, a rule it does not create and cannot violate" (ibid., 547; my translation).

12.3.3. The Theory of the State

It is no doubt an original contribution that Duguit's theory of the state (including his early work) made to legal theory, at least in the context in which it was formulated, that of early-20th-century France. First, he criticizes conceptions of the state he associates with German culture: those on which the state is said to be a person with a real existence and is thus capable of manifesting its will, that is, of exercising the power to determine itself for what it is, or, in other words, of exercising its sovereignty. It is by virtue of this sovereignty that the state can create law and enforce it. In Duguit's view, however, the idea of sovereignty is a potent sign of the survival of a theocratic conception of law: "If sovereignty is the manifestation of a will superior to individuals, it is capable of conferring rights; however, a right can only result from the will of an entity superior to the sovereign; and, by definition, no manifestation of will on the part of an entity superior to that of the sovereign is possible on earth" (Duguit 1927, 545; my translation).

But the originality of Duguit's approach lies in his effort to deploy this social analysis in constructing the notion of the state. Especially relevant in this regard is the concept of public service that Duguit uses to define the state. Indeed, public service is defined by him as "any activity ensured, regulated, and controlled by those who govern as part of a process aimed at implementing and promoting social interdependence, bearing in mind that this process can be fully achieved only through the intervention of the governing force" (ibid., 61; my translation). This conception allows him to explain the state's intervention in economic and social issues. In his first major book, *L'Etat, le droit objectif et la loi positive* (The state, objective law, and positive law: Duguit 1901), Duguit criticized this neoindividualistic approach to the law, an approach that constrains the power of the state but leaves unanswered the question of the foundation "of the active obligations incumbent upon it."

Numerous duties of the state derive from social solidarity; the state, in other words, has a legal obligation to pass certain laws on such issues as education, social services, and labour. Duguit, however, opposes the notion of a right to active social benefits dispensed by the state (what are generally referred to today as social rights, or entitlements), even though in his view the state, whatever may be its political organization, has a social duty to promote the rights of those who participate in the labour force and to protect them from exploitation, as well as to ensure equal access of all to health care, not to mention minimal standards of subsistence, education, and culture (see Duguit 1923, 214, 299–300). Otherwise stated, "the law the state has an obligation "to formulate and implement" (Duguit 1921, 554; my translation) includes provisions giving "each individual the practical and moral possibility to promote social solidarity" (Duguit 1928, 641; my translation). This is not to say, however, that the power of the state is boundless. Indeed, to begin with, Duguit criticizes the concept of sovereignty and any other account aimed at explaining the state as something other than the community of those who hold power in a given society. Duguit sums up this idea in a rather simple equation: "In the distinction between those who govern and use force and those who are *subject to* this force—therein lies the state" (Duguit 1901, 616). This vision entails important consequences regarding the limitation of power, since, in Duguit's view, "those who govern are individuals like all others, subject like everyone else to social rules based on social and intersocial solidarity." These social rules "impose duties on them, and their acts are legitimate and must be obeyed, not because they emanate from a so-called sovereign, but insofar as they are in conformity with the legal rules which obligate those who formulated them." In other words, the state has a *de facto* power "whose object and scope are determined by objective law" (Duguit 1921, 565, 407; my translation).

After World War I, Duguit took a more liberal and classical path. He valued the idea of human rights and praised the 18th-century declarations for constraining power by proclaiming superior principles. Of course, this does not mean that he turned his back on the sociological approach to legal rules he always advocated; in his view, these declarations never *created* any rights but only *ascertained* them, as in the example of security, which he regarded not as a right proper but as a "socially recognized and protected liberty and property" (Duguit 1923, 217; my translation). From this point on, his analysis of the law would be more overtly congruent with natural-law theory, for he subscribed to the idea that "man enters society with rights to liberty and property" (ibid.; 1927, 603). As for the "practical consequences" of his theory, he readily conceded that he had arrived at the same conclusions as those who advocated an individualistic approach. Moreover, he was in favour of judicial review modelled on the American experience. In the context of the Third Republic in France, he proposed that the constitutional law be distinguished from the 1789 Declaration of the Rights of Man and of the Citizen as supreme

norm, should the former be judged unconstitutional, arguing that the Declaration would survive such a judgment because it carries "full positive legislative force." Duguit was a strong advocate of the possibility for all litigants to challenge the constitutionality of a law by upholding a higher law, whether written or not (see Duguit 1927, 718–9). He believed that judges should have the power "to refuse to apply a law that evidently contradicts a higher unwritten principle of law deemed by the collective conscience to be obligatory for the state" (ibid., 356; my translation).

Duguit's liberalism sheds a different light on his epistemological enterprise. He saw early on that the state is a collective entity which, if personified, is likely to "foster social struggle, thus paving the way, in the short run, for the triumph of revolutionary anarchism and tyrannical collectivism" (Duguit 1901, 615; my translation). He would also change his conception of private property, which he initially refused to regard as a right *per se*, eventually conceding that "the only way to combat communism is to educate people to understand that private property is not a right but a function" (Duguit 1924, 111; my translation). But the solidarity which permeates his legal theory already allowed for a conception of the social devoid of conflict. As Bonnard keenly saw, Duguit's approach is characterized at bottom by two other important features aside from his positivist claim, namely, his liberalism and his social conservatism. Although allegedly "political," these features reverberate through and pervade the core notions of his legal theory. But behind what Eisenmann (2002) took to be an irremediable contradiction between an empirical method and a social normative principle, there may actually be a challenge of no small account: Duguit was elaborating a theory aimed at conceptually embracing the social changes of his time.

12.4. Raymond Carré de Malberg (1861–1935) (*by Pierre Brunet*)

Raymond Carré de Malberg (1861–1935) spent his entire career as a law professor at the University of Strasbourg. Although he succeeded to Paul Laband in 1919, when Alsace was reintegrated as part of France, he pursued a critical reading and discussion of German legal scholars (among whom Laband himself and Georg Jellinek) with a view to articulating their conceptual system in light of the specific features of the French state. He was then regarded, and still is today, as one of the most influential French theorists of the state (*Staatslehre*) and of constitutional law—if not *the* most influential such theorist—and was a prominent representative of legal positivism understood both as an approach to law and as a theory of law.[3]

[3] Here I follow Norberto Bobbio's distinction among three meanings of the word *legal positivism*: as legal theory, as an axiologically neutral approach to law, and as an ideology. In this last sense legal positivism could be identified as legalism, where positive law is held up as an ideal of

Carré de Malberg had a deep understanding of German legal literature. His critical approach to Kelsen's and Merkl's theory of the hierarchy of norms is expounded in a book titled *Confrontation de la théorie de la formation du droit par degrés avec les idées et les institutions consacrées par le droit positif français relativement à sa formation* (The theory of the stepwise formation of law in comparison with the ideas and institutions entrenched in French positive law with respect to its formation: Carré de Malberg 1933), which, as the title suggests, is aimed at assessing the relevance of the hierarchical theory for the purpose of analyzing French positive law, especially with regard to its sources. The main critique he articulates is that the hierarchy of norms does not give a realistic account of the sovereignty of the French Parliament sovereignty or of Parliament as the sole source of positive law. His last book, published in 1935 and titled *La loi, expression de la volonté générale* (The law as the expression of the general will: Carré de Malberg 1984), analyzes the specificity of the French legal system as regards its sources and gives a critical account of parliamentary sovereignty, along with a number of suggestions on how to remedy its defects.

But Carré de Malberg's masterwork is undoubtedly his *Contribution à la théorie générale de l'Etat* (A contribution to the general theory of the state: Carré de Malberg 1920). Written before World War I, it was actually not published until 1920, as Carré de Malberg doubted its relevance following the devastating experience the states went through during the war. Notwithstanding his scruples, this work exhibits a richly detailed and complexly structured theory of the modern state from a positivistic point of view, though it is not immune from methodological criticism, for it is not so consistently positivist in its approach as it regularly claims to be.

If legal positivism, as Bobbio says, encompasses both a theory of law, that is, an axiologically neutral approach to law, and a theory of justice, then Carré de Malberg is surely a legal positivist in the first sense. But Carré de Malberg is also a positivist in the sense that his approach accords with many positivistic theses, and in particular with those identified by H. L. A. Hart, namely, that law is created by an act of human will, that these rules constitute a coherent system, and that legal concepts need to be analysed from a *legal* point of view, not from a sociological one.

12.4.1. The Positivist Theory of the Sources of Law

According to classical legal positivism, law is the product of authoritative acts ultimately backed by force. As Carré de Malberg puts it, law is a command, the expression of the will of an organ of the state, namely, the legislature. This is how he expresses himself:

justice itself (see Bobbio 1965). On Bobbio, see also Section 11.4 in this tome and Section 9.3.1 in Tome 2 of this volume.

Law, in the proper sense of that word, is nothing if not the whole set of rules imposed on men across a given territory by a superior authority having the ability to rule by exerting an effective power of domination and unvanquishable constraint. (Carré de Malberg 1920, 490; my translation)[4]

This is not to say that he promotes a naïve imperativist theory of law (like that put forward by John Austin). Indeed, the legislator is not, in his view, an abstract entity but rather one created through the State's constitution. His analysis is thus strictly legal and does not subscribe to any kind of ontological realism (on which see Section 12.4.2 below).

According to this strain of positivism, the origin of the constitution is a pure fact, and the constitution itself is viewed less as a norm than as a system of legislative and executive organs. This entails two consequences: first, the constitution cannot constrain the legislature; and second, the constitution cannot be reduced to its text.

Carré de Malberg is interested in characterizing the state with specific regard to French positive law. By *positive law* he means not only the French written constitution—which at the time consisted only of three written power-conferring laws enacted in 1875—but also the positive general principles inherited from the French revolution and never since revoked.

He points in particular to two such principles that in his view are closely linked. The first of these is the principle of national sovereignty: Sovereignty belongs to the nation as a whole; it is personified in the state acting through its representatives. The second is the principle that the laws are an "expression of the general will." Carré de Malberg understands such a claim not so much, or not only, as a norm but also as a "real" definition of the law as part of the French legal order, meaning that a law is valid only insofar as (if and only if) it is passed by Parliament regardless of its substance, and also meaning—no less importantly—that a law passed by Parliament is not amenable to judicial review. This explains why Carré de Malberg criticizes the distinction made by French scholars (but not by German ones, such as Laband) between substantive and formal law. According to Carré de Malberg, such a distinction fails to give an accurate account of the positive legal order, since the law can be defined only from a *formal* point of view:

Under French positive law, the real notion of a constitutional statute [...] is above all any decision issued by the legislative assembly in the form of a legislative act. (Carré de Malberg 1920, vol. 1, 327; my translation)[5]

[4] The French original: "Le droit au sens propre du mot, n'est pas autre chose que l'ensemble des règles imposées aux hommes sur un territoire déterminé par une autorité supérieure, capable de commander avec une puissance effective de domination et de contrainte irrésistible."

[5] The French original: "La vraie notion constitutionnelle de la loi selon le droit positif français [...] c'est d'abord toute décision émanant des Assemblées législatives et adoptée par elles en forme législative."

Because the laws enacted by Parliament are the main sources of law, one might expect the judiciary and judicial decisions to be defined as pertaining to the executive branch. Carré de Malberg does indeed claim that once a law is passed, judges have to decide cases in conformity with it. But he also envisages a scenario where no applicable law exists. And he goes on to explain that under Article 4 of the French Civil Code, prohibiting a denial of justice, judges may create new norms, since this power is rooted in the law itself (Carré de Malberg 1920, vol. 1, 704; see also Carré de Malberg 1933, 97ff. and esp. 114). As it stands, this claim can be interpreted in two different ways: On the one hand Carré de Malberg may be regarded as subscribing to the idea that there exist gaps in the law, in which case his approach is probably not as positivistic as it claims to be; on the other hand, his view may be seen as meaning that there can never be any gaps in the law, in that judges have a legal obligation to *create* norms when the law is silent. There are a number of reasons why the latter interpretation is surely the better one: Carré de Malberg's positivism may be deemed old fashioned today, but he was a coherent positivist nonetheless. And this explains why he never subscribed to the *Stufenbau* theory developed by Merkl and Kelsen. Whereas these authors believed that the difference between the creation of law and its application is only one of degree, Carré de Malberg maintains that the difference is in kind: The creation of law is in the hands of the legislature, whereas its application is in the hands of the executive. Even law entrusted to the creation of judges should be understood as *particular* norms, applicable only to the case at hand.

12.4.2. Legal Analysis of Legal Concepts

Under the influence of Jellinek and Laband, Carré de Malberg is concerned to articulate a purely legal theory of the state, that is, a concept of the state that can be distinctly observed by legal science. He also gives a legal analysis of the concepts of sovereignty and representation.

This explains why Carré de Malberg rejects the classical definition of the state as a compound consisting of a people, a territory, and a government. According to Carré de Malberg, this threefold characterization is inadequate because it blurs the distinction between facts and law. As he puts it, as much as the combination of these elements will most surely give rise to the state, the state cannot be reduced to it: "From the standpoint of legal science, the birth of the state is no more than a fact, one not susceptible of legal qualification" (Carré de Malberg 1920, vol. 2, 492; my translation; cf. ibid., vol. 1, 62).[6]

[6] The French original: "La naissance de l'État n'est pour la science juridique qu'un simple fait, non susceptible de qualification juridique."

Since legal science should focus on strictly legal elements, rather than on factual ones, it would be better, according to Carré de Malberg, to define the state as a "legal person," in which regard he comments as follows: "The state should be conceived, not as a real person, but only as a legal person [...]; the state cannot appear as a person until it has been contemplated from a legal standpoint" (Carré de Malberg 1920, vol. 1, 27; my translation).[7]

Very much in the same vein, he also comments thus: "From the standpoint of legal science, the birth of the state is a simple fact, as such not amenable to legal qualification" (Carré de Malberg 1920, vol. 1, 62; my translation).[8] And: "At the outset, the state was a *de facto* organization before it became *de jure*" (Carré de Malberg 1933, 167; my translation).[9] His analysis is in this respect very close to that of the German scholars, and it comes into contrast with the classical, albeit conflicting, views of French scholars who subscribe to the idea of the state as a fiction irreducible to the individuals who act on its behalf—but compare Duguit 1901: "The will of the state is in reality nothing but the will of the officials" (ibid., vol. 1, 261; my translation)[10]—or, on the contrary, to the ontological argument whereby the state is a real, albeit collective, person (see Michoud 1998, 62ff.).

According to Carré de Malberg, the state is a unity as the point through which acts of will are imputed. In this sense, the law never runs the risk of being confounded with facts; nor is the state liable to be viewed as a fiction subject to criticism or as an ontological claim in need of justification. The state is a legal person if, and only if, from a strictly legal point of view, human acts can be said to have a legal purpose. He writes that the state is thus a complex of *systèmes d'organes* (systems of organs), *c'est-à-dire*, "the result of an organization by the unifying effect of which the collection of its members is then reduced to unity"[11] (Carré de Malberg 1933, 167; my translation).

Carré de Malberg can thus account in an original way for the relationship between the will of the state and human acts. Indeed, according to a conception that had wide currency in his time, the state constitutes a person whose will can be set in motion only by way of individuals who act on its behalf. Departing from this view, Carré de Malberg claims that the state is a person *by virtue of* the fact that people act on its behalf. And that is so from what he calls a "logical point of view."

[7] The French original: "L'État ne doit pas être envisagé comme une personne réelle, mais seulement comme une personne juridique [...], l'État n'apparaît comme une personne qu'à partir du moment où on le contemple sous son aspect juridique."

[8] The French original: "La naissance de l'État n'est pour la science juridique qu'un simple fait, non susceptible de qualification juridique."

[9] The French original: "A l'origine, l'organisation étatique a été de fait avant de devenir de droit."

[10] The French original: "La volonté étatique n'est *en fait* que la volonté des gouvernants."

[11] The French original: "la résultante d'une organisation par l'effet unifiant de laquelle la collectivité de ses membres se trouve ramenée à l'unité."

So, for Carré de Malberg, the state is not an ontological entity: It is a pure legal concept, which he analyzes in very much the same way as he does the concepts of sovereignty and representation, both of which are in his view intrinsically linked to the concept of the state.

Carré de Malberg's analytical emphasis enables him to distance himself from the classical views on the sovereignty of the state. He is thus faced with the question: Is sovereignty the essential criterion of statehood and, if so, what distinguishes the state's sovereignty from parliamentary sovereignty?

Here, again, Carré de Malberg relies on German legal scholarship. His analysis rests on the threefold distinction among *Souveränität*, *Staatsgewalt*, and *Herrscher*. The first word is to be understood from a formal point of view: It points to the power of the state as originating from a supreme and independent body or organ. The second word refers to the various powers the state can make use of—especially the power of coercion—and is to be understood in a material sense. The third word refers to the power of a state organ, or the position this organ occupies within the state. Hence *sovereignty* refers to three different concepts, and there is no necessary contradiction in saying that a state is sovereign (in the sense captured by *Souveränität*), that a parliament is sovereign (in the sense captured by *Herrscher*), and that sovereignty (*Staatsgewalt*) belongs to no other entity than the state itself (Carré de Malberg 1920, vol. 1, 79–88).

Carré de Malberg is of course fully aware that positive legal orders are made of heterogeneous norms. He readily admits, for instance, that the German legal order of his time is based on the sovereignty of the monarch, whereas the French legal order is based on the sovereignty of the nation. This constitutes to his mind a most important difference between the two legal orders, insofar as the sovereignty of the monarch evinces a confusion between the monarch as a person and sovereignty itself, whereas national sovereignty allows for a clear-cut distinction between the sovereign—the nation legally personified in the state—and the physical persons who act on its behalf. As much as these natural persons may *exercise* sovereignty, sovereignty does not *belong to* them, because they are acting not on their own behalf but as organs of the state (Carré de Malberg 1920, vol. 2, 306). To better understand this point, we need to examine Carré de Malberg's conception of representation.

His analysis of the concept of representation is a key feature of his overall theory. Here, again, he transcends the academic discussions of his day, and German legal scholarship provides him with a renewed point of departure. According to classical French jurists, mostly focused on private law, political representation is either a mandate or a delegation of power from the electors to their representatives. This view was sometimes criticized, by Duguit, for example, and was even rejected for its lack of realism—a lack of *sociological* realism, as Duguit saw it—on the ground that representation is a myth, if not a kind of lie (see, for example, Duguit 1901, 18).

Carré de Malberg took a very different approach. He relies on Jellinek's analysis of the concept of a state organ (see Jellinek 1900) to show that there is no necessary link between representatives and their electors. His argument is that from a legal point of view, representatives are committed to realizing the will, not of *particular* electors, but rather of the people as a whole. To make the rule explicit: "Representatives are representatives of the nation." As Carré de Malberg comments, "this means that they represent, not the totality of citizens individually considered, but their indivisible and extra-individual collectivity as a whole" (Carré de Malberg 1920, vol. 2, 223; my translation).[12]

Thus the will of particular individuals—as organs of the state—can be attributed to the state itself on the basis of the Constitution, not in virtue of the conformity which that particular will may have with the actual will of the people who elected the representatives. To put it otherwise, the will of the person legally constituted as an organ of the state counts as the will of the state, or, in modern parlance, that person's will is "constitutive" of the will of the state.[13] The question, then, is Why does positive law use the word *representation* rather than *organ*? For Carré de Malberg this has to do with the rhetorical weight the word *representation* carries, in a way that *organ* does not (see Carré de Malberg 1920, vol. 2, 305; Brunet 2004). But rhetoric is not the only explanation. He also points to the previously recalled specificity of the French legal order in distinction to the German one, in that, whereas the former was dominated by the sovereignty of the nation, the latter was by that of the monarch (and of course in drawing this distinction he was making a political claim in defence of democracy against autocracy: see Carré de Malberg 1920, vol. 2; Schönberger 1995, 1997).

12.4.3. Carré de Malberg as a Quasi-Positivist

Despite his oft-reiterated profession of positivism, Carré de Malberg does not adhere to a purely descriptive approach to the positive law: He rather elevates some of his descriptions to the rank of absolute and incontestable truths.

Carré de Malberg's concept of positive law is ambiguous. Indeed, what he has in mind here is not so much a set of rules created in accordance with procedures set forth in the constitution as a set of "principles the truth value of which is unrelated to positivity" (Maulin 2003, 26, 335; 2002, 5–27; see also Beaud 1994, 1251–4; 1997, 219–54).

The epistemological status of the principle of national sovereignty as he defines it raises numerous difficulties in this respect. Carré de Malberg describes

[12] The French original: "Elle signifie qu'ils représentent non pas la totalité des citoyens pris individuellement mais leur collectivité indivisible et extra-individuelle."

[13] Here the term *constitutive* is being used in Searle's sense to mean that what is constitutive can be qualified as such not in virtue of its *creating* any behaviour but in virtue of its providing that behaviour with a *meaning* (see Searle 1969 and 2009).

that principle as a "given" attribute of French constitutional law, without specifying what he means by *given*. Hence he fails to give a plausible justification of his oft-repeated claim that the *Constituante* (or constituent assembly) operated on a general theory of the modern state. According to Franz Weyr, Carré de Malberg regards the revolutionary juridical order in much the same way that theologians regard the Bible (see Weyr 1934): as a source of principles expressing incontestable truths from which other incontestable truths can be derived.

Moreover, the principle of national sovereignty as defined by Carré de Malberg departs "from the norms his method imposes" (Maulin 2003, 107; my translation), insofar as the French Constitution of 1791—which in his view comes first not only in a chronological sense but also in virtue of its principles—does not just lay out a distribution of powers but also proclaims theoretical principles whose truth is unrelated to their status as positive law. As Eric Maulin aptly comments, "it is not because these principles are stated that they have a juridical status but it is because they are true that they are stated and thus acquire juridical value" (ibid., 108; my translation).

So it seems that Carré de Malberg espouses a natural-law approach on which the validity of a juridical norm rests on its truth. Indeed, while defining the essence of the state on the basis of the French Revolution—by which is meant: according to his *own* construal of this revolution—Carré de Malberg (2004, 336) adopts a "fundamentally prescriptive" approach. Indeed, as much as, in the name of science, he is constantly seeking to "verify" or "compare," as he himself puts it, the theoretical claims he advances with the legal system such as it exists, he winds up failing in that effort insofar as, in his view, the criterion for establishing the truth of a theory lies in its agreement with the principles of positive law—but then these principles turn out to be themselves juridical or positive only inasmuch as they correspond to his *a priori* theoretical conception. And in this way, as Michel Troper (1993) rightly observes, "the *a priori* rational conceptions become indistinguishable from the applicable public law" (my translation).

Moreover, Carré de Malberg's approach is not devoid of political presuppositions. Indeed, he not only seeks to determine the defining principles of the legal orders he scrutinizes but also sets up an axiological hierarchy among them, claiming that the principle of national sovereignty led to the adoption of a representative government and fostered the birth of the modern state, over against the sovereignty of the monarch or of the people in such a way as to raise an individual or a group above the rank of the others, and to the detriment of the latter. His demonstration rests on another, more implicit presupposition, which has to do with the philosophy of history such as it was generally understood by the positivists of his time, namely, that history charts a course of progress, and especially that the French Revolution marked a new beginning in this evolution. Stated otherwise, ancient direct democracies conferred sovereignty on the *people*, the *Ancien Régime* on the *monarch*, but in the

wake of the revolution came the sovereignty of the *nation* and the adoption of representative government—both developments significantly advancing the progress of humanity.

Still, despite the reservations one may have about the "master of Strasbourg" and the criticisms that can be directed at his *oeuvre*, and in particular at his legal analysis of the modern state, the questions it raises and the arguments articulated in addressing these questions show an incredible richness of thought that should not be underestimated.

12.5. François Gény (1861–1959) (*by Jean Louis Halpérin*)

The 1899 publication of François Gény's *Méthode d'interprétation et sources en droit privé positif, essai critique* (The method of interpretation and the sources of law in private positive law: A critical essay, Gény 1899) marks what is often regarded as a kind of revolution in French legal philosophy. This assessment can be justified from a twofold point of view. First, Gény—born in 1861, professor in Dijon since 1890, then in Nancy in 1901 until the end of his career in 1931: He lived to be almost one hundred when he died in 1959 (see Hakim 2007, 360–2)—was one of the leaders of the new generation whose members wrought a deep and ameliorative reform of French legal thought in the late 19th and early 20th centuries. With his older friend Raymond Saleilles (1855–1912)—and with Maurice Hauriou (1856–1929) and Léon Duguit (1859–1928), two specialists in public law—Gény is among the great theorists who took part in a larger movement of intellectual revival of legal scholarship during the Third Republic in France (1870–1940). By comparison with their mid-century predecessors, these young professors were all more aware of the contemporary scholarly debate and of the international literature, especially the German literature originating in the Lorraine province (Gény read the German lawyers and on this subject exchanged many opinions with his colleague Saleilles). Moreover, Gény wanted to break with the "traditional method" of French civil-law professors—as he called it, preferring that phrase to the all too familiar "exegetical school," later stigmatized by Bonnecase (1924)—and he was the spokesman for the dominant movement that until today has recognized a key role for legal scholarship (the opinions of legal writers) and legal doctrine (the case law, especially that of the Court of Cassation) in French civil law (see Halpérin 2001, 180–8).

Geny's reflection since the *Méthode* is importantly developed without sweeping changes in his second great work, the four-volume *Science et technique en droit privé positif* (Science and technique in positive private law: Gény 1914–1924). Old-fashioned, written in a rather elegant, sometimes innovative French style, impressionistic in its mood, very far from the German writers' precision in the use of philosophical categories, this work today is more difficult to appreciate in any detached manner. The same goes for Gény himself

as a conservative jurist, a Catholic unfriendly to the anticlerical governments of the Third Republic (see Jamin 2000, 13), and who was given to fits of anxiety in the face of socialist threats (at the end of his life he was rather sympathetic to the Vichy regime). To be sure, many positivists may be disappointed with, or altogether uninterested in, the work of what appears to be a consummate yet trivial proponent of natural law (as we will see in what follows) who has invited lawyers to question the nature of facts and our opinions about justice in order to adapt legal rules to social needs. Moreover, what Gény has called "free scientific research" runs the risk of coming across as a pseudo-sociology—something he never himself indulged in (see Jestaz 2000, 52)—or as a pale forerunner of the *Freirechtsschule* (which he criticized in the 1919 edition of the *Méthode*: Gény 1899). But it seems fairer to first situate Gény's masterwork in its historical context in late 19th-century France, so as to then draw differences between his global (and rather unoriginal) theory and some of his more acute analyses.

12.5.1. A Time for Renewing French Legal Theory

As is explained in the first pages of Gény 1899, the context in which the book was written was one of crisis in the French law schools, for there was a sense that the study of law was rapidly moving toward the new discipline of sociology, which at the time meant the discipline that was shaping up with Émile Durkheim's early work, as well as under the influence of Herbert Spencer; the Italian positivist criminologists, especially Cesare Lombroso and Enrico Ferri; the school led by Frédéric Le Play (1806–1882), the author of *La réforme sociale en France* (The social reform in France: Le Play 1864); and the books by Gabriel Tarde, especially *Les transformations du droit* (Transformations in law: Tarde 1896), and René Worms, especially *Organisme et société* (The organism and society: Worms 1896).[14] There came up a generation of law professors who turned out to be more knowledgeable and better qualified as a result of the new institutional framework set up from 1854 to 1856, under which professors were appointed on a competitive basis—the so-called *agrégation* (or "aggregation"). The curriculum was redesigned in keeping with the republican reforms: The new programs of 1880 and 1889 expanded the curriculum so as to include the history of law, as well as economics and a stronger grounding in public law. Then in 1896 the curriculum was divided into in four sections: private law, public law, economics, and the history of law. But at the same time these reforms also raised concerns among faculty, who were worried that students might "jump ship," finding the other social sciences more attractive. At fault for this situation, in the opinion of Gény and the other advocates of renewal, was the traditional method of writing and teaching law: The standard

[14] For an overview of this entire landscape, see Mucchielli 1998, 144–54.

practice at the schools had ossified into a kind of sclerosis—the traditional method, Gény commented coining a French neologism (and in translation an English one, too) "stagnifies" (*stagnifier*) law—this in contrast to the German ferment of ideas since the works of the late Jhering until the debates leading up to the enactment of the German Civil Code (1896).

Gény starts out by offering an analysis of the "traditional method," focusing (with some exaggeration, as he would on occasion admit) on its abuse of purportedly geometric deductions from the legal texts, and in criticising these aprioristic constructions he drew on Jhering. Is it only at a second stage (Gény 1899, 24)—a very short-lived one, and quite neglected in many accounts of his thought—that he took aim at the "fetishist" attitude toward statutory law on the part of the mid-century interpreters of the Code Napoléon: Exemplary in this respect is Charles Demolombe's slogan, "*les textes avant tout!*" (the texts before all else!) (Demolombe 1845, vol. 1, VI; see also Halpérin 2001, 67). According to Gény (1899, 57–129), this religious reverence for the legislator entails the drawback of freezing the law in time at the moment of its statutory enactment (with a vain quest in search of an elusive legislator's will), and it gives a false authority to engage in abstract reasoning, completely disconnected from real facts. So, as Gény (ibid., 147) argues, behind the exegetical method there is the arbitrariness of the interpreters and the illusion of a subjective dogmatics. Gény dares to attack the Strasbourg professors Charles Aubry (1803–1883) and Frédéric-Charles Rau (1803–1877),[15] translators of the German handbook on French civil law written by Karl Salomo Zachariae,[16] and often praised as the most abstract interpreters of the Code Napoléon, especially with their theory of *patrimoine* (or patrimony, the civil-law equivalent of the common-law estate). This "transcendental" method (perhaps an allusion to its Kantian roots) has isolated legal thought, imprisoned in fictions without any connection to social needs (see Gény 1899, 174). Still drawing on Jhering, Gény sets that method against that of the Roman lawyers, whom he praises for their mitigated use of logic and a pragmatic analysis of factual phenomena. Just as Jhering proposed going *through* Roman law so as to move *beyond* it, Gény suggests a new method that would go through case law so as to progress beyond the Code Napoléon.

12.5.2. The Fear of an Unbridled Judge-Made Law

The main thrust of Gény's analysis lies in his making it possible to appreciate the prominent role that case law plays in French civil law. Here the stage

[15] On Aubry and Rau, see Arabeyre et al. 2007, 22–3 and 653, respectively.

[16] See Halpérin 2001, 65–6. The first edition of Zacahariae's handbook was published in 1808 (Zachariae 1837 for the fourth edition); Aubry and Rau's *Cours de droit civil français* (Course on French civil law: Aubry and Rau 1839) was first published in 1839 and went through four increasingly revised editions.

for Gény's conclusions, enabling them to stand, had for the most part already been set. Indeed, the drafters of the Napoleonic Code, especially Jean-Étienne-Marie Portalis, themselves stated that codified law could not foresee all situations, and that many rules therefore had to be left to the courts' decision-making, that is, to their case law, or jurisprudence. For a long time, French lawyers had widely recognized that the published decisions of the Court of Cassation (the country's highest court) could fill the gaps in the Napoleonic Code (which, for example, was silent on the adoption of illegitimate children): In fact they accepted that the court could give new interpretations to much-debated articles of the code, and could even decide *against* the so-called plain meaning of the words used in the code. The court was established in 1790 (it was originally called *Tribunal de Cassation*, a name it retained until 1804), and starting from 1837, the courts of appeal were bound to follow the second of any two opinions the Court of Cassation may have rendered in deciding cases of the same kind (see Halpérin 2001, 52–4). For example, in three different opinions rendered from 1841 to 1846, the Court of Cassation interpreted a gap in the civil code in such a way that a child born out of wedlock could lawfully be adopted by either of the biological parents. French judges, as quoted by Gény, were of course aware that they played a role in the legislative power, despite their formal subjection to statutory law. French law professors increasingly took to citing the opinions of the Court of Cassation as authoritative even when they disagreed with what the court had said. As far back as thirty or forty years before Gény's *Méthode*, the practice of French lawyers in dealing with what they considered to be "bad" decisions had been not to attack those decisions frontally but to provoke modifications or inflections of the case law by writing critical commentaries, the famous *notes d'arrêts*, a legal genre originally developed by Joseph Émile Labbé (1823–1894), a professor of Roman law whom Gény quoted from different law journals (on Labbé, see Arabeyre et al. 2007, 441–2). In the years leading up to the publication of Gény's *Méthode* (Gény 1899), the innovating leaders of French legal scholarship (Adhémar Esmein, 1848–1913; Raymond Saleilles, 1855–1912; Étienne Louis Josserand, 1868–1941, all of them held in high regard by Gény) encouraged the Court of Cassation to develop a doctrine making employers strictly liable to workers for injuries caused by accidents on the job, and the way the court was to do this was by taking up a bold interpretation of the statutory language, and in particular of the phrase "liability because of things" contained in Article 1384 of the Civil Code (alluded through the words, "things which a person had under his care").

From then on the problem became that of finding appropriate limits for this influence of judicial jurisprudence (the case law) by removing any discretionary power of the judges and maintaining the legal scholars' monopoly on the interpretation of statutory law (Gény was not an enemy of codification and held on to the traditional primacy of statutory law in France). That is why,

contrary to Saleilles, Gény was not inclined to let judges "doctor" legal texts in order to support new interpretations. He preferred to insist that statutes had to be applied strictly, like in criminal matters, and that the space for "free scholarly research" was open only when the law was "silent" or failing (a view that today is regarded as nonsense by the advocates of heuristics: see Gény 1899, 232). Furthermore, he was sceptical about the burgeoning sociology—a science without clear directions, suspected of forsaking Christian morals (a veiled accusation directed at Durkheim and then at Eugen Ehrlich and Hermann Kantorowicz)—finding unpersuasive its claim to arrive at objective solutions with which to adapt legal rules to social needs.[17] The task of developing this new legal science was entrusted to the jurists, a class in which he appears to have included the judges, though he was especially thinking of legal scholars and commentators.

12.5.3. Natural Law as a Line of Defence Against Social Change

There is little doubt but that the legal theory defended by Gény—emerging as it does against the backdrop of the French situation as just analysed—implicitly entails a return to natural law. It must nevertheless be pointed out that the case for this legal philosophy (i.e., natural law) was not made with any dogmatism and that many of Gény's analyses were inflected with a savvy pragmatism. Very early on in *Méthode*, Gény quite straightforwardly sets out the mission of *jurisprudence*, a word he is probably using ambiguously in reference to both case law and *doctrine* (the French word for legal writing): *Jurisprudence*, Gény comments, is tasked with discovering and applying the rules most suited to maintaining harmony among men "in accordance with the aim assigned by God to humanity" (Gény 1899, 5; my translation). Having said that, Gény turns to (uppercased) *Justice*, suggesting (however much allusively) that that principles are needed with which to guide judicial interpretation. Rather than rejecting positivism and setting it against natural law, he finds that even the staunchest positivists use the concept of justice: In our own day we might call them crypto–natural lawyers. According to Gény, feelings of justice are an insufficient basis on which to fill gaps in statutory law, and free scientific research needs to be based on facts garnered through a serious study of history, statistics, or comparative law (see ibid., 492). As much as law may be linked to the social sciences, this does not mean that it should yield to sociology, but that it needs to rely on ethics, economics, and politics as objective tools with which to find solutions adequate to social needs (cf. ibid., 513–36).

Gény thus takes the view that the classical theory of natural law—as against the overly abstract conception of the modern school of natural law—needs to be modernized in light of new scientific ideals (see Villey 1969 and Cayla 1988).

[17] On Kantorowicz and Ehrlich see respectively Sections 3.1 and 3.3 in Tome 2 of this volume.

Although the method recommended by Gény undeniably bears connections to Roman jurisprudence and the work of the medieval commentators on Roman and canon law, it is not based on Aristotle's philosophy or on Aquinas's theology but is rather influenced by a nonconfessional (and rather vague) conception of social science. Despite his commitment to Christianity, Gény advocated a secular and changing natural law, comparable to the conception that Stammler was advancing, which was very influential on Gény's friend Saleilles.[18] Furthermore, in a distinctly French mode of thought, Gény's natural law is connected with the primacy of statutory law and a respect for codification. There come into view here the contradictions of the thesis: Gény is unable to *theoretically* explain why legislative power is not authorized to prohibit the use of other sources of law (like custom) and why the legislature has to be modest by not overstepping the bounds of its law making activity. The *political* explanation is, however, clear: Gény is trying to curb state interventionism—with a clear fear of a growing welfare state akin to socialism—and to ensure for conservative jurists an ability to control the evolution of law. That is also why Gény's work is limited to private law, with a clear-cut defence of individual rights (consistently with a concern to protect the interests of the bourgeoisie). In this sense, Gény can be seen as an archetypal member of what Pierre Bourdieu once called the "hypocrite keepers of the social order" (Bourdieu 1991, 95–9).

12.5.4. A Kind of French Pragmatism?

It would be too harsh to condemn Gény's entire *oeuvre* for this philosophically naïve theory of natural law. While acculturating the parlance and terminology of the German legal writers into French (*ordre juridique* for *Rechtsordnung* or *autonomie de la volonté* for *Willstheorie*), the *Méthode* develops in original ways the theme that law is not limited to statutes and that many legal problems have solutions outside the use of logic. The main examples of this pragmatism are found in Gény's analysis of custom as "spontaneous law," another modern-sounding expression taken up by Gény, seeing in it a force capable of counteracting the imperialism of statutory law (see Gény 1899, 230). Gény paid attention to legal practice, looking in particular at the impact of the legal instruments prepared by notaries,[19] and some of his sentences are surprisingly not very far from the notion of "living law" expounded by Ehrlich—surprising in view of the fact that Gény seems to have ignored Ehrlich at the time of the first edition of his *Méthode* (Gény 1899), and in 1919 even rejected his work as a hotbed of anarchism.

[18] On Stammler see Section 1.3 in this tome and Section 2.2 in Tome 2 of this volume.

[19] Herein lies another specificity of French law, in that notaries could influence the evolution of private law by drawing up marriage settlements (or separation agreements) and implementing rights of succession.

This importance accorded to the practice of non-lawyers is why Gény refused to consider case law as a direct source of custom. In order for a new rule of law to be created out of the solutions offered by the judges, it was necessary for those solutions to be known and accepted by laypeople. This was where the lawyers and practitioners had a role to play: They could work from custom in forging law, in effect using custom as an "engine" for the creation of law.

Another example of this pragmatism lay in the possibility, cautiously suggested by Gény, of judicial review of the constitutionality of law, contrary to a forward-looking French tradition that Gény judged to be open to new attitudes as they develop (see Gény 1914–1924, vol. 4, 92–100). Finally, Gény was convicted that the relation between law and fact was not at all simple: Lawyers were making a selection of social facts to construct some of them as legally interconnected or as legal concepts (see Gény 1899, 464–72). And the ongoing progress of law needed repeated recourse to facts. According to Gény, law was not a self-enclosed system, so lawyers needed to also look outside the legal world—something they were not accustomed to doing in France.

Paradoxically, as much as Gény's analyses may have been deeply rooted in German legal science, they turned out over time (even within the long arc of Gény's own life) to run completely opposite to the directions that German legal positivism would take with Kelsen's normativism as well as with the sociological developments (see Chapters 2 and 3 in this tome). Although Gény ignored the common-law tradition—he of course appreciated the importance of judge-made law, even if he probably considered it incompatible with French codification—his pragmatism can be likened to Oliver Wendell Holmes's hostility to abstract logic. It is no surprise that Gény's work became quite influential in the United States at the beginning of the 20th century (see Petit 1991). In France, Gény's *Méthode* is still regarded by legal scholars as the best philosophical work for the training of a future lawyer, but otherwise its destiny was perhaps less fortunate: Gény does not compare to Jhering, Jellinek, or Ehrlich, nor of course does he stand comparison with Kelsen. For these reasons, it is more fruitful to read Gény as a keen analyst of the problem of the sources of law than as a legal philosopher.

12.6. Michel Villey (1914–1988) (*by André Jean Arnaud*)

Michel Villey was Emile Boutroux's grandson and the son of Pierre Villey, an expert in the work of Montaigne. He taught Roman law, the history of law, and legal philosophy in that order at the Universities of Nancy, Saigon, Strasbourg, and Paris.[20]

Villey was above all a historian of legal thought. It is only through history that he came to philosophy, through his previous investigations and a per-

[20] On Villey see also Section 3.3 in Tome 2 of this volume.

sonal reflection on the causes and consequences of World War II. Indeed, he was close to some great German-speaking historians and philosophers of law, such as Franz Wieacker (1908–1994), Erich Fechner (1903–1991), and Hans Thieme (1906–2000), all of whom returned to natural-law theory, and he explained that as a reaction to Nazism.[21] Having embraced the vision of Aristotle and Saint Thomas Aquinas, he was labelled a neo-natural-law theorist.

12.6.1. A Specific Approach to Roman Law and Premodern Legal Scholarship

His conception of natural-law theory is based in the first place on a detailed analysis of Roman legal thought. At the very beginning of his career, in 1945, he published *Recherches sur la littérature didactique du droit romain* (Investigations into educational literature in Roman law: Villey 1946). Michel Villey always highlighted the importance of Roman law, devoting a large work to illustrating the fertility of the philosophical definition of law bequeathed to us by the Roman lawyers. As Bauzon and Delsol (2007) argue, when he proposes that law be conceived as a form of sharing, he is making the point that, as can be appreciated in Roman law, law cannot be reduced to the set of legal rules laid down by the state or to the set of past judicial decisions, because the allocation of goods and responsibilities forming the object of the law is rather something for the legislator and the judge to *discover*, in an endeavour to find out what the best such allocation must be. Law, in other words, is not a set of decisions issued from the top by a formally competent body that authoritatively determines the way relations among individuals are to be set up (see, for instance, Villey 1962b). Law lies not *outside* human relations but *in* them. The jurist's specific role is to find a fair scheme or balance for social relations. Rather than demanding that legislators be intervening on a permanent basis, we should be trying to *minimize* their role, turning instead to the jurist and the judge, who are entrusted with decoding what Villey calls natural equity (see Villey 1961–1962, Part 1). Law is rooted in reality and as such needs to be *discovered* by intellectual work. This legal art consists in understanding what can be qualified as right in social relations. This is why, in the preface to *Le droit romain* (Roman law: Villey 1957), we read that the old Roman laws are not foreign to our everyday problems: In large part they are still topical. It is in light of this background that he assigns a central place to the brocard *ius suum cuique tribuere* (to each his own), which runs like a leitmotiv throughout his work.

According to Villey, Roman law is most interesting in the context of ancient Greek and Roman thought. By investigating the principles of Roman law (cf. Villey 1961–1962, Part 1), he showed how important a study of the foundations of Roman law is for an understanding of the modern world. To him, there is nothing void or irrelevant about the maxim *ius suum cuique tribuere*

[21] On Fechner see Section 10.2.1.2 in this tome.

or about the idea of *iurisprudentia* as the *iusti atque iniusti scientia* or about the concepts of *pietas*, *bona fides*, and *humanitas*. In going back to the use of maxims, he is saying that always pertinent to law is the method of reasoning by *quæstiones* and *casus*.

It is by reexamining ancient Greek philosophy—while also reviving medieval philosophy and its effort to set religious faith on a rational basis, especially in the work of Aquinas, as well as in First and Second Scholasticism at large—that Villey laid the foundation on which his thought would be built. Greek and Roman civilization developed law as the art by which to organize society by allocating rights and duties to its members. The modern world fed on that creation. Where Villey in the *Philosophie du droit* (The philosophy of law: Villey 2001) speaks of the need to return to the basic foundations (ibid., sec. 26), he is saying that we need to go back to the Greeks. In the first volume of *Philosophie*, Villey addresses the purposes of the art of law in a discussion divided into three chapters, two of which are devoted to *Dikaiosunê* (rightness) and *To dikaion* (rights), while in the third he has a few remarks about his philosophical approach going forward.

On these bases, Michel Villey offers a detailed analysis of the medieval doctrine of Roman and canon law and traces out the birth of modern legal thought in Second Scholasticism by innovatively interpreting and extrapolating from authors classically considered as proponents of the natural law school (especially Hugo Grotius, Samuel Pufendorf, Christian Thomasius, Johann Gottlieb Heineccius, Christian Wolff, Jean Barbeyrac). Proceeding from a critical analysis of this current of legal thought, Villey went into philosophy, building his own theory by working on opposite set of premises pulled from Aristotelian and Thomist philosophy (see Villey 1962b and 1975).

12.6.2. A Trenchant Criticism of Modern Legal Thought

There is some caustic criticism that Villey levelled at modern legal thought in its formative period from the 16th to the 18th century, and some Spanish and Italian commentators have seized on the significance of that criticism, while also pointing out its shortcomings (see esp. Contreras Peláez and Pérez Luño 2009 and Punzi 2009 and their extensive bibliographies). So, for example, Villey blames on William of Ockham the appearance of "subjective rights" understood as real entities, a development out of which grows the conceptualization of so-called subjective rights by "modern" philosophers of the state and of rights. But some of Villey's commentators believe he does not give due weight to practices before Ockham, a period when the concept of a right as *potestas* (as a power or faculty) received a more sophisticated formulation. Here Villey brings Hobbes into the picture by attributing to him a methodological turn to individualism. Indeed, scientific knowledge, according to Hobbes, is built on a method on which any object we set out to investigate must in the first place

be broken up into its smallest constituent parts, whereupon the object can be reconstructed so as to arrive at a proper understanding of it. But when that object is society, the whole reconstruction turns hypothetical, and what comes out in the end is a scenario in which the protection of civil rights is entrusted to an omnipresent Leviathan under the social contract (Villey 2001, 77ff.).

Recognizing that law is by nature relational, Villey draws the conclusion that it can never be made to rest on the subjective rights accorded to each individual, for that would lead to the law defeating itself. But the soundness of his method in arriving at that conclusion has been called into question. This can be appreciated in his debate regarding the School of Salamanca, especially as he turns to Francisco de Vitoria, Francisco Suarez, and Gabriel Vázquez, criticizing the first two for understanding natural law in pragmatist and subjectivist terms, respectively, and the last one for altogether dissolving natural law. But commentators have seen Villey's analysis as too sector-specific and fragmentary, in that he pulls sentences and arguments out of context, and this makes it difficult to draw general conclusions about the School of Salamanca. So, on this view, Villey would have unjustifiably set the concept of subjective rights in a polemical context artfully selected to make his point that rights cannot serve as a foundation of law: He did this by linking the concept to metaphysical nominalism, to Christian personalism, and to the controversy between the Roman Church and the Franciscan order (Villey 1973, 53ff.).

The significance of Villey's inquiries was not lost on English-speaking commentators, either, but these scholars, too, have felt the need to point out some flaws in those inquiries. One example is Brian Tierney (1997, 13ff.), who also looks at Villey's discussion of Occam's work, questioning what Villey presents as the necessary connection between Occam's nominalism and the voluntarism on which basis Occam was led to exalt the will of the individual, reducing the role of reason to that of serving as a normative standard. Villey, in Tierney's view, would have neglected to draw a basic distinction among between two phases in Occam's thought—an earlier one where his essential contribution is in moral theory, and a second one in which he is essentially devoted to political thought—and it is not clear, Tierney argues, that a necessary relation obtains between the two.

What matters, on Villey's conception, is *justicia* (justice) and what is *justum* (just), such as justness in the words of Justinian's *Digest*: *Est autem a justicia appellatum jus*—law was named for justice. In this way, we can see that rights are not exclusively traceable to the law.

12.6.3. Going back to Aristotle and Thomas Aquinas

Must law be understood as a system of rules of conduct? Aristotle rejects such a conception. The art of law is aimed neither at the truth nor at utility but at a sharing of goods, so that under its rule we each have our own (Villey was very

fond of the motto *ius suum cuique tribuere*). He explains what this means by reference to the concept of *to dikaion*, arguing that law must strike a golden mean, a proportion or equality (*ison*) as this concept is understood in Greek mathematics. But this means that we must go out in search of the perfect order in the cosmos, the twofold assumption being that equity lies in the harmony of the world and that this harmony can be revealed to us; that is, the cosmos will reveal to us what is fair (*equitas*), but this concept is akin to that of the beautiful—nothing to do with egalitarianism.

Then, too, this natural law is nothing that anyone can arrive at by inherent knowledge: It is not a set of unchanging and definitive rules that we have here, but something that will arise out of experimentation. It is in this sense that Villey entrusts to lawyers, and especially to judges, the task of discovering where the right balance of interests lies in each of the cases before them, to this end reasoning from the rules of fair allotment. This will be achieved through a dialectical discussion. Villey regards as fundamental the notions of *dikaion* and *dikaiosunê*, recalling that in Greek the judge is *dikastês* and justice *dikaiosunê*. The task entrusted to the judge is to determine what is just. The way we now understand the words *judge* and *law*, they do not come from the same root; but before political and legal philosophy went through the transformation that ushered in the modern conception of rights, law, and the state, the law was what the *judge* said it was. Although this is a lesson we take from the premodern philosophers, the insight holds true everywhere at every time, even today. In deciding what was in accord with the *dikaiosunê*, the judge did not fill a "subjective right," something that according to the 16th-century theorists of law and the state attaches to each person as an "individual": Rather, the judge told us what is right, and did so by tracing everything back to the *dikaion*, to the "proportion." The judge thus determines the way in which something is to be shared (the *to autôn ekein*): We need to know what is fair in that regard, and the judge is the one whose role it is to make that discovery. Or, stated otherwise, the right lies in a proper allocation of goods and obligations, and we discover that allocation by turning to the jurist, specially the judge, and also to the legislator, should that prove necessary. So law, for Villey, remains rooted in the reality of things: It is an intellectual quest entrusted to specialists (first among whom the judge) tasked with finding out what is right by looking at what the nature of things is (see Villey 1981, 1987).

12.6.4. Natural Law as a Bulwark against Idealism

How can this intellectual quest be conducted? We proceed by *epieikéia*, a method enabling the jurist to adapt the written rule to each case. Through this adjustment, gaps are filled and the excesses of generalization avoided. What the interpreter must do here is not to apply orders issued by a government

authority but to rely on legal texts in finding a fair solution to the case at hand. Here, the *epieikéia* proves to be irreplaceable. On occasion, it will even trump the demands of justice, by injecting into the law elements of utility, opportunity, and "mercy" (see, for instance, Villey 2001, secs. 33–4, 41, 245.

In this way, natural law can steer clear of any idealism, all the while avoiding the discourse of rights, which in Villey's view would do nothing short of *killing* the law. Indeed, contrary to the conclusions of modern legal thinkers, Villey argues that if we ground the law in subjective rights, we will make it more difficult to find a fair solution to the conflicts arising from coexistence in society. This is because the claims that rights give expression to in any society are potentially unlimited, and when each of these claims is cast as an absolute subjective right, we will have a big problem on our hands trying to make all those claims compatible. So, the idea of a justice and a law rooted in the nature of things gives rise to contradictory rights, which in turn leads to intractable conflicts. For this reason Villey asks that we at least soften such an absolutism of so-called rights (see Campagna 2004). He rejects a social culture in which the individual is located at the very centre of the cosmos, and in this sense he makes a case against the development of individualism.

Social justice is nothing more than the result of such idealism. Absolute equality is illusory. It is unreasonable to believe that equality can be achieved by relying on the concomitant development of legislation and human rights. In a polemical book devoted to human rights (Villey 1983), he gives a critical reading of the history of the language of human rights. The target of this book is what rights would later develop into within the framework of the welfare state, namely, into entitlements. What he criticizes above all is the idea of history as a permanent process of dialectical breaks with the past. To adopt such an approach is to resign oneself to an aimless, soulless practice, a death certificate for the lawyer, while "classic" philosophy, with its speculative bent, shows itself to be indifferent to the various practices in its effort to seize the realities that different individuals share across time and space (cf. interview in *Le Monde*, 9–10 December 1984; Villey 1983).

In short, Michel Villey, adhering to what he considered to be the foundations of sound philosophical thinking, was sceptical of any gratuitous striving to innovate, for it was his belief that everything we need and might want to look for can be delivered by tradition: Everything our world has to offer, he thought, is foolishly lost by ignorance of the past.

12.7. Michel Troper (1938–) (*by Veronique Champeil Desplats*)

Michel Troper is the most important contemporary French legal theorist.[22] On the one hand, following in the footsteps his French teachers, such as Raymond

[22] On Troper see also Section 9.4 in Tome 2 of this volume.

Carré de Malberg and Charles Eisenmann, but to a greater extent than they managed to do, he was substantially responsible for introducing the foreign masters of legal theory to a French audience. Many of these authors were little known, if at all, until Michel Troper's teaching and works. That is the case, for instance, with Alf Ross, Georg Henrik von Wright, H. L. A. Hart, Chaïm Perelman, Norberto Bobbio, Uberto Scarpelli, Giovanni Tarello, Neil MacCormick, Carlos Santiago Nino, Carlos Alchourrón, and Eugenio Bulygin, and with all of Hans Kelsen's works other than the *Reine Rechtslehre*, translated by Eisenmann in 1962. Moreover, Troper is the first French scholar to have deeply analysed and discussed Kelsen's theses. While sharing his epistemology and his legal positivist posture, Troper proposes a critique of the Kelsenian ontology of norms based on a realist theory of legal interpretation.

On the other hand, Troper has developed a legal theory of his own that can be presented in two main points. First, he sets out a legal positivist epistemology and theory; and, second, he defends a strong version of the realist theory of legal interpretation, though the conception is tempered by a theory of legal constraints based on the interdependence of legal actors.

12.7.1. A Legal Positivist Theory and Metatheory

A well-known distinction by Bobbio (its fame in France is owed precisely to Michel Troper) is the one he drew identifying three different conceptions or levels of legal positivism: an ideological, a theoretical, and an epistemological one (Bobbio 1965). Troper is a positivist in the two last respects, whereas in the first sense, on account of his epistemological and methodological premises, he can be said to be neither a positivist nor a natural law theorist.

12.7.1.1. An Epistemological and Methodological Positivism

As an epistemology and methodology (or metatheory), legal positivism says how to do legal theory and legal science. And in this respect Michel Troper embodies the typical traits of a legal positivist metatheorist. Important in this connection is the central thesis of the separation between facts and values—a postulate with many implications.

At first, Troper thought like a moral noncognitivist. To him, this meant that, whereas facts can be known and verified or falsified by procedural mechanisms of proof, values lie beyond empirical knowledge. Values are reduced to sensations. It follows that the object of a legal science or theory cannot be values but only facts. Troper distances himself from the hyletic Kelsenian ontology of legal norms, where legal norms are conceived as special ideal entities, and considers law and legal norms to be facts. Legal norms are specific 'meanings' (*signification*) conferred on statements, and these legal meanings are expressed by an act of the will (Troper 1990, 518).

The separation between facts and values implies for Troper, too, that the object of a positivist legal theory lies in the law as it *is*, and not in the law as it *should be*, in light of an ideal conception of the legal order. There is no natural, moral, metaphysical, or true law over the law created by competent legal authorities acting in a given legal order. Above all, even if such an ideal law could exist, it would not be a criterion for the validity of the positive law. The only criterion of legal validity lies in a norm's having been enacted or created by a competent authority in a given legal order (Troper 1990, 526). The content of a norm, especially its morality or fairness, is not relevant in identifying it as a *legal* norm. On this point, Troper has repeatedly underlined that the Nazi normative order could properly be considered law, in spite of its iniquity (Troper 1989, 287). The only way to prove the contrary is to show that the Nazi rules fail to correspond to a previous definition the legal system, a definition that in Troper's view rests on formal and procedural criteria setting out the ways in which norms may be produced. The content of norms, that is, what they concretely prescribe, is not an essential criterion.

This posture carries another important consequence for Troper's metalegal theory, in that Troper sets out to describe the law as it is, without bringing in value judgments or prescriptions designed to make the law more efficient, equitable, or moral. In a word, he defends the axiological neutrality of scientific discourse. Such discourse does not pretend to *change* the law, prescribe how the law should be, or subject its content to critical scrutiny. Stated otherwise, scientific discourse on the law is something *other than* the law itself. The two serve distinct functions and aims. The only prescriptive propositions that can be made from a scientific standpoint are not political, ideological, or moral but technical. This consists in saying, in light of the knowledge and expertise available to the scientific investigator, "If lawmakers want this result, they will have to do this and that"; for example, "If one wants to drive back tyranny, one has to institute a separation of powers." These meta-statements, or propositions *about* law, are therefore logically and ontologically distinct from the legal statements which themselves form the object of legal science (Troper 2003, 26ff.).

If we go back now to Bobbio's description of legal positivism as an ideology as distinct from the ideology of natural law, we will see that Troper's claim for the neutrality of scientific legal discourse makes him neither a legal positivist nor a natural law theorist. Indeed, as an ideology, positivism basically requires obedience to whatever law is imposed by the state, while the theory of natural law requires obedience only to that law which is fair. But on Troper's epistemology, a scientist cannot say anything about the way individuals behave vis-à-vis positive law: The scientist must be indifferent. This posture has opened two epistemological debates in France. The first, still current, concerns the conditions for the possibility of an axiological neutrality of scientific discourse in law. The second—which, too, is still current as well as widespread in the French legal academic world—originated at the end of the 1980s in response

to Danièle Lochak's (1946–) criticism of the attitude legal scholars took to the anti-Semitic laws of Philippe Petain's government in World War II (see in this regard Lochak 1989, 1994). For Lochak, simply to *describe* these kinds of legal norms is to have a hand in "naturalizing" and legitimizing their contents. A purely descriptive work would implicitly justify the government that passed those laws. It follows that the French jurists of the time were complicit in passing the anti-Semitic norms: They were so in virtue of their framing those norms within legal categories comparable to other more traditional categories, thus contributing to an acceptance of the norms so categorized (Lochak 1989, 252–85; 1994, 296). Troper's answer consists in drawing a clear distinction between the various discourses one can engage in, a distinction that enables him to avoid giving up the claim to the axiological neutrality of scientific discourse. So, on the one hand, Troper presents scientific description as a kind of discourse that does not prevent one from engaging in other kinds of discourse where value judgments about the law are expressed, so long as these value judgments are not expressed in the name of science. On the other hand, Troper also concedes that, in such a difficult context, scientific discourse can be put "on hold" so as to avoid the risk that it should wind up legitimizing a perverse legal system (Troper 1989, 288).

Finally, Troper's metatheory deserves a few words on method. The structure of Troper's reasoning is very close to that of the Italian analytical school as well as that of Scandinavian legal theorists such as Alf Ross. It consists of two main intellectual operations: (*a*) We distinguish the different meanings of legal concepts and meta-concepts or the various presuppositions of legal reasoning; and (*b*) we reformulate legal problems in an appropriate theoretical language so as to solve them by way of very simple falsifiable or verifiable statements. For instance, Troper shows that the problems arising in connection with the notion of supra-constitutional principles emerge out of confusions among different levels of thinking: the political, the philosophical, the legal, and the jurisprudential. Thus, the proper question for legal theory is, "What are the criteria for recognizing principles and their superiority to constitutional norms?" (Troper 2001, 196). Troper then offers three meanings for the notion of principles and four conceptions of the superiority of a legal norm (ibid., 197–8). He analyses the conditions for the possibility of each of these hypotheses and explains their legal, theoretical, and ideological presuppositions. This is a method he uses in almost all his essays, using it to analyze the concepts of sovereignty (ibid., 283ff.), validity (ibid., 19), the separation of powers (Troper 1980), and the rule of law (Troper 2001, 267), as well as to analyze the distinction between legal science and legal dogmatics (ibid., 3) and the problems of interpretation (ibid., 69), among other examples.

12.7.1.2. A Positivistic Theory of Law: Law and the State

In Bobbio's distinction among three different meanings of legal positivism, the second meaning describes a theory of law that combines several common presuppositions about the legal concept of the state and its relation to the concept of law. In this meaning, positivists tend to recognize the legislator as having a monopoly on the production of legal norms. It follows that positivism as a theory of law rests on a particular theory of the sources of law on which the law is the expression of human will and not of a higher system of values. The law's validity does not depend on its conformity with a moral or natural order. Troper undoubtedly subscribes to such a set of theses, but he gives it a twist with his theory of legal interpretation, which wrests the monopoly on the production of legal norms from the legislator and hands it to the authentic legal interpreter (on which see the next Section 12.7.2).

Here Troper's legal theory is very close to Kelsen's thesis on the relation between law and the state (on which see Section 2.3.1 in this tome and Section 8.5 in Tome 2 of this volume). The state is conceived by Troper as no more than a set of legal norms (Troper 2001, 267). In other words, like Kelsen, Troper defends the *unity*, not the dualism, of law and the state: There is neither law without the state, nor the state without law. The state is a set of legal norms that define the procedures for the production of legal norms within a given legal order (ibid.). Such a formulation can appear circular. But it is not. For Troper, the starting point is the constituent (or constitution-making) process, which in the constitutional text defines the organs of the future state as well as their legal competences. Consequently, the powers of the organs of state are limited not on the basis of moral or natural rules but by virtue of their separation (Troper 2001, 147).

Two implications follow from such an identification of the state with the law.

On the one hand, Troper defends a *monist* theory of legal sources, not a pluralist one. In other words, a rule (be it religious or moral or a collective agreement) can be considered a legal norm only if an authority empowered by the legal system itself gives it the meaning of a legal norm. For instance, customs do not become legal norms until judges identify, formulate, and impose them as binding norms (Troper 2003, 89–91).

On the other hand, coming back to a point previously discussed, supra-constitutional norms are not understood by Troper as existing on their own. They are the highest *legal* norms. Therefore, when a supreme court invokes a supra-constitutional norm in assessing the validity of constitutional norms, it will not go looking for it in a previous and higher normative system but will instead *create* or produce it (Troper 2001, 205). This creation is allowed as long as other legal actors cannot act against it or otherwise refrain from doing so. Troper thus implicitly accepts a self-originating power to produce supra-constitutional norms (ibid.).

12.7.2. A Strong Realist Theory of Legal Interpretation

The second important feature of Michel Troper's legal theory lies in his theory of legal interpretation. Referring to the last chapter of second edition of Kelsen's *Reine Rechtslehre*—and particularly to the idea that "authentic" interpretation is an act of will and not, as in "scientific" interpretation, an act of knowledge—Troper defends a strong realist theory of legal interpretation that leads to a break with the Kelsenian ontology of norms and brings out the power of interpretation wielded by legal actors, that is to say judges as well as any normative authority. Two points bear mentioning in this regard: (*a*) This power is tempered or limited by a set of legal constraints. And (*b*), it is on these legal constraints that Troper focuses as a legal positivist.

12.7.2.1. The Deconstruction of the Ontology of Legal Norms and the Freedom of Legal Interpreters

Troper highlights a conceptual difficulty with the definition of legal norms previously offered at the beginning of Kelsen's *Reine Rechtslehre* where a legal norm is defined as the specific meaning attached to an act by which a behaviour is prescribed, obliged or permitted (Kelsen 1967a, 4). But, as Troper points out, if a legal norm is a specific meaning, and if the object of interpretation is a norm, then legal interpretation must consist in ascribing a meaning to a meaning (Troper 1990, 520), which is absurd. Consequently, the object of interpretation cannot be a norm but a text or a set of statements that legal interpreters recognize as sources of law.

On this basis, Troper takes up Kelsen's distinction between scientific and "authentic" interpretation, the former an act of *knowledge*-gathering, where every possible meaning of a statement is brought to light without giving special emphasis to any one of those meanings, the latter an act of *will*, where we do, by contrast, pick out one meaning as capturing the best understanding of the statement in question (Troper 1975, 133ff.; 2003, 98ff.). But in Troper's view, there is no set range of possible meanings. The authentic interpreter—or, in Troper's theory, the legal actor, referring especially to judges and their power of judicial review (see, for instance, Troper 2011, 153)—can give *any* meaning to a statement, including an absurd or unconventional one. Legal actors, in their capacity as subjects empowered to produce legal norms, and in virtue of their exercise of that power, are free to ascribe to a statement the meaning of their choosing. This conception of legal interpretation has several implications in Troper's work. Let us focus on five of these.

First, legal interpretation is the result of an act by which a text is given a meaning: This meaning is *created*, and so to interpret legal norms is to create them (legal interpretation is tantamount to the creation of legal norms). The meaning of a legal text does not *precede* its interpretation. There is no one true

meaning of a legal text but many possible meanings. Thus, for example, any search for the constitutional drafters' original intention is considered by Troper to be in vain, because many intentions are more or less well expressed in the constitution-making process, and it is often very problematic to single out the most relevant or the essential one (Troper 1987, 83).

Second, Troper's theory of legal interpretation necessarily entails a distinction between texts as *sources* of legal interpretation and legal norms as *products* of interpretation.

Third, when judges set about deciding or settling a case, they will interpret legal texts pertinent to the concrete situation at hand, but they will also interpret the legal texts that form the basis of their own interpretive competence. So, barring any overruling interpretations by other legal actors, they can be said to have competence over their own competence (Troper 2001, 215–49).

Fourth, insofar as interpreters are not bound by any purported true meaning of the legal text, the chosen meaning in light of which a case is decided is by and large going to be an *a posteriori* justification of a previous decision. The text contained in a source of law is in this sense a *pretext* (Troper 1987, 87). Legal actors interpret a text, not to find the right solution to the case in issue, but to ascribe the most convenient meaning to that text within a given legal system: the meaning that allows interpreters to justify their own will.

Fifth, many of the rules and principles that are supposed to structure legal systems do not preexist legal actors but are *created* by them. This is especially the case with the central Kelsenian legal concept of a hierarchy of norms. On several occasions, Troper reconsiders this concept in light of his realist theory of legal interpretation (see, for instance, Troper 1975, 134; 1978, 1523). As Guastini (2010a, 73) once observed, Troper, along with Tarello (see Section 11.6 in this tome), is among the rare breed of authors to have linked the question of the hierarchy of legal norms to that of interpretation. Indeed, Troper underlines that the hierarchical relations between legal norms are usually conceived as preexisting legal interpretation, with the consequence that legal interpreters would restrict themselves to recognizing and applying norms so arranged. And as Troper observes with Kelsen, "legal scholars usually reason on the basis of the postulate of the supremacy of the written constitution—and more generally the postulate of the hierarchy of norms—and they investigate the consequences that the existence of this hierarchy can have for the phenomenon of the interpretation" (Troper 1975, 135; my translation). But then, Troper goes on to argue, if we concede that any process by which the law is applied presupposes an interpretation of legal statements, the hierarchy between norms can no longer be analysed as an objective fact that precedes legal reasoning. It becomes an *outcome* of this reasoning. In other words, legal actors, and judges in particular, do not *preserve* the hierarchy of norms but rather *produce* it. Thus, it is not because norm N1 is superior to a contrary norm N2 that the latter can be declared invalid by judges, but it is because N1 is the

basis for a judgment on the legal validity of N2 that judges are led to confer on it the meaning of a norm superior to N2. The concept of a hierarchy of norms thus appears to serve as a means by which to justify legal effects whose rationale rests on other bases (Troper 2011, 139). On the one hand, this reversal of the concept of the function of the hierarchy of norms makes it possible to explain in some cases why the hierarchical relations by which legal systems are structured may not be aligned with Kelsen's ideal pyramidal model. These misalignments are simply owed to the plurality of possible interpretations that can be given to sources of law and to their normative relations (Troper 1990, 528). But, on the other hand, the same reversal should prompt us to investigate the reasons why the misalignment is weaker than one would expect in view of the legal interpreters' freedom. Here Troper invites us to work from a theory of legal constraints in explaining the importance of the hierarchical structure in legal systems and legal reasoning.

12.7.2.2. The Functioning of the Legal System Reconstructed on the Basis of a Theory of Legal Constraints

If legal interpreters are free to choose between several possible meanings of legal texts, and so if the text contained in a source of law does not bind those interpreters, then we must ask: Why and how do legal systems depend for their functioning on a certain coherent structure and a coherent body of legal decisions, and judicial ones in particular, that secure a relative continuity for those systems? (see Troper et al. 2005, 1–2).

Michel Troper readily acknowledges that numerous factors can explain the coherence that legal actors display in their behaviour and choices: sociological, political, economic, psychological, and conventional forces come to bear. The American legal realists, for example, had pointed out the role of psychological or moral factors in explaining or even predicting how judges decide cases. Judge Jerome Frank is famously reputed to have claimed that what a judge has had for breakfast will determine how he or she will decide the case at bar (J. Frank 1930, chap. 4).

What the theory of legal constraints does is to filter out these factors so as to focus on the *legal* ones, all the while holding on to the legal positivist claim that in law lies the object of legal science. Legal factors are the ones connected to the legal system itself, and they are often neglected by theories that, in the effort to explain legal decisions framed *within* the system, look for support *outside* the system by drawing on various social or human sciences (sociology, literature, psychology, or the like). The object of a theory of legal constraints thus lies in those factors whose nature is distinctly legal, in that these factors emerge from the configuration of the legal system itself and from the web of interdependencies the legal system sets up among legal actors, and in the menner represented and interpreted by the actors themselves (Troper et

al. 2005, 11–2). This representation is connected to the way legal actors understand (*a*) their own power and the power that other actors have over them (the power to overrule a decision, dissolve a legislative body, etc.) on the assumption that these other actors seek to preserve and even increase their power and advance their institutional position (ibid., 15–6), and, (*b*) legal argumentation and the functioning of the legal system (so, for example, much will depend on the weight the hierarchical principle is understood to carry or on the perceived need to justify a judgment so as not to be suspected of arbitrariness, showing that legal decisions do not depend only or even primarily on what the legal actor wills but that they are bound by the prior structures, norms, and principles of the legal system: Troper 2003, 139).

Consequently, "the legal constraint is a de facto situation in which legal actors are prompted to choose one solution or behaviour rather than another by reason of the configuration of the legal system they brings into being or in which they are acting" (Troper et al. 2005, 12; my translation).[23] A legal constraint can produce an action or an omission of action, as well as it can produce legal norms (a given interpretation of a legal text), a meta-norm (a criterion for hierarchically ordering legal norms), or a conception or theory, such as a particular conception of citizenship that excludes foreigners, women, or poor people (ibid., 45). Legal constraints come in a range of degrees, but they can broadly be grouped into two classes: stronger imperative ones, which do not allow the legal actor any discretion, whether it be in choosing an *end* or the *means* by which to achieve that end, and weaker hypothetical ones, which make it possible to choose ends but not the means to those ends. Constraints in this latter group are more frequent and can be expressed through a statement having the following form: "If a legal actor wants to do X, he or she must do Y" (ibid., 21). Legal constraints thus help us understand why, on a mainstream conception of the functioning of the legal system in a given context, some legal arguments or norms come into being that cannot be circumvented, and why legal actors cannot do whatever they want.

A theory of legal constraints can therefore bridge the gap between a realist theory of legal interpretation, which recognizes a range of reasons for action, and a legal positivist epistemology, on which it is best to focus on the study of law itself as the only proper object of legal science.

[23] The French original: "La contrainte juridique est une situation de fait dans laquelle un acteur du droit est conduit à adopter telle solution ou tel comportement plutôt qu'une ou un autre, en raison de la configuration du système juridique qu'il met en place ou dans lequel il opère."

Chapter 13

THE POLITICAL HISTORY OF 20TH-CENTURY SPANISH PHILOSOPHY OF LAW

by Benjamín Rivaya[*]

13.1. The First Three Decades of the 20th Century: The Neo-Thomist Academic Monopoly and Modernist Alternatives (1901–1931)

In Spain, during the 1900s, professorships in Fundamentals of Natural Law, the name of the legal philosophy undergraduate course at the time, were held by Scholastics of rather strict observance (see Gil Cremades 1969, 190). Oviedo and Madrid were exceptions, though not for long. At the University of Oviedo, in Asturias, there was a Krausist, Leopoldo Alas, but he would die the following year, in 1901, soon to be replaced by a thunderous catholic, Fernando Pérez Bueno. In Madrid, the chair of the doctoral program in the philosophy of law was held by a philosophical master of literature (with his many disciples), Francisco Giner de los Ríos, though his main work dated back to the 19th century. He would die in 1915. It is clearly false that Krausists were absent; it is rather the case that in the 19th century and at the beginning of the 20th, they had failed in their attempt to gain professorships in natural law, even though they did hold other positions. In any case, Krausist natural law theory had stirred up the waters of the philosophy of law. In order not to fall victim of simplifications, it is important to point out that, although this was far from the "other" natural law, i.e., the Scholastic one, such distance did not prevent the two from sharing basic ideas: "There is no doubt," Alas said, "that the theological school, in its recognition of divine law, and in the ethical basis it provides for legal science, is very close to what we consider the true doctrine" (Alas, 1878, 141; my translation). Perhaps what set the two apart was the "very liberal nature" of this true doctrine (see Díaz 1973, 59; cf. Pérez Luño 2007, 131) in comparison with a much more conservative tendency of the other—equaly true—doctrine (see Rubio Castro 1984, 133). However, legal philosophical Krausism was already a thing of the 19th century, and if we add that historicism, especially the Catalan variety, would not have anyone to renew or continue Hegelianism, and that positivism had failed to gain roots in our country, it is possible to understand the monopoly that Scholastics would have in the professional philosophy of law at the turn of the new century. Apart from the exceptions of Alas and Giner, the professors who crossed into the new century and lived during part of it were neo-Thomists, as were those who became professors at the turn of the new century.

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The memory of this natural law from the turn of the century is not a really good one, especially—it seems—due to the opinion of Recaséns, who issued a stern judgment against almost all the representatives of Catholic natural law theory *between centuries* (quoting in particular the clergymen José Mendive S. I. and Zeferino González O. P., Juan Manuel Orti y Lara, the priest Juan Urraburu S. I., Pedro López Sánchez, Francisco Javier González de Castejon y Elio, the Marquis de Vadillo, and Rafael Rodriguez de Cepeda), commenting that they "do not offer anything of interest" and that "they show neither an extensive nor a profound knowledge of the great classic authors of Scholasticism; rather, they merely repeat inert formulas and definitions they have received at second or third hand, showing a frenzy of fighting against anything that has to do with a different type of modern thinking, spewing out the most violent insults, calling it 'crazy,' 'absurd,' 'monstruous,' etc." (Recaséns Siches 1936, 450–1; my translation). And he went on to say that "many are inspired by sources of the lowest intellectual quality, as the Italian thinker Prisco, while they have never even read the works by Saint Thomas, Suarez, Soto, or the other great Schoolmen" (ibid.; my translation). Although, perhaps, such a harsh judgment should have been toned down—is it also reasonable to direct it at Cardinal Zeferino González?—it is true that it did bring about a consensus: The Spanish natural law theory of the late 19th and early 20th centuries would not present anything peculiar, as it would instead be devoted to restating what had already been said before, especially in line with Italian neo-Thomism. Only Luis Mendizábal Martín would be saved from the scathing remarks (see ibid., 451). Of course, Mendizábal was a staunch Thomist, although, on the one hand it seemed that he was not a popularizer, and on the other hand he was more open than others to new ideas, as is evidenced by the last edition of his *Tratado* (Treatise of natural law: Mendizábal Martín 1928), reworked with the help of his son Alfredo. Its interest increases when we consider that it resulted in the so-called Aragon school of natural law, to which belonged Miguel Sancho Izquierdo, Alfredo Mendizábal Villalba, Enrique Luño Peña, Luis Legaz Lacambra, and Ramón Pérez Blesa, all playing a major role in this history.

The neoscholastic monopoly lasted for a long time. Some of the old natural law theorists disappeared: Rafael Rodríguez de Cepeda died in 1918, and Francisco Javier González Castejón Elio died the following year, in 1919. Then new ones emerged: Miguel Sancho Izquierdo and Mariano Puigdollers would be appointed as full professors in 1920, followed by Wenceslao González Oliveros, in 1922. No changes can be observed in Scholastic legal and political thought. Although there are subtleties that can be pointed out, in general its followers maintained a conservative ideology, which at times could be described as more moderate, at others more radical. I do not think, therefore, that it would be a mistake to say that academic philosophy of law was clearly conservative at the time. On the one hand, its history is, to some extent, the

attempt of that philosophy, which we might call Catholic, to maintain an ideological dominance; at the same time, it is the determination of other ideologies, not always subversive or atheist, to break the monopoly, although it is also true that there were Scholastics who tried to prevent Thomistic thought from gaining momentum, adapting it to the modern world, as in the case of Alfredo Mendizábal. The new professors—the majority in Spain—thus followed the same philosophical direction. During this time, in my assessment, only one of these professors might have played a transformative role, Blas Ramos Sobrino, but he did not do so.

Blas Ramos belonged to the school of Laureano Díez Canseco, a school that, in addition to not having a common ideology, was characterized by its resistance to writing: All of its members were preliterate or almost preliterate, both the teacher and those who seem to have been his disciples, namely, Eduardo Callejo de la Cuesta and Blas Ramos Sobrino. As for Díez Canseco, in 1900 he obtained a professorship in natural law, in Valladolid, but he left it for another position teaching the history of law in Madrid. There is little that can be said of Eduardo Callejo except that he adhered to neo-Thomism and that the scarce theoretical work he wrote is of no major relevance. Finally, Blas Ramos, who obtained his professorship in 1918, could perhaps have been a transformer of Spanish philosophy of law from within; however, here too, that was not to be the case. He was a peculiar philosopher—confusing, I think—whose thought bore traces of Stammler and later of Dewey, and even of Pashukanis, although he did not publish anything in his lifetime.[1] What matters, in any case, is that in the early 20th century, professorships were still being mostly awarded to Scholastics, who kept a monopoly on legal philosophical academia.

This does not mean that during the early 20th century there were no legal philosophical alternatives to the prevailing Scholasticism, but they did have to arise outside the academic field of legal philosophy, which was dominated by that trend. Worthy of mention, however, are the legal political ideologies of the labour movement. Marxist socialism and, above all, anarchism had gained a foothold in Spain since the 19th century and had their own conceptions of law. Although the anarchists had a greater following (see Rivaya 2007), it is worth highlighting that among the Marxists there was an Austrian man who played a central role in this history, namely, Wenceslao Roces (cf. Rivaya 2000b). On the other hand, the main contribution to the development of theses challenging the dominant Scholastic philosophy of law no longer came from ideologues of the labour movement but rather from academic jurists, mostly university professors. This applies, for example, to Dorado Montero, an expert in criminal law, a unique personality, and a positivist in his philosophy of law, in the

[1] On Stammler, see Section 1.3 in this tome and Section 2.2 in Tome 2 of this volume. On Pashukanis, see Section 17.3 in this tome.

sense that he applied the positive method to the study of legal phenomena and loathed natural law. Also worthy of mention is another specialist in criminal law, Quintiliano Saldaña, who advocated a pragmatic theory of law. He was interested not just in the theory of law but also in its practice, not merely in its validity but also in its efficaciousness. Outside academia, there is Luis Hernández Rico and his confrontational notion of law. I should also mention the two great thinkers in Spain at the turn of the 20th century. On the one hand, there was Unamuno, who began writing back in the 19th century, but whose main work would not be written until the 20th. Then there was Ortega, who began writing in 1902. The question is whether either of these great minds had any kind of philosophy of law.

As for Miguel de Unamuno (1864–1936), his legal ideology is often considered to be laid out in Chapter 12 of the first part of *Vida de don Quijote y Sancho* (The life of Don Quixote and Sancho: Unamuno 1988), in which he talks about the "liberation of the galley slaves." Unamuno's initial position can be summarized in his own words: "No human punishment is in any way fair" (ibid.; my translation). But he actually goes further, much further. Both natural and divine punishment are driven at the same time by the anger of the moment and by revenge, but after that comes forgiveness: "Any punishment that is not followed by forgiveness or that does not lead one back to the right path once inflicted," he argues, "is not punishment but hideous cruelty" (ibid.; my translation). Therefore, the criminal code is inhumane, and so it is intolerable that so-called justice be carried out in the name of God. For whoever believes in God and in salvation, "where, in the end, we are all to be forgiven" (ibid.; my translation), does not have a duty to administer justice, to repay evil with evil, but rather to forgive. "I see you here, timorous readers, putting your hands to your head, and I hear you cry out, 'What atrocities!' And then you talk about social order and security and other gibberish like that" (ibid.; my translation). How can we forget Prince Nekhlioudov, the protagonist in Tolstoy's *Resurrection*? Indeed, Unamuno sees legal matters roughly as Tolstoy did, through the lens of religious zeal, a radical evangelical Christianity focused on highlighting the sinful nature of law.

As for Jose Ortega y Gasset (1883–1955), who was destined to become *the* Spanish philosopher of the 20th century, he too played a key role in the history of legal philosophy. In his first work, the *Meditaciones del Quijote* (Meditations of Don Quixote: Ortega y Gasset 2005), he pointed out many suggestions and issues that would be readily applicable to the philosophy of law. Many of those suggestions would be expanded (albeit once again in a incomplete, fragmentary, and dispersed way) in the philosopher's next work, and after the 1930s they would have a huge influence on Spanish philosophy of law. Even so, the posthumous book in which his so-called sociological theory was expounded (note that the expression includes legal theory) appeared much later, in 1957, under the title *El hombre y la gente* (The man and the people:

Ortega y Gasset 1980), though it is true that it included ideas from a much earlier time. In short, Ortega followed in the footsteps of Durkheim in his understanding of society, which he defined as an "enormous conventional architecture," because the conceptual keystone of society lies in "use," understood as a standard and a pattern of behaviour that makes human action intelligible. When dealing with real life, during which everyone does what they wish, want, feel, or thinks on their own, another type of existence emerges: the inauthentic, in which individuals behave like civil servants of the group, carrying on with their business while rejecting any type of originality. These are the "uses": impersonal, coercive, and irrational guidelines—as long as they have meaning, though they lose such meaning as soon as they become customs. Ortega classifies uses into strengths and weaknesses, and the law, he says, is strong use par excellence, which uses maximum coercion, physical coercion—even in developed societies—through an organization, the state, specifically devoted to that end. I must say that Ortega had a high regard for both uses in general, and law in particular, as they made life possible at that particular time. This sociologism deeply influenced Spanish philosophy of law, to the point that if one can speak of a national legal philosophy in the 20th century, a philosophy not imported from abroad, it would have to be the one put forward by Ortega.

But let us now take another look at Krausism, since there are interesting legal philosophical movements to be observed. Although we already know that as an academic philosophy Krausism has run its course and fulfilled its mission, as a modernizing movement it could still promote the renewal of both Spanish science and, more interestingly, Spanish philosophy of law. I say this because this was the ideology of the idealist philosophers who inspired the project behind the Association for Advanced Studies and Scientific Research (*Junta para la Ampliación de Estudios e Investigaciones Científicas*), and since the importance of this kind of initiative can hardly be overstated in any area of knowledge, the same goes for legal philosophical thought. Note once again that it was mostly philosophers of law, pupils of Elías Díaz, who chronicled the work of the association. Let us also consider how many academic philosophers of law also benefited from scholarships from the association between 1907 and 1936, enabling them to travel abroad, especially to Germany, and study alongside the leading thinkers in the field: This was the case with Francisco Rivera Pastor, Blas Ramos Sobrino, Luis Recaséns Siches, Enrique Luño Peña, Luis Legaz Lacambra, José Corts Grau, and Felipe González Vicen, to name a few. The first outcome was an increase in the number of translations of legal philosophical works. Clearly, the history of translation is a fundamental part of Spanish philosophy of law (cf. Gil Cremades 2004, 17–60). The monopoly on professional Spanish philosophy of law was held by neoscholasticism, but now the door to neo-Kantianism was opened. José Castillejo, who was the crucial figure in the association, can be credited with having begun an interest-

ing chapter in Spanish philosophy of law, that of the reception of the Stammler's neocriticism in Spain. Castillejo was granted a scholarship in 1903 by the Spanish Ministry of Education; at the recommendation of the University of Oviedo, he went to Berlin, where he studied comparative law under the tutelage of Josef Kohler. Then, at the University of Halle, he met Rudolf Stammler and was impressed by his lectures. Although this would later influence the choice of destination that young scholars would make at the association, it is not surprising that many of those who came from the field of law would end up studying with the neo-Kantian thinker, whose major works would be translated by two scholars who studied with him: Francisco Rivera Pastor and Wenceslao Roces.

"Stammler in Spain" is a very important chapter in Spanish legal philosophy, and the expression can also be taken in a literal sense, as Stammler visited both the Central University and the University of Granada. While in Madrid, he gave several public lectures, later published as *Cuestiones fundamentales de filosofía del derecho* (Fundamental issues in the philosophy of law: Stammler and Rivera Pastor 1922), translated by Francisco Rivera Pastor, who also wrote the foreword. In turn, the lectures Stammler gave in Granada in the spring of 1922 were translated by Wenceslao Roces in a short book titled *La génesis del derecho* (The genesis of law), which has recently been republished (Stammler 2006). The aforementioned translators also published typical neo-Kantian works: Rivera Pastor wrote *Lógica de la libertad* (The logic of freedom: Rivera Pastor 1918), a book following the path of his teacher and read even by Ortega, who considered it to have superseded Stammler himself. Roces wrote several articles in which, despite the warning that Stammler's work warrants criticism, he closely followed his teacher, at least with regard to the concept of law (Roces 1924, 1925). Roces is credited with the translation of the *Tratado de filosofía del derecho* (Treatise of legal philosophy: Stammler 1930) and *Economía y derecho* (Economics and law: Stammler 1929), as well as with *La génesis del derecho* (The genesis of law: Stammler 2006). Thus, in a short time, the key works of the neo-Kantian professor were translated into Spanish. However, although Spanish legal philosophy at the time is mainly indebted to Stammler, its rigidly formalistic conjecture was already a thing of the past. In 1936, Legaz could comment that Stammler's legal philosophy was outdated (see Legaz Lacambra 1947).

Furthermore, in the early 20th century, the Italian philosopher Giorgio Del Vecchio, another neo-Kantian who would also take a stand against positivism, started to become well-known in Spain: At first, this happened especially through translations of his work, and later through his own work, although his legal philosophy was, in my opinion, less formalistic than Stammler's.[2] The first Spanish translation of a work by Del Vecchio, done in 1908 by the notary

[2] On Del Vecchio see Section 11.2.1 in this tome.

Mariano Castaño, was *Los supuestos filosóficos de la noción de derecho* (The philosophical assumptions of the concept of law: Del Vecchio 1908b). Thereafter, translations would continue to appear until his death, in 1970; and even afterward, his works continued to be reprinted. While Stammler was the philosopher of law with whom most Spanish philosophers had studied, Del Vecchio, I think, would be the most translated one in the 20th century (an honour he may share with another Italian legal philosopher, Norberto Bobbio). In April 1923, shortly before Primo de Rivera would come to power, Giorgio Del Vecchio visited Spain at the invitation of the Central University of Madrid and the University of Granada, where he gave several lectures that would later be published. The lectures he gave at the Central University were translated by Fernando Pérez Bueno (see Del Vecchio 1923). Del Vecchio was a respected philosopher of law, but by then he had already become affiliated with the Fascist Party and had accompanied Mussolini on his march on Rome. It was probably during this trip that he took advantage of the opportunity to found the Italian Fascio in Madrid, in 1923.

As for French legal culture, once very influential, it continued to make its way into Spain through translations and studies, even though these were not usually carried out by professional philosophers of law. At the turn of the century came the best example of the revolt against formalism in a neighbouring country: It came by way of Francois Gény's *Méthode d'interprétation et sources en droit privé positif* (Methods of interpretation and sources in private positive law: translated in Spanish as Gény 1902). In addition, Duguit and Hauriou would both later be translated into Spanish.[3]

13.1.1. Philosophy of Law under the Dictatorship of Primo de Rivera and the Crisis of the Monarchy (1923–1931)

There is a group of three legal philosophers who obtained their professorship around 1920 and who for one reason or another, not necessarily owing to their intellectual activity, they would become influential. They are Miguel Sancho Izquierdo (1890–1988), Mariano Puigdollers (1896–1984), and Wenceslao González Oliveros (1890–1965). If we add that in 1904, the aforementioned Fernando Pérez Bueno had already obtained a professorship at the University of Oviedo, and Eduardo Callejo de la Cuesta obtained his in 1912, there seems to be some relation between the philosophy of law and those who held key roles under the dictatorship. Pérez Bueno flaunted his role as the ideologue of the dictatorship (see Pérez Bueno 1925, 52); Sancho Izquierdo collaborated with the dictatorship, though in a technical organization (see Gil Cremades 1989, 445); Wenceslao González Oliveros was General Director of Higher Education at the Ministry of Callejo; and, finally,

[3] On Hauriou, Duguit, and Gény see Sections 12.2, 12.3, and 12.5, respectively, in this tome.

Callejo, in addition to participating in the creation of the Patriotic Union of Primo de Rivera, was Minister of Public Instruction at the Civil Directory (1925–1930). Thus, Callejo did not go down in history as a philosopher of law but as a minister; and indeed he changed the curriculum for the bachelor's degree in law, requiring that natural law be taught in the first year of the programme and philosophy of law in the last year. If we look at the Consultative Assembly created by Primo to legitimize himself, we will once again notice several of these philosophers along with others (see Hernando Serra 2004, 231–57).

However, it should be said that although Primo de Rivera initially managed to get some intellectuals to acquiesce, he ultimately lost the allegiance of almost everyone. From the beginning, the iconoclastic genius Unamuno himself took a confrontational position, representing the opposition to the dictatorship. His assistant in this endeavour was a lawyer previously mentioned, Wenceslao Roces, professor of Roman law at the University of Salamanca, though he so focused on the philosophy as to be recognized among those whose role was decisive in introducing the discipline as studied abroad, especially in Germany. When Unamuno was expelled to Fuerteventura, Roces accompanied him to Madrid, from where the wise man would continue to head toward his destination. As a result, the Romanist professor was punished by the dictatorship of Primo de Rivera.

As the years went by, the dictatorship came under increasingly intense criticism, and after 1928, with the Callejo reform of the universities, opposition became almost unanimous. That is why Eduardo Callejo de la Cuesta, professor of natural law and Minister of Public Instruction from 1925 to 1930, has received much criticism in history books, as he has the dubious honour of having been the cause of the *rebellion* mounted by the university and even of the resulting consensus against the dictatorship. Another previously mentioned philosopher of law was actually involved, one who held the position of General Director of Higher Education and who apparently was among the founders of such law, namely, Wenceslao González Oliveros. They both hold the dubious distinction of having made sure that virtually all the intellectuals in the late 1920s were allied against the regime, because they had no tact in solving the situation but, on the contrary, managed to make it increasingly worse. Once again, we find both philosophers of law holding relevant political positions under the Franco regime. I am not saying that the Callejo law of May 1928 did not try to tackle some of the problematic areas in the university, but rather that it would up ultimately achieving just the opposite. The provision that enraged students as well as many professors aimed to recognize private education, and it was interpreted as a step toward the privatization of schooling. At any rate, I think that never in the history of Spanish universities has there been such a revolt, which lasted about a year and resulted in a victory for the students and in a repeal of the law. Several professors participated

in the revolt, some of the most significant among them being professors of law such as Wenceslao Roces, Jiménez de Asúa, and Luis Recaséns. Among the jurists, as well as among the majority of intellectuals, there were numerous attacks levelled at the dictatorship. In fact, Tuñón de Lara acknowledged that one of the critical tendencies with Primo de Rivera lay in his censorship of "legal normativism" (see Tuñón de Lara 1982, 184–5), an acknowledgment that meant the existence of an opposition front constituted by lawyers—a front that actually existed. What arguments did the professionals and theorists of law use against the dictatorship? They had different approaches. There were those who appealed to the principles of natural law to attack the established political order, but there were also those who used Kelsenian legal instruments to that end. The arguments more often used by jurists against the dictatorship, however, came from Stammler.[4] On his conception of law, law itself was "an interlocking, autarchic, and inviolable will" (Stammler 1930; my translation). These characteristics could not be extracted from our experience of law but had to be logically formulated; they were prior to that experience and were precisely what made it legal. To put in simple terms what Stammler expressed in obscure language, the law was a way of ordering not the inner life of individuals but human society or community (the interrelation among individuals), characterized by its purpose (its will and desires); by the mandatory nature of its rules, which were imposed on the recipients even though they did not want them (autarchy); and by its permanence and uniformity (its inviolability) (see ibid., 63–122).

The most Stammlerian among Spanish professors of law at the time, the Romanist Wenceslao Roces, used his teacher's views to condemn the dictatorship, being himself an open and very active enemy. In a 1924 article devoted to the concept of law, he focused on the last of the elements of law, namely, its inviolability, which Stammler used as a criterion by which to distinguish a system of law from a system of arbitrary rules. Roces also used this article to clearly state that the Spanish dictatorship was not a legal regime (see Roces 1924, 416).

An example of the criticism by natural law theory was the one offered by Ángel Ossorio y Gallardo, a political conservative as well as a renowned jurist who introduced the Christian Democratic ideology in Spain. He was interestingly also a monarchist who, as a result of political events, would describe himself as having no king. Ossorio was among the most belligerent opponents of Primo de Rivera. In 1925, in an article titled *Retorno al absolutismo* (Return to absolutism: Ossorio y Gallardo 1925)—without making reference to Spanish but only to Italian absolutism—he said that we were living in a time marked not by a conflict among different conceptions of law but by the fact that the very existence of law was in a crisis, a position rejected by both Communists and Fascists. It seems clear that he was also referring to what was happening

[4] On Stammler, see Section 1.3 in this tome and Section 2.2 in Tome 2 of this volume.

in Spain at the time, as he remarked that the dictatorship was a respectable political and legal system of government, provided it was "exercised for a set amount of time and in furtherance of a profound national need" (ibid., 543; my translation). In addition, law is characterized by its having authority, and if that was missing, law itself would disappear. But he asked, "What is authority if not a guarantor of freedom? If it were not that, it would simply have an arbitrary function" (ibid., 539; my translation). Behind that condemnation stood not only natural law, which is what granted authority to positive law, but clearly, and once again, Stammler.

During those years, Ossorio also directed an editorial project committed to fighting the dictatorship. I am referring to *Estudios políticos, sociales y económicos* (Political, social, and economic studies), a publisher that put out very interesting books. Suffice it to mention *Sentido democrático de la doctrina política de Santo Tomás* (The democratic meaning of Saint Thomas's political doctrine: Romero Otazo 1930), a book written by the clergyman Romero Otazo depicting Aquinas as espousing a quasi-Republican view. In academic legal philosophy, a representative of this trend was Alfredo Medizábal, professor at the University of Oviedo, who also challenged the dictatorship regime and the monarchy. In 1926, he secured a position at the University of Oviedo, where he participated in the anti-dictatorship movement. Given the serious events that took place at the Central University of Madrid and the closing down of the institution itself by government diktat, the law school in Oviedo decided to write a letter to the dictator with the unanimous support of all faculty members. Today, we know that the letter was written by the professor of natural law, who closed by saying, clearly referring to Primo de Rivera, that professors were "astonished by the intrusion of a certain policy evincing an absurdly military concept within the very heart of university life" (see the letter reported in López-Rey 1930, 179–83; my translation).

At this point, in the context of the universities' battle against the dictatorship, we should go back to a young man already mentioned in this work and whose commitment was to renew Spanish philosophy of law, Luis Recaséns Siches (1903–1977) (see Castro Cid 1974 and Rivaya 2001). I say this because he, too, as we shall see, was against the Primo de Rivera regime. Recaséns had been educated in traditional ideas but then, through the aforementioned for Advanced Studies and Scientific Research, he was exposed to the institutional mindset and ultimately became attracted to modern thinking, both foreign and Spanish. While abroad, he studied with the most prominent legal thinkers, but his philosophy would stem above all from that of Ortega. Recaséns was a faithful follower of Ortega, and his legal philosophy is, so to speak, a successful application of rational vitalism to the analysis of the legal phenomenon. In 1927, he was awarded a professorship at the University of Santiago de Compostela. There are two pieces of information that are of interest to us with regard to Recaséns. The first, as we shall see, is the role he played in renewing legal phi-

losophy; the second, as we shall also discuss, was his fight against the dictatorship, and later against the monarchy, in favour of a republican form of government. Let us start with his strong anti-monarchist militancy, with the quick remark—should anyone come under a different impression—that he was a politically moderate man who repudiated both Marxism and anarchism, as well as any type of ultra-conservatism and any form of fascism. He was recognized as being a personalist, that is, he claimed dignity, equality, and freedom to be the highest of values: He was sympathetic to anyone who shared these values, and that regardless of political persuasion, be it liberal, non-Marxist socialist, Christian democrat, or Christian socialist. There is evidence of his deep involvement in the protest, to which he lent his high intelligence and training: Suffice it to mention a book that includes a thesis he presented at the Academy of Law in Madrid under the title *El poder constituyente* (Constituent power: Recaséns Siches 1931), where he condemned the Alfonsin monarchy, repudiated Primo de Rivera and his immediate successors as arbitrary, he opposed those who wanted to return to the ante-1923 situation, and he appealed to natural law in forging a new regime. It was openly stated, as did the young professor, that Spain was going through a revolutionary time. In what sense? Recaséns's explanation, pointing to the opportunity to "delve into the entrails of the concept" (Recaséns Siches 1931, 23; my translation), is no longer relevant. Given that there was no positive law, that meant that the only existing law was natural law and that only a constituent power was justified.

However, not everyone agreed with the use of the Stammlerian argument to discredit the regime. Years later, another Spanish philosopher of law, Luis Legaz, expressed his surprise at this argument, on which Spain had no law to begin with under the dictatorship, an argument that in his view was based on the identification between the state and the rule of law and on the protection of personal rights. "It is otherwise unexplainable why he should question the legal status of the Spanish state under the dictatorship" (Legaz Lacambra 1934a, 14; my translation). Even more curious is that the dictator's son himself, José Antonio Primo de Rivera, also used Stammlerian arguments, but did so to instead defend his father (see Primo de Rivera 1964, 15–36). José Antonio illustrates that well-educated lawyers of the time (and he did fit that description) were familiar with the neo-Kantian thinker and deployed his arguments, however much in making different claims.

But let us go back once again to Recaséns, because in 1929, shortly before the aforementioned book on constituent power appeared (i.e., Recaséns Siches 1931), another of his works was published that would become greatly influential in academic philosophy of law in Spain. It was subtitled *La filosofía del derecho en el siglo XX* (Philosophy of law in the 20th century: Recaséns Siches 1929), and even with significant omissions, it was confined almost entirely to the German area. It served two objectives: First, it chronicled European legal philosophy during the thirty years that were about to come to an end, thus

offering an overview of the period; and, second, it laid out a plan for Spanish philosophy of law to follow, a research project calling on Spanish legal philosophers to study everything beyond their borders. It would not take young legal philosophers long to set their hands to that project and put their minds to work. This is what was meant at the time by doing philosophy or laying the groundwork for it. One need only scan through the index of authors cited in Recaséns's book, bearing in mind, too, that many of them he had worked with: Stammler, Del Vecchio, Kelsen, Lask, Radbruch, Münch, Smend, Heller, and Reinach. The approaches include, above all, variants of neo-Kantianism, but also the philosophy of values, sociology, and phenomenology. This flow of thought could classified pairwise by distinguishing between logicism and ethicism, formalism and anti-formalism, rationalism and sociologism. In addition, we should look at the appendix of the book, titled *The Scholastic Tradition*. Recaséns did not disdain that tradition, but on the contrary pointed out that the Catholic leadership remained strong and, opening to new horizons, not always Thomist or neo-Thomist in outlook. He even announced that he was writing a paper about in this regard and that he would hand it out to his students. This was the impressive *Recaséns Project*, otherwise adapted to the territory of Spanish philosophy of law, which at this point was basically going in two directions: a Scholastic one and a neo-Kantian one, the latter being dominant, and initially modelled after Stammler's conception, although new trends would soon spring up, both neo-Kantian and of the Scholastic type. If we add Ortega's influence, the map is drawn (cf. Gil Cremades 2002, 43). The monarchy then fell, thus ushering in a new era for the philosophy of law as well.

13.2. The Republican Era: A Pluralist Legal Philosophy (1931–1936)

The vast majority of Spanish intellectuals were against the dictatorship and the monarchy; many of them worked to establish a republic (see Tusell and Queipo de Llano 1990, 255). The legal philosopher who best embodied this ideal was, in my opinion, Luis Recaséns, who played an active role within the new republican government. Under the republican Pact of San Sebastian, Recaséns's political superior, Miguel Maura, was appointed by the general director of the local administration to the less than desirable Ministry of the Interior, a position through which the legal philosopher was given a voice in the process of consolidating the nascent republic. The appointment, however, did not last long, since Recaséns's fate was linked to that of Maura, who did not take long to resign. Recaséns was then elected representative in the province of Lugo, helped to draft the Spanish Constitution through various amendments and had an even more incisive role in shaping the law of the *Tribunal de Garantías Constitucionales* (Court of Constitutional Guarantees). He was not involved only in politics, however, but also continued to play a pivotal role in modernizing Spanish philosophy of law.

Accompanying the institution of the republic were several developments in the philosophy of law: Luis Mendizábal died; Luño Pena was appointed professor at the school that Mendizábal had founded; and Recaséns moved to the Central University of Madrid. Assuming that it is indeed possible to distinguish between teaching and research activities, there is something that ought to be pointed out in regard to the former (teaching), namely, that in 1930 the amendment that Callejo introduced in the curriculum was repealed, resulting in the elimination of the subject of natural law; however, the republic quickly established an "Introduction to Philosophy" as a foundational course and a "Philosophy of Law" course at the end of the educational programme. As concerns research, around 1933 a young legal philosopher, Luis Legaz, lamented a "lack of literature on legal philosophy" (Legaz Lacambra 1933a, 106; my translation) in Spain, although it is true that the number of books and articles devoted to the subject was increasing.

Let us now take a look at how the new philosophy of law established in Spain developed over the years and how the subject one might call traditional philosophy was developing. The former I have named the Recaséns Project, and many years later Recaséns would comment thus on the transformations the discipline was going through at the time: "A new generation of legal philosophers was cropping up, the majority of them trained in Germany, but with a critical mind enabling them to discern, reshape, renew, and even move beyond the lessons learned at the German universities" (Recaséns Siches 1964, 12; my translation); he also quoted Luis Legaz y Lacambra, José Medina Echevarría, Antonio Luna García, Felipe Eduardo González Vicén, Manuel García Pelayo, and José Corts Grau.

Interestingly, the first book enabling us to observe the ascendance of Recaséns is one not included in his project, which finds its starting point in the *Direcciones contemporáneas del pensamiento jurídico* (Contemporary directions in legal thought: Recaséns Siches 1929). I say this because the dissertation written by Felipe González Vicén, a legal philosopher who would subsequently gain enormous prestige, was published in 1932 under the title *Teoría de la revolución* (Theory of the revolution: González Vicén 1932), when Recaséns was stressing the need to study the concept used in reference to the establishment of the republic. Neo-Kantian influences were apparent in González Vicén's book—"Let us study the revolution apart from *any* revolution," he said (ibid., 21; my translation)—as were the influence of Kelsen in setting up the legal system and the influence and justification of socialism, though this did not prevent González Vicén from calling Thomas Aquinas a "productive personality and a gifted mind" (ibid., 102; my translation) or calling Francisco Suarez a "formidable natural law theorist" (ibid., 126; my translation). In the end, one inevitably questions whether or not the revolution is lawful, and basing his response on the theory, he bluntly replied: "It depends on just one factor, namely, whether the attacks against the essential principles of personhood are veri-

fied in a 'general' way and as a 'system.'" What matters even more is that at the beginning of the dissertation, he appealed to the ruling classes to change "all current legal structures" and establish a new law that in the first place would enable all citizens to have a better standard of life and, in the second place, would enable everyone to freely develop his or her personality (González Vicén 1932, 37, 149). This was a well-written work that would shortly thereafter come face to face with reality with the revolution of October 1934: Would the revolution be lawful under the policy implemented by Felipe González?

Few are the philosophers of law, to the best of my knowledge, who have analyzed this crucial event. One of these few is a man who suffered it firsthand, so much so that he nearly lost his life at the hand of the revolutionaries and was miraculously saved in the end. His name was Alfredo Mendizábal Villalba, a professor at the University of Oviedo, and the analysis he offered has struck many as surprising (see Mendizábal Villalba 2009, 123–30): He condemned the failed revolution as well as the excesses of repression, while warning that it was time to change everything, starting from "the attitude of the powerful toward the humble" (Mendizábal Villalba 1934b, 73; my translation). The others kept silent, but it is not difficult to imagine what their judgment was. In the Republican era, several philosophers of law had ties with intellectuals who opposed the republic on the journal *Acción Española* (these philosophers include Puigdollers, González Oliveros, and Corts Grau, who in that period was awarded a professorship); others, like Sancho Izquierdo, joined the *Confederación Española de Derechas Autónomas* (CEDA); others, however, belonged to right-wing Republican parties (they include Luis Recaséns, Alfredo Mendizábal, and Luis Legaz, who in the same year of the revolution published a study on the rule of law). As far as I know, none belonged to the *Partido Socialista Obrero Español* (PSOE) or to the *Partido Comunista de España* (PCE), with which Wenceslao Roces even fought in the revolution, or to any other left-wing party. Perhaps Blas Ramos espoused a leftist ideology, but as far as I know he did not advertise that fact. Perhaps the young and educated Medina Echevarría and González Vicén also took part in the revolution, but neither was affiliated with any particular party. Generally speaking, philosophers of law remained politically conservative, even though the label says little, as the distance between them was immense (as was the case, for example, between Recaséns and González Oliveros). Moreover, some key figures in Spain were involved in politics. I have already mentioned Recaséns, who was general director of the local administration, then became a representative for the Liberal Republican Right, and then, after the second election, switched to the Radical Democratic Party of Diego Martínez Barrio, which would subsequently become the Republican Union, where he became Secretary of Industry and Commerce in the administration led by the Popular Front. Sancho Izquierdo was a representative of CEDA, whereas Legaz ran for parliament as a Conservative Republican Party candidate but failed in his attempt to gain a seat.

It is important, however, to go back to the Recaséns Project and mention an event that was doctrinally crucial. In those years, Recaséns was tutoring a young man from Aragon affiliated with the school of Mendizábal, Luis Legaz, and recommended that he devote his doctoral dissertation to the Vienna school, and so he did. Recaséns also recommended the student to Kelsen himself, and so, in 1930, Legaz travelled to Vienna to complete his studies (Legaz Lacambra 1971–1972, 77–8). Shortly thereafter, his dissertation would be published, in which the young Spanish pupil's immense admiration for his teacher came through very clearly: "I consider the advent of Kelsen's doctrine to be an event no less important in legal philosophy than Kant's critique in pure philosophy" (Legaz Lacambra 1933b, 15–6; my translation). But he had the same weaknesses pointed out by Recaséns: He was not a complete philosopher, for he left ontological and axiological issues aside. It comes as no surprise that he would later acknowledge that his position was "close" line to that of Recaséns Siches (1964, 173).

Luis Legaz then came onto the scene, and it is worth mentioning him, since he would become the most prominent Spanish legal philosopher of the 20th century. Another issue is how to assess his political choices and his academic performance, even though there is no denying the enormous significance he had in legal philosophy. It should also be noticed that his biography (intellectual and otherwise) has yet to be written. Like Recaséns, Legaz was a very gifted young intellectual with outstanding academic training, even if his thinking revealed a certain tendency toward syncretism, a tendency that would become even worse over time. His career was brilliant: In 1935, he was awarded a professorship at La Laguna and then moved to Santiago de Compostela, where he worked as a professor. His doctrine was derived from Christian thought, so it was inevitable that he should have experienced an intellectual shock upon encountering German neo-Kantianism and that a certain disruption should have followed. He was also very attracted to sociology in the manner of Ortega and to the new Christian personalistic tendencies. In short, he was attracted to everything and knew how to extract some originality or some interesting ideas from everything he came across. It is even difficult to determine whether he ought to be considered a legal positivist or natural lawyer. I suppose it depends on how one looks at the question: The tradition he followed was that of natural law, but his later training was in legal positivism. In the documents of the examination through which he earned his professorship, he stated that he was neither. On the one hand he commented thus: "We do not deny the existence of ideals that form this complex set of rules that are traditionally called natural law; what we question is whether the term *law* actually designates a real notion" (Legaz Lacambra 1933c, 127; my translation). But on the other hand he also abhorred positivism: "The contempt elicited by positivism is owed not so much to its recognizing nothing other than positive law but to its denying all sorts of transcendent values and goals" (Legaz Lacambra 1933c, 127; my translation).

Another work I think can be included in the Recaséns Project was written by José Medina Echevarría (1903–1977), though he would eventually devote himself successfully sociology. He began his intellectual journey in the philosophy of law and was already a professor in Murcia when he came out with *La situación presente de la filosofía jurídica* (The present situation of legal philosophy: Medina Echevarría 1935), offering a new perspective on the most recent philosophy of law. At the time, philosophy was, in his words, a philosophy of crisis; in many ways, philosophy itself was in a crisis, as was life itself, the way we had hitherto known it: There was a political crisis of liberalism and the rule of law, followed by the rise of dictatorships, coupled with an economic crisis and the transformations of the capitalist system and a crisis of law itself as a form of life. This was the diagnosis, but we should take a look at the philosophical solutions that were being proposed. Medina distinguished several currents in legal philosophy: dualist idealism; normative idealism, whose main representatives he thought were the neo-Kantians, and also phenomenologists and the empiricists; objective idealism, best exemplified by the neo-Hegelians, even though in his view the institutionalists also fit this description; and naturalism, encompassing both Marxists and sociologists and philosophers whose approach was sociological. In a separate category he placed the irrationalists, whose last and most prominent representative in the philosophy of law was Hermann Jsay. Finally, Medina distinguished another current: legal philosophy grounded in politics, though using a different terminology to express this idea. In essence, his distinctions came down to that between communist and fascist tendencies or to that between liberals and socialists. The philosophy of law was, of course, no stranger to the worrisome political situation in Spain and throughout Europe.

Another extremely important doctrinal event took place in 1935. Enrique Gómez Arboleya (1910–1959) was a young man in whom none other than García Lorca had placed his confidence, in hopes that he would devote himself to literature; but such hopes would not be fulfilled, as he was sent away with a scholarship from the University of Granada in order to study in Berlin. He defended his doctoral dissertation on Hermann Heller, one of the greatest philosophers of law and of the state in the interwar period. Heller was particularly well known in Spain because, having fled the Nazis as a Jew, he ended up in Madrid, where he died a short time later. Gómez Arboleya's doctoral dissertation has been extensively studied (see Mesas de Román 2003), but two aspects need to be highlighted: his thesis that the formalism which had taken over legal theory was quite inadequate, and that it drew criticism from all sides, with Smend attacking it from a liberal viewpoint, Schmitt from a totalitarianian one, and Heller from the standpoint of socialism with a human face.[5] Heller was

[5] On Rudolf Smend, see Section 8.4 in this tome and Section 8.7 in Tome 2 of this volume. On Carl Schmitt, see Chapter 8 in this tome and Sections 8.7 and 8.8 in Tome 2 of this volume. On Hermann Heller, see Section 7.4 in this tome and Section 8.7 in Tome 2 of this volume.

especially opposed to ideological positivism, for no one today is in a position to believe that what is dictated by legislative power issues from "metaphysical predestination" (Gómez Arboleya 1982, 123; my translation). The odd thing is that Arboleya Gómez defended his dissertation in 1935, but he did not publish it until 1940, so even though there are some differences between the dissertation's original text and the published one, the work stands as a metaphorical bridge between the Republican period and the Franco regime.

Now that Nazism had entered the scene, a few words ought to be devoted to its legal philosophy and reception in Spain (see Rivaya 1998b). Just as the most recent Spanish philosophy of law was linked to German philosophy, the rise of Nazism transformed all aspects of life and even of thought, taking our main actors by surprise. Spanish legal philosophers were quick to discuss the coming to power of Nazism and its philosophy of law, which they generally judged to be negative. The first one to warn against what was happening in Germany was Alfredo Mendizábal Villalba, who found the new regime and its philosophy intolerable (see Mendizábal Villalba 1933). But a colleague of his, Wenceslao González Oliveros, writing on *Acción Española*, applauded both the new situation and the new ideology: he saw in it "an essentially anti-liberal movement," but also characterized it as "the rebellion of the physically and spiritually healthy people" (!) against the "sinister socialist degeneration" (González Oliveros 1934, 331, 333; my translation). In any event, German Fascism was so all-encompassing in its revolutionary zeal that it sought to transform everything, even the philosophy of law. Legaz, who was always alert to new developments, offered a description of the new legal thinking in a monograph (Legaz Lacambra 1934b) in which he defined it a racist theory of law; that is, he understood it as a spiritual product of the race aiming to satisfy its biological needs by preserving the purity of the People, regarded as racially pure. Spain would soon hear news of the measures adopted by the Nazis against the "other races," and this drove a well-known philosopher of law to declare himself an anti-Fascist activist. I am once more referring to Recaséns, who along with others in the Republican intelligentsia (Unamuno, Jimenez de Asúa, and Marañón) wrote a manifesto calling for the establishment of a committee of conscientious intellectuals to help "the victims of Nazi terror." Shortly after that, during the formation of the committee, in a ceremony held at the University of Madrid, Recaséns spoke with Jimenez de Asúa, specifically warning against the barbarism of Nazism (see Arrarás 1969, 182). Indeed, it is worth noting that at this point Recaséns had the honour of having been among the intellectuals most attacked by the Spanish Fascists. Just before the establishment of the republic, Ramiro Ledesma Ramos unleashed some particularly crude and malicious attacks against him (see Ledesma Ramos 1986, 73–4). As for the relation between Recaséns and the head of the Falange, José Antonio Primo de Rivera, the mutual respect between them (Recaséns even admired the latter for his deep knowledge) did not prevent Primo de Rivera from

threatening Recaséns within the Republican parliament itself: "Be very careful!" he said in a bitter debate (see Rivaya 2001; my translation). Such words were not to be taken lightly.

However, in the end, Fascism had little, if any, importance in the philosophy of law. Reference should be made, however, to Scholastic philosophy, which continued to grow during this time, although, as Legaz pointed out, it lacked "a figure with a resonance both popular and universal: There is no Balmes or a Donoso Cortés" (Legaz Lacambra 1947, 341). In the legal field, that trend maintained the traditionally implemented meaning and subject, both, though it seems to me that there were some attempts at reform. On the one hand, one can observe the attitude of José Corts Grau, a professor who in 1935 introduced the doctrine of institutions developed by Georges Renard (with whom he studied at the University of Nancy in 1930 and 1931), a doctrine that, in the words of Corts himself, "ultimately becomes the last legal rendering of the Thomist notion of the common good" (Corts Grau 1934, 100; my translation), observing law as a practical phenomenon, inseparable from morals, and geared toward the satisfaction of those human needs that lead to supra-individual realities, "such as the family, the nation, the business enterprise, the state, or the university" (ibid., 102; my translation). After the war, institutionalism would continue. Alfredo Mendizábal, who was more of a reformist, became the Spanish representative of a democratic and progressive Catholicism identifying with that of Jacques Maritain in France.[6] We already saw that under the dictatorship, Mendizábal focused on the doctrinal study of philosophy, which he identified with Thomist philosophy. He now began to put these ideas into practice, although I am sure many would think it was quite a peculiar application. Let us take a look at the subjects he dealt with and how. On the one hand, we know that he is among the first in Spain to have written about and explained German Fascist thought, which he strongly condemned; on the other hand, he also explained and criticized communist doctrine (see Mendizábal Villalba 1934a). At the same time, he translated Luigi Sturzo (1871–1959), the Italian philosopher (Sturzo 1935), with which he shared a democratic Christian ideology and the theory of totalitarianism, a concept that includes and shows what Fascism and communism have in common.

As has been observed up to this point, I think we can conclude that the legal philosophy developed during the Republican period was in good health. For one thing, speculation was characterized by pluralism (with positivist, neo-Kantian, and sociological influences, on top of more traditional influences). For another thing, access to academia was characterized by the same pluralism, considering that scholars of various political and philosophical tendencies were awarded professorships, as was the case with Medina, Legaz, and González Vicén, as well as Luño and Corts. The discipline at the time was very

[6] On Maritain, see Sections 1.3.2 and 3.2 in Tome 2 of this volume.

healthy: A phrase was coined, "the silver age of legal philosophy," that aptly fits this context (see Gil Cremades 1987, 564; my translation).

Just as this stage should somehow begin with Recaséns (*Direcciones contemporáneas del pensamiento jurídico*: Recaséens Siches 1929), so it can be made to end with his *Estudios de filosofía del derecho* (Studies in legal philosophy: Recaséns Siches 1936): This was the source of his textbook on legal philosophy (Recaséns Siches 1986), which was among the most representative of the 20th century, as it covered all trends, thus making it a very relevant book. Precisely at this point, Recaséns was the "main leader" of Spanish legal philosophy (see Gómez Arboleya 1982, 689), as Gómez Arboleya would rightly later say in his classic 1958 *Sociología en España* (Sociology in Spain: Gómez Arboleya 1958). A long career would still await him in Mexico, and as much as he would make new and interesting contributions, I think that from this point onward (and the political circumstances cannot be disregarded), Luis Legaz stepped into the role of witness and observer, even though Recaséns was ready to become the new engine for legal philosophical speculation in Mexico. As for Recaséns's *Estudios de filosofía del derecho*, which touched on the concept of law, especially apparent was his dependence on Ortega and Stammler, and as far as the issue of valuation is concerned, he was influenced by the philosophy of values and Scholasticism. He asserted the right of moderation against extremism. And then war broke out in Spain.

13.3. The Civil War and the Philosophy of Law (1936–1939)

The bloodiest and most unfortunate event to have happened in Spain in the 20th century, the civil war, affected all spheres of public life, right down to areas as specific as legal-philosophical thought. With some qualifications, it seems appropriate to say that from a legal-philosophical perspective, war was an inevitable rupture. As a general rule, those thinkers who can be described as Scholastics chose to take up arms against the republic. Thus, Miguel Sancho Izquierdo, Enrique Luño, Mariano Puigdollers, and Wenceslao González Oliveros were committed to the anti-Republican opposition. Conversely, and as a general rule, those who cannot be labelled traditional did not side with that camp: This applies to Luis Recaséns, Blas Ramos, and Jose Medina. But there were a few exceptions, two of them being Legaz and that Mendizábal, who belonged to the same group, the Aragon school of natural law.

Luis Legaz put himself at the service of the rebels and did an important ideological service (see Tuñón de Lara 1982, 252; Sueiro and Díaz-Nosty 1985, 51). So a question inevitably arises: Why did Legaz side with Franco? This question actually has a satisfactory answer. The question that does *not* have an explanation is: Why did Legaz become one of the most important ideologues of Spanish Fascism? Given that he was now a professor at the University of Santiago, the early days of the war posed a serious dilemma. In political terms, the

words that best describe him are that he was a liberal conservative, a defender of the state and of democracy: To the best of my knowledge, he never spoke out against the republic. He did campaign in a right-wing party, but it was a radical Republican one. As we will soon find out, some people very close to Legaz did not want to have anything to do with the uprising. By affinity of ideas, the cases that are most representative and closest to him are those of Luis Recaséns and Alfredo Mendizábal: Although their positions did not coincide, both refused to support either side and both certainly repudiated the rebels more than Republican loyalists, since, in the end, they were themselves Republicans. As far as other matters are concerned, Legaz was a Catholic, like the other two, and although the vast majority of Spanish Catholics took the same side, Recaséns and Mendizábal themselves showed, among others, that that did not necessarily have to be the case. Hence, despite the Catholic faith, the evidence points to a decision in favour of the republic, or, in any case, a decision adverse to the rebels. Perhaps his choice was to flee, as was that of Recaséns, who was unhappy with some of those on both sides, and who feared the worst. But Legaz decided to collaborate even so. Why? Luis Legaz was above all a scholar, a man of peace and moderation, not at all an extremist. I suppose that the direction taken by the regime as of February was not particularly to his liking, but he would not consider it serious enough to take up arms. That said, however, there were at least two circumstances that would prompt him to support the uprising: In the first place, he was in Galicia, where the uprising was an immediate success; and, in the second place, he was about to marry. In the decision that Legaz *had* to make (what he could not do was to make no commitment to any side at all), both factors tipped the balance in favour of an option he could not commit to with any sense of real conviction. But he became a supporter—and a radical one at that, contrary to what anyone might have predicted. Like all who had to choose one side or the other, the decision would mark his life.

The other exception was the aforementioned Alfredo Mendizábal Villalba, who was still a faithful Thomist and yet loathed the military, while also refusing to support the Republicans. His case is even more interesting, because his position was somehow heroic. He was abroad when the war broke out, and, luckily for him, he could not return, so he stayed in France. He survived with the help of Maritain and his contemporaries and in the meantime founded the Spanish Committee for Civil and Religious Peace in Spain, an organization that was involved in some interesting activities, including attempts to broker a truce or an exchange of prisoners or to have prison sentences commuted, but unfortunately none of these initiatives succeeded. These years are the subject of an important book he wrote discussing contemporary Spanish history titled *Aux origins d'une tragedie: La politique espagnole de 1923 à 1936* (At the origins of a tragedy: Spanish politics from 1923 to 1936: Mendizábal Villalba 1937). This is largely unknown in Spain (it was written in French and translated into English and Swedish shortly thereafter, but to this day it has not been

translated into Spanish): It is known only by reason of the important preface by Maritain, with whom he found himself in an area somewhere between the two sides when, as he put it, a "war of extermination" was underway (ibid., 50; my translation).

Let me now recount the circumstances of Legaz and Mendizábal, who as we have seen belonged to the same group, the school of Aragon, and had similar interests and perspectives. Philosophically speaking, Mendizábal was clearly a Scholastic; politically speaking, he was a Christian democrat. Legaz was himself in a way a Scholastic and a Christian democrat, though his position was more complex and included more tendencies. A sad event took place involving Emmanuel Mounier himself. Besides having several other things in common, Mendizábal and Legaz joined Friends of *Esprit* (the journal founded by Mounier), a group formed in late 1935 and headed by José María Semprún, professor of philosophy of law and a very close friend of Alfredo Mendizábal. And here we can see Legaz's about-face, from advocating Catholic personalism to fighting it. It is obvious that the young philosopher of law admired Maritain, as emerges from some of his works written before the war. But now he became a political as well as a philosophical enemy to Maritain, the most important Catholic thinker to have spoken out against the rebels. Mounier was also important, but certainly Maritain enjoyed greater prestige among Catholics. The unequivocal democratic and anti-Fascist nature of Maritainism made his conception especially loathsome in the eyes of the rebels, who had to live with the fact that Republicans put out a pamphlet with a preface that Maritain himself had written for Mendizábal's aforementioned book, i.e., *Los rebeldes españoles no hacen una Guerra santa* (The Spanish rebels are not fighting a "holy war": Maritain 1937). Legaz rightly thought that the attack should be directed against this very important Thomist who questioned the arguments of those who took up arms and, as we know, refused to consider the Spanish civil war a holy one. He would now devote his articles to this purpose (Legaz Lacambra 1937, 1938), attacking the Christian Democrats who criticized the uprising: Maritain, Mounier, Sturzo, Mendizábal, and Semprún. He accused these latter two—both friends of his—of following the path of the so-called Third Spain and of Christian peace-making.

To my knowledge, Mendizábal never responded publicly to his former friend, but Semprún Gurrea did; he sent a letter to Mounier, and this attracted even greater attention to his complaint, however much unwittingly, or so I would imagine. Part of Semprún's letter to Mounier was published in *Esprit* (see Semprún Gurrea 1938). In it, Semprún described the personalistic cause as "stained with blood and mud" ("because we are not angels but men," he said), equating that cause with the Republican one (in this way he incidentally answered Legaz's criticism of Maritain), while speaking of the others as "murderers of so many poor innocent people" (ibid.; my translation). The other part of the letter was private. Mounier, however, responded publicly to both

parts of Semprún's letter, and as for the second, referring to Legaz, he said that he did not want to judge him, but added: "It would be sufficient to show that no caricature is more dangerous than the one he drew of personalism, of the notion of a 'total' man in support of the totalitarian state, and in defence of war as a 'genuine factor of personalization.' I would only need to verify this in order to erase the term *personalism* from our community" (Mounier 1938, 246–7; my translation). Mounier's words bear witness to the rupture that had taken place between the more enlightened Spanish Catholics, as well as between academics in the philosophy of law. This incident paradigmatically illustrates the kind of environment that existed at that time.

Now, with the recent reference to Semprún, always a loyal supporter of the Republic, one might think that there surely had to be other supporters. But this was not the case at all: Although philosophers of law refused to cooperate with the rebels, they did not necessarily support the republican government. More to the point, only one philosopher of law chose loyalty to the established regime: José Medina Echevarría. In his case (as in the case of other university professors), such loyalty meant going on a diplomatic mission to Warsaw in 1937 as secretary of the Spanish Legation in the Polish capital. Recaséns, on the other hand, briefly worked for the Republic and then left for Mexico, no longer convinced of the Republic's neutrality. He undoubtedly did not identify with either of the two. As for Blas Ramos, he too was living abroad and wisely decided not to return to Spain. He did try to return after the war, but his attempt was unsuccessful.

Also exceptional, as well as bizarre, is the case of Felipe González Vicén. On July 18, 1936, he was in Germany and strangely he decided to return to Spain. The explanation, however, seems quite simple: His brother, Luis, was a senior official in the Falange, and so Felipe felt protected. But the protection he could count on was not so strong as to prevent a legal case from being initiated against him in Seville, under charges of being a left-wing extremist and with a motion to have him removed from professorship, leaving him unfit to fill any position of authority or trust. Faced with these circumstances, he had to flee with his family. But apart from his personal circumstances, which were of course dramatic, it can be observed that, while many philosophers of law chose to side with the rebels, only one was clearly allied with the Republicans, and this seems to bear out the traditionalist nature of Spanish legal philosophy or, if such political interpretations are worth anything, their majority anti-Republican militancy against abstention or the *third way* of others like Recaséns and Mendizábal, who would be labelled by some as conservatives.

With regard to ideological work, to my knowledge, among Spanish philosophers of law there was no significant doctrinal collaboration aimed at justifying the Republic. Instead, among those who sided with the rebels, some were devoted to what was more natural to them: writing books and articles in support of military action and the next hypothetical regime. It is sufficient to cite

the three most relevant of those philosophers, so as to bring out the diversity within the nationalist opposition: Wenceslao González Oliveros, supporting the radical right; Miguel Sancho Izquierdo, supporting the conservatives; and Luis Legaz again, who now embraced Spanish Fascism. No wonder that their programmatic speeches were different, sometimes even contradictory. As was to be expected, González Oliveros distinguished himself by writing some of the most combative wartime books (González Oliveros 1937a, 1937b). An active collaborator in Primo de Rivera's dictatorship and a declared enemy of the Republic, the professor at the University of Salamanca overtly stated that his writings were actual weapons primed for an assault in the "war of ideas," itself part and parcel of the war effort. He warned against the modernist spirit of the Falange and laid the groundwork for an environment that would unify the traditionalists in the war of ideas. Between unusual invocations of God and country, he spared no insults to all those he considered opponents of the national cause and enemies of Spain (Menéndez Pidal, and Fernando and Giner de los Ríos, Castillejo, Jimenez de Asua, among many others). More moderate, by contrast, was Sancho Izquierdo, even within the fervent environment that prevailed: He revealed his Christian democrat roots as well as praising the rise of Italian Fascism. It is no wonder, then, that the Aragonian's main concern was the question of society, on which he wrote several articles in which his dependence on papal speech was apparent (see Sancho Izquierdo 1936–1937, 1938). Finally, Luis Legaz was committed to a Spanish Fascism resting on modern political and legal theories that cut across Europe and with which he was very familiar: They included the theories put forward by Schmitt, Heller, Kelsen, Gurvitch, and Ortega, and so were not always Fascist but were sometimes liberal and even socialist. It is true that he also came from Catholic circles, but in his academic training he had been educated in the latest European philosophy, while choosing a personalistic liberalism that, as we have observed, he would now have to adapt to the totalitarian fashion. In fact, the problem for which Legaz tried to find a solution at the time—the problem of the type of regime that would have to be implemented—was not unrelated to the previous question. That he advanced a thesis of "totalitarian humanism" should in itself be enough to alert us to his impossible attempts to reconcile the two (Legaz Lacambra 1937, 1938).

Indeed, among legal philosophers, there were also those who played leading roles in the so-called technical board. Mariano Puigdollers, in particular, sat on the *Comisión de Cultura y Enseñanza* (Committee on Culture and Education), an organization devoted to the infelicitous task of purging the universities of unaligned professors. Sancho Izquierdo also took part in this effort. This is not the time to go into the intricacies of the purge, but it will be noted that all the philosophers of law forced into exile were sanctioned by the committee, which deprived them of their professorship and prevented them from holding public office. Recaséns, Mendizábal, Medina, Ramos, and González

Vicén thus had to try their luck and take whatever arrangement they could find.

13.4. Francoism and the Philosophy of Law (1939–1975)

Meanwhile, a new situation was shaping up in Spain: an anomalous political regime that would survive for nearly forty years in Spain's history, affecting various fields throughout that time, including that of legal philosophy. The extent of the Francoist regime makes it necessary to break it down into further periods from the standpoint of legal philosophy. And it is once again striking, in this regard, to see how the periods in the history of legal philosophy coincide with those of general and political history.

13.4.1. The Post-war Period: Reconstruction of Legal Philosophy (1939–1975)

The post-war period was marked by fierce repression as the foundations of the New State were being laid. This construction had to cover even the minutest aspects of life and so required the effort of all those who considered themselves part of the Franco project. Among philosophers of law, there were those who served in the highest bodies of the New State. Eduardo Callejo de la Cuesta, for example, became part of the *Consejo de Estado* (or State Council) shortly after the war ended, being appointed president of that council in 1945. After the war and for many years to come, Mariano Puigdollers would serve as general director of Ecclesiastical Affairs. But the one who held the highest responsibilities in the gruelling post-war period was Wenceslao González Oliveros, who was appointed civic governor of Barcelona in 1939; the following year, he would also be appointed president of the *Tribunal de Responsabilidades Políticas* (Court of Political Responsibilities) and vice president of the *Tribunal Especial de Represión de la Masonería y el Comunismo* (Special Court for the Suppression of Freemasonry and Communism). These two roles, coupled with his fanaticism, would cause him to become "one of the greatest executors of the regime's repressive policies of the regime," as Manuel Alvaro Dueñas rightly put it (Alvaro Dueñas 2006, 107, 127; my translation; cf. Alvaro Dueñas 1999).

If we focus on intellectual activity, we will see that after the war, even a sector as specialized as the philosophy of law would require the renewal that everyone was calling for. In addition, several professorships were now vacant, for obvious reasons, and needed to be filled. Loyal thinkers were needed, it was said, in order to develop an authentic Spanish thought. So, to begin with, a university academy was founded consisting mostly of professors of legal philosophy, along with some in other legal disciplines (examples being Castán, De Castro, and Hernández Gil, who all taught civil law). Since the post-war academy was clearly another result of the conflagration, there are two acad-

emies that can be spoken of: an "internal" one, in Spain, and one in exile, the "pilgrim" one. At the end of the war, the internal academy was composed of Callejo de la Cuesta (who rejoined the body of professors, even though he was hardly committed to the discipline, and then moved on to the State Council), Sancho Izquierdo, Puigdollers Oliver, González Oliveros, Luño Peña, Corts Grau, and Legaz Lacambra. The number of vacancies, however, meant that the university academy would have to be rebuilt over those years, and this explains why seven calls were put out between 1940 and 1945 to fill professorships. Political influences played a central role in deciding who would be awarded such professorships, but there is more. It is obvious that in the postwar period, those who passed the national exams for a professorship were those who had not been denied access in the first place, although this does not necessarily mean they lacked intellectual capacity. On the contrary, all the newly appointed professors were, I believe, intellectuals of the highest order: Enrique Gómez Arboleya, Ramón Pérez Blesa, Francisco Elías de Tejada, Joaquín Ruiz Giménez, Eustaquio Galán, Salvador Lissarrague, and Antonio Truyol.

But the two academies, the internal one and the exiled one, were not the only ones. There was a third academy, already established, that would now gain special importance, that of the clergy. We need not point out the significance the clergy gained in those years, nor need we make explicit what the modus operandi was for many of those who belonged to it: The clergy acted as the final arbiter of good and evil. As a logical consequence, those who were considered capable of developing a moral philosophy were also devoted to the philosophy of law, the latter being part of the former. They not only judged the academic philosophy of law already in existence but also wanted their conjectures to become orthodoxy. This trend is exemplified by Santiago Ramirez O. P., Teófilo Urdánoz O. P., Gabino Márquez S. J., Joaquín Iriarte S. J., and Marina Martín S. J., among others.

As previously noted, conflicts between the two academies did emerge, but often muffled. See, for example, the case of the pure theory of law (cf. Rivaya 2000a). Among the professors, there were two tendencies, I think: those who knew and admired Kelsen's work, though not sharing his ideological beliefs, and those who were older and more traditional, not the least bit interested in Kelsen. Those who condemned his legal thought were not university professors but part of the "clerical" academy. Legaz himself had been warned that his "Kelsenian leanings" were inconsistent with the purpose of helping to develop the new theory of the state, as the Catholic tradition was incompatible with Kelsen's doctrine (see Izaga 1941, 174). Legaz's response was of course strong, warning the "chorus of systematic critics" that many of the Kelsenian constructions had already been "permanently" incorporated into legal science, despite their "gross insults" at him (Legaz Lacambra 1942, 355, 371). But this did not concern only pure theory, as conflicts like these were not uncommon in those years.

There is no academia that can be spoken of in the case of another orientation in legal philosophy that sought to establish itself in Spain in that period: National Socialism (see Rivaya 1998b). A group of journals including *Investigación y Progreso* (Research and progress) and *Ensayos y Estudios* (Essays and studies) was dedicated to spreading German Fascist thought and, more relevantly here, German Fascist philosophy of law. Among the German legal thinkers whose work appeared in these journals were Schmitt—who deserves a separate chapter—as well as Larenz, Siebert, and Hedemann, along with other lesser-known authors.[7] The culminating point in the introduction of this racist philosophy was reached with the publication of a work by Karl Larenz translated by Eustaquio Galán and Antonio Truyol under the title *La filosofía contemporánea del derecho y del estado* (Contemporary philosophy of law and of the state: Larenz 1942), hinting at the great controversy the National Socialist ideology sparked among Spanish authors (see Rivaya 1998a, 177–84).[8] Although no one denied the kinship of ideals, it has been proved that Spanish and German thought at the time were incompatible, at least generally speaking. No wonder there were those who belonged to the "religious academy" previously referred to and the more traditional jurists, who reacted against a philosophy of law mainly predicated on the cult of race.

Given this scenario, the most striking aspect about the makeup of Spanish philosophy of law in those years is that it so faithfully reflected the political reality. That between "Catholics" and "Falangists" is perhaps too rough a division, but it is nonetheless necessary as a first approximation. The first category takes in both those who came from the radical right wing and those who were among the conservatives, as the similarities between the two outweighed the differences: They lay in a steadfast defence of Catholic dogma and the traditional social structure, a consummate anti-communism, and support for political authoritarianism. The second category takes in those who belonged to the Falange—and not just nominally at that—such as Legaz or Lisarrague. They seem to have come from a less diverse background, even though they were all conservative and propounded a modernism that was sometimes, though not always, repudiated. They swore allegiance to the Catholic dogma, of course, but did not give it as much importance as did the conservatives. In fact, we could even rank the philosophers of the period on the basis of their degree of tolerance for different doctrines: from Puigdollers, who is said to have rejected "materialism apriorism, formalism, phenomenologicalism, existentialism, vitalism [...] and all the *isms* that are not a clear and accurate Christian view of the world and of mankind" (Puigdollers 1942, 12), to Galán, Truyol or Arboleya, who accepted much of contemporary thought. However, that the period is characterized by complexity, within a limited pluralism, is demonstrated by a

[7] On Schmitt see Chapter 8 in this tome and Sections 8.7 and 8.8 in Tome 2 of this volume.
[8] On Larenz, see Sections 5.4 and 9.4 in this tome.

circumstance previously mentioned, namely, that even though one could think that the Falangists would import National Socialism—and indeed Legaz, but not Lissarrague, devoted himself to this task for a time—Karl Larenz's paradigmatic book of Nazi legal philosophy was translated by two young men, Galán and Truyol, who belonged not to the Falangist camp but to the "Catholic" one.

As for access to professorships in philosophy of law and natural law, the latent conflict between the two groups was settled from the outset in favour of the Catholics, and in particular in favour of the *Asociación Católica Nacional de Propagandistas* (National Catholic association of propagandists), to which belonged the majority of the main characters on the Spanish scene: Sancho, Puigdollers, Luño, Corts, Elías de Tejada, and Ruiz Giménez. Although Legaz used to belong to the association, he was no longer a member at this time. With the sole exception of Lissarrague, the National Catholic Association of Propagandists lent its support to all those who obtained a professorship in the post-war period. In any case, the Falangist group would have far less weight in the university system in shaping the school of legal philosophy in the post-war period (in fact this was true of all schools of law, where the National Catholic Association of Propagandists exerted greater control), a circumstance largely reflecting the lesser degree of Falangist influence in the National Ministry of Education, whose minister (and so those who had access to him) exercised direct control over the ministry as well as access to professorships.

From the standpoint of philosophical trends, we should talk about two basic tendencies: the Scholastic one and that of the followers of Ortega, even though it would perhaps be appropriate to call the latter the "modern" tendency, considering that Ortega was not the only one to have influenced it. There are in principle some parallels that can be drawn between this classification and the previous one: The "Catholics" could be considered Scholastics and the Falangists followers of Ortega, or modernists. In fact, I think that Lissarrague can properly represent the Ortegian Falange, while Sancho, Puigdollers, and Ruiz Giménez, for example, can be described as proponents of Catholic Scholasticism. But, as always, the distinction is not so clear. Leaving Legaz aside for now—as he deserves a separate chapter—we must not forget Lissarrague's effort to integrate Catholic philosophy into his thought, with his studies on Thomas Aquinas and Vitoria. As far as Gómez Arboleya is concerned, it has already been mentioned that he showed a certain personal affinity for "liberal Falangism" influenced by Laín, even though he was above all a Christian thinker, albeit a modern one, as evidenced by his studies on contemporary German philosophy or, more specifically, on Carl Schmitt. The same could be said of Galán, Pérez Blesa, and Truyol. Galán's case is interesting, especially because of his subsequent development, which pushed him over to the extreme right, and also because he was among the young and well-educated Scholastics, who at that time were influenced by historicist thought and, more

specifically, by Ortega. In addition, the post-war Galán is a good example illustrating that Recaséns's project to introduce contemporary philosophy of law in Spain had not failed; paradigmatic in this sense is his dissertation on Emil Lask, one of the leading thinkers of the Baden school (see Galán Gutiérrez 1944).[9] Truyol was undoubtedly more traditional, but something along the same lines could be said of him, too. Even with certain changes, therefore, the "Recaséns project" still had some followers.

Although philosophical reflection on law was subject to strict limitations, it was not all consistently homogeneous; in fact, as previously mentioned, a limited pluralism can be said to have existed in the early post-war period. Consider, for example, the concepts of law that were put forward, ranging from that of Sancho, who understood law as the "mandate of the supreme Chancellor and Governor of the Universe" (Sancho Izquierdo 1943, 10; my translation); to that of Ruiz Giménez, who was likewise a Scholastic thinker but whose conception was rejuvenated by institutionalist terminology (see Ruiz Giménez 1944); to Lissarrague's distinctly Ortegian concept of law, for whom the legal phenomenon consisted of a set of unique uses and applications, owing both to the impersonality of law and to its coerciveness and irrationality (cf. Lissarrague Novoa 1944, 1948); to the more complex Legaz, whose definition of law deserves to be quoted verbatim: Law is for him a "form of social life in which a point of view is developed on justice, a point of view which defines the respective areas of lawfulness and duty by means of a legal system, and which has a self-sufficient value" (Legaz Lacambra 1943, 161; my translation). A variety of very different influences can also be observed in Legaz's definition. Behind his "form of social life" stood Ortega, Recaséns, and Gurvitch, at least; behind the "point of view," Ortega once again; behind "justice," Thomas Aquinas or Suarez; behind the "point of view on justice," Ortega and Recaséns once again, but also Kelsen and perhaps Lask, Mayer, and Radbruch; behind "lawfulness and duty" was Kelsen, who was also behind the "system of lawfulness," of regulation, and of the order of law; and behind "autarky" was Ortega, Recaséns, or Stammler.[10] It was Legaz's perspectivism that drew attention, for it was understood that the several points of view were equally legitimated as law. That meant that the Catholic notion of justice was not the only one or, if you will, that there was not just one natural law, but as many as were the possible perspectives. I also believe that the interpretation is correct, as was shown *a contrario sensu* when Legaz later retained the terms but warned that they should not be interpreted like that (see Legaz Lacambra 1979, n. 288). At least during the war and the years

[9] On Lask, see Section 1.4 in this tome and Section 1.1.3.2 in Tome 2 of this volume.

[10] On Stammler, see Section 1.3 in this tome and Section 2.2 in Tome 2 of this volume. On Mayer, see Section 1.10.3 in this tome. On Radbruch, see Section 10.2.2 in this tome, Sections 1.1.3.2 and 9.1, and Chapter 2 in Tome 2 of this volume.

that immediately followed, even though natural law theorists were in the majority, there were still positivists around.

Interestingly, any inkling of innovation on the philosophical mainstream would be nipped in the bud. It was not the powerful speculation of any thinker but the end of World War II and the downfall of Fascism that definitively laid the groundwork for the philosophy of both law and the state developed under Franco's regime. The rise of Catholicism, so-called humanism and natural law, the repudiation of communism and totalitarianism in general, and the defence of property and of a traditional social order, as well as that of a *sui generis* democracy, provided the foundation for the *new* edifice. This moment would result in a doctrine of unequal value. Let us cite two examples: Whereas in the *Sentido español de la democracia* (The Spanish meaning of democracy: Corts Grau 1946), Corts Grau purported to lay out "the real meanings of democracy" (ibid., 39; my translation) for the Franco regime; in *El derecho natural y su incesante retorno* (Natural law and its incessant return: Galán Gutiérrez 1945), Galán offered an interesting classification of natural law doctrines, while explaining why natural law kept coming back, and in particular why it was doing so at that particular time (ibid., 169).

13.4.2. Autarchy and Openness: Stabilization of the Philosophy of Law (1945–1959)

So, by 1945, the university academy of legal philosophy had already been stabilized, not only in the sense that all the professorships were filled and a new national exam would not be held until 1957, when Agustín de Asís was awarded a professorship, but in the sense that the dominant Catholic thought was imposed everywhere. The international political scene was innovative, which for Spain meant an almost complete isolation that would only begin to take shape in the early 1950s, though it would gradually ease up as the decade progressed, with developments such as Spain's concordat with the Vatican (1953), its agreements with the United States (1953), and its admission to the United Nations (1955). The qualifier that best describes this stage in the philosophy of law is probably *autarchic*. Aside from the aforementioned Agustín de Asís, there were no new additions to the discipline, nor was there—to my knowledge—any constant contact with legal philosophers from abroad. There were few translations of works. Again, this does not mean that there were no outstanding works in this period; there were indeed some, but they almost invariably leaned in the same direction. I am thinking of the magnificent book that Gómez Arboleya wrote on Francisco Suarez, S. I. (Gómez Arboleya 1946); of the first edition of Galán's masterpiece, the *Ius Naturae* (Galán Gutiérrez 1954); and of Truyol's *Fundamentos de Derecho Natural* (Fundamentals of natural law: Truyol 1949). Two exceptions are Lissarrague's Ortegan *Introducción a los temas centrales de la filosofía del derecho* (Introduction to the main issues in the philosophy of law*:* Lissarrague

Novoa 1948) and Legaz's *Filosofía del derecho* (The philosophy of law: Legaz Lacambra 1953), an updated reprint that filtered out the hyper-ideologization of his 1943 *Introducción a la ciencia del derecho* (Introduction to legal science: Legaz Lacambra 1943). This was the first edition of the most comprehensive treatise of legal philosophy written in Spain, which kept being updated by its authors with each new edition. It did not receive the reviews it deserves.

The key exception, the discordant note, in this academy which almost always leaned in the same direction, was Felipe González Vicén. As we know, following a series of complicated accidents, González Vicén had to flee Spain during the civil war. He returned—I believe before the end of World War II—and after that he resumed his position as a professor. In 1946, Truyol too left his position at the University of La Laguna, resuming his professorship at the University of the Canary Islands, which seemed a satisfactory solution for everyone. Indeed, although he could return as a professor, it is also true that as an intellectual he was quite inconvenient, so it was felt best to keep him far from the centres of power. For the 1947–1948 academic year, he gave the inaugural lecture at the University of La Laguna under the title "La filosofía del Estado de Kant" (The philosophy of the Kantian state: González Vicén 1952), which was certainly an inappropriate subject for the time. Then, in 1950, he published *El positivismo en la filosofía del Derecho contemporánea* (Positivism in contemporary philosophy of law: González Vicén 1950), again an outstanding achievement in his time, unique not only in its quality but also because it was common to treat natural law from a historical perspective rather than as legal positivism. He did not subscribe to the dominant trend. He did not write other works of his own in this period but was by and large busy translating those of others, especially historical ones but also, in the 1950s, little gems of legal thought by Austin, Kant, Bachofen, and Welzel.

Another important event was the death of Ortega. His influence on Spanish philosophy of law has already been highlighted, but it was especially after his death that many works explaining this thought—and, where appropriate, criticizing it—were published, some of them of great value, and they are still coming out today. Ortega also raised the question of existentialism, which at the time was fashionable even in Spanish legal philosophy. Indeed, it may be asked: Did any such legal existentialism exist in the Spanish intellectual landscape in those years, as Legaz and Elías de Tejada would say? Both claimed that there were two tendencies in Spain at that time—a Scholastic one and an existentialist one (see Legaz Lacambra 1947, 355; Elías de Tejada 1949, 10)—and that the traditionalist philosopher represented a combination of the two tendencies. This argument, however, is debatable. What did exist was Ortegaism and *ratio*-vitalism, and, as Legaz (1947, 342–3) says, if "*ratio*-vitalism is a product of the intellectual horizon within which all of modern philosophy, which is existence, moves," then existentialism did exist, more often diluted into a conjecture in a Christian mould.

During these years Pérez Blesa and Callejo de la Cuesta died (almost preliterate). In 1959, after forsaking philosophy of law for sociology, Enrique Gómez Arboleya tragically ended his own life, the same day that Eisenhower landed in Spain. There were also other philosophers who decided to change their field of study, two of them being Salvador Lissarrague, who took up social philosophy, and Antonio Truyol, who turned to international law. The first time someone turned shifted away from the subject of legal philosophy was in 1953, a particularly relevant year for two reasons: First, a new curriculum was created in bachelor of laws programme (which included natural law as a first-year course and philosophy of law in the fifth year); and second, the *Anuario de filosofía del derecho* (Yearbook of legal philosophy) came out, serving as a kind of organ for Spanish philosophy of law. A player in both events was Joaquín Ruiz Giménez, who was seeking the position of minister of education, and who was the philosopher of law that rose highest in the political hierarchy: He was president of *Pax Romana* between 1939 and 1946; from 1946 to 1948, he served as director of the *Instituto de Cultura Hispánica* (Institute of Hispanic culture); then, from 1948 to 1951, he served as ambassador close to the Holy See; and finally, from 1951 to 1956, he served as minister of education. No doubt, his reputation was exploited by the regime to strengthen relations with other countries.

13.4.3. Developmentalism and Late Francoism: The Demise of Francoist Legal Philosophy (1959–1975)

As a crucial watershed year in Francoism, 1959 is also important from a legal-philosophical standpoint; in fact, it can be considered the starting point of a series of fundamental developments. Of course, in this period we find a continuation of what went before, but there also came challenges to the status quo, as new ways of understanding natural law developed, and even positivist and Marxist positions took hold.

Starting in the late 1950s and continuing in the 1960s, the Spanish Church voiced criticism of the Spanish political system until the doctrine of natural law itself was changed, resulting in a natural law theory rooted in the Catholic tradition yet opposed to Francoism. Paradigmatic in this sense is the case of Ruiz Giménez; as much as he had been a good representative of natural law in the post-war era and was committed to the regime to the point of serving as ambassador to the Holy See and then as minister of education, as time went on he found himself alienated from Francoism and came to reject any rigid doctrine of natural law. Well into the 1950s, he warned the regime that the religious legitimacy it enjoyed was not going to last forever, and in the 1960s he openly advocated a democratic option, which found its most apt forum in the *Cuadernos para el Diálogo* (Notebooks for dialogue), a prescient journal that announced an upcoming liberation. Ruiz Giménez's aim,

I am sure, was to decouple the Scholastic doctrine of natural law from the Spanish political system. No wonder, therefore, that it would be a pupil of his, Gregorio Peces-Barba, who in the not-too-distant future would defend an interesting and important thesis on Maritain's thought (see Peces-Barba 1972), the best known anti-Francoist Catholic intellectual. This discussion should also include Díez Alegría, and to some extent, Aranguren, among the lesser-known intellectuals.

However, not all was a religious effort to counter the prevailing natural law theory that had been pressed into service as a tool with which to legitimize Francoism: The spectrum was broadened, and new natural law doctrines appeared in the Spanish landscape. It was Luis García San Miguel who mas mainly responsible for introducing existentialist natural law, the kind argued in various versions by thinkers like Heidegger, Sartre, and Maihofer. The theory of the nature of things, for its part, was embraced in the early 1960s by Elías Díaz, along with others, especially the criminal lawyer Cerezo Mir. Finally, the natural law of classical Christian philosophy was rejuvenated with the *new* philosophy of values by Rodriguez Paniagua, who at the same time argued that the controversy over natural law should not spill over outside philosophy, which seemed to be anchored to the political struggles that still accompanied it. Indeed, natural law theory would pay a high price for the ideological use that Franco made of it (see Delgado Pinto 1982, 11; Pérez Luño 1982).

But the transformation was even broader. On the one hand, there was an interest in legal methodology, and this brought thinkers like Heck, Kantorowicz, and Larenz into focus, with translations being done of many of the works they devoted to that question, even though no philosophers of law were involved in doing these translations.[11] Moreover, theories inimical to natural law were also emerging that took a radical stance to the status quo in both legal philosophy and politics. I am referring to Marxist theory of law, which would be cultivated above all by the Barcelona school. In 1963 an article came out by Manuel Sacristán, who would eventually gain enormous prestige as a legal philosopher even though his main interest was in general philosophy, and in this article, titled *Sobre la idealidad en el derecho* (On ideality in law: Sacristán 1984),[12] he attacked both natural law theory and legal positivism: Natural law theory he characterized as just another "medieval vogue" and as pure ideology, an involutional one at that; and positivism he attached because, even though it takes a "much more solid and discreet" position than natural law theory, it proceeds under the guise of scientificity to conceal the "advocacy for the bourgeois order" typical of that theory (ibid., 304, 311 and 314; my translation). Faced with the ideality of law, we must look for its reality, which in his view simply lies in the use of law as a device of class rule.

[11] On Kantorowicz, see Section 3.1 in this tome.

[12] Only a fragment of this work has been preserved in the reprint edition Sacristán 1984.

Now that Manuel Sacristán has come up, we should also mention his most significant disciple, Juan Ramón Capella, a legal philosopher who had already made an innovative contribution to legal philosophy in Spain by writing the first comprehensive work on the way the philosophy of language applies to legal phenomena (see Capella 1968), and who would also publish a radical pamphlet titled *Sobre la extinción del derecho y la supresión de los juristas* (On the extinction of law and the suppression of jurists: Capella 1970). Here, Capella began with "the conviction that all law is evil," because it neither answered current social needs at the time nor was impartial, and although it must be brought to an end, such an end must come about by means of law itself. As for natural law, it was an ideology of law "in the sense of its being partial or concealing" (ibid., 20–1; my translation).

Whether or not it was explicitly stated, however, scholars increasingly began to see in the natural law theory prevalent in Spain at the time the ideological appeal that Francoism had used to justify itself. Enlightening in this sense were the articles on natural law and public policy that Elías Díaz and Luis García San Miguel wrote in the early 1960s, even though, as Díaz (1962, 74) saw the matter, the initial proponents of natural law were "in general" conservative, whereas García San Miguel argued that "natural law theory is not necessarily conservative and static: A humanitarian, progressive natural law theory is possible" (García San Miguel 1964, 37; my translation). A short time later, these two scholars wrote two textbooks that brought innovation to the Spanish panorama: *Notas para una crítica de la razón juridical* (Considerations for a critique of legal reason: García San Miguel 1969), and *Sociología y filosofía del derecho* (Sociology and philosophy of law: Díaz 1971). However, natural law was criticized not only for political reasons but also as a matter of principle, because there was much scepticism about the actual existence of this supposed natural legal order.

I think the most important chapter in the fight against natural law at the time was the publication of a book that would become symbolic and that was curiously titled *Crítica del derecho natural* (Critique of natural law: Díaz 1966b). I say curiously because the original work, published in French, was simple titled *Le droit naturel*. The editor was Elías Díaz, who translated the articles for the book and write the preliminary study, titled *Introducción a la sociología del derecho natural* (Introduction to the sociology of natural law). The majority of the articles included in the book did not reject natural law, but neither did the most authoritative ones, those by Kelsen and Bobbio. The book as a whole did not lay out any common ground among the authors: It was rather for the reader to see in each of the articles a latent criticism of the regime's legal ideology. Thus, the critique of natural law would become the critique of the natural law of Francoism. I should also mention here another work that Elías Díaz wrote at the time: It was titled *Estado del derecho y sociedad democrática* (The rule of law and democratic society: Díaz 1966a) and became a classic.

In it he maintained, in short, that rather than speaking of the *Rechtsstaat* in the singular we should speak of it in the plural, since the liberal *Rechtsstaat* of the 19th century was followed by the welfare state typical of affluent societies; and in time we would reach another democratic *Rechtsstaat* that would remove the contradictions of the former. Finally, although no mention of Spain was made, it was clear that the Francoist state was neither a *Rechtsstaat* nor a democratic state. As we have begun to observe, Elías Díaz was playing a very important role in the renewal of Spanish philosophy of law, at the same time as he was also taking part in the fight against Francoism. It is also crucial to refer to his work in accounting for the introduction of a new issue in Spanish philosophy of law, that of human rights, an issue that is still relevant today (see García Manrique 1996). The focus on this issue was not just an academic exercise: It was the expression of a political choice critical of a regime that was trampling on human rights. At the school Elías Díaz belonged to (with Ruiz Giménez), the challenge was precisely to see who would work most intensively to introduce this topic. Ruiz Giménez himself published a work that was very representative of the Church at the time, titled *El Concilio Vaticano II y los derechos del hombre* (The Second Vatican Council and human rights: Ruiz Giménez 1968); and in 1973, Gregorio Peces-Barba published the first edition of *Derechos fundamentales* (Fundamental rights: Peces-Barba 1973), characterizing fundamental rights as "an indispensable element of a democratic society" (ibid., 12; my translation).

But going back to what I mentioned before, the Francoist legal ideology of Francoism was yet to suffer a blow from another resounding criticism of natural law: I am referring to the censorious thesis advanced by Felipe González Vicén (1969), seeking to deny nothing less than that natural law theories are theories of legal philosophy, claiming that the concepts deployed in those theories could be either historical or formal: historical when necessarily tied to a specific "historical structure," such that they could not be applied meaningfully to different historical moments (an example being the concept of *polis*); formal, on the other hand, when they were not to tethered and were used interchangeably to refer to a reality that could come into being at time in history (an example being the concept of a group). According to González Vicén, however, the concept "philosophy of law" was historical, as it bears a connection to a given historical structure: It originated in the late 18th and early 19th centuries, precisely when the old concept of natural law was beginning to be left out of the conversation. On the basis of these premises an unstated conclusion was easily drawn, namely, that students of natural law in Spain—that is, nearly all legal scholars in González Vicén's day—ought to be regarded, not as true philosophers of law, but merely as natural lawyers. This thesis generated some criticism, even harsh criticism, though without igniting any a public debate. In my view, however, there was a simple answer. What was amiss was the way González Vicén classified concepts into two types, for although some con-

cepts are actually historical and others actually formal, the majority are *both* historical and formal, depending on the use made of them. So as much as Felipe González may have been justified in claiming that "philosophy of law" was a historical concept, this can also be said to be a formal concept; and this last thesis could be supported with the same arguments as those used by González (see Rivaya 1998c, 41).

The previous reference to scholars in González Vicén's own day offers an occasion to mention who was awarded a professorship at the time. In 1960, a professorship was granted to José Delgado Pinto—who went on to play a particularly important role in renewing the discipline, as he respected tradition while working to open it to new ideas—and another was granted to Mariano Hurtado Bautista. In 1966, Francisco Puy and Nicolás María López Calera both obtained professorships; and in 1974, just before the end of the dictatorship, a professorship was granted to Juan José Gil Cremades and another to Elías Díaz, who in the previous year had started editing new journal, *Sistema,* that would stand the test of time. In 1974, Díaz also began to publish another journal, *Persona y derecho* (Person and law): This journal, based at the University of Navarra, was of a different ideological leaning and it, too, would also stand the test of time, since it is still published today. But what matters here is the issue of the way professorships were awarded. Since the end of the civil war, access to professorships in the philosophy of law was controlled by Mariano Puigdollers, but in the 1960s this role was taken up by Francisco Elías de Tejada, who created an absolutely anomalous and quite worrisome situation that rightly came to be referred to as "intellectual terror" (cf. Gil Cremades 1985, 233). Specifically, both Gil Cremades and Elías Díaz had previously been denied a place, but once the doctrinal monopoly was broken, so was control over the awarding of professorships, and both scholars thus managed to obtain a professorship. There would still be skirmishes when it came to determining the allotment of professorships, but the philosophy of law was inevitably entering a new era embracing new perspectives.

13.5. Democracy and Philosophy of Law (1975–2000)

Because the history of legal philosophy of the last quarter of the 20th century is so close, it is difficult to write about it. If we stick to the ordinary division in the timeline of political history, it is certainly easier to narrate what happened *during* the transition period than afterward, as it is generally accepted that the transition lasted until 1982, when the *Partido Socialista Obrero Español* (the Spanish Socialist Workers' Party, or PSOE) came to power for the first time, whereas what happened after that time slides into the present day, or, depending on how one chooses to look at it, is still in the making.

13.5.1. Transition and Philosophy of Law (1975–1982)

As happened in politics, there was also a transition in legal philosophy: The first section in academia was formed by the aforementioned opposition, a section in which both Gil Cremades and Elías Díaz were awarded a professorship. Obviously, around 1975, the atmosphere in the discipline was strained. This is probably because working in the philosophy of law was an activity closely associated with being involved in politics, too. Some legal philosophers who began working in the 1960s already knew this full well, two examples being Elías Díaz, who was exiled to Villagordo (Jaén), and Gregorio Peces-Barba, who was confined to Santa Maria del Campo (Burgos), both in 1969, once a state of emergency was declared. Then, with the imminent end of Franco, another philosopher of law, Manuel Atienza, was accused of the crime of illegal propaganda (he had delivered a lecture on human rights) and thus had to move to Argentina.

In this rarefied atmosphere, however, there were also relevant doctrinal developments that cannot be left out of this story. For the year that inevitably marks the line between what went before and what came after—that would be 1975—reference ought to be made to the special issue of the *Anales de la Cátedra Francisco Suárez* (Annals of the Francisco Suarez professorship), an issue published under the title *La filosofía del derecho en España*, which was the most serious collective up to that time attempt to elucidate what the philosophy of law is or should be. Because the work appeared at that specific moment, some authors pointed to the change the philosophy of law—as well as the concept of law—was going through in Spain. It is well known that an important part of the legal philosophy developed during the Franco regime was apologetic, seeking to legitimize an unacceptable state of affairs. As Atienza said, this showed that some legal philosophies were merely ideologies. The term was used in its most pejorative sense, pointing to the near absence of progress that according to Peces-Barba the discipline had made in Spain in recent years. Nor was that odd, given that others wisely made sure that all jurists, including legal philosophers, were politically committed (Ollero). This speculation was thus more or less openly political but not critical of the Franco regime. Against that view there was another one yet to be completed: "I think it is absolutely urgent," Manuel Atienza declared, "that we take on a renewal task that may have already begun" (Atienza 1975, 4; my translation).

In *La filosofía del derecho en España*, moreover, two issues were addressed that still have currency in Spanish legal philosophy, namely, the critical nature that Spanish legal philosophy has or should have, and that of its tripartition. Almost all legal philosophers declared that the role of legal philosophy was to criticize (see Rivaya 2006). Perhaps none exerted a greater influence in this regard than Laporta, Hierro, and Zapatero, who pointed out that there was still a need to develop a theory of values. Gil Cremades had also made it abundant-

ly clear that "criticism is impossible unless it is based on criteria" (Gil Cremades 1975, 70; my translation), and these criteria need be developed. These values or criteria could very well be those of natural law, but we have already seen that natural law was tainted: The dictatorship had benefited from a legitimation grounded in natural law, which as a result was not only widely disregarded but also blindly condemned. The other issue that gained prominence was that of the subject areas of legal philosophy: Almost everyone agreed these were legal ontology, epistemology, and axiology (even though different names were given to these areas). Upon reading the aforementioned issue of the *Anales*, one had the feeling that a horizon of hope would open, when everyone would recognize that the philosophy of law makes sense (not only that it does exist but that it *should* exist) and that it has an important function to play. Perhaps it was not the main function, but as Delgado Pinto claimed, it was also necessary to participate in the training of the jurists.

I have just quoted some young philosophers of law representative of a new generation. This detail is important: If we are to understand the transition to a new philosophy of law, we need to take into account not only the change in political coordinates but also the disappearance of a generation of thinkers devoted to the discipline, some of whom were of fundamental importance. Here, too, I will refer to Legaz, who in his later years found the time to call for restraint and lend support to the transition. For many reasons, the article titled *La lealtad política* (Political loyalty: Legaz Lacambra 1976), which he wrote shortly after the death of Franco, is extraordinarily important and contains core elements offered at the end of a life. Of course, he did not try to justify himself; in fact, he even acknowledged his loyalty to the *Caudillo*, but what matters now is that he justified the impending transition (ibid., 27 in the footnotes). In that transition the philosophy of law did of course play an important role. It is true that many have looked at the process years later with the benefit of hindsight, but there have also been those who committed to the change in practical terms: That goes for Ruiz Giménez, who led a Christian democratic project that would fail; Gregorio Peces-Barba, who won a seat in Parliament on the PSOE ticket for Valladolid; and Agustín de Asís, who ran for the senate with *Alianza Popular*. But it was not only through politics that change could be wrought: This could also be done by working from a different background, as is shown by some articles of Nicolás María López Calera (1992), Elías Díaz (1987), and Luis García San Miguel (1998), among others. In a short time, there even came a theory of transition developed by a philosopher of law (see García San Miguel 1981), and another legal philosopher offered a systematic survey of many of the theories of transition (see Díaz 1989).

The transition led to the most important event in all Spanish legal culture in the 20th century: the 1978 Spanish constitution, which under Article 1 and according to Elías Díaz, established a "social and democratic rule of law." One of the members of the constitutional committee entrusted with drafting

a constitutional text was Gregorio Peces-Barba, representing the socialist parliamentary group and, we might also say, Spanish legal philosophy. As far as the philosophical influences on the constitution are concerned, because Peces-Barba was in the committee that carried out the project, some have seen Maritain's influence (an example being Tusell 1985, 16), though this does not mean that Peces-Barba follows a religious orientation or anything of the sort. On the one hand, the ideological orientation of a philosopher of law who served as rapporteur, as well as his specialization in human rights, had to have had an influence in making for the plural nature of the constitution and also in the decision to include a social-democratic line; on the other hand, that ideological orientation had to influence the scheme of fundamental rights. The constitution ushered in political change, and with it a new legal culture and a new paradigm that made us rethink legal questions from new perspectives. Without a doubt, most important in this regard was the consolidation of an issue that had already begun to develop in Spain in the 1960s, namely, human rights, even though the issue did raise some controversy. Naturally, the new constitutional situation fostered a blooming of legal-philosophical thought.

But I would now like to mention another issue that was interestingly also bound up with the new constitution: that of the influence of Marxism in Spanish legal culture, an influence that was no less important. As it happened, the new constitution provided a valid argument in support of a current of legal thought rooted in the Marxist tradition (though it spilled beyond the narrow framework of classical Marxist theory of law): In that period Spain became receptive to a theory of Gramscian influence that was imported from Italy and stipulated an alternative use of law. In short, the constitution stated that the law had a conventional use that benefited the ruling classes, but there was also a different use protected by the constitution, a use that would benefit the subordinate classes. The law, in short, could play a role in the social struggle in favour of those who had traditionally been harmed by it. In Spain, "the movement for the alternative use of law originated in the last years of the Franco regime as a form of resistance to the regime, even though its real possibilities would not be seen until the immediate aftermath of the regime, that is, during the democratic transition" (Souza 2001, 107; my translation). Those who were involved in adopting the alternative use of law were, of course, judges. This is especially true of Plácido Fernández Viagas and Perfecto Andrés Ibáñez, perhaps the most representative jurist of that current in Spain. There were also Marxist intellectuals, leaders in the Communist Party, such as José María Laso. In academic philosophy of the law, the centre for the reception and development of the alternative use of law in Spain was, I believe, the Department of Philosophy of Law at the University of Granada, under the stewardship of Nicolás María López Calera (see López Calera et al. 1978).

But Marxism was also involved in a dispute whose origins are explained in an article published the year after the new constitution was enacted. Once again

the article was by González Vicén: It was titled *La obediencia al derecho* (Obedience to the law: González Vicén 1979) and had the unquestionable distinction of proving to be the most controversial article in the history of 20th-century Spanish philosophy of law. At first sight, the controversy does not seem surprising at all, given the thesis González Vicén defended: "While there is no ethical basis for obeying the law, there does exist an absolute ethical foundation for disobeying the law" (ibid., 388; my translation). There was an outpouring of criticism in the years that followed. Clearly, one may or may not agree with González Vicén's subversive thesis, but much of the confusion was due to the fact that those who debated it started out with a set of assumptions that were different from those used by the author: On the one hand was an assumption rooted in the existentialist tradition, namely, that only the individual coral conscience can give rise to obligations, and on the other hand was the Marxist premise that the law is an instrument that one social class uses to subjugate another.

In light of these uses of Marxist ideas, I think it is fair to say that in the final years of the Franco regime and the start of the democracy, Marxism also became fashionable within the philosophy of law. From this perspective, that is normal. After years of silence, of "*a priori* condemnation" and "a contempt for rejecting Marxist thought, the dignity and height of true philosophy" (Díaz 1983, 101; my translation), little by little, in the 1960s, Marxist thought began to recover, and by the 1970s and the 1980s, intellectuals and even legal philosophers had read Marx's essential works. To recognize the introduction of Marxism in Spanish philosophy, even in the philosophy of law, is not to embrace legal materialism: It is simply to observe that there was a great interest in Marxism and that many intellectuals, including some philosophers of law, became Marxists or were influenced by Marxism. There were many Marxist readings of legal theories. Two doctoral dissertations can be cited here whose authors subsequently followed different paths: Clear Marxist influences can be appreciated in the dissertation that Gregorio Robles wrote in a reading of Ortega (Robles 1977) and the dissertation written by Albert Calsamiglia (who has sadly since died) in his reading of Kelsen (Calsamiglia 1977). There were also translations: of Cerroni, Pashukanis, Stoyanovitch, Poulantzas, and others. Finally, studies appeared applying Marxist ideology to law, examples being the studies by Elías Díaz, Virgilio Zapatero, Carlos Eymar, Manuel Calvo, Nicolás López Calera, Manuel Atienza, and Juan Ruiz Manero. A critical rereading of Marxism was offered by Atienza and Manero in *Marxismo y filosofía del derecho* (Marxism and the philosophy of law: Atienza and Ruiz Manero 1993): This work can be seen both as the end of the Marxist trend in Spain and as the continuation of an approach that could and should serve a critical role in a plural legal-philosophical context, so long as it did not turn dogmatic. In any event, the decline of Marxism is from this standpoint a symptom of the end of the transition, marking as well the end of the transition in legal philosophy. Both Spain and Spanish legal philosophy thereafter ceased to be different.

13.5.2. The Philosophy of Law in Democracy (1982–2000)

The final stage we are going to look at is the present one. In fact there have been no major interruptions since 1982; there has rather been an evolution that led Spanish philosophy of law to gain considerable prominence in the European context, as is natural. I will point out what I believe to be the most important landmarks in this present context. Before that, however, let us begin by taking note of five features that characterize this period.

1. The reestablishment of political normality created an environment that also influenced Spanish philosophy of law, especially because Spain finally came out of isolation and joined the geographical area to which it belongs, namely, Europe.
2. There was a significant increase in the number of people who are professionally dedicated to the philosophy of law, and this has resulted in an increase in the number of professors of philosophy of law, not only male but also female professors: The inclusion of women has been an important novelty that has furthered developments in academic legal philosophy. This increased interest was undoubtedly due to the proliferation of law schools as part of a university expansion that is unprecedented in the history of Spanish universities.
3. As a consequence, the production of Spanish philosophy of law increased until it reached a situation of abundance (and some would say overabundance), by contrast to the dearth of literature that Legaz lamented in the early 1930s.
4. There has been an Anglo-Saxon pivot in the new legal philosophy of democratic Spain. German influences did not disappear, to be sure, but were no longer the main ones.
5. It is my assessment that the new political situation, a normalized one, has resulted in a trend in legal philosophy away from a critical attitude toward an analytical one that takes up the internal point of view of democratic procedure.

The new period opens in 1982 with the *Partido Socialista Obrero Español* (PSOE) coming to power, and here too a coincidence ought to be highlighted: That same year, in some famous national exams, there were five professors who were appointed to positions as attachés: Andrés Ollero, Juan Ramón Capella, Gregorio Peces-Barba, Marcelino Rodríguez Molinero, and Luis García San Miguel. The pluralism of this group—with the various philosophical and political tendencies it represented—was interesting in its own right. And just as the overall political landscape was being normalized—so much so that the socialists managed to form a government without causing the system to fail—so the philosophy of law was also beginning to enjoy a normalcy that made for

ideological pluralism, for example, a feature not at all common over the course of the 20th century, not even toward its end.

From an institutional point of view, the new course ushered in ways for sharing information, and these were undoubtedly necessary. The *Anuario de filosofía del derecho* (Yearbook of legal philosophy) reappeared in 1984, now edited by Juan José Gil Cremades, a role that he would play until 1996, when he replaced Javier de Lucas as editor in chief. Also in 1984, a new journal appeared on the Spanish legal-philosophical scene, namely, *Doxa: Cuadernos de filosofía del derecho* (Doxa: Notebooks on the philosophy of law), published by the University of Alicante and directed by Manuel Atienza. Its format included a bibliographic collection of the publications in the philosophy of law in Spanish as well as interviews with philosophers of law. In the following decade there emerged the Bartolomé de las Casas Human Rights Institute, editing a new journal called *Derechos y libertades* (Rights and freedoms), directed by Gregorio Peces-Barba. Along with the publications already in circulation, the new ones help to illustrate the present situation, the force of Spanish philosophy of law, finally integrated in the European legal-philosophical context. Moreover, a new academic curriculum for the study of law in democracy was established. In 1990, a law was enacted which established a curriculum for the bachelor of laws degree, modifying the previous one, which had been in place for almost forty years. The first-year compulsory course on natural law was replaced by a course on the theory of law, while the philosophy of law continued as a fifth-year course. In response to the legitimate demands of many legal philosophers responsible for the teaching of these subjects, the label "natural law" was removed, as it was associated with a specific legal ideological choice. Another important change was that the length of the course for new subjects was shortened from twelve to three months.

Let us now focus on a very broad doctrinal production which, precisely because of its size, needs to be put to order. At first glance the aforementioned tripartite scheme, which is already widely established in the philosophy of law, can perhaps be useful. It draws a distinction among the concept of law, legal methodology, and the theory of justice. To be sure, this classification is clearly inadequate, especially because the three branches of legal philosophy are inevitably intertwined. But if we start from the question of the concept of law, we should refer to the many studies that in this last stage were devoted to the philosophers of law that are globally considered most important: Kelsen, Ross, and Hart.

Although Kelsen had already died, he continued to be studied as the classic that he was. Perhaps there was no one willing to defend a Kelsenian notion of law in the legal-philosophical academy, but legal philosophers did take the pure theory into account; in fact they *espoused* that theory, having never ceased to take it into account, even though it was repudiated by scholars who embraced Francoist orthodoxy. Now research continued, but it seems that it took

on a different form; there were less general analyses (though they continued to exist), and more analyses focused on specific aspects: derogation, deontic logic, legal science, the principle of normative hierarchy, or the role of efficaciousness in the validity of law, among others, all within the context of the pure theory. But investigations also appeared analyzing the keystone of Kelsen's construction—the basic rule.[13] Spain also brought up specialists in Ross and the realist current he belonged to, and some seminal works were published on the topic. But the realist currents, in my assessment, have been scarcely followed in Spain. Far more enthusiastic was the reception of the third of the great thinkers previously mentioned, H. L. A. Hart. Important theses of his theory were defended, several studies were published (he was even interviewed by a Spanish magazine), and some of his work was translated, even though the Spanish edition of his greatest work, *The Concept of Law*, appeared in Buenos Aires. But before we take the path of Dworkin and the criticism directed at Hart, it should be noted that the most translated and discussed philosopher in democratic Spain was another great European philosopher who had a remarkable importance in Spain, Norberto Bobbio.[14] Two features bear mentioning in this regard. The first was the encyclopedic nature of his work, for which reason he wound up being quoted in many places; and the second is the moderation of his thinking, though it may have been too eclectic at times, inspiring those who have been nurtured by its sources. There are so many translations of works by Bobbio, as well as studies on his legal and political philosophy, that it would be difficult to mention them all. As for Hart's critics, who to a certain extent shaped the course of legal philosophy in the years that followed, even to this day, one cannot fail to mention Dworkin, who published works that made him arguably the most influential theorist of law in Spain, where these works were also translated. Again, it would be very difficult to draw up a complete list of his Spanish followers. The new theses that were being defended—such as the one on principles, under which law is not just a set of rules but also contains principles, or his thesis on rights, understood as battles won against the ambitions of the majority—open the door for further developments that make us view law not so much as a finished product but as a reality in a constantly developing process. This is probably the main difference between the notion of legal philosophy at the beginning of the century and that at the end of it. There were actually three tendencies in the 20th century: Law was initially viewed, and is still viewed, as a given object that has already been constructed and is to some extent a finished product amenable to description like any other reality; then law came to be perceived as a point of view, a perspective

[13] On Kelsen's *Grundnorm*, see Section 2.3.2 in this tome and Section 8.5 in Tome 2 of this volume.

[14] On Bobbio, see Sections 11.4 in this tome and Sections 9.3.1 and 24.2.1 in Tome 2 of this volume.

that transforms what is observed into law. Although this approach was made popular by Hart, the idea is a classical one in legal thought. In Spanish legal thought, the basic theory in which this idea is developed is that of Ortegan perspectivism, a theory that Recaséns further developed in his philosophy of law, for it is an idea that most aptly applies to the definition of law offered by Legaz, who begins precisely by stating that law is a point of view. Now the legal phenomenon is more akin to an activity carried out with a malleable material, one that can take on many forms and yield different outcomes (even if Dworkin curiously maintains the thesis of the one right answer). Purpose, perspective, and praxis can be criteria for classifying the different interpretations of the concept of law that developed over the course of the 20th century.

To some extent, principialist constitutionalism was developed into a path that many other thinkers would follow. Those who have proceeded along this path, which has been well received in Spain, include Robert Alexy, drawing on Habermas; Luigi Ferrajoli, building on the *uso alternativo del diritto* (The alternative use of law) and now a proponent of legal protection of human rights; Gustavo Zagrebelsky, in constitutional law, whose idea of *ductile law* would provoke considerable controversy in Spain; Joseph Raz and Neil MacCormick, in the Anglo-Saxon area, whose work has all been studied and conveniently translated, some of it in Spain and some in Latin America.[15] As a result of the new direction, some began to talk of post-positivism. There have also been those who asked out loud whether the eternal dialectic between positivism and natural law has been exhausted or whether we should at any rate move past it. But since the dialectic between natural law theory and legal positivism goes back centuries, and since it is useful in classifying the entire field of legal thought into two categories, one might wonder how convenient it really is to have it disappear. Indeed, if all legal ideology is either a kind of natural law theory or a form of legal positivism, post-positivism is a kind of natural law theory. In any case, this neoconstitutionalist principlism has also found opponents who, faced with all possible discretion, claim the rule of law. This is where we are now.

If that evolutionary line dealt primarily with the concept of law, it is clear that this depends on the methodology adopted, and the methodological question is now gaining a growing interest in Spanish thought. The shift toward Anglo-Saxon sources is being accompanied by a shift in the focus of speculation, with a greater emphasis on the question of method. Unlike those who believe in a rational procedure for endowing legal decisions with rationality, there have been sceptics who, by contrast, see subjectivism as an inevitable part of the decision-making process when interests and motives cannot be re-

[15] On Alexy, see Sections 10.3.2.2 and 10.4.3.1 in this tome, and Sections 1.5.4.1, 10.3 and 25.4 in Tome 2 of this volume. On Ferrajoli and Zagrebelsky, see Sections 10.5 and 10.6 in Tome 2 of this volume, respectively.

vealed. After that came the argumentation theories introduced by Perelman and Viehweg.[16] Both would be called on to play an important role in present-day legal theory and legal methodology, both in Europe and Spain. If the purpose of law is to argue a point, then the question is how must reasoning be structured in order for a legal decision to be grounded, and so that result would be reasonable. Indeed, that word, *reasonable*, previously used by Recaséns, has come to encapsulate the purpose of law. The other methodological chapter, a smaller one, is that of hermeneutics, which has attracted the interest of Spanish philosophers of law exploring the possibility of applying it to the legal world. In this methodological section, reference ought to be made as well to the interest taken in investigating the way facts are brought to bear in the courtroom in the process of applying the law. Obviously, the jurist must not only know what rules to apply but also the cases to which such rules must be applied, and it is often forgotten that this task is also carried out by the jurist.

Finally, as for the theory of justice, the rule of human rights is clear, the rule that, as has been pointed out, is enshrined in the 1978 constitution. Nearly all Spanish philosophers of law have continued to write about human rights, and to some extent, as has been commented, rightly so in my opinion, they can all in this sense be regarded as inheritors of natural law theory. In this framework, there are books and articles that have already become classics, both on the general theory of human rights and on individual rights. The question of the foundation of rights has spawned a wealth of controversial literature that discusses the needs to the argument, from the great ideals to the objective and inter-subjective dialogues. In this chapter, reference should be made to the political trend in legal philosophy, a trend that clearly makes it political philosophy. Particularly noteworthy in this respect is the work of John Rawls, the topic of several doctoral dissertations in Spain, and also worthy of mention are the issues linked to human rights, examples being the issue of liberalism, the value of tolerance, and multiculturalism. Of course, the criticism of human rights, classical and modern alike, continues to be studied.

Clearly, the situation has not been sufficiently described. There are other issues, some general, some more specific; at any rate, we must point out the issues of our time, and these too have been addressed by Spanish philosophers of law. These issues include immigration and multiculturalism, globalization and the influence of postmodernism in law, nationalism, and bioethics, under whose scope, in turn, come some classic issues like euthanasia (which has been of huge bibliographical interest) and abortion. Reference should also be made to the reception of other movements that usually have Spanish proponents or at least scholars aware of what they do: These include the economic analysis of law, feminist jurisprudence, and critical legal studies. There are other in-

[16] On Perelman and Viehweg, see Sections 23.2 and 23.3 in Tome 2 of this volume, respectively.

vestigations that work from more or less novel perspectives. These range from the classic theme of the history of legal thought, which has been addressed by nearly all current philosophers of law, to the least charted territory, that of deontic logic, but they also include legal information technology and the cultural legal studies, especially in law and literature.

We should not get our hopes up too high too quickly. But if we look back at the history just surveyed—now that a new century has begun and at the same time Spain's turbulent 20th century has come to a close—and we look back at that turbulence, which gave a certain anomalous distinction to the philosophy of law developed over the course of much of that century, then I think that in the end there are reasons to be optimistic.

Chapter 14

20TH-CENTURY LEGAL PHILOSOPHY IN PORTUGAL

by José De Sousa e Brito, José Manuel Aroso Linhares, Luís Meneses do Vale, Ana Margarida Simões Gaudêncio, and Alessandro Serpe

14.1. Institutional Setting and Cultural Background

At the beginning of the 20th century there was only one school of law in Portugal. It was in Coimbra, where the traditional chair of philosophy of law has since 1901 been named General Sociology and Philosophy of Law. Under the influence of positivism and sociologism (Spencer, Durkheim, Tarde) the professor who held that chair, Avelino Calisto (1843–1910), considered philosophy of law a specific chapter of sociology (Calisto 1901, 226). The chair was suspended in 1911 and reintroduced as philosophy of law only in 1937, when it was awarded to Luís Cabral de Moncada (1888–1974). At the Lisbon School of Law, established in 1913 by the new republican state, philosophy of law was introduced in 1952: It was offered only as a graduate course taught by an invited Spanish professor, Antonio Truyol y Serra,[1] until the democratic revolution of 1974. In 1945, the same law school rejected an application for a professorship by António José Brandão (1906–1984), who had already published writings of high quality in the field. Only beginning in 1981–1982 would the philosophy of law be taught as a compulsory subject for undergraduate students at all law schools, not only at the traditional state universities in Coimbra and Lisbon (at the latter university it was lectured for the first time in 1981–1982 by José de Sousa e Brito) but also at the new state universities in Lisbon, Porto, and Braga, as well as at half a dozen private universities with faculty drawn from the two older schools.

The positivism and sociologism that dominated at the law schools in the first quarter of the century was influenced by the French and the Italian legal traditions. But in Coimbra it was the German legal tradition that prevailed: This was true starting from the beginning of the century in private law, under the influence of Guilherme Moreira, and starting from the 1930s in public law, under the influence of José Beleza dos Santos and Afonso Rodrigues Queiró. In Lisbon, German legal culture would not hold sway until the 1960s. In the philosophy of law after 1938, the main philosophical orientation espoused by Moncada and Brandão was German phenomenology (especially Husserl and Hartmann), which they brought to bear on law in original ways. In the last

[1] Truyol y Serra (1952) defended Aquinas's theory of natural law of against its critics. He wrote an excellent *History of the Philosophy of Law* that came out in three volumes: Truyol y Serra 1978, 1975, and 2004.

E. Pattaro, C. Roversi (eds.), *A Treatise of Legal Philosophy and General Jurisprudence*,
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quarter century, the German philosophies expounded by Heidegger, Gadamer, and Habermas influenced João Baptista Machado (1927–1991) and António Castanheira Neves (1929–) and were combined with French and American postmodern trends by José Manuel Aroso Linhares (1956–) and with analytical philosophy by José de Sousa e Brito (1939–).[2] But it would be a mistake to underestimate the role played by the traditional Scholastic ideas (especially Thomist ones) cherished by the Catholic Church: This tradition was constructed as bearing a connection to the ideas advanced by the French institutionalists (Georges Renard), and in particular to Hauriou's *théorie de l'institution*, and in this way it influenced the theorists of constitutional and administrative law close to the dictatorship under António de Oliveira Salazar (a case in point being Marcelo Caetano).[3] Its influence can also be seen in the original theory of law put forward by Manuel Gomes da Silva (1915–1994), who taught private law in Lisbon, as well as in other theories.

The liberalization of culture and of the university that followed the revolution of 1974 explains the appearance of works in philosophy of law that remained marginal because the philosophy by which they were inspired had no following in the country's universities or in its intellectual life.[4] The same cannot be said of the philosophical constitutionalism of Paulo Ferreira da Cunha (2006), who teaches at the University of Oporto, or of the outstanding postmodernist sociology of law of Boaventura de Sousa Santos, even if he is probably more influential in the English-speaking world than in Portugal.[5]

14.2. Philosophy of Law under the Influence of Positivism and Antipositivist Movements: From Calisto to Delfim Santos

Avelino César Calisto (1843–1910) was not a coherent philosopher. He takes a positivist stand when he says that the philosophy of law is a chapter of sociology. Calisto (1902, 41) defines sociology as the science that studies the re-

[2] On Habermas see Sections 10.3.5 and 10.4.3.2 in this tome, and Sections 10.4 and 25.3 in Tome 2 of this volume. On Gadamer and legal hermeneutics see Section 10.3.5 in this tome and Section 23.4 in Tome 2 of this volume.

[3] On Hauriou see also Section 12.2 in this tome, and Section 1.1.4.2 in Tome 2 of this volume.

[4] An example is the sociobiology of Neto de Carvalho (1992). This author will not be discussed here, and neither will some legal philosophers who have worked mainly on historical themes, such as Henrique Meireles (1990), José Lamego (1990 and 2014) and João Lopes Alves (1983, 2003, and 2005). The latter is a Hegel scholar who has also engaged in the contemporary discussion about justice, human rights, and democracy (Alves 2005).

[5] The innovative and insightful contributions to legal theory and philosophy (especially to the theories of the legal system and of revolutions) of Miguel Galvão Teles—who lectured on Constitutional Law at the University of Lisbon before and after the Portuguese revolution of 1974—are now collected in his *Escritos Jurídicos* (Legal writings: Teles 2014). They are important building blocks of a greater architecture and could not be integrated in our text.

lations of man to man, the causes that produce those relations, and the laws that regulate such facts and govern the conditions for life in society. But when he specifies the elements in virtue of which legal facts are distinguished from other social facts, he includes nonfactual elements of an ideal, teleological, or evaluative nature: The elements of law must be a condition of social cohesion, subordination, and harmony, capable of perfecting, developing, and harmonizing the individual and the society, while at the same time providing a guarantee of external social coercion (ibid., 233). He defends human rights as natural rights—as powers inherent in human nature—that we each use in satisfying such conditions as are dependent on free will and are necessary for the realization of our rational, individual, and social aim, independently of the arbitrary opposition of others (ibid., 239). These rights are claimed by him to be the result of persistent instinctive forces (ibid., 240), but that is not in itself an argument sufficient to support such a set of rights.

Despite the dominance of legal positivism, the theory came under criticism by many of the best minds of the new generation in the first quarter of the century. Legal positivism in general—and particularly its French version propounded by Duguit and its application to crime by the Italian *scuola positiva*, or positivist school (Enrico Ferri)[6]—was criticized by Manuel Paulo Merêa (1889–1977) in light of the work done by William James, Henri Bergson, Raymond Saleilles, Maurice Hauriou, and even Rudolf von Jhering, all of them regarded as anti-materialists, and to that extent as idealists (see Merêa 1913). At the same time and in the same sense, but with much greater philosophical sophistication, Leonardo Coimbra (1883–1936), the best Portuguese philosopher of the same generation, offered a profound refutation of positivism (see Coimbra 1912). However, the influence of positivism remained pervasive, especially in the law schools. In 1938, Delfim Santos (1907–1966), the best-trained philosopher of the next generation, began his philosophical career with a critique of neopositivism on its own terms (see D. Santos 1971).

14.3. The Phenomenology of Law: Moncada

The final result of thirty years almost exclusively dedicated to research and the teaching of legal philosophy is Moncada's *Filosofia do direito e do Estado* (Philosophy of law and the state), which came out in two volumes: a *Parte Histórica* (or Historical part: Moncada 1955) and a *Doutrina e Crítica* (Theory and criticism: Moncada 1966). According to Moncada, the philosophy of law and the state has to ask and answer the same (essentially philosophical) questions as general philosophy, only relating them to its own object: (1) What do we or can we *know* about law and the state and *how* do we or can we know it?

[6] On the Italian positivist school see Section 11.1.1 in this tome.

(2) What *are* they? (3) What are they *for*, or what ends and values should they seek? And (4) what is their *ultimate meaning* within a global conception of human life? (Moncada 1955, 3; 1966, 14). So the second volume has three chapters: the first deals with the theory of knowledge, that is, with legal and political knowledge, working from the concepts of the "legal" and the "political" to the different degrees and types of knowledge of law and the state; the second deals with ontology, that is, with the being of law and the state as objects of experience in the domain of social life and history; and the third deals with axiology, that is, with legal and political values from the perspective of a philosophy of value. There is no fourth chapter on metaphysics because Moncada rejects classical metaphysics and thinks that metaphysical questions fall outside the limits of reason and so of philosophy.

Moncada brings Husserl's phenomenology to bear in describing the content of the concept of the "legal" (the same would apply to the phenomenology of the "political"), that is, in describing the content of the concepts that are thought by the intentional act whose object is law. This is a kind of intuition of essences obtained by a reduction or bracketing (*epoché*) of questions about the reality (i.e., the being in itself) of the object, of the thinking subject, and of the individual psychological act of thinking. In this way, we have the constitutive elements of cogitations insofar as they are cogitated, an *ego cogito cogitatum* inspired by Descartes's *ego cogito*, but more radical. Applying this method, we discover a set of concepts or a phenomenological field of relations that make up an anatomy of what is thought when thinking of law: "ought," "free will," "value," "norm," "person," "ego" and "other," "order," "justice," and "political community" are simultaneously meant as objects of related intentional acts. The concept of law so obtained is *a priori*, and as such it acts as a *condition* of knowledge, not yet true knowledge of something given in experience (see Moncada 1966, 32–46).

The experience of law is cultural experience, and in it there are different types of knowledge of law: spontaneous, legal, scientific, and philosophical knowledge of law. It is important to compare the legal knowledge of law with the scientific and the philosophical. Legal knowledge consists of value judgments of two kinds: We have imperative judgments ("Someone under certain circumstances shall act or not act thus") and normative and evaluative judgments, the latter based on the first (cf. ibid., 53). Such judgments refer to the facts of experience: to historical and cultural facts of a special kind that constitute positive law. Legal science or jurisprudence takes the same facts as the object of its operations: the interpretation, construction, systematization, and application of law. The interpreter is more insightful than the lawmaker as author of the text to be interpreted: One thing is the lawmaker's psychological will, another is the broader will of the spirit and the cultural meaning objectively inherent in law and in the legal system (see ibid., 81, n. 2). The jurisprudent—as judge, legislator, or writer on law—is always cooperating in the

ongoing creation of living law. Jurisprudence is in this sense a normative and practical science characterized by the creativity that is the hallmark of all the arts, and it contributes to making positive law, as it is one of its sources (see Moncada 1966, 76–86). The philosophical knowledge of law includes the epistemology or theory of legal science as the less problematic of its parts. More problematic are its other parts, where legal philosophy seeks a knowledge of questions other than truth. Nevertheless, philosophy has important functions for lawyers, enabling them to (*i*) locate different questions through a global view of the law, (*ii*) avoid applying the categories and methods of some areas of knowledge to others where they do not belong, (*iii*) be conscientious of their responsibilities and proper role and aims in contemporary society, and (*iv*) deal with the moral challenge of believing in the true worth of their profession in the face of serious doubts about it (see ibid., 97–103).

In the ontology of law, Moncada follows Nicolai Hartmann by acknowledging different spheres of being, and he empirically analyzes positive law as a kind of real nonsensible being, since it is a part of culture, a manifestation of the objective spirit. There is no law other than the positive law (see ibid., 111–3). Positive law is temporal, historical (as a uniquely human projection of the past onto human existence), imperative, normative (setting forth an imperative aimed at an addressee), valid, efficacious,[7] morally obligatory, and coercive (see ibid., 120–7).

The central part of Moncada's axiology lies in his treatment of legal value, or the value inherent in the law: Is it possible to rationally determine or to construct the law that ought to be? Which, in other words, is the problem of natural law. For that we have to distinguish in the law its formal value, namely, justice, from its material value, namely, the values pertaining to its content. But there is very little that can be said in that regard on the basis of universal value: that human personality should be respected; that there are vital and spiritual values, the former subordinate to the latter; that there is an ethical minimum for the law to respect. Beyond that, it is *life* that has to impart content to a natural or ideal law. We arrive in this way at a natural law with variable content similar to the conceptions expounded by Francisco Suarez, Rudolf Stammler, and Giorgio Del Vecchio.[8] We can call it a natural law made positive in the various legal systems: It is a certain interpretation of such values made positive—in combination with the requirements of the fundamental conditions of social life—that constitutes the basis for the general principles of law in each legal system. This basis cannot be derived from any metaphysics: It can *aspire* to a metaphysics, to be sure, but such an aspiration exceeds the limits of philosophy (see ibid., 289–92, 298–307).

[7] Validity and efficacy at the present time characterize current law as opposed to past law (Moncada 1966, 123).

[8] On Stammler, see Section 1.3 in this tome and Section 2.2 in Tome 2 of this volume. On Del Vecchio see Section 11.2.1 in this tome.

Moncada had some early students who published before he gave shape to his systematic philosophy of law. One of them was a professor of public law in Coimbra named Afonso Rodrigues Queiró (see Queiró 1989, 2000a, and 2000b),[9] who was influenced by the neo-Hegelianism of Karl Larenz and Julius Binder and the ordinalism of Carl Schmitt.[10] Another former student of Moncada who would go on to develop a neo-Hegelian conception was António José de Brito, and from that standpoint he would much later criticize Moncada (see A. J. Brito 2006 and the preface to Moncada 2004). In the same generation, but educated at the Lisbon School of Law, was José Hermano Saraiva (1950), who started out from a neopositivist approach and then moved into phenomenology (see Saraiva 1963, 1964–1965, and 1986).

14.4. The Ontology of Law: Brandão

In 1942, Brandão published *O direito: Ensaio de ontologia jurídica* (The law: An essay on legal ontology, Brandão 2001a, 69–260).[11] As main influences he names Augustine, Aquinas, Pascal, Hegel, Scheler, Heidegger, and Nicolai Hartmann (ibid., 69). The dominant influence for his ontology of law is clearly the last of the authors just named. Brandão accepts Hartmann's theory of the different ontic strata, whereby the categories of the inferior strata are constitutive elements of the superior strata. The law is a special being within the objective spirit: It belongs to the stratum of the spirit, which is superior to that of conscience; it therefore pertains to autonomous categories, but it is nonetheless ontologically dependent on the conscience, which is a constitutive element of the spirit. Likewise, the conscience is dependent on the organic and the organic on the material.

Justice is not, for Brandão, the supreme value of the law but the common good. The common good is not an end that absorbs and nullifies other ends: It is the ideal form for realizing other ends. Because law is the normative criterion on which basis to live together in society, its supreme value is the value of generality and equality. All persons are equal before the law: They have the same secured space of freedom to act and also the same duties. That is the good common to everyone, the common good. However, values are always values for *someone*. Only the individual person is a conscious subject, capable of choosing intentional objects and of visualizing and supporting values. Only the individual benefits from and makes real the common good. Therefore, justice stands to law not as the idea or supreme value that renders law valuable, but as

[9] On Queiró, António José de Brito, Hermano Saraiva, and other figures of Portuguese legal philosophy in the 20th century, see Sousa 2005 and Braz Teixeira 2005.

[10] On Larenz see Sections 5.4 and 9.4 in this tome. On Binder see Section 5.3 in this tome.

[11] On Brandão, see António Braz Teixeira's preface to his edition of Brandão 2001a and 2001b.

the moral value of imposing a certain definition of the common good through force. From the point of view of the individual person, the law is just if in its definition of the common good it tends as much as possible to what has value for an individual's life. When we obey the positive law, pay taxes, or are being coerced by a decision of the courts or by the armed forces of the state, we are not accepting to be reduced to instruments of the community but are acting as means of our own realization in life as persons. For otherwise we would all be living under an oppressive feeling of injustice. How the law envisages the common good varies over time and depends on the community's spiritual level. But the imposition of the common good through the law must satisfy one requisite: It needs to be just (see Brandão 2001a, 86–94).

We have been considering the axiological aspect of law, or how law is related to value, which is only one of the ways in which law appears or one of its modes of existence. To that extent, law can be described under the ontic categories of essence. For example, law is timeless and not conditioned by the person who visualizes it. There are, however, two other modalities of law. In human life, law appears as part of the objective spirit of a certain national community and is historically situated in space and time: It changes over time, it is valid as positive law, and it continues to be a cultural object after losing validity. Finally, law appears in a third modality as objectified spirit in the written text of a statute, for example. To the positive law belongs heteronomy as an ontic category insofar as the will of the state has such a content. In order for law to be valid, however, it must harmonize with the visualizations of legal value and of justice that at any given time seize the minds of the people (see Brandão 2001a, 217–56).

The theme of the validity and temporality of law was extensively developed by Brandão in a long essay of 1943 which bears that same title *Vigência e temporalidade do dreito* (Validity and temporality of the law: Brandão 2001b, 261–329) and which draws on the previously mentioned methods and categories set out by Hartmann.

14.5. The Ontology of Law and "Portuguese Philosophy": Braz Teixeira

In Lisbon, António Braz Teixeira (1936–) carried forward the same type of ontology and axiology of law that Moncada and Brandão had developed before him. Like Brandão (2001b, 59ff.), he does not accept Moncada's idea of a variable natural law that sets out general principles of law for various legal systems (A. Teixeira 2000, 210–1, 219). In his view, the different theoretical attempts to justify or secure the idea of natural law are insufficient or cannot be maintained (see ibid., 220). Like Moncada, Braz Teixeira holds that justice is the value, principle, or ideal of law. But he goes further than both Moncada and Brandão by asserting that justice is a sufficient reason of law and so is the reason of its validity, and that since law exists only as long as it is valid, it is

justice that makes law what it is (see ibid., 223, 278–9). On the other hand, Braz Teixeira sees justice as always concrete: Persons and situations are always different, and its criterion therefore cannot be equality; the written general law as a legal source does not adequately express justice, and there is no distinction between justice and equity. Here Braz Teixeira follows Delfim Santos,[12] a Portuguese disciple of Hartmann and Heidegger who comments on Plato's definition of justice as "the act of giving to each his own," arguing that justice is not what is given but what makes us give what cannot be given in reality, because it already belongs to those to whom it ought to be given. There is nothing that justice actually *gives*, but this nothing gives "meaning" to things and determines to whom they belong. It is therefore not possible to determine what justice is, because justice is the act of determining thought and appears as a value that cannot become an object. Only *injustice* reveals the need for justice: Only injustice is real. Justice is sought after because it does not exist, and if it did exist, it would not manifest itself as justice (see D. Santos 1973, 58–9). So far goes Delfim Santos. Braz Teixeira extracts further the conclusion that justice is an intention or intentionality, a never-completed struggle for its own realization. Justice can neither be defined by nor be derived from reason: It can only be the object of an intuition in a concrete case through emotion or evaluative feeling. The reason you can give for it is a reason of the heart, of the immediate experience of value (see A. Teixeira 2000, 287). Being based on justice, the law is equally concrete in its essence—it becomes real in the hands of the judge deciding a case and not in the hands of the legislator. Braz Teixeira (ibid., 130–2, 282–5) thus defends a concrete normativism.

Braz Teixeira diverges from Moncada and Brandão in his conception of philosophy. For Teixeira philosophy is dependent on language and other characteristics of a national identity and much closer to literature and religion than to science or to legal science. The philosophy of law should resolve itself into a metaphysics of justice, implying a general metaphysical vision and an investigation of problems such as the idea of God, the reality of evil, the relation between justice and charity, and the ontological foundation of freedom, whose answer is to be worked out within what Teixeira (ibid., 290) calls "ontoteology." He includes himself in a movement named Portuguese philosophy (initiated by Álvaro Ribeiro, José Marinho, and Agostinho da Silva, all disciples of Leonardo Coimbra), since that movement embraces the same conception of philosophy.

[12] Delfim Santos was professor of philosophy and of pedagogy and wrote two short articles on the philosophy of law: *Psychology and Law*, of 1948 (collected in D. Santos 1977, 11–9), and *Law, Justice and Freedom*, of 1949 (D. Santos 1973, 51–62), and he also wrote a review of Brandão's previously mentioned essay on the validity and temporality of law (D. Santos 1944).

14.6. Neo-Thomism and Personalism: Gomes da Silva

In a book titled *Esboço de uma concepção personalista do direito* (Outline of a personalistic concept of law: M. da Silva 1965), Manuel Gomes da Silva (1915–1994) reflects on the use of the human corpse for therapeutic and scientific aims. His point of departure is not philosophical but theological: He starts out from what he describes as an "objective exposition of the Christian doctrine," conceived along the lines of the Catholic theologians Bernhard Häring, Romano Guardini, and Michael Schmaus. On this conception, humans are dominated by the *ontological demand to realize their ultimate end*, which is to glorify God; humans are endowed with the *autonomy* needed to pursue that end, but at the same time they have a *duty of fidelity* to the same end, on the basis of a principle that links autonomy to a predetermined end. This duty is an essential element of the structure of human personality and expresses natural law, which applies divine law to human acts (see ibid., 116–7). But natural law contains only universal principles that can be intuited by every right conscience, so the life of the community and the realization of its common good need positive laws that will specify those principles of natural law. Natural law must therefore act as a guide in the interpretation and scientific study of such positive laws and in the making of new positive laws (see ibid., 119–20). With Aquinas, Gomes da Silva holds that the universal natural laws and the general positive laws are not the law proper but only express the *ratio* of law, that is, its form and underlying rationale. The law is real or actual only as *concrete* law. Law, properly speaking, is constituted by three elements: the objective legal order as a set of laws or legal "forms," the subjective or concrete order resulting from the application of such laws through human acts, and the life of the law as the dynamics of such action. If we are to have an accurate picture of the situations of those who are subject to the law, we have to determine the general types of forms through which law becomes concrete: These forms consist in the individual situations that aggregate the diverse powers and duties established by law. Individual legal situations may be classified into (*a*) situations of autonomy, as in the case of *in personam* and *in rem* rights, and (*b*) situations of cooperation, as in the case of the legal relations involved in contracts and institutions or communities (ibid., 142–66). The resulting analysis of legal concepts is often illuminating and can usefully be considered on its own merits, apart from its theological foundation.[13]

[13] It must be noted that Aquinas is also the main source of inspiration for the legal philosophy of Mário Bigotte Chorão (2008). A more eclectic natural-law theory, by contrast, can be found in Soares Martinez (2012).

14.7. Critical Theory and the Global Social Project: Orlando de Carvalho (*by José Manuel Aroso Linhares*)

The subsequent generation of scholars in Coimbra takes us to Orlando de Carvalho, João Baptista Machado, and António Castanheira Neves, who all made important contributions, each in his own way.

For a long time, Orlando de Carvalho (1926–2000), a distinguished scholar in private and commercial law, was responsible for a course on legal theory. Although his written texts on this subject area (mainly Carvalho 1996 and 1997) account for only a small portion of his overall *oeuvre*, they do lay out a powerful holistic conception of critical theory, a conception that couples the heritage of the jurisprudence of interests (*Interessenjurisprudenz*) with a very selectively reconstructed view of dialectical materialism. The core of this conception is what Carvalho describes as "the global social project," a reconstitution of present social reality simultaneously understood as an interpretative task and as an autonomous "performative potential." When we reconstitute this project, we are in fact acknowledging "a cluster of values at once juridical and not juridical, ethical and not ethical." If the normative "force" attributed to this "cluster" depends mainly on a process of rationalizing universalization (see Carvalho 1996, 8; my translation), its "dynamic promotional ideal"—discovering society as a promisingly thriving "melting pot" of "values and counter-values," and even of "chrysaline values" (ibid., 9)—acts decisively upon law in "systemic" and "counter-systemic modes" alike (Carvalho 1997, 16; my translation). Why in a "systemic" mode? Certainly because this interpretive reconstitution confers on the intertwinement of judicial jurisprudence and legal scholarship the status of a *conditor juris*. Why also in a "counter-systemic" one? Certainly because this intertwinement is performed in such a way that an irreducible politically and ethically relevant social "insubordination" (permanently challenging the conservative stabilisation praxis of the *communis opinio*) can pursue "human emancipation" and its indispensable *liberté d'épanouissement* (the freedom to flourish). By this *freedom* is as a matter of fact meant "the realization of each person in the community and the realization of the community in each person" (ibid., 16–7; my translation).

14.8. Hermeneutics and Discourse: Baptista Machado (*by José Manuel Aroso Linhares*)

Baptista Machado (1927–1991) and Castanheira Neves (1929–) explore the common ground that can be said to lie in the *"rehabilitation" of practical knowledge or practical philosophy*, but also in an effort to resist rule-centered formalism and legal scientific instrumentalism (and its calculating forms of reason). The common task is not only to free legal discourses and practices from the dominance of *episteme-techné* or *techné-episteme*, but also to return to an autonomous experience of praxis-*phronêsis* and to reconsider legal validity as insepa-

rable from the specific construction of communitarian meaning. In pursuing this project, however, the two authors proceed along two markedly different paths.

Baptista Machado gave us two main contributions in two short periods of creative activity, the first revolving around *Antropologia, existencialismo e direito* (Anthropology, existentialism, and law: Machado 1991b), written in 1965, the second one culminating in the first published version of *Introdução ao direito e ao discurso legitimador* (Introduction to law and legitimizing discourse: Machado 1983). At first these contributions will look like separate nuclei, corresponding to independent (discrete) developments, engaging with significantly different interlocutors.[14] But the conception does have unity, as can be appreciated by considering two remarkable *pairs* (and the productive tension or even the unresolved wavering that these pairs produce). The first of these (see point A below) lies in the counterpoint created between *natural law* and *(constitutive) historicity*, where one could also see the need to experience the "permanent openness" and the "radical disquietude" of *Dasein*, our "being there" (see Machado 1991b, 144), without abandoning the "possibility" of taking the question of "natural law" seriously (ibid., 120–1); the second (see point B below) lies in the experience of the discursive polarity (but also the convergence or at least the overlap) between two translations of *phronêsis*, namely, the topical-rhetorical one (see Machado 1965) and the *existential*-hermeneutical one (Machado 1991b; 1983, 314ff.).

(*a*) The counterpoint between the *quest for the natural law* and the *cultural "openness to Being"* suggests the possibility of approaching juridical validity in two different reflexive steps that can be understood as complementary stages in a work in progress where the effort is to overcome traditional ontic (ahistorical) substantialism or essentialism (see Machado 1991b, 78–9, 84ff.).

The first reflexive step enables us to discover legal validity by adopting a participant's perspective. This perspective, however, is a *specific* one—no doubt because the practices to be internally considered (the practices that construct the relevant point of view) are exemplarily related to the radical possibilities (but also to the risks) associated with a personal "responsible" ("non-arbitrary") "existential decision" (ibid., 109–13; my translation). From this perspective, Baptista Machado aims to resist theoretical essentialism, while simultaneously resisting the dangers of relativistic historicism and voluntarism (ibid., 116ff., 121ff., 137ff.). As a result, natural law may be experienced as "a

[14] In the first period, these interlocutors were Heidegger, Fechner, Welzel, and Max Müller (in Machado 1991b), but also Engisch, Esser, and Viehweg (Machado 1965). In the second period, they were Gadamer, Hruschka, and Larenz, but also Apel and Habermas (Machado 1983). Kelsen is present in both periods as the unsurpassed example of a "logico-structural" theoretical thinking (cf. Machado 1991a, 1991b, and 1983). On Viehweg see Section 10.3.2.2 in this tome and Section 23.3.1 in Tome 2 of this volume. On Gadamer and legal hermeneutics see Section 10.3.5 in this tome and Section 23.4 in Tome 2 of this volume. On Habermas see Sections 10.3.5 and 10.4.3.2 in this tome, and Sections 10.4 and 25.3 in Tome 2 of this volume.

human task" with "a content *to come*" (a content whose fullness is always deferred to the future) (ibid., 111; my translation). This understanding (as a kind of "pre-reflexive knowledge") involves in fact not only an irreducible dialectics between an "evaluative cultural tradition" and "constitutive free participation" (ibid.,137–42; my translation), but also a *nexus moralis* between *man* as an "agent of History" and the "concrete" singular circumstances or "relations" (ibid., 97, 143–56) in which people find themselves. It is as if the historical (permanent) "transcending of man by man" (that constitutes *humanity*) could be seen to correspond to the awareness of an autonomous validity, that is, a validity not dependent on arbitrary contingent decisions (ibid., 137ff., 143).

The second reflexive step (Machado 1983) sets out the previously unconsidered ambition to explore the connection between natural law (or natural-law thinking) and the experience of the community, the latter conceived as a socio-historical form of life, the former as a normative (regulative and justificatory) axis (if not as an ensemble of reflexive standards). Natural law is in fact presented here as a kind of immanent "law of life and evolution" (ibid., 209, 212, 213; my translation), but also as a global supra-statutory reference point or standard, setting out an *idea of law* as order and system, if not directly making a claim to coherence or integrity (see ibid., 212ff., 320). Exploring this supra-statutory reference, natural-law thinking installs in communitarian praxis an unsurpassed dialectical transaction between positive and extra-positive (or trans-positive) polarities (ibid., 208ff.), which means consecrating the "postulate of Natural Law" as an unsurpassed "structure of thought, inherent in the language of legal validity" (ibid., 260; my translation), but also concluding that "the problem of legal Justice" still *is* "the problem of Natural Law" (ibid., 287; my translation). With this conclusion Machado confirms the universality and the anthropological necessity of the supra-statutory standards (ibid., 208) as direct normative expressions of *die Sache Rechts* (the *quid* Law), paying simultaneously attention to the risks of disintegration involved in a radically pluralistic conception of the communitarian connection. As previously noted, the answer to this demand (and its difficult challenges) is constructed under the explicit influence of Apel's and Habermas's universal (transcendental) pragmatics. Baptista Machado recognizes a necessarily constitutive *tie* that intertwines three diverse components, making them reciprocally inherent: "The regulative principle of Justice," the form of life "man" (the superior way of life that can be called *human*), and the transcendental (meta-institutional) conditions of "communicative community" (see ibid., 272–84, 286ff., 293–307). It is precisely this *tie* that hermeneutical existential discourse will be able to reveal: on the one hand recognizing that nature (or *naturalness*) means culture—i.e. a cultural dimension which escapes the contingencies of arbitrary *voluntas* (or deliberate constructive programs), thus revealing itself to be a product of spontaneous communitarian evolution (see ibid., 288ff.); on the other hand, reconstituting a complex of supra-positive normative principles, or supra-contingent ethical

commitments (to responsibility, veracity, or justice). As an expression of "unitary regulative wisdom" (i.e. as plausible transcendental aprioristic presuppositions), these principles and commitments "emanate from the (symbolic) structures inherent in a communicative community" and enable humans to evolve toward a superior *Lebensform*, or form of life (see ibid., 302–3; my translation).

(*b*) The constructive wavering between topical and hermeneutical discourses finds a plausible promising solution in the unitary celebration of a *total human* anthropology. This celebration presupposes a certain "epistemological conversion" (i.e. a reflexive discourse providing a "more adequate understanding of human reality": Machado 1991b, 135; my translation). According to Baptista Machado (1991b, 143ff.; 1965, XIVff., XXIII), this reflexive discourse will provide not only the conditions for recognizing the bonds of the *Lebenswelt* (or life-world) from the participant's perspective of a "situated self", but also provide the possibility of revealing this "self" as an interpretive *existence* (with the relevant affective-emotional and volitive dimensions and a genuine sensitivity to concrete and unrepeatable contexts). Accepting this possibility means in fact rejecting (avoiding) a certain theoretical (empirico-explicative and technological) "forgetting." Which "forgetting"? The one which refuses to take into account that decisive "anthropological difference" that makes the "interpreting subject's identity" dependent on historico-communitarian "interaction and communication" (and on its meta-institutional principles) (see Machado 1983, 342–55).

This global reinvention of *phronêsis* as the core of practical reason opens the path to an understanding of legal dogmatics as an authentic "hermeneutical science" (ibid., 359–75) and justifies an eloquent rejection of Kelsen's understanding of legal norm as a "frame" (*Rahmen)* (Machado 1965, XXVII, LXII–LXIII), it does not however produces a specific legal methodological thinking. Machado (1991b, 115; 1983, 307–11) did not rethink legal principles in an autonomous way (which would have broken their continuum with the presuppositions of the "communicative community" and its "universal pragmatics"), nor did he take the opportunity to develop a genuine understanding of the case (and its legally relevant "concreteness") as a plausible methodological perspective. He rather contented himself with a global reinvention of the interpretive problem, or, one might say, with the possibility of concentrating the process of juridical concretization on the level of generalisation and in the "operating formula" that legal norms self-sufficiently provide. This means that Machado's existential-dialectical hermeneutics—pursued under the *modus* of an indispensable legitimating discourse—allows us to reduce the "legal order" to two main constitutive layers, or strata, both of them concentrated on the intelligibility of the legal norm, the first one corresponding to this norm's "logical" ("notional or denotative") "dimension" (referring through the *hypothesis* of the *conditional program* to real-life historical situations), the second one translating the norm's "intentional" (or "spiritual") understanding and building a plausible interpretation of the extra-positive *quid* (Machado 1965, XXVI–XXIX, LX–LXV; 1983, 205ff.). It is precisely this

interpretation—invoking the previously mentioned meta-institutional presuppositions—that, from the perspective of the judge qua participant, will be in a position to overcome the problems of (extensional and intensional) indeterminacy that the experimentation of a norm's "logical dimension" unavoidably provokes.

14.9. Jurisprudentialism: Castanheira Neves (*by José Manuel Aroso Linhares*)

Castanheira Neves has put forward an unmistakably original conception of law and legal thought from the outset. This can be appreciated in his first major work, *Questão-de-facto-questão-de-direito* (Matter of fact matter of law: Neves 1967), as well as in his *Introdução ao Estudo do Direito* (Introduction to law: Neves 1968–1969, rewritten as Neves 1971–1972). In both of these works his voice can already be fully recognized and the components of his reflection are already maturely articulated, and he has since developed a continuous and powerfully integrated (albeit no less demanding) reflexive path. In contrast to Baptista Machado's approach, this path can be said to overcome the constructive hesitation between natural-law thinking and practical philosophy, not only because it conclusively rejects the former, along with its weak equivocal vestiges (see Neves 1967, 693ff.; 2003a, 35–52; 2008a, 107ff.), but also, and especially, because it takes up the challenge of a radically problematic (constitutively immanent) practical thinking. This challenge is in fact concerned with an autonomous reconstitution of *juridicalness* as validity, taken in earnest as a self-transcendental communitarian normative context and as a correlate of an open historical *praxis* (see Neves 1995a, 32ff., 51–239; 1997, second lecture; 2003a, 140–7; 2008a, 84–91). To follow this path is essentially to make a wager (Pascal's *pari*!), i.e. to "bet" on the plausibility of a contextual reinvention of the problem of law, a reinvention through which we may be able to rethink and critically experience law's constitutive cultural-civilizational *originarium* in a limit-situation like our own. This means rejecting an unproblematic presupposition of universality (see Neves 2008a, 1–41, 101–28) but also the possibility of a previous (pre-juridical) definitive global discussion about the practical world or the community, i.e. a discussion whose alternatives and results could somehow be predetermined *without* law (abstracting from the specific experience of law) and then externally and unilaterally projected or specified (in such a way that juridical discourses and practices could content themselves with a pure passive assimilation) (see ibid., 74ff., 91ff.).

Castanheira Neves follows this reflexive path by exploring a specific model of legal discourse on different levels and facing different problems.[15] This

[15] Which means that he is revisiting (rethinking) some central meta-dogmatic problems, such as the problem of the legal system and of the sources of law (see Neves 1995b, 7ff., 109ff.), but also considering the decisive normative implications of several dogmatic tenets, such as *nullum crimen sine lege*, private and criminal responsibility, *question-of-law* versus *question-of-fact* (see Neves 1995, 349ff.; 2008a, 129ff., 321ff.).

model is one that he distinguishes from two other alternative contemporary perspectives (formalistic normativism and pragmatic functionalism) and that he identifies as *jurisprudencialismo*, or jurisprudentialism (Castanheira Neves 1998, passim; 2008a, 161–318; 2008b, 56–68). To explore this model is immediately to recognize an autonomous (institutional) understanding of legal rationality. According to this conception, the presupposition of a communitarian validity—fully understood as the assumption of a material axiological compromise—cannot be experienced without paying attention to a circularly constitutive praxis of realization, a praxis whose prius (a basic generative component, in its permanent novelty and uniqueness) lies in practical controversy (a concrete situated problem of inter-subjectivity), and whose performative development demands the degree of attention that only an internally plausible methodological reflection can offer. However, the trans-subjective validity and the practical controversy cannot be recognized as basic polarities of legal rationality (corresponding to the axiological and the problematic dimensions) without bringing two other dimensions into the foreground: the third one (the dogmatic dimension)—which pertains to the experience of the legal system and confers a stabilizing objectifying role on validity—and the fourth one (the judicative one), which responds to the novelty of controversy with an adjudicative prudential mediation (or assimilation). To recognize the complex intertwinement of these four dimensions is ultimately to conclude that legal rationality corresponds to an irreducible main dialectic, the one we identify by invoking the perspectives of *system* and *problem* (along with the constitutive circle, if not "methodological unity," that they produce). And we should not forget here that this system is conceived as being dynamic and open, with a regressive permanent recomposition and with several different strata that are not methodologically equivalent—normative principles (taken seriously as *jus* and as foundational *warrants*), legal norms, precedents, dogmatics, legal reality (cf. Neves 1993, 77ff., 155–9; 1995b, 109ff.; 2009, 18ff.). It is the methodological priority of controversy that gives this recomposition its unmistakably specific meaning. This is so because, on the one hand, the perspective of concreteness restores *interpretatio* to its fully normative (not hermeneutical) "integral sense" of "realization of law," an integral sense incompatible with any methodologically plausible scissions or divisions between the interpretation of law and its application, between interpretation and the filling of gaps (see Neves 1992, 78ff.; 1993, 74–7, 83–154; 2003b, 45ff.), and, on the other hand, the immediately constitutive juridical relevance of the mentioned controversy (distinguishing concreteness from pure singularity) enables us to go beyond a pure topical assimilation of legal materials (Neves 1993, 71–4), thus not only introducing a decisive counterpoint between foundational warrants (*fundamentos*) and rules or criteria (*critérios*)—i.e., distinguishing the systemic layers that should be assumed and treated as such—but also attributing different presumptions of bindingness or normative force to these layers, in such a way that principles

benefit from a presumption of communitarian validity, legal norms from a presumption of political-constitutional pedigree or authority-*potestas*, precedents-*exempla* from a singularly contextualized presumption of correctness, and legal dogmatic models from a presumption of rationality or rational conclusiveness. Indeed, all of these presumptions are treated as explicitly or implicitly rebuttable, their refutation entailing a special burden of counter-argumentation (see ibid., 154ff.; 1995b, 82–90; 2008b, 66–7). This perspective also allows us to fully experience the two faces of legal norms, on the one hand as decisions and commands (giving way to a reconstitution of the *ratio legis*) and on the other as legal criteria, as plausible objectifications of principles-*fundaments* integrated into a multilayered open system, demanding an autonomous interpellation of the *ratio juris* (see Neves 1993, 149ff.). These elements also presuppose the importance of a normatively productive "jurist's law" that is meant to integrate the reciprocally constitutive contributions of judicial jurisprudence and legal scholarship, without forgetting a plausible dialogue with meta-dogmatic legal discourses (see ibid., 157, 184–6; 1995b, 89–90; 1997, 54F–54Q; 2008a, 71–2), and it is on this basis, using the same elements, that Castanheira Neves (1993, 30ff., 159–286) constructs a powerful developed methodological scheme revolving around the judge's adjudication (treated as a paradigmatic case of *judicium*), without forgetting that if this judgment is to be taken seriously, it will require an urgent internal reflection on the material intentionality of jurisdictional power (see Neves 1983; 2008a, 161ff.).

It is indispensable to have a final remark so that we can go back to the core of a specific legal philosophy, for it is on this basis (conceived of not as a tranquilizing exposition of traditional themes but as a true reflective reconstruction of problems) that, according to Castanheira Neves (2003a; 2008a, 73ff.; 2009, 3ff.), we can cope with the crisis presently affecting the European civilization. It was previously mentioned that Neves rejects law's unproblematic universality. Now we must qualify that stance, for according to Neves (2008a, 9ff., 101ff.) such a rejection should prompt us to recognize that the quest for law—a quest first stoutly articulated with the jurisprudential *Isolierung (isolation)* accomplished in the Roman *civitas*—is only a plausible (continuously renewed) civilizational answer (among other possible answers) to a socially and anthropologically necessary problem. This recognition is indeed built under the reflexive urgency of a radical (Heideggerian) question—"Why Law [...] in the *human world* [...] rather than Law's absence?" (Neves 2008a, 10–1; my translation; 2003a, 140ff.)—and leads us to an inevitable reconstitution of the conditions under which law emerges. Three conditions are listed by Neves: (*a*) the worldly-social condition, delimiting an objective relational (intersubjective) performative space and the parcelling relationships by which it is constituted; (*b*) the anthropological-existential condition, which lies in the incompleteness and openness of humans and in the corresponding invention of their cultural and institutional second nature against the backdrop of an irreducible

dialectic between subjective autonomy and communitarian integration; and (*c*) the ethico-juridical condition—the decisive one—where a person (a specific legal *subject-person*) figures as a foundational axiological acquisition, constitutively illuminated by the supra-positive principles of equality and responsibility, a responsibility that institutionalizes itself in a materially and formally limited way (see esp. Neves 2008a, 9–41; cf. 2009, 11–5).

If we can suppress this last (culturally possible) condition, then we will be able to answer the first two (necessary) conditions with the institutionalization of a social order from which law (as an autonomous order of validity) remains absent. In a word, we will be able to critically address the problem of alternative orders, meaning those orders that are not juridical in the strong civilizational sense demanded by (claimed for) this conception of juridicalness. What are these orders? Neves lists three: the order of necessity justified by pure power, the order of possibility illuminated by techno-science, and the order of finality supported by politics (see esp. Neves 1997; see also 1995a, 287–310). And we should not forget that the radical Heideggerian question is only the first step in addressing the urgent need to revisit the central problem of law's autonomy (for a time unencumbered from the formalist claims): Having asked that question, we must turn to a problem constitutively intertwined with it, that is, we must reconstitute the tasks of law in its different historical cycles (the problem of the functions of law) and then we must turn to the decisive question of the foundations of law by engaging in an autonomous discussion of specifically juridical self-transcendentality (see Neves 1999; 2003a 145–7; 2008a, 94–100; and 2009, 16–8).

14.10. In Neves's Footsteps: Bronze, Linhares, and Marques (*by Luís Meneses do Vale and Ana Margarida Simões Gaudêncio*)

Following the trails blazed by Castanheira Neves, Pinto Bronze (1947–) devoted his best endeavors to a thorough reflection on *jurisprudentialism*'s core assumptions, assertions, and projections (Bronze 2006), with a focus on its methodological dimensions or implications (Bronze 1994): These are aspects whose relevance he had originally become aware of (and to the unpacking, interpretation and communication of which he was consequently led to) in his earlier research on international private law and comparative law. Meanwhile, throughout all his writings and lectures, he has always cultivated a distinctive style that elegantly combines scientific *gravity* with aesthetic *grace*. Indeed, without detriment to the theoretical rigour and practical intentionality expected from legal discourse, his texts bristle with cultural references—especially literary ones—bearing witness of his exquisite sensibility to the intricate relations between Law and the Humanities.

Acknowledging law's autonomous meaning from a properly juridical perspective (practical and normative), Bronze (1993 and 2006) offers a complete

account of its inherent *mode of existence* (a synthesis of validity and efficacy), of its *constitution* (through multiple sources), and of its *precipitation-objectification* in a dynamic, open, and incomplete system of principles (foundations) and criteria (legal norms, judicial precedents, doctrinal models, professional standards, etc.). This way he winds up recognizing the nuclear relevance of studying law's mode *of realization*, which is precisely the object of methodology, more aptly coined, in his own words, as a "methodonomology." What is meant by this neologism is the practically and normatively rationalized realization of law through "judicative decisions", or, to put it more analytically, through the specific *logos* (or reason), which reflexively and critically reconstructs the *odos* (path), deemed necessary in order to achieve the *meta* (end) of law conceived as *ius*, that is, as a material normative validity concretely enforced and realized through the adjudication (by means of a decision-making judgment) of concrete juridical problems (*nomos*).

This peculiar mode of reasoning purportedly displays a complex set of features:[16] As a *practical* enterprise (as against a theoretical or logical one) it is said to be *material*, but it is also inevitably *argumentative* (cf. Bronze 2000, 2003, and 2008b), *axiological*, and *teleological*,[17] and, most importantly it is deeply rooted in, and intertwined with, analogical ponderations (see Bronze 1994; 2006, 933ff.; 2007, and 2012a). This is where we find Bronze's most significant and original contribution to the Coimbra jurisprudentialist school (Bronze 2012b). In fact, since law is understood as a specific axiological-normative validity with an inner practical problematical intention—the drive to respond to juridical problems, thus making itself real, i.e. realizing its own existence and therefore affirming and projecting those values which simultaneously constitute its material foundations, substantive content, and ideal-regulative orientations—its way of facing the concrete juridical problems arising from reality can be conceived as an analogy, that is, as a search for juridical similarities between the specific juridical problematicity (merit) of the problems and the intentional problematicity of law (in all its principled or regulative expressions and dogmatic positivations).

Hence, juridical analogy comes to light as a mode of thought (a way of reasoning) that proceeds argumentatively, comparing particular problems (the *relata*) through the mediation of a *tertium comparationis* (the meaning of law) on the grounds of the universal principle of justice (and its demand for material equality), while also pragmatically relying on the inertial force of the praxis—therein lies the entire method of law's realization, interweaving its different moments.

Jurists, for their part, are regarded as true subjective mediators between juridical problems and the law, and, for that reason, obliged to engage in a per-

[16] For specific dialogues with other types of rationality see Bronze 1997, 1998, 2006, and 2012a.

[17] This is so in a sort of *teleonomology* or intrinsically dialectic *archeoteleology* committed to a teleological jurisprudence of ends and values.

manent "intersubjectivization" of their subjectivity. This requires them to pay adequate attention both to the *rationality* (so as to understand how to act) and to the normative system of law (making it possible to figure out what has to be assumed), while accurately appealing to the *judícia* or faculty of judgment (*judicium, Judiz*) as well as to the ancient virtue of *phronesis* or *prudentia* (cf. Bronze 1994, 95ff.; 1998, 2008a), with a view to the intended *just judicial decision*.

Explicitly exploring the possibilities and challenges of Castanheira Neves's jurisprudentialism, Aroso Linhares (1956–) has specifically privileged two main themes. The first one lies in the *urgency* of an autonomously understood approach to legal theory developed as a specific (permanently *open*) *critical testimony* of our present *différend* about law and juridical discourses[18] (and the *need* to discuss the plausible *idiom* of this theory, or its claim to find a perspective-*visée* that may be in a condition to recognize and constructively interpret this heterogeneity). The starting point for this first theme, already present in two main monographic studies (Linhares 1986, 2001), lies in the consideration of the problem of juridical proof, treated as an inter-discursive limit question, whose explicit developments justify a systematic reconstitution of contemporary trends in the philosophy of law and legal theory (see Linhares 2006c, 2009), from communitarianism to the postmodern jurisprudences.[19] Deeply intertwined with this theme is the second one, the radical questioning of the *plausibility* of the *project of law* (as an *invention* of a culturally specific *homo humanus*) in a cultural-social circumstance like our own, divided between the *celebration* of *plurality and difference* and the *promises* of a *new practical undifferentiated ethical holism*. This second theme emerges in specific discussions on different subjects, from animal rights (Linhares 2003) to cosmopolitanism (Linhares 2006b), to explicitly concentrate on a systematic exploration of the proposals presented by Habermas (Linhares 1984 and 2006b), Levinas, and Derrida (Linhares 2006b, 2007a, 2007b, and 2008), essentially diverging from an *"acultural" experience of modernity* and, therefore, proposing an *axiologically autonomous* construction for the *civilizational experience* of law (Linhares 2006a, 2006b, 2009, and 2012).

Also in this school, Mário Reis Marques (1950–), from a more historico-philosophical perspective, develops a critical reflection in legal philosophy and legal reasoning, having as its starting point the historical evolution of law's

[18] In this diagnosis of *plurality* (using Jean-François Lyotard's categories in a deliberately different context of intelligibility), Linhares mainly considers the "multiplication of concepts of Law (and practical discourses) which the so-called *academic house* (on a certain meta-dogmatic level)—reacting to the unrecoverable *Detruktion*-loss of a dominant methodic paradigm—has been producing in recent decades (creating esoteric incommensurability and other cognitive dissonances)" (Linhares 2012, 492).

[19] Having as privileged interlocutors the Critical Legal Studies, Law and Economics (Linhares 2002), the systems theory, the argumentation theory, the semiotics of law, Law and Literature (Linhares 2001, 2004), and the ethics of alterity (Linhares 2007b).

foundation, in a reconstruction that goes from classical antiquity to our days, through the Middle Ages and, mainly, the Modern Age (see Marques 1987, 1998, 2002, 2003, and 2007a).[20] In his main monographic studies (Marques 1987, 2003), he specifically considers the modern codification processes, mostly in civil law—and its paradigm, the French Code Civil—, relating them, as positive law constructions, to their philosophical and political origins, axiological foundations, and practical projects (Marques 1987, 1998, 2002, 2003, 2005b, 2005c, and 2006). On that basis, Marques reflects on the present problems of law in human society, from human rights to the relationship between, on the one hand, the meaning and role of law and, on the other, the increasing pace of change in society (Marques 2007b, 2008, and 2009). He thus states the possibility of a "third way," a *tertium genus* beyond positivism and natural law, albeit not dismissing their contribution, in thinking the material foundations of law, a *way* based on the primary values of a community—liberty, equality, solidarity, and security—resulting from the idea of *human dignity*, which imposes itself on and supports every juridical rule (Marques 2005a, 2007a, and 2010). At the same time he rejects the idea of law as a strict *urgency management*, to affirm it as an authentic *material normativity*, with its *proper time* (Marques 2008, 2009).

14.11. Analytical Philosophy of Law: Brito (*by Alessandro Serpe and José de Sousa e Brito*)

Sousa e Brito (1939–) studied with Heidegger and Gadamer in Germany and with Hart at Oxford. He sought to link the Continental philosophical tradition with analytical philosophy by pursuing hermeneutic philosophy with analytical methods. In his early work, as a student of Gadamer, Brito studied the 19th-century historical school of German legal science and its legacy (see J. Brito 1987; 2011, 163–98).[21] It was in particular Savigny who, according to Brito (J. Brito 2011, 163–4), exerted much influence on current legal interpretation and adjudication. Characteristic of Savigny's *System des heutigen Römischen Rechts* (System of Contemporary Roman Law: F. Savigny 1840) is its twofold view of legal interpretation, for on the one hand interpretation applies to particular laws, but on the other it involves a reconstruction undertaken through the dialectic of part and whole.[22] This distinction, in Brito's language, sheds light on the use of

[20] The privileged interlocutors in this historical analysis are, mainly, Thomas Aquinas, Francisco Suarez, Hugo Grotius, Thomas Hobbes, Samuel von Pufendorf, Gottfried Leibniz, Christian Thomasius, Christian Wolff, Montesquieu, Jean-Jacques Rousseau, Immanuel Kant, Cesare Beccaria, Friedrich Karl von Savigny, Friedrich Krause, Gustav Radbruch, and Hans Kelsen (Marques 1987, 1998, 2002, 2003, and 2007a).

[21] The original articles quoted in the text have an Italian version revised by the author in (J. Brito 2011).

[22] On Savigny's theory of legal reasoning see also Section 21.3 in Tome 2 of this volume.

the sources of law as the basic starting point for interpretation. But in recognizing this fact, Savigny goes contrary to the spirit of the Enlightenment, for in his view the theory of the sources of law is not separate from that of legal interpretation; rather, the two interact (see ibid., 165–7). This perspective enables Brito to look closely at the ways the common-law system and the Continental legal system are related. Indeed, Brito maintains that the case-to-case reasoning by analogy typical of the common-law system is compatible with the Continental legal tradition: The only difference, as Esser previously showed, lies in the degree to which interpreters are aware of their recourse to inductive and deductive reasoning, which in reasoning by analogy coexist (see ibid., 187, 192–3).

In *Wahrheit und Methode* (Truth and Method: Gadamer 1960, 295ff.), Gadamer underscored the "hermeneutic actuality of Aristotle," referring to Aristotle's analysis of ethical knowledge. In Brito's opinion, Gadamer was thinking of the Aristotelian practical syllogism (cf. J. Brito 2011, 195–6). The crucial importance of the practical syllogism as a method for the human sciences has also been recognized by analytical philosophers, such as G. E. M. Anscombe and G. H. von Wright. Against the background of the distinction between analytical and Continental philosophy, which in practice is less useful than is often thought, Brito groups hermeneutical philosophers into two main camps: "dialectically oriented" ones and "analytically oriented" ones. On the one hand, this soft distinction enables Brito to use the label "hermeneutical philosophy" as a common designation for both orientations and to arrive at a better understanding of current philosophical positions (ibid., 196–7). On the other hand, by recognizing Aristotle's methodological importance, Brito can bring the hermeneutical structures of legal subsumption and legal interpretation back into the fundamental and formal structure of the practical syllogism.

The way in which the concept of law is conceived depends on how its relation to facts and to ethics is framed. Brito answers both questions by engaging with the two main theses that define legal positivism: that of the conceptual separation of law and morals and that of the social sources of law (see J. Brito 2011, 141–60). According to the first thesis, law neither depends on nor is determined by morals (or ethics, in the sense of a set of moral principles), in that there is no implication or conceptual necessity from law to morals or from morals to law: The law can be unjust or immoral and still count as law. According to the second thesis, the validity and content of law depend solely on social facts: The content of law is determined by the content of certain social facts, the social sources of law. The second thesis entails the first: If the validity of law conceptually depends on social facts, then law must differ from ethics.

According to Brito, it is true that once you ascertain certain facts (such as legislative acts, customs, judicial decisions, or the efficacy of the norms that form the content of such acts), you can ascertain the validity of certain norms: This validation happens when those facts are recognized by judges and other agents entrusted with applying the constitutive rules of law, for it is on the

basis of these rules that facts are linked to norms. But these rules do not licence us to pass from an *is* to an *ought*, that is, they cannot be used in a logical deduction from what *is* the case to what *ought to* be the case, for that would amount to a violation of Hume's law. Otherwise stated, the facts constitutive of law do not logically entail the law: They are just the *condition* for the validity of law; that is, norms cannot exist unless facts exist, and once the facts are ascertained, then the relative norms ought to be applied (J. Brito 1982, 264; 2002, 917–18; 2011, 150–1). However, in Brito's view, contrary to the claims of legal positivism, validity depends not only on facts but also on rightness, that is, on the morality or rationality of the law. To what extent? That depends on recognition. The constitutive rules of law have evolved from a system of recognized subjection—arguably always limited by some kind of divine law or natural law—to a system of recognized rationality. Therefore, the self-definition of law is itself not fixed but evolves with the very constitutive rules that define what is law. In a rule-of-law state, the validity of a legal norm does not depend only on a combination of supporting facts, namely, (*a*) the social facts of its creation in accordance with the sources of law, coupled with (*b*) the facts on which rests the norm's efficacy—absent which the norm is revoked by derogative custom—and (*c*) the facts on which rests the efficacy of the entire legal system: It also depends on normative content. It certainly depends on the content of the norms that rank higher in the hierarchy, since the norm at issue must be in conformity with them. But it also, and no less importantly, depends on the rationality of the norm's content, and so on its conformity with ethics or at least with a minimal ethical standard. That is because of the constitutive rules recognized in the legal system (see J. Brito 2011, 153–4). The law contains ethical concepts like human dignity and guilt, which carry enormous consequences reflected in systems of legal theory, such as the theory of human rights, or in the general principles of criminal law. These systems aspire to a rational or ethical foundation and are developed or criticized through ethical reasoning. When criteria discovered by reason are recognized by positive law as having legal validity, the validity of law ceases to depend on its positive recognition, which thus retreats, withdrawing from its own role as a criterion of validity. In the sphere of rationality so created, the rules and principles of ethical reason will eventually contradict positive law and then prevail over it: They are logically and normatively superior, so much so that even constitutional rules may become unconstitutional. Therefore, in a rule-of-law state, recognition is to some extent self-effacing. And since legal positivism is based on recognition, it must be self-effacing without being self-defeating (see ibid., 159–60).

For Brito, the conceptual failure of the social-sources thesis brings with it the failure of the positivist ground for the conceptual separation of law and morals. It remains true, in his view, that if we examine the arguments generally considered correct in the practice of law, and if we compare these arguments with those generally considered correct in ethics, we will notice that the former

show limits not present in the latter. Indeed, legal argument is from the outset limited by the obligation to refer to the sources of law, i.e., to statutes, custom, and the case law. A legally correct argument must be justified in light of the entire body of the sources of law. Every sentence or proposition in that corpus which bears a positive logical relation to the issue to be decided must be integrated into the overall argument on which the legal decision is based. But this must be done recognizing the authority and consequent hierarchy of the sources of law. In legal argument, we have to take into account not only that the sentences contained in the sources have the logical priority that premises have in relation to the conclusion but also that those sources are hierarchically arranged—e.g., the constitution ranks above acts of Parliament, which in turn rank above executive orders, and so on—in such a way that if two sentences (propositions) should contradict one another, the hierarchically superior one will prevail. Likewise, all sentences that are sources of law will have an authority or force not recognized for any other sentence in the same argument. This authority endows them with hermeneutical priority: It is from these legally authoritative sentences that one has to start in the argument, demonstrating step by step that the logical system constructed on their basis is indeed compatible with them. It will be noted that hermeneutical priority is not the same thing as logical priority: Even if authoritative sentences must be used as starting points in setting out the logical system within which a decision is justified, they may not figure as principles or axioms within that system. So, too, there are other constraints imposed on ethics in the law. For example, the law uses decision-making procedures that limit the range of sentences admitted in legal argument in the courtroom or in parliamentary debate. The limits the law imposes on ethics are justified on a variety of ethical grounds: They save time and make law more practical and secure, but above all they protect the democratic process. But such limits are themselves limited on ethical grounds that form the basis for theories of civil disobedience and of the right of resistance and revolution (see J. Brito 1995, 1996, 1998; 2011, 154–8). Thus, "law is rationally limited ethical reason or a just limitation of justice" (J. Brito 1995, 38; my translation).

In *Falsas e verdadeiras alternativas na teoria da justiça* (False and true alternatives in the theory of justice: J. Brito 2008; 2011, 15–101), the complex relationship between law and justice is investigated from the standpoint of the foundations of ethics. Utility, duty, rights: Are these alternative foundations of theories of ethics and politics, as Dworkin (1977, 171) would say? Or are they instead reducible to one another, thus representing false alternatives? According to Brito, a rights-based theory can be reduced to a duty-based theory. This can be done by applying the paraphrase method with which Bentham anticipated the analytical theories of definition expounded by Russell and Carnap: In this way, statements that contain terms referring to rights can be reduced to statements that contain terms referring to duties (J. Brito 2011, 21–31). Ben-

tham did propose more than one way of paraphrasing, or reducing sentences containing the word *duty* to sentences about other things, namely, about possible forms of pleasure or pain acting as a particular kind of motive or source of action. But he went some way toward demonstrating why such proposals could not succeed (see ibid., 33–7), this by defending a kind of transcendental proof of the principle of utility, a proof in which utilitarianism and Kantianism are each transformed into a variant of the other (see ibid., 49–52). Indeed, Brito argues, "the rational reconstruction of the foundations of ethics offered by Bentham, Kant, and Aristotle shows that they are false alternatives" (ibid., 101; my translation). Bentham's proof of utilitarianism can be aligned with Kant's categorical imperative, and when it comes to the development of applied ethics, neither offers any alternative to Aristotle's practical syllogism. By contrast, the complex web of relations between ethical and legal reason previously described can give further development to Kant's and Rawls's theories of public reason and to Aristotle's original theory of natural law. It follows that the different legal systems of states governed by the rule of law can be a basis on which to proceed in constructing alternative ethical systems from the law. From a hermeneutic point of view, philosophical ethics cannot start out from a normative vacuum: It has to start from the normative preconceptions underpinning the normative language of social morality, religious law, or positive law, building on that basis by developing a critique of those normative languages. In this way we can have developments alternative to the law which at the same time make up ethical systems for the kinds of justice that may be appropriate to the circumstances distinctive to each state. So we can proceed on the basis of a prudential Aristotelian method—constructing ethics from the bottom up by progressively harmonizing maxims for action and resolving conflicts between principles—so as to arrive at truly alternative theories of justice and of law (see ibid., 101).

14.12. Postmodern Philosophy of Law: Santos

Boaventura de Sousa Santos (1940–) began his academic career as an assistant lecturer of criminal law at the law school in his native Coimbra. He then became professor at the Department of Sociology of the Coimbra University School of Economics in Portugal, and from September to December he teaches at the Institute for Legal Studies at the University of Wisconsin Law School in the United States.[23] His main book is on the sociology of law (see B. Santos 1995, 2000, 2002), but it takes a distinctively philosophical angle. Santos begins with a theory of history: Our time is a time of transition between the paradigm of modernity and

[23] See his autobiography in B. Santos 1995, 155–249.

another emergent time, of which so far we have only signs. The signs are unmistakable, and yet so ambiguous that we don't know if the paradigm of modernity will give rise to one or, rather, to more paradigms, or indeed if, in lieu of new paradigms, we are approaching an age whose novelty consists in not being paradigmatic at all. (B. Santos 2002, XV)

According to Santos, this paradigm transition has two main dimensions: an epistemological one and a sociopolitical one. The epistemological transition is between the dominant paradigm of modern science and an emergent paradigm he would call "prudent knowledge for a decent life" (B. Santos 2002, XVI).[24] The difficulty in picking up the signs of the coming time seems attributable for the most part to the sociopolitical transition

between the paradigm of global capitalism—broadly conceived as a mode of production, a system of norms and institutions, a model of consumption and lifestyles, a cultural universe, a regime of subjectivities—and the signs of a different future contained in the alternatives to this paradigm that are emerging variously in various fields of social activity. (B. Santos 2002, XVI)

This helps us understand Santos's "oppositional postmodernism" as a conception positioned against modernist critical theory (modern solutions for modern problems, as in Habermas and Roberto Unger) and against celebratory postmodernism (as in Duncan Kennedy). Modernism is "subparadigmatic," in that it seeks to develop a potential for social emancipation within the dominant paradigm itself. Oppositional postmodernism, by contrast, takes the view that the dominant paradigm of modernity has long exhausted all its potential for emancipation.

Critical thought must therefore assume a paradigmatic stance for a radical critique of the dominant paradigm from the standpoint of an imagination sound enough to bring forth a new paradigm with new emancipatory horizons […]. Otherwise the critique will lose all efficacy and tend toward Phyrronism, closing all gateways and choking itself to death in the confined space thus created by itself. This has been the tragic (or farcical) destiny of the critical legal studies movement in the U.S.A. (B. Santos 2002, XVIII)

And in its stance against modernist critical theory, oppositional postmodernism once again

does not wish to stop at the oppositional, centrifugal and vanguardist moment. To be sure, all critical thought defamiliarizes. But the mistake of modernist vanguardism was to indulge in the belief that defamiliarization is a goal in itself, whereas on the contrary defamiliarization is but the moment of suspension necessary to create a new familiarity. To live is to become familiar with life […]. The goal of postmodern critical theory is, therefore, to turn into a new common sense, in this particular case, into a new legal common sense. (B. Santos 2002, XVIII)

[24] This the title of a conference organized by Santos. The corresponding proceedings (Santos 2003) also bear the same title.

Bonaventura de Sousa Santos (2002, 85) puts forward a sociological conception of the legal phenomenon as "a constellation of different legalities (and illegalities) operating in local, national and global time-spaces." But the concept of law espoused by liberal political theory and by legal positivism recognizes only one of those time-spaces: the national one. Santos's conception needs a concept of law that is "broad and flexible enough to capture the sociolegal dynamics in such different frameworks of time and space" (ibid., 86). So he defines law as

> a body of regularized procedures and normative standards that is considered justitiable—i.e., susceptible of being enforced by a judicial authority—in a given group and contributes to the creation and prevention of disputes as well as to their settlement through an argumentative discourse coupled with the threat of force. (B. Santos 2002, 86)

Law has three structural components acting as three different forms of communication and decision-making strategies: rhetoric, bureaucracy, and violence. Rhetoric is based on persuasion, which it seeks to achieve by mobilizing an argumentative potential, and it is present in such legal practices as the amicable settlement of disputes and retributive (as against repressive) criminal justice. Bureaucracy is based on authoritative impositions effected by mobilizing the demonstrative potential of regularized procedures and normative standards. Bureaucracy is the dominant component of state law and is present in such legal operations as the adjudication of cases by courts and the passing of laws by legislative authorities. Violence is based on the threat of physical force. Violence can be used either by state actors (e.g., the police) to enforce the state's law or by illegal groups (e.g., organized crime) to enforce the code by which they operate (see B. Santos 2002, 86). So conceived

> law has both a regulatory or even repressive potential and an emancipatory potential, the latter being much greater than the model of normal change has ever postulated. The way law's potential evolves, whether towards regulation or emancipation, has nothing to do with the autonomy or self-reflexivity of the law, but with the political mobilization of competing social forces. (B. Santos 2002, 85)

How law can be emancipatory can best be seen by considering human rights. In Europe, human rights lay at the core of the emancipatory developments of modern law from the reception of Roman law toward rationalist natural law and the theories of the social contract (see ibid., 280). Like any other dimension of Western modernity, human rights in the 19th century were exclusively gauged to the needs of capitalist development. They were then regauged to solidify Western capitalism as a global endeavour, that is to say, as imperialism. The Western discourse on human rights has justified unspeakable violations, and these violations have been evaluated and dealt with under revolting double standards. But this is not the whole story. Millions of people and thousands

of nongovernmental organizations across the world have been victimized by authoritarian capitalist states. The political agendas underpinning the struggles against such victimization are typically explicitly or implicitly anti-capitalist. In sum, alongside the dominant discourse and practice of human rights conceived as a globalized Western localism, there has been developing a counter-hegemonic human-rights discourse and practice conceived as a cosmopolitan politics. According to Santos, the central task of emancipatory politics in our time consists, in this domain, in transforming the conceptualization and practice of human rights from a globalized localism into a cosmopolitan project (see ibid., 270–1).

> A post-imperial cosmopolitan politics must start from what exists. What exists is, on one hand, the nation-state as the still prevalent political form vis-à-vis which human rights politics seems to be the most adequate one to trim off the excesses of authoritarian rule; on the other hand, an interstate system that has adopted human rights as a kind of international code of moral conduct. The contractions in the regulatory function of human rights must therefore be taken as the starting point for an emancipatory politics. Because they are experienced worldwide, albeit very differently, such contradictions bear the seeds of translocal intelligibility and the formation of cosmopolitan global coalitions. In their conventional conception, human rights are falsely universal because they are oblivious to the inequalities in the world system, the double standards, the multiple forms of gender domination and the different ways and degrees in which human rights are embedded in different cultures. It is up to cosmopolitan politics to transform such false universality into the new universality of cosmopolitanism. Human rights are a political Esperanto, which cosmopolitan politics must transform into a network of mutually intelligible native languages. (Ibid., 282)

It is clear that this "must" is a political imperative, not a philosophical necessity. Santos's treatment of the "conditions for such a transformation" reveal how philosophy is placed at the service of the political agenda:

> First of all, it is imperative to transcend the debate on universalism and cultural relativism. The debate is a inherently false debate, whose polar concepts are both and equally detrimental to an emancipatory conception of human rights. All cultures are relative, but cultural relativism as a philosophical posture, is wrong. All cultures aspire genuinely to ultimate, universal concerns and values, but cultural universalism, as a philosophical position, is wrong. Against universalism, we must propose cross-cultural dialogues on isomorphic concerns. Against relativism, we must develop cross-cultural procedural criteria to distinguish progressive politics from regressive politics, empowerment from disempowerment, emancipation from regulation. Neither universalism nor relativism must be argued for, but rather cosmopolitanism, that is to say, the globalization of moral and political concerns with and struggles against social oppression and human suffering. (Ibid., 271–2)

A further condition for cross-cultural dialogue is, in Santos's view, the development of rhetorical devices such as diatopical hermeneutics. Diatopical hermeneutics is based on the idea that the *topoi* of an individual culture are as incomplete as the culture itself. Incompleteness in a given culture must be assessed through the lens of another culture's *topoi*. The objective of diatopi-

cal hermeneutics is to make cultures cognizant of each other's incompleteness through a dialogue with one foot in one culture and the other in another, as by looking at the human rights *topos* in Western culture in comparison with *dharma topos* in Hindu culture or the *umma topos* in Islamic culture. In this way, diatopical hermeneutics makes it possible to see that the weakness of Western culture lies in its establishing too strong a dichotomy between the individual and society, thus becoming vulnerable to acquisitive individualism, narcissism, alienation, and anomie. The weakness of Hindu and Islamic culture, on this same analysis, lies in their failing to recognize that human suffering has an irreducible individual dimension that cannot adequately be addressed in a hierarchical society (like that of the Hindu caste system) or in a society (like the Islamic society) that does not recognize equality between men and women or between Muslims and non-Muslims (ibid., 272–4). As a consequence, "the cross-cultural reconstruction of human rights must involve some measure of *mestizaje* of alternative cultural meanings and conceptions of human dignity" (ibid., 286).[25]

[25] It should be mentioned here that also inspired by philosophical postmodernism is the critical legal theory advanced by the legal historian António Manuel Hespanha (2007).

Chapter 15

A HISTORICAL SURVEY OF LEGAL REASONING AND PHILOSOPHY IN GREECE DURING THE 20TH CENTURY

by Constantinos Stamatis

15.1. New Insights into Legal Reasoning and Philosophy

At the twilight of the 19th century, legal thinking in Greece was primarily premised on positivistic tenets, at times embroidered with law-of-nature ideas and idealistic beliefs. However, at the dawn of the 20th century some remarkable signs of rejuvenation in Greek legal science came into sight.

This is explained by the fact that the obsolete legal order in Greece was incapable of facilitating a modernization of social life, in the slow transition of Greek society into the industrial era (see Triantaphyllopoulos 1923, 219ff., and Zepos 1934, 1978). Similar issues of institutional revitalization had already preoccupied legal science in more-advanced European countries, after the famous revisionary breach of Rudolf von Jhering (1865). So these themes could stir themselves into a flurry in Greece by benefiting from a broader debate that was then unfolding in European legal thought (see Sourlas 1990, 785ff.).

In some writings that Elias Anastasiadis (1879–1949) published in the early 20th century, we can sense an innovative spirit in the matter of legal interpretation.[1] For him, formally logical, deductive justification is nugatory if it brushes aside the substantive aspects of the case in dispute. By contrast, he can be characterized as having propounded the view of the social conditioning of legal reasoning, placing him very much off the beaten track. Nevertheless, he was not yet in a position to articulate an alternative methodological model in any fairly consistent manner. In a disorderly and indiscriminate fashion, his work strung together completely divergent trends of thought, from Auguste Comte's positivistic social theory and claims of "legal socialism," to neo-Kantianism and metaphysics (in small traces), to the intuitionist philosophy of Henri Bergson.

He was mainly inspired by the anti-formalistic vogues of legal thinking on the European continent, spearheaded by François Gény in France and Joseph Kohler, Eugen Ehrlich, Hermann Kantorowicz, and Philip Heck, in Germany.[2]

[1] This is especially the case with *Nomika filosofimata* (Studies in legal philosophy: Anastasiadis 1927), originally published in 1910, with a second edition in 1927. Particularly noteworthy in this book is the chapter "I thetiki, elefthera ermineia tou dikaiou" (The positive or free interpretation of law).

[2] On Gény, Kantorowicz, Ehrlich, Kohler see respectively Sections 12.5, 3.1, 3.3, and 5.2 in this tome.

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In contraposition to the formalistic grounding of legal judgments, he proposed an "inductive" method for finding the applicable rule, a method proceeding by "observation" of related social phenomena. Somewhat vaguely, he suggested that in every legal matter the relevant source of law is ultimately to be sought not only by resorting to various kinds of legal texts or to deductively drawn syllogistic schemes, but also, and especially, by considering the social utility ascribable to the resulting legal solution (ibid., 60).

This kind of thinking perhaps bespeaks some confusion about the normative nature of law and of legal interpretation. Be that as it may, Anastasiadis ushered in a fresh perspective in legal reasoning. He declared himself in favour of an "objective" interpretation when it comes to determining the regulative purpose of the applicable statute, in a way that is receptive to the contribution of other social sciences.

A few years later, however, he grew sceptical about the rationality of legal reasoning. Under the influence of Bergson's vitalistic philosophy, he suggested that legal interpretation be carried out not only through the intellect but also through a reliance on intuition (see Anastasiadis 1927, 121). He regarded this suggestion as recognition that the application of law cannot be severed from the various manifestations of social life. In the same text, he expressed serious doubts as to whether legal methodology is at all possible (ibid., 115).

Anastasiadis's approach thus resulted in an inchoate view about law and legal reasoning, a view informed by the erroneous notion that society as an object of knowledge is inescapably enveloped in indeterminacy. In this frame of thought, it proved epistemologically quite impossible to find ways in which the social equivalent of legal rules or their social framework could be understood by the use of reason. Thus his attack on the rigidly positivistic legal thinking of his time remained incomplete and assailable.

15.2. The Free Interpretation of Law

In 1916 came a work that was much better conceived: Its author was Constantinos Triantaphyllopoulos (1881–1966) and its title *Elefthera ermineia tou dikaiou* (The free interpretation of law: Triantaphyllopoulos 1916). The thrust of his doctrine was that jurists needed new methodological insights on which basis to deal with the rapid social and economic developments of the time, as European societies were advancing toward industrialization (for a detailed analysis, see Stamatis 2002, 243–72). He placed special emphasis on the emergence of the "social question." Affirming the need to gradually reform bourgeois society, he urged judges to play a part in restraining the propensity of overly powerful enterprises toward "antisocial" behaviour (ibid., 30).

Triantaphyllopoulos rightly maintained that a modern legal system cannot be complete or gapless but will inevitably contain discontinuities and normative antinomies. He repeatedly underlined that the methodological core of the

free interpretation of law is mostly focused on filling legal gaps. Like Anastasiadis, he entertained an expansive view of the concept of a legal gap, including cases where the law is amenable to doubtful or contentious interpretation.

The interpreter is still bound by the law as long as the meaning of the rule is clear enough (ibid., 13). But whenever argumentation shows that the semantic content of the applicable norm is ambivalent or gives rise to some regulative gap, the judge must adopt the interpretation that leads to a practically useful outcome, congruent with the needs at stake in social life. The judge should not just analyze notions in the legal text but should also resort to ethical reasons, thus acting in a "crypto-sociological" guise (ibid., 6).

This original position remained unclear in Triantaphyllopoulos's thinking: It hadn't become clear to him that a sociological understanding of legal phenomena seeks a *descriptive* account of them, while recourse to "ethical reasons" for action is necessarily a *normative* undertaking. The question of how one can legitimately shift from one level to the other without committing a naturalistic fallacy as to the discrepancy between "is" and "ought" was left unaddressed by him.

Triantaphyllopoulos also argued that when a text is ambiguous, the interpreter ought to follow the solution most in keeping with "correct law" (Triantaphyllopoulos 1922, 23), following a neo-Kantian line of thought suggested by Rudolf Stammler.[3] In cases of legal gaps or of interpretive doubt, the judge is to proceed to free, unrestricted interpretation of the law, except in the proper qualification of acts under criminal law (ibid., 8). The interpreter, then, is to some extent freed from the putative preestablished legislative will if the conceptual core of that will happens to be difficult to pin down. Yet, even then, the judge should try to stretch the abstractly stipulated terms of the rule so that they can fit the specific social parameters of the case at hand. Indeed, the judge is not supposed to administer justice merely by reasoning on a case-by-case basis, for that would amount to sheer ad hocism (Triantaphyllopoulos 1916, 22).

The interpreter is in principle committed to applying the rule, unless that rule has fallen into disuse, as can happen with old legal rules that have turned out to be incompatible with currently valid law. Otherwise, legality would be severely undercut. Triantaphyllopoulos recognized that more intricate is the case where the interpreter stumbles on a law that seems *conceptually clear but substantively unjust*. He claimed that the remedy in this case lies in a duty for jurists to critically assess the unjust law, in order that the injustice may be tempered or dispensed with. Anyone, jurist or citizen, intent on pursuing such an unjust provision should expect to do so meeting at some point in that quest the so-called right to resistance, or even a right to revolt, if the circumstances are desperate enough (Triantaphyllopoulos 1922, 23).

[3] On Stammler, see Section 1.3 in this tome.

In the opinion of Triantaphyllopoulos, the appropriate method of legal interpretation is one that grasps the "common sentiment" about the law and to this end recognizes the importance of intuition. The judge must carefully weigh the conflicting interests at stake by taking into account all the relevant *bona mores* and economic, social, and moral features of the case at issue. The judge must in this sense aim for the solution that might have been adopted by the legislator (Triantaphyllopoulos 1916, 4–5). Since legislators rely on social considerations of public policy in framing the law, the judge would do well to fashion these considerations into legal criteria on which basis to interpret the rules they support.

Triantaphyllopoulos was fully aware of the criticism the *Freirechtsbewegung* (or free law movement) attracted in Germany and even in France.[4] The thrust of the criticism was that even if we acknowledge the shaping hand of the judiciary in construing the meaning of legal rules, this is not tantamount to acquiescing in "free" legal interpretation. A theory of "free" interpretation can in this sense be seen to bring with it a whole host of intractable difficulties, but two stand out. For one thing, the free interpretation of law claimed for judges would empower them to create new law, and that is inconsistent with the separation of powers. And, for another, it was claimed that the theory would translate into a practice dangerously close to unfettered judicial discretion; so the allegation was that free interpretation would morph into interpretive arbitrariness, which in turn would lead to legal uncertainty in social life.

To assuage such misgivings and rebut such objections, Triantaphyllopoulos responded that the objectivity of legal interpretation can in any event be secured so long as the interpreter is *committed to finding an appropriate solution* (Triantaphyllopoulos 1922, 22ff.). This means that judges must make sure their decisions hew to the overall spirit of a good legal order and are socially justifiable as well. Indeed, legal issues are at bottom *social* issues. And since jurists and judges are themselves participants in social life, it takes a combined use of the social sciences to work through those issues. So, what the author is suggesting, quite reasonably, is that the rightness of legal judgments ultimately lies in their historical embeddedness, in the advancement of modern societies toward social justice, beyond the formal equality of all before the law.

However, a few years later Triantaphyllopoulos would no longer deal with the problem of legal interpretation specifically but would content himself with a programmatic thesis no longer in tune with his initial methodological radicalism. He adhered to a crudely positivist conception of legal rules on which laws

[4] Two years later (in 1918), when Triantaphyllopoulos was appointed professor of civil law at the Athens School of Law, a similar line of criticism was directed against his own thesis. As we will see, the most powerful critical assessment of this movement in Greece is the one offered by Constantinos Tsatsos.

in general set forth imperatives understood as commands.[5] He claimed that in interpreting law, jurists should engage in *reproductive* (rather than creative) work. They should merely seek to ferret out a normative thought previously expressed by someone else, the legislator, and they are fully committed to the imperative baked into that thought. Jurists do not really find out anything new that has not already been textually spelled out by legislative volition, whether directly or indirectly.

This positivistic outlook sits poorly with his earlier view on correct law.[6] Indeed, as Rudolf Stammler illustrated, if laws are envisaged as commands, then too little room is left for the interpreter to meet the demands of justice.

15.3. The Formative Function of Jurisprudence

In 1932, Alexander Litzeropoulos (1903–1988) published a remarkable work, *I nomologia os paragon diaplaseos tou idiotikou dikaiou* (Jurisprudence as a formative factor of civil law: Litzeropoulos 1932). The book managed to resourcefully bring into a coherent view the best arguments developed by currents critical of legal positivistic reasoning, which by that time had become outmoded. His central idea was that judicial authority should properly play a significant ancillary role, next to the legislature, in shaping the general principles of law, in that judicial authority is entrusted with co-promoting, in the best possible manner, the general interests of society at large (see Litzeropoulos 1932, 8). According to Litzeropoulos, the judiciary may exceptionally deviate from legislative volition when it finds that the applicable rule hinders freedom of transaction or offends society's shared understanding of law and justice.

Litzeropoulos held a moderate view in comparison with the German free law movement or even with his own earlier theses. He argued that the judge must interpret the law by closely adhering to the fundamental principles underlying the legal order. As much as judges must still rely social (material or moral) utility as the principal criterion on which basis to frame legal solutions, they cannot discount the values embodied in existing legislation. The judge, in other words, must craft solutions that the legislature would itself enact as law (ibid., 9).

Subsequently, having satisfied that condition, the judge qua interpreter must evaluate the anticipated social consequences of the solution to be adopted, placing those considerations in the major premise of the syllogism. How-

[5] This is a view he set out in a short commentary titled *Dikaion* (law: Triantaphyllopoulos 1932).

[6] See especially Triantaphyllopoulos 1926. The very same year, Panayotis Kanellopoulos published a book titled *Peri tis ennoias tou diethnous dikaiou apo criticofilosofikis apopseos* (On the concept of international law from a critical-philosophical point of view: Kanellopoulos 1926), which, too, was cast in the mould of Stammler's neo-Kantian philosophy of law.

ever, the teleological argumentation deployed to this end must cohere with the aims of the legislation at issue, and must be interwoven with the overarching aims of legislation at large. In Greece, where Roman law was still formally in force, and yet was historically defunct, the ethos of the country was much better reflected in the recent laws, the ones passed by the parliament. For this reason Roman-Byzantine legislation was being abundantly complemented or deeply revised (see Papachristos 1975, 15–20).

In borderline cases, the interpreter must also take into account a complex of elements that lie beyond the legislative realm *stricto sensu*, such as society's shared consciousness in the matter of law and morality and the potential social utility of one solution relative to another (Litzeropoulos 1932, 100). Reasoning along these lines, Litzeropoulos held back from a wholehearted espousal of the free law movement, in Greece or abroad. He would definitely not subscribe to the vague and politically contentious view that the law is simply a regulatory device for judges and interpreters to use at their own discretion, so long as they head the people's shared understandings about law and justice.[7]

It bears mentioning that when Litzeropoulos appealed to society's shared consciousness about law and morality, he had a narrower purpose in mind, which was to legitimize the lawmakers' effort to bring *urgent* changes to the legal system. Indeed, the cliché in the interwar period was that Roman-Byzantine law had by then grown so outdated, it proved utterly ill-equipped as a basis on which to provide a contemporary and flexible corpus of rules, in a rapidly growing society,[8] with an outward-looking market economy dependent on the global market. Litzeropoulos's appeal to society's shared consciousness about law thus served an ideological reformative purpose: It was functional to the view that the state, and in particular the legislature, ought to be responsive to social needs and expectations, especially in light of the consideration that these went unanswered by the country's legal system.[9]

15.4. A Teleological Model of Legal Interpretation

In 1932, a veritably compelling book came out that enriched Greek legal reasoning by introducing an unquestionably original conception for its time: Its author was Constantinos Tsatsos (1899–1987), who in *To provlima tis ermineias tou dikaiou* (The problem of legal interpretation: Tsatsos 1932) offered a robust model departing from both formalistic legal reasoning and the free law movement.

[7] This view can be found, among other places, in the work of the Greek legal thinker Georgios Daskalakis, who in those years followed the *Freirechtsschule* (see Daskalakis 1940, 456ff.).

[8] This phenomenon is aptly described in Lampiris 1923.

[9] Not all authors, however, supported that reform agenda. See, for instance, Balis's quite restrictive account of gaps in the law (Balis 1937, 23ff.).

Running all through Tsatsos's thought are the themes developed by the vast neo-Kantian current, though he was especially influenced by the neo-Kantianism of Heinrich Rickert.[10] Legal science is set in contrast to the natural sciences by virtue of its being "historical, practical, and spiritual," and to the (descriptive) social sciences—such as economics, sociology, and psychology—by virtue of its being normative (Tsatsos 1932, 32).[11] Positive law does not *describe* social reality: It normatively sets out the way the latter *ought to* be fashioned by law. And since embedded in positive law is the aim of its own application over time, positive law gains a normative autonomy from the volition of the historical legislator.

But humans are prone to violate their own freedom—incapable as they are to act enduringly in compliance with imperatives of reason that they themselves select—and the legal order must therefore constrain that freedom. This makes the legal order heteronomous, but Tsatsos saw this heteronomy as a rational response to that human weakness, and so as a morally and politically justified response (ibid., 53–61). Positive law is in this sense legitimized in marking out spheres of freedom mediated by the state as a way to ensure social coexistence, using the state's coercive powers if the occasion calls for it.

The work of the legislator and the legal interpreter alike requires in every instance some interpretation of existing law (ibid., 88). Either the lawmaker or the interpreter (the judge or jurist) has to identify proper ends for the regulative content of legal norms by looking at their systemic entwinement within the legal order. The interpretive assumption is that the legal order is axiological and teleological through and through (ibid., chap. 2). It follows that legal reasoning is underpinned by *a deeper nexus unifying all fields of positive law*. The interpreter must make sense of the enacted statutes in light of the regulative ends they encapsulate, and there is no way to appreciate those ends without taking into account the crowning values (or principles) overtopping the given legal order (ibid., chap. 3).[12]

The meaning of laws lies in the regulative purpose they each have in their interplay with the ends served by rules of higher rank, in virtue of which concrete rules can be meaningfully justified. Tsatsos subscribed to an especially broad concept of "teleological" legal interpretation: This wasn't just another method of interpretation next to the others—the grammatical, the historical, the logical, and the systematic—but was rather legal interpretation itself, period (ibid., 24, 131, 141). Indeed, the legal order as a whole was conceived

[10] This can be appreciated from the outset, in his doctoral dissertation, which he defended in Heidelberg: See Tsatsos 1927. On Rickert see Section 1.1 in this tome.

[11] See also Tsatsos 1929, 201–39. This was in contrast to Frangiscos Valindas, whose unbending philosophical nominalism and sociological positivism led him to embrace a conception of legal science as a *positive* science (see Valindas 1930).

[12] See also the useful comments in Sourlas 1978.

by him as a stratified web of legislative ends endowed with coercive authority: It was the historical concretization of the "idea of law." Encapsulated in this idea, as he understood it, was an objective value, figuring as a rational prerequisite of any legal judgment (ibid., 28–30).

But Tsatsos's "idea of law" appears to be philosophically ambiguous, since it has all the makings of a postulate of *practical* reason, and yet he introduced it as an idea of *theoretical* reason. What is more, this conception carries conservative overtones, since it foregrounds legal coercion as the single most significant element in which to ground the external regulation of freedom in society. It bears pointing out that such external regulation of freedom within a polity was *itself* the thing he called "heteronomy": He took no broader view of that concept. Totally absent from this account was the Kantian foundation of a modern republic grounded in the united will of the people as *co-legislating* subjects—the most highly valuable form of political self-determination for the people. So, as much as Tsatsos may have been right to make the case for legal coercion as a general condition for the possibility of freedom in a political community, he neglected to say anything about the basis on which such coercion (the exercise of state power) can be legitimized.

It is perhaps for this reason that Tsatsos's thought subsequently swung in quite the opposite direction, away from Kant's critical idealism to Plato's dogmatic metaphysics.[13] Exemplary in this regard—arguably the moment that best illustrates Tsatsos's philosophical and ultimately political disaffection with Kantian critical philosophy in the post-war years—was his espousal of the premodern idea, unreservedly conservative and distinctly Platonic, of a polity helmed by enlightened "royal men"[14] not bound by the rules of positive law. This stance sparked the trenchant criticism of an eminent constitutional law scholar, Aristovoulos Manessis (1921–2000),[15] who approached the question from the angle of the fundamental principles of liberal democracy, defending the lawful exercise of state power under the citizenry's constant oversight.

One of the precious insights that Tsatsos left to posterity in legal reasoning lies in the distinction he introduced between, on the one hand, code law (enacted statutes) and the principles underpinning the legal order and, on the other, the specific norms *inferred* through interpretation (Tsatsos 1932, 117 and 235). Although Tsatsos took up in the main Savigny's classic set of four methods in legal reasoning, he reformulated it in a quite inventive and coherent manner (ibid., 110–45).[16] Neither the putative literal interpretation (or

[13] An extensive account of this transition can be found in Stamatis 1984, 259ff.

[14] That designation comes from an article by Tsatsos that bears that very title, *Oi Vassilikoi Andres* (Royal men: Tsatsos 1963). See also the lecture he delivered at the Academy of Athens under the title *Oi antinomies tou praktikou Logou* (The antinomies of practical reason: Tsatsos 1962).

[15] The criticism is laid out in a famous pamphlet by Manessis (1963) titled *Kai palin peri Vassilikon Andron* (On royal men once again).

[16] On Savigny see Section 21.3 in Tome 2 of this volume.

"plain meaning") of the law nor the legislative intent (the will of the actual legislator) suffice as a basis on which to arrive at an adequate understanding of the statutes. Interpretation makes it necessary to *systemically* integrate valid rules into the teleological fabric of the legal order. Jurists ought to interpret the law *as a whole*, as if the existing legal order were coherent and complete (even while recognizing that it is not): Solutions offered in legal matters must be congruent with the systematic articulation and *teleological integrity* of the legal order (ibid., chap. 4).

Defending the idea of a "deontological completeness of law" (ibid., 214; my translation), Tsatsos suggested that to interpret the law is generally to arrive at a *more concrete norm not explicitly laid down by any legislator*. As he keenly observed, the interpretive process imparts to rules the shape of regulative enclosures within which each rule finds its place in multiple alternatives corresponding to various subcategories of cases.

And yet, as he correctly pointed out, this work is carried out by interpreters relying on an intermediary norm whose meaning, by contrast, can only be one: It needs to be univocal. If we rejected this rationale, we would foreclose the possibility of reaching anything like the best solution, by which he means the solution that is best *relative to the ones put forward*. That is the import of the view defended by Tsatsos that for every legal problem under any system of positive law there can only be a *single correct solution*: It means that there must be a solution which turns out to be better than any of the ones that suggest themselves as plausible (Tsatsos 1932, 200 and 257). As was previously noted, a similar view had previously been expressed by Triantaphyllopoulos, arguing that the interpreter has to look at all possible solutions and identify the one offering the best rendition of "correct law." This turned out to be a particularly prescient thesis, considering that it would be made famous several years later by Ronald Dworkin, among others.

In contrast to Triantaphyllopoulos, Tsatsos rightly held that the law constrains the judge even when the task at hand is to fill *gaps* in the law: Judges are bound by the general principles of law or by a statute that is to be applied by analogy, or both. So, under no circumstances is it correct to speak of a "free interpretation of law" or of the judges' discretionary authority, since legal interpretation is an inherently rule-bound activity. Accordingly, Tsatsos held that legal reasoning properly understood should not resort to "extralegal" criteria (ibid., 236–7). Whenever the law invokes economic and social yardsticks (moral standards, business ethics, and the like), usually tacitly, these already form part of the normative range of the existing legal order.

15.5. A Positivist Marxist Theory of Law and Legal Reasoning

Although Yanis Kordatos (1891–1961) studied law, it is especially for his work in history that he gained renown. His thought on legal theory is less known.

The most significant work in this area is *Eisagogi eis tin epistimin tou dikaiou* (Introduction to legal science: Kordatos 1939), published under the Metaxas dictatorship (which ran from 1936 to 1941).

It is commonly accepted that science pursues objective truth. Kordatos took this to mean that we must look for the laws of movement governing the objective world, and that we must do so from a materialistic worldview, understanding the manifold intellectual manifestations as reflections of material relationships. It also means that we must try to understand and classify social phenomena by reference to causal relationships. To do science is essentially to correlate cause and effect, through a knowledge of nature and society alike. These tenets situate Kordatos in the *positivist* Marxism of the Second International, the predominant Marxist current in the first half of the 20th century.[17]

Kordatos was influenced by the Russian Marxist Nikolai Bucharin (1888–1938) and came to view sociology as the queen of the humanities. Therefore, when it comes to the study of legal and political phenomena, only the history and sociology of law can rise to the rank of authentic science. The rest of legal science, by contrast, is reduced to a *philological* understanding of existing statutes. The subject matter of legal science is not freely determined by jurists but is produced by authority of the legislative will. The implementation of law is a simple empirical endeavour (Stamatis 1989, chap. 1). It is aimed, not at discovering the truth of things, but simply at carrying out the legislator's will in a given legal order. It follows that what is described as "legal science" is at bottom *devoid of scientific credentials* (ibid., 15).

It is rather odd, in light of Kordatos's Marxist background and outlook, that he should have gone to great efforts to find a "pure" definition of the object of legal science (ibid., 40–1). And he located that object in the idea that law and the state constitute a legal and political superstructure erected atop the economic and material infrastructure in every class society. However, in the superstructure of society he included both law and legal thought without distinguishing between the two, on the premise that they share a focal feature, in that both are merely ideological: No less than positive law, theories of law express ideas reflecting the material substratum of each society (ibid., 17–8). Kordatos wholly neglected the *normative nature* of both law and legal science. Indeed, following his reasoning, if the humanities can be regarded as scientifically sound only to the extent that they set out to uncover chains of causes and effects, then no science worthy of that name can have a normative or deontological bent.

Kordatos held that in any class society with private ownership, law and the state will remain firmly ensconced in their essential nature, since they function as complex *instruments of domination* serving the interest of the ruling class (ibid., 19). This explains why he was chasing after a "pure" definition of law

[17] For further commentary, see Stamatis 1989, esp. chap. 1.

and the state. That endeavour evinces a latent crude historicism, viewing social processes in the abstract through the lens of a grand conceptual scheme in which to fit them. Thus, for example, he summarily projected the modern categories of legal thought onto the pre-bourgeois past, a case in point being the distinction between the public and private spheres of society (ibid., 23) or the concepts of rights and of a subject of law (i.e., a legal person or a subject of rights). More to the point, he lacked an adequate understanding of the historical conditions for the formation of bourgeois societies, thus failing to appreciate the relative separation of the state machinery from society.

Kordatos saw law and the state as integral to an apparatus of oppression. For this reason there was no point in looking for the conditions that would *legitimize* them in the eyes of the oppressed classes. But this attitude set the stage for other problems; thus, for example, he attached next to no significance to individual and political freedoms, all the while ignoring the role of a modern legal system in providing basic safeguards, just as he failed to recognize the import of equality and freedom for all citizens irrespective of class or status (ibid., chap. 2). The judge, on his conception, is bound to closely implement the legislator's will, but the content of that will, at its bare essence, comes down to what the ruling class wills in social and legal matters (ibid., 208–10).

Also discounted by Kordatos was the *argumentative* nature of legal interpretation, with the result that, in his view, the very possibility of reaching legal judgments by any *rational* process was out of the question. Working away in the background here was the view that justice and rationality are no more than illusory bourgeois conceits. Even in this light, his analysis did not avoid some glaring contradictions (ibid., chap. 3).

So on the one hand he embraced a formalistic approach to legal reasoning, incorrectly believing that judges should go about interpreting rules solely on the basis of a philological and quasi-mechanical analysis of legal concepts (ibid., 15). But on the other hand he surprisingly nudged the judiciary toward catering to the needs of society (ibid., 202), yet this would prove to be an idle exercise in light of his previous definition of legal interpretation as a merely philological enterprise. Indeed, if the interpretation of legal rules is strictly philological, it will likely be insensitive to their fairness or to the way they might shape their social surroundings.

Similarly, having ascribed to judges a role as mechanical reproducers of the legislator's will (ibid., 29), Kordatos denied that they can be held morally or politically accountable for the judgments they render. But then he invested judges with just such a responsibility (ibid., 30), and that without offering any indication as to how such responsibility was supposed to play out in concrete terms. The problem here is that a deeper contradiction is lurking behind the explicit one just pointed out, in that from the outset he had contended that genuine science can only concern itself with *explanatory* schemes purporting to relate causes and effects: It cannot dwell on *practical* principles in light of

which to guide human action, and yet that is precisely what the idea of the judge's responsibility involves. Not to mention that Kordatos came to believe that the judge acts as an agent of the dominant social system and is thus committed to carrying out the will of the ruling class (ibid., 25, 96). But that view can hardly be reconciled with Kordatos's exhortation—a justified one this time—that the judge should not cave in to the wealthy elite (ibid., 30).

In short, Kordatos's *Eisagogi eis tin epistimin tou dikaiou* clearly conveys a dire pessimism about the law of bourgeois society and its historical development. In fairness to him, it must be pointed out that he was writing at a time when dictatorial or fascist regimes had risen to power across much of Europe, including Greece. And so his profoundly bleak outlook no doubt came in response to the destructive historical development he witnessed in the interwar period.

Even so, this awful tract of history cannot fully account for the weaknesses of his theory: His thinking simply echoed the theoretical shortcomings of the prevailing Marxist current of the time, namely, "scientific" socialism. His sociological viewpoint committed him to an *external* critique of law as having no role other than as an organ of class rule. And this analytical lens limited his field of vision in such a way as to prevent him from seeing or accommodating any other function of law, much less a positive one.

15.6. The Period after World War II

In the years following World War II, Constantinos Tsatsos abandoned academia and devoted himself to politics, rising to prominence in the country's conservative political establishment.[18] As to legal philosophy, however, he did introduce some considerations of note in the epilogue to the (unchanged) second edition of the previously discussed *To provlima tis ermineias tou dikaiou* (The problem of legal interpretation: Tsatsos 1978).

More to the point, while he held on to the "idea of law" as central to his thought, he did make that idea more perspicuous by remarking that it was to be understood as coinciding with the idea of justice. On the latter idea,

> everyone ought to be in command of the self, being free to act rightly, so that all can creatively develop various capabilities in society. No one should be deprived of this primary *facultas agendi*, not on account of their background or (fragile) economic status or, more generally, on account of the material aspects of social coexistence (Tsatsos 1978, 265; my translation).

Two elements here need to be singled out for praise: first, the inherent link between moral autonomy and acting rightly, as opposed to just doing whatever the agent happens to choose, and, second, the correlation between autonomy

[18] Just after the fall of the military dictatorship (1967–1974), he served as one of the framers of the new constitution, enacted in 1975: see Tsatsos 1988.

and some supportive material foothold in life for all, suggesting that the social product ought to be redistributed as a condition for social welfare.

In the post–World War II era, legal reasoning in Greece began to branch out into various areas of law, endowing them with a certain methodological awareness. And even though this appreciation was slow to develop and bear fruit, there are some outstanding figures, notably Themistocles Tsatsos, Emmanuel Michelakis, Constantinos Despotopoulos, Georgios Michailidis-Nouaros, Yanis Aravantinos (see Aravantinos 1974, 1983), and Georgios Mitsopoulos. All of the authors in this group were to a greater or lesser extent influenced by Constantinos Tsatsos's neo-Kantian teaching, the only exception being his own brother, Themistocles Tsatsos, whose intellectual background was instead neo-Hegelian.

This situation has been appreciably improving since the 1980s: The landscape in legal reasoning in Greece has since been growing richer with a good many law-review articles and studies, published either as original research (in Greek) or as translations from other languages, in an effort to connect anew with contemporary developments in legal methodology internationally (see especially Sourlas 1989, 1995, and 2011 and Stamatis 1995, 1999). In parallel, philosophical reflection on law is again picking up steam, with authors of Kantian persuasion like Pavlos Sourlas, Yanis Strangas, Constantinos Papageorgiou, and Constantinos Stamatis.[19]

[19] Following is a selection of recent books by Greek legal theorists, published in English, German, or French: Chanos 1994, Despotopoulos 1983, 1997; Douzinas 2000, Mitsopoulos 1967, Paparrigopoulos 1993, Papageorgiou 1994, Paroussis 1995, Roumeliotis 1994, Sourlas 2011, Stamatis 1995, Stavropoulos 1996, Strangas 1988.

Part Three

The Eastern European Countries

Chapter 16

20TH-CENTURY LEGAL THEORY AND PHILOSOPHY IN POLAND

by Tomasz Gizbert-Studnicki, Krzysztof Płeszka, and Jan Woleński

16.1. Introduction[1]

In general, Polish philosophy has gone through the same phases as has the rest of the Western world. This does not apply to antiquity, of course, but it does hold true for the Middle Ages, the Renaissance, the Reformation, modernity (the 17th century), the Enlightenment, and the 19th and 20th centuries.[2] Philosophy in Poland saw similar problems and currents as those dominant in the mainstream of philosophy in the Western world. However, there have also been some distinctive features. For example, due to the peculiarities of Polish social and political history, Scholasticism and Renaissance thought appeared in Poland later than in Western Europe. This delay was characteristic in further phases, too. Thus, for example, the Enlightenment and Romanticism flourished in Poland later than in France, Germany, or England. The situation changed in the 20th century, when Polish philosophy engaged fully with world philosophy. However, the specific situation just mentioned caused Polish philosophy to be always fairly pluralistic, with several ideas simultaneously at work, very often in conflict.

Many Polish philosophers of the 15th century were interested in political-legal issues. Since many Poles studied in Prague at that time, they were strongly influenced by Prague's late Scholasticism, very sympathetic to views of John Wyclife. In particular, Mateusz of Kraków (ca. 1345–1410), Paweł Włodkowic (Paulus Wladimirus, ca. 1369–ca. 1443), and Benedykt Hesse (ca. 1389–1456) took a very active part in the debate between curialists (defending the supremacy of the Pope over the Council) and conciliarists (arguing

[1] Since the preceding volumes of this *Treatise* do not discuss legal thought in central and eastern Europe, we will be making some remarks about the development of legal theory and philosophy in Poland before the 20th century, but only covering the most important points.

[2] For an overview of the history of Polish philosophy, see Jordan 1963 (post-1945), Krzywicki-Herburt 1967, Szaniawski 1980 (post-1945), Kuderowicz 1988, Gogacz and Ślipko 1996, Coniglione 1996, Czerkawski, Stępień, and Wielgus 1998, and Woleński 2003. Unfortunately, there is no survey of the history of Polish legal theory and philosophy available in any Western language. People familiar with Polish can look at Opałek and Wolter 1948 (its first part written by Opałek)—in fact, this is the only work entirely devoted to this subject. Some information can be found in Wagner 1970. Further, I will not quote secondary writings on legal philosophy in Poland published in Polish. Moreover, with only very few exceptions, works published before 1900 are mentioned in the running text without full bibliographical information.

E. Pattaro, C. Roversi (eds.), *A Treatise of Legal Philosophy and General Jurisprudence*,
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that the Council is the highest authority in the Roman Catholic Church). The mentioned Poles (and other as well) belonged to the concilliarist camp. The most important Polish contribution to legal philosophy in the Middle Ages was connected with Poland's conflict with the Teutonic Knights, who were defeated at the Battle of Grunwald in 1410. The knights accused the Polish king, Władysław Jagiełło, claiming that he should not bring pagans into his troops: They argued that the enlistment of pagans to fight against Christians violated the rules of *bellum iustum* (just war). The case was brought before the Council of Constance (1414–1418). The Polish arguments were first presented by Stanisław of Skarbimierz (?–ca. 1431) in his speech *De bellis iustis* (1410), and then in Paweł Włodkowic's 1415 treatise *Tractatus de potestate pape et imperatoris respectu infidelium* (Treatise on the Pope's power with respect to pagans). Włodkowic very painstakingly fleshed out the concept of *bellum iustum*. Following in the footsteps of Stanisław of Skarbimierz, he argued that every war in defence of one's homeland is just and every aggression unjust. Furthermore, military force cannot be used to convert people to Christianity. Włodkowic also defended the principle of tolerance and said that pagans should be left in peace if they lived by the general rules of Christian morality. His treatise was very important to the development of international law.

The 16th century is usually referred to as the golden age of Polish culture. This remarkable period was a result of favorable political and social circumstances. Poland—or, more precisely, the Polish-Lithuanian Commonwealth—was a large, rich, and strong country. The Reformation was another important factor. A considerable part of the Polish nobility adopted Calvinism, but Lutheranism became popular in the towns. The 16th century was a period of outstanding toleration in Poland, greater than in other European countries. The Polish people, nobility and burghers alike, had a free choice of religion. This was the context for the rise of the Polish Brethren (*Fratri Polonori*, also called Socians or Arians), the most radical Calvinist group in Poland. Their philosophy rejected violence and defended tolerance. The Polish Brethren were expelled from Poland in the 17th century. They emigrated to the Netherlands and became very popular there as well as in England. In particular, they strongly influenced Grotius, Spinoza, and Locke. Although Poland flourished in the 16th century, this is also the time when the first signs of political crisis began to emerge. Several authors accordingly proposed reforms of the state and society. Andrzej Frycz-Modrzewski (1503–1572) was the most important Polish political writer and theorist of the state in the Renaissance period. He wrote a treatise called *De Republica emendanda* (On the improvement of the Republic, published in Basel in 1554). This book diagnoses the social structure of Poland and puts forward a program for reform. The points are as follows: equality before the law for all citizens, tolerance, the legal protection of peasants, privileges for burghers as concerns trade and the crafts, the separation of Church and state, conciliarism in both institutions, a stable tax system, educa-

tion as a starting point for public activity, and a peaceful foreign policy. Modrzewski's program was well known in Europe, especially in Switzerland and Spain.

The Counter-Reformation triumphed in Poland in the 17th century, even though the country was still more tolerant than most of Europe. The political and economic crisis was becoming increasingly palpable: Poland gradually waned as a political power, and education and philosophy were entirely post-Scholastic, so much so that the great systems of rationalism and empiricism were almost unknown in Poland. The situation changed in the second half of the 18th century. Since the country was facing the threat of the aggressive policies of Russia, Prussia, and Austria, the leading representatives of the Polish Enlightenment, influenced by French, German, English, and Scottish thought, focused on political philosophy, social ethics, and the theory of the state. At least two authors deserve mention here. The first of these is Hieronim Stroynowski (1752–1815), who in 1785 published a book titled *Nauka prawa przyrodzonego politycznego, ekonomiki politycznej i prawa narodów* (The science of natural law, of political economy, and of the law of nations). This work is an attempt at summarizing the problems singled out in its title. Stroynowski followed the French doctrine in its deistic version. He proceeded from the economic theory of physiocracy and accordingly viewed moral and physical principles as parallel and necessary; legal rules must be consistent with universal morality. The second of the authors, Hugo Kołłątaj (1750–1812), was perhaps the most original Enlightenment thinker in Poland. His book *Porządek fizyczno-moralny* (The physical-moral order, of 1810) contains a very extensive philosophical system. Although Kołłątaj was also a deist, his conception was more radical than Stroynowski's. In particular, he considered the physical order to be genetically more basic than the moral one. Relying on physiocracy, Kołłątaj deduced the priority of nature from the fact that the earth and its fruits are ontologically basic. Thus, the moral and legal orders—moral and legal duties and rights—are constituted on the basis of the physical structure of reality. Kołłątaj was a social optimist. He believed in an automatic progress of humanity. This view anticipated positivism.

Poland eventually lost its independence in 1795, when it was partitioned among Prussia, Russia, and Austria (earlier partitions took place in 1791 and 1793). The annexation period (lasting until 1918) was very hard on academic life in Poland.[3] Poland had three universities before 1795: in Kraków, Vilna, and Lvov.[4] In broad outline, these universities were either closed (Vilna) or

[3] Poland is actually a misnomer here, we should rather speak of the Polish territories in the period from 1795 to 1918. But since it is customary to refer to them by the name of the country (even for that period), we too will follow that practice.

[4] There is a problem here when it comes to the proper way to spell the name for these last two cities (a problem with political undertones). The Polish spellings are *Wilno* and *Lwów*, the

Germanized until the 1870s (Kraków and Lvov); the University of Warsaw was established in 1816, closed in 1831, reopened in 1857 as the main school, and closed once again in 1869; the Prussian (later German) government almost completely blotted out Polish intellectual life in its territory. Another factor that slowed down the development of legal thought in Poland lay in the fact that the country lacked a legal system of its own. The occupiers introduced their own law, and part of the country adopted the Code Napoléon. In some works by Polish historians of law, one can find traces of the German historical school. The situation improved after 1870, particularly in the Austrian part of the country (where Kraków and Lvov were located). The liberalization of the Habsburg monarchy resulted in a re-Polonization of the universities and in systematic investigations even in legal philosophy. In 1887, in a book called *Zadanie filozofii prawa i jej stanowisko w dziedzinie nauk prawnych* (The task of legal philosophy and its place in jurisprudence), Franciszek Kasparek (1844–1903) offered a typical example of legal positivism. He thought legal philosophy should set out general concepts for the doctrinal study of law. Ludwik Gumplowicz (1838–1909), associate professor in Graz, developed an innovative theory of the origins of the state, a theory he set out in several writings, including the 1883 *Der Rassenkampf* (The racial struggle). Philosophically, Gumplowicz was a positivist and a social determinist: He thought individual life is determined by people's participation in social groups, and that society develops by a mechanism of conflict among races. But races were understood by him as sociological constructs, not biological ones. On this theory, states arise as results of conflicts between races.[5] Edmund Krzymuski (1852–1928), professor of criminal law in Kraków, worked in the tradition of legal Kantianism and through his lectures popularized legal philosophy.

16.2. The Period from 1900 to 1939[6]

The situation of Polish intellectuals gradually improved during the last thirty years of the 19th century; even the German territory had some Polish research institutions, such as societies and libraries. The best conditions were in the

Lithuanian spelling is *Vilnius*, and the Ukrainian is *Lviv*. We have decided to use the English-sounding words *Vilna* and *Lvov* because they tend not to stir up nationalistic sentiments. We do understand that using Polish words can sound offensive to Lithuanian or Ukrainian speakers, but neither the Lithuanian nor the Ukrainian spelling would be justified here, because we are reporting on times when Vilna and Lvov were Polish cities.

[5] Gumplowicz's ideas are discussed from different angles in the articles in Brix 1986.

[6] We are dividing the 20th century into two periods, namely, 1900–1939 and 1945–2000. Although this division is obvious and particularly important in the case of Poland, it is perhaps interesting that not everyone perceives it that way. Consider, by way of example, that the National Library in Warsaw once received from a South American country a complaint that subscriptions to Polish scholarly journals were unavailable for the period from 1939 to 1945.

Austrian part. Both universities (in Kraków and in Lvov) were completely Polonized, and the Polish Academy of Science and Letters (located in Kraków) became another academic centre. Warsaw was in worse shape because it had no Polish university. The Russian Imperial University was not very popular among Poles and did not contribute to Polish culture in any significant way. On the other hand, Warsaw had an advanced system of quasi-academic teaching, as well as remarkable publishing activities; the Warsaw Scientific Society, established in 1907, became the most important academic centre in the Russian territory before World War I. However, these institutions did not suffice for a normal development of science and the humanities in Poland. Legal philosophy was in even worse shape than other fields, this owing to the lack of any national legal system. We can note two works in the philosophy of criminal law, namely, *Einführung in der Philosophie des Strafrechts auf Entwicklungsgeschichtlicher Grundlagen* (Introduction to criminal law on the basis of its historical development), published by Juliusz Makarewicz (1880–1955) in 1906 (Makarewicz 1906), and *Podstawy filozofii prawa karnego* (The foundations of the philosophy of criminal law: Makowski 1917), published by Wacław Makowski (1880–1942) in 1917, who subsequently also published a treatise devoted to the theory of state (Makowski 1939). Makarewicz successfully used the comparative method, but Makowski's treatment sought to integrate criminal law, psychology, and sociology. These works, addressing some rather specific problems of jurisprudence, are the first Polish attempts to apply neoscholasticism to law, and together they practically accounted for the whole of legal philosophy in Poland (or rather, *within* Poland) before 1914.

It was Leon Petrażycki (1867–1931) who gave Polish jurisprudence international recognition.[7] According to Petrażycki, legal theory (a label he preferred to *legal philosophy*, especially in his later works) needs to be set on new methodological and theoretical foundations. In particular, legal theory should serve what Petrażycki called legal politics, a practical science of his own devising that deals with the social effects of law. He justified the need for legal politics relatively early on, in his analysis of the *Bürgerliches Gesetzbuch* (or BGB, the German Civil Code), an analysis presented in his work *Die Lehre von Einkommen: Vom Standpunkt des gemeinen Civilrechtes unter Berücksichtung des Entwurfs eines bürgerlichen Gesetzbuches für das Deutsche Reich* (The theory of income. From the perspective of common civil law taking into account the draft of civil code of German state: Petrażycki 1893). Although the BGB would be completed only later, in 1896, and would not be promulgated until 1900, the debate had

[7] *Petrażycki* is the Polish spelling. One can also find *Petrazycky* and *Petrazhycki*. He was born to a Polish family and studied medicine and law in Kiev and law in Berlin. He was professor in St. Petersburg from 1898 to 1917 and in Warszawa from 1919 to 1931. Petrażycki belongs to the history of Russian as well as Polish legal philosophy. On Petrażycki, see also Chapter 18 in Tome 2 of this volume.

been going on for a long time. This civil code was considered extremely important, serving as the national compact and as a symbol of Germany's unification. Petrażycki argued that this project to codify and unify German civil law was too abstract and ignored economic needs. This criticism was partly accepted, partly strongly rejected, but its young proponent became famous in German legal circles. Petrażycki was an expert in Roman law, but his views were rather influenced by civil law. He maintained that Roman law satisfied economic needs very well, due to its spontaneous conformity with social facts, but this was by and large impossible in the reality of the late 19th century, its economic and social fabric being much more complicated. Petrażycki criticized the legal theory of his time for being unable to fulfil its principal task, that is, to serve as the basis of legal politics. This, he thought, is because legal theoreticians have no scientific concept of law. They use a notion that can be called "law juristically understood," a notion which may well be suitable for some practical purposes and is accepted by most jurists, but which cannot play a role as a correct theoretical category. For example, if we define law as a system of norms issued in accordance with a legal procedure, we will have a circular definition.

Having set out his criticism of the *Bürgerliches Gesetzbuch*, Petrażycki went on to elaborate his own legal theory. This was done in his two main books: *Vvedenie v izučenie prava i nravstvennosti: Osnovy emocjonaln'oj psychologii* (Introduction to the science of law and morality: The foundations of emotional psychology, Petrażycki 1905) and *Tieorija prava i gosudarstva v svjazi s teoriej nravstvennosti* (The theory of law and the state in connection with the theory of morality: Petrażycki 1907a).[8] His project comprised the following parts: (*a*) the logical and methodological foundations of science, (*b*) the identification of law as a real phenomenon, (*c*) the relation between law and morality, (*d*) general sociology, and (*e*) legal politics. Parts (*a*) through (*c*) were developed by Petrażycki himself; parts (*e*) and (*d*), by contrast, must be reconstructed from various sources, bearing in mind that we have much more material pertaining to the former than to the latter. Petrażycki held certain definite general philosophical views.[9] He was a radical empiricist in epistemology. His ontology posited the category of reality as basic. On the basis of these views,

[8] These two books form the basis of our account of Petrażycki's views. None of Petrażycki's major writings are accessible in English in full. Some fragments are translated in Petrażycki 1955, which also contains a useful introduction by N. S. Timasheff. A summary of some of Petrażycki's views about law and morality is outlined in German in Petrażycki 1907b. The methodological part of Petrażycki 1905 has been translated in German as Petrażycki 1933. A Polish translation of Petrażycki 1905 was published in 1930. Polish translations of several other of his works appeared after 1956. For the secondary literature (books only), see Baum 1967, Górecki 1975, and Motyka 2007.

[9] To be sure, Petrażycki did not publish any extensive philosophical work in his lifetime, but his major books contain many philosophical fragments. Moreover, he left many philosophical manuscripts in Polish, published after his death, including ones on Kant and the categories.

Petrażycki strongly rejected all forms of transcendentalism, especially in the Kantian sense. The two main ontological theories, for Petrażycki, are materialism and idealism. Both are presumably possible, but materialism offers a better ontology. Since the category of the real comprises the physical and the psychical, materialism implies that the latter can be reduced to the former. The theory of reality exhausts theoretical philosophy. Practical philosophy is the second philosophical field, and it formulates various norms.

This distinction between the theoretical and the practical is connected with two kinds of propositions: one kind Petrażycki calls objective-cognitive (*obiektywno-poznawcze*) and the other subjective-relational (*subiektywno-stosunkowe*). Whereas propositions of the former sort assert the existence of objects and their properties, those in the latter group expresses the attitudes (such as likes and dislikes and acts of will) that one may have to something existing or imagined. Petrażycki identified the practical with the normative, and so he spoke of normative sciences. On the other hand, he distinguished between fundamental norms (*normy zasadnicze*) and teleological norms (*normy celowościowe*). Only teleological norms can be validated in a scientific way, so we cannot proceed on that basis in grounding the basic values, such as goodness or justice. On the other hand, teleological norms—having the form "If you want to accomplish task *C*, you should act using means *M*"—do admit of scientific validation. Consequently, if a life task has been set out, we can show how to carry it to completion. Like many other legal and moral theorists, Petrażycki wanted to avoid relativism putting forward the highest ideal of social life. According to him, history shows that the social actions accepted in most societies give rise to certain regularities. In particular, there can be observed a tendency toward human solidarity and universal love. Petrażycki derived further values from this observation, especially equality (including between races and genders) and justice.

Petrażycki devoted careful analysis to the methodological foundations of science. Although he argued his ideas by drawing on examples taken from social science and psychology, he understood his method to be valid across all areas of inquiry. Theories, for Petrażycki, are universal and based on concepts referring to classes (class concepts); they are in this sense single universal statements. Since theories identify essential causal connections, their basic function is to explain and predict. Class concepts are our own creation. Although class concepts are grounded in experience, inductive methods for creating them are not effective, because we cannot set out in advance how many instances of a concept will suffice to complete the conceptual work required to define that concept. We should render concepts independent of the terminological customs of natural language and of practical tasks. For example, the concept "greens" and the concept "game" are very important in cooking and hunting, respectively, but completely useless in botany. The creation of class concepts is parallel to their functioning in theories. The requirement of truth is too weak

Leon Petrażycki (1867–1931)

for theories. For instance, we can formulate several true propositions about greens or game, but this does not mean that such assertions thereby constitute theories. The main attribute of a correct theory, in Petrażycki's view, is adequacy (*adekwatność* in Polish). Since a theory has the form (*) "Every *K* is *P*," (*) is adequate if *P* can be predicated of the entire class *K*. Incorrect theories can be described as limping (*kulawa*), leaping (*skacząca*), or absolutely erroneous. A limping theory *T* is one in which *P* is attributed to too narrow a class. For example, if we say that all planets move according to the laws of gravitation, this assertion can be described as limping, because the principles of motion also apply to other phenomena. A leaping theory, by contrast, is one in which *P* is (unjustifiably) ascribed to a range of phenomena wider in scope than *K*. This second error is characteristic of various sociological theories that identify a single force or attribute, such as religion or religious belief, as the one and only relevant factor. One can correct limping or leaping theories by suitably narrowing or widening their scope of predication. This is impossible with absolutely incorrect assertions, since their entire scope is erroneous and the relations they record are only apparent. There are various causes leading to incorrect theories, but the main one lies in the failure to preserve the conditions necessary to create class concepts. In general, theories do not afford a picture of reality, or at least this is not their only function. Theories are rather constructions aimed at finding correct explanations and predictions. As concerns the need to justify the adequacy requirement, Petrażycki proposed an analysis that combines deduction with eliminative induction in Mill's sense.

Legal theory must be adequate in the sense previously indicated. The way to go about constructing such a theory presumably consists in properly identifying law as an empirical phenomenon. For Petrażycki, law in the juristic sense is not a proper class concept and leads to either limping or leaping theories. This is where legal psychologism enters the scene. Generally speaking, Petrażycki regarded law as something of a psychical entity, but this view required a new approach to psychology. Petrażycki replaced the traditional classification of psychic phenomena with a new one. The traditional account distinguished sensation (cognition), will, and feeling as three basic factors of the psyche. Petrażycki saw the matter differently and added the emotions as a fourth category. But the change was more than just classificatory. Indeed, for Petrażycki, it was a very deep difference that separated the emotions from the other factors of the psyche: Whereas these factors are one-sided—sensation and feeling are exclusively sensitive and the will exclusively impulsive—the emotions are sensitive-impulsive (*doznawczo-popędowe*) and can in this sense be described as two-sided. This view suggested to Petrażycki that the emotions are genetically prior, whereas sensations, feelings, and acts of will arise as a result of our mastering one side and removing the other over the course of evolution. Petrażycki thus considered the emotional level of the psyche as fundamental to the whole of mental life.

Petrażycki identified both law and morality (ethics) as emotions of a certain kind. More to the point, ethical emotions are the kind we experience when faced with imperatives: They consist in a reaction to an external signal (an imperative) experienced as a duty (or obligation). Now, the ethical emotions can only be either imperative (that is, duty-creating) or imperative-attributive (in which case they connect duties with rights). Thus follow the definitions of morality and law, respectively: morality is the class comprising the imperative emotions; law, the class comprising the imperative-attributive emotions. With these definitions in hand, it is very easy to show that typical theories of law are incorrect, usually limping. Take, for example, the theory under which law is defined as a coercive order. This can lead us to ignore that a coercive order must be guaranteed by the state (for otherwise we would have a vicious circle), and in that case our predications about what is law will be attributed to only part of the class concept in question (the concept "law"). There are important consequences that can be seen to follow from this approach. Petrażycki radically changed the concept of a legal norm, a concept designating not linguistic entities or propositions but also psychical entities. In order to make this view more coherent with tradition, Petrażycki considered the sentences contained in legal codes to be, not norms per se, but projections of norms. This led him to a radical noncognitivism, even if he did not use that label. It also follows from this conception that the positive law accounts for only a fraction of the full class of legal phenomena. For Petrażycki, the class concept "law" is broad enough that we can, and indeed should, use that term when speaking of the law of gangs or of groups of children, because every imperative-attributive emotion is legal regardless of its origin. Thus, we have distinctions like that between official (positive) law and unofficial law or that between intuitive law (*prawo intuicyjne* in Polish, or law as a complex of natural emotions) and the law imposed by the authorities. The same signal can give rise to either law or morality. So, for example, I might see a man begging on the street and give him food or money: My emotion will be moral if I experience that signal as a duty of support, but legal if I think my duty is correlated with the beggar's right to have food or money from me.

Petrażycki saw that his theory could be criticized as overly subjectivist and individualistic. In anticipation of such an objection, he maintained that legal emotions have a tendency toward uniformization. This means that whereas law is relatively concise and comparatively homogeneous, morality is much more individual. Although morality and law both play a central role in guiding human behaviour, law is much more pervasive and essential in that role. As he once remarked, morality is the champagne of daily life, but law is "goose wine" (water), and we may well be able to live without champagne, but certainly not without water. This circumstance is of utmost significance for legal politics. In order for the legal systems put in place by government authorities to be effective as tools of social life, they must be coherent with intuitive law.

Petrażycki illustrated this point with a very interesting example. He argued that forcing people to sell their private property, especially their land, can lead to a wasteful use of economic resources, with dire consequences. This prediction was borne out by the Soviet Union after the country collectivized agriculture. Petrażycki accordingly held that his legal theory could be used to make predictions about how law will affect social life, thus making it possible to formulate teleological rules about how to achieve a given social ideal.

Petrażycki's general philosophical tenets were consistent with philosophical positivism and psychologism. In this sense, he was a child of his age, or at least of one of its currents. This resulted in the naturalistic scientific method he proposed. Petrażycki rejected the idea that the humanities and the social sciences require their own special methods. In his view, the lack of successful theories in social and natural sciences is owed to methodological underdevelopment. On the other hand, his method moves beyond the bounds of typical positivism, especially as concerns the creation of concepts and the status of theories. Petrażycki can be said to have anticipated some of Popper's ideas about how scientific concepts are to be formed and how theories relate to the world.

Although Petrażycki was a positivist in philosophy, his theory of law was very far from typical legal positivism. The main difference consists in a completely different account of legal phenomena. What legal positivists, such as Hans Kelsen, consider to be the reality of law, namely, valid statutes or solutions to particular cases, constitutes for Petrażycki a secondary phenomenon showing only *part* of law. Petrażycki's approach anticipates various forms of realism, and in particular the Scandinavian legal realism of Axel Hägerström, Alf Ross, and Karl Olivecrona.[10] But there are two important differences here: First, the scope of law in later legal realism is narrower than in Petrażycki's theory, and, second, Petrażycki's psychology is based on introspection, while "Scandinavian" psychology looks more like a kind of behaviorism. Parallels can also be observed between Petrażycki's legal politics and the project of social engineering by law advocated by the American functionalists, particularly by Roscoe Pound. Petrażycki's theory of the social ideal is often likened to Rudolf Stammler's idea of natural law with changeable content.[11] Regardless of how we might evaluate Petrażycki's theory as a whole (a task beyond the scope of this exposition, for we are concerned with its *historical* significance), it seems that he was the first to attribute such an important role to legal consciousness and to the social functions of law.

Poland regained its independence as a state in 1918. The new state devoted many resources to building the academic system, especially at the university level, and organizing research across all fields. Activities were resumed at two

[10] On Scandinavian legal realism, see Chapters 13 through 17 in Tome 2 of this volume.

[11] In fact, Petrażycki claimed that Stammler had plagiarized his views. On Stammler, see Section 1.3 in this tome and Section 2.2 in Tome 2 of this volume.

existing universities, namely, Jagiellonian University in Kraków and Jan Kazimierz University in Lvov (the name of the latter university was adopted after 1918). The Universities of Warsaw and Vilna were reopened in 1915 and 1919, respectively. Two new universities were established, one in Lublin (Lublin Catholic University, or KUL, in 1918) and the other in Poznań (Adam Mickiewicz University, in 1919). All universities had law schools and professorships in legal theory or legal philosophy.[12] The curriculum typically comprised the so-called encyclopedia of the legal sciences (or introduction to the legal sciences, what in Polish is referred to as *wstęp do nauk prawnych*) and legal philosophy, mostly confined to historical issues. Petrażycki came from Soviet Russia in 1918 and became professor of sociology in Warszawa in 1919; he turned down several offers from abroad, including one from Oxford. Since Poland inherited several legal orders from the annexation period (five systems in all), it became a policy priority to unify law, and jurisprudence was considered essential to that end. Many professors of law were appointed in the Codification Commission, and among them was Petrażycki, owing to his idea of legal politics. Makarewicz wrote the Polish Criminal Code, introduced in 1932 and usually referred to as the Makarewicz Code. Legal theory and philosophy did not have quite the same practical import as the specialized fields of jurisprudence, but they were nonetheless perceived as worthy of study and development. Even though Petrażycki was not very productive after 1918, his lectures in Warszawa were very popular, and his presence stimulated other people. The influential Polish analytic and logical school known as the Lvov-Warsaw school did not work much in legal philosophy, but its main representatives—especially Kazimierz Twardowski (1866–1938), Kazimierz Ajdukiewicz (1890–1963), and Tadeusz Kotarbiński (1886–1981)—did take an interest in some specific problems at the intersection of philosophy and jurisprudence (and so they investigated, for example, the concepts of action, free will, and justice). This school stressed the importance of clarity in thinking, speaking, and writing and underscored the need for law to embrace these values.[13] This sort of thinking lay behind the first Polish works on legal logic. In the interwar period, then, there was a range of factors that conspired to favour the development of legal theory and philosophy.

An important event took place in Kraków in 1924. The Kraków Philosophical Society held a special conference on legal theory with a variety of participants, including philosophers, legal theorists, and scholars representing specific areas and currents in the study of law. The proceedings of this conference appeared as Jaworski 1924 and documented the state of this area of study in

[12] With very few exceptions, we will only report on works of legal theory and legal philosophy written by Polish scholars who have taught at law schools.

[13] For further discussion of the Lvov-Warsaw school and its role in Polish philosophy, see Woleński 1989.

Poland in the 1920s, especially with regard to its internal and external links. The discussion at the Kraków conference, along with other facts, shows that Polish legal philosophy and legal theory were very pluralistic in the interwar period. We should mention the main influences. Petrażycki's position was strong but not dominant. His idea of legal politics was widely embraced, but his psychologism was criticized by many Polish writers for its subjectivism and its departure from some strong juristic intuitions. Kelsen became very influential in Poland at this time. His main works, namely, the *Hauptprobleme der Staatslehre* and the *Reine Rechtslehre* were translated in Polish. Kelsen's role in Poland can be explained by his success as a framer of law in Austria. He was thus regarded as a model to look to as a theorist who succeeded in legal practice. Other influences came from the briefly discussed Lvov-Warsaw school, as well as from the French sociological mode of legal interpretation and from neoscholastic philosophy.

Let us move on to specific persons and circles. Jerzy Lande (1888–1954) was the most important follower of Petrażycki in Poland.[14] He gained his professorship in 1929, teaching in Vilna and then Kraków, popularizing Petrażycki's theory while also developing it. Under Kelsen's influence, Lande came to see that Petrażycki had neglected important theoretical problems pertaining to legal norms: He thus proposed that his teacher's ideas be supplemented in order to fill this gap. Lande developed these ideas more extensively after 1945, and we will come back to them in the next section.

In Vilna, Lande and Bronisław Wróblewski (1988–1941) trained a group of young legal theorists, also influenced by the Vienna Circle and the Lvov-Warsaw school.[15] The most promising members of this group were perhaps Sawa Frydman (1907–1981, who changed his name to Czesław Nowiński) and Józef Zajkowski (1900–1945). Frydman developed a sociological theory of the doctrinal study of law (his interests shifted focus after 1945), and Zajkowski offered an approach to the concepts of civil law based on radical nominalism and physicalism. This group's writings are collected in B. Wróblewski 1936, 1939.

Particularly interesting from a contemporary perspective, as concerns the output of the Vilna school, is Frydman's constructive concept of legal interpretation (Frydman's 1936). His idea was to build a theory of legal interpretation through a description of the activity of lawyers. The approach to this description was realistic, cast in sociological terms, corresponding to his treatment of legislation, which he regarded as a kind of social engineering, a way to steer social life by suggesting certain modes of behaviour to the members of society, or otherwise *imposing* those modes. Frydman's realism led him to treat law as

[14] Lande studied with Petrażycki in St. Petersburg. His works are collected in Lande 1959. On him see also Chapter 19 in Tome 2 of this volume.

[15] B. Wróblewski was professor of criminal law; his son was Jerzy Wróblewski, himself a distinguished Polish legal theorist.

a social phenomenon, and this in turn led him to postulate the need to build an empirical—and hence, in his view, scientific—theory of interpretation. The empirical nature of the theory of interpretation was to be shaped through the application of an ideal-type construct in Max Weber's sense. Frydman sought to apply the idealization procedure to create ideal types for legal interpretation.

What makes Frydman's theory of legal interpretation descriptive is his reliance on the concepts of realism in approaching law, coupled with his empiricism in building a theory of interpretation and with the idealization procedure as a convenient methodological tool for constructing descriptive models of practical legal interpretation. Moreover, the theory can be seen to be clearly constructive. These premises also enable Frydman to envision the role of the lawyer qua interpreter, a role that consists in constructing modes—of behaviour and transferring them to social reality so as to shape the behaviours of members of society.

The interpretation of law is a constructive process by which we as interpreters "comprehend" certain modes of behaviour expressed through signs (i.e., objects perceivable through the senses, such as a statute printed in an official journal). A mode of behaviour is freely constructed by the interpreter and results from various factors which influence the interpreter in the process of comprehending—i.e., interpreting a legal text—and which also influence the aim of the interpretation. The meaning of a legal text is the outcome of these interpretive activities. The legal text itself is just printed matter, an object that can be observed by the senses and can function as a sign. It is only the interpreter who provides the sign with meaning by relating a mode of behaviour to it. Each legal text must therefore be interpreted, for otherwise it would only be printed matter, a string of signs set to paper.

In arguing the thesis that modes of behaviour are freely constructed, Frydman assigns an important role to the notion of directions of interpretation (*kierunki wykładni* in Polish), by which he means that certain relevant classes of facts are taken into account which either precede the creation of a statute or coexist with them, an example being the classes of facts by which economic or social processes are formed. Frydman does not understand directions of interpretation as a matter of sensory perception but rather treats such constraints as belonging to the cultural sphere, which is their ontological realm. Directions of interpretation are indispensable in deriving valid interpretive conclusions via arguments used in the process of interpretation. Directions of interpretation either determine the content of a legal text (and nothing else besides) or express the *consequences* of adopting a given interpretation. Interpretive arguments (directions of interpretation) are freely chosen, in the sense that this choice is determined not by any objective factor but by practical reasons. Practical reasons, also termed by Frydman as the needs of interpretation (*potrzeby wykładni* in Polish), are in fact the interpreter's evaluations (regardless of whether these are witting or unwitting). Hence, the different conditions and

the different roles played by interpreters—that is, the different interpretive situations—will determine the choice of specific arguments for interpretation. Different interpretive situations will influence the way in which the needs of interpretation are shaped, which may be the outcome of a single interpretive situation or a combination of such situations. In this sense, the construction of a mode of behaviour as an outcome of interpretation is a free construction, since this mode is constructed on the basis of freely adopted premises. No objective or commonly accepted method exists for selecting the premises of interpretation. The only constraint on the freedom to construct a mode of behaviour lies in the interpreter's interpretive situation, a situation determined by the needs of interpretation.

In the process of constructing a text and relating it to a corresponding mode of behaviour, the interpreter is forced to determine and rely on (*a*) empirical premises, (*b*) linguistic premises, and (*c*) judgments and assessments, and must then draw correct conclusions from those premises and judgments.

As concerns the freedom to establish the meaning of sentences in a legal text, the question arises as to whether such an approach does not entail that the law is, as a matter of fact, created by the interpreter. This may be the case, but Frydman sees certain limits to such freedom. He explains this by drawing a distinction between a legal text and a law: A legal text is nothing but printed matter (printer's ink on paper), while a law is a mode of behaviour developed by interpretation. As there is no such thing as a single exclusively correct, i.e., "objective," legislative meaning of a legal text, this meaning is created through interpretation. The only limitation on the freedom to ascribe a meaning to a legal text, it seems, lies in the cultural community of values. In certain situations, the cultural community of values can act as an interpretive community. And so, as much as meaning is freely ascribed to a legal text, there are certain limits to this freedom.

Quite similar to Frydman's views are those of the postmodernist deconstructionists associated with Jacques Derrida, especially if we consider Frydman's position on the role of legal interpretation and method for interpreting a legal text. In more-general, philosophical terms, Frydman can be said to seek a rationality that transcends Enlightenment reason. On the other hand, certain ideas of Frydman's seem to be close to the New Rhetoric, the argumentative theory developed by Chaïm Perelman.[16] Frydman would probably have agreed with the proposition that interpretive arguments provide a certain sociolinguistic means of persuading a certain audience.

Eugeniusz Waśkowski (1866–1942) was another scholar who approached legal theory from the standpoint of a specific branch of law (civil law in his case). Waśkowski's theory is considered a form of legal positivism, mainly because he implicitly adopts a positivist definition of law. His theory is derived

[16] On Perelman's New Rhetoric, see Section 23.2 in Tome 2 of this volume.

from the identification of the tasks and aims of legal interpretation set out in his work *Teoria wykładni prawa cywilnego* (Theory of the interpretation of civil law: Waśkowski 1936). He held that the aim of legal interpretation is to discover the true meaning of a legal text. But then interpretation is understood by him as the entirety of the methods through which one comes to an understanding of the creations of the human spirit. He emphasizes at the same time that these products of conscious human activity—the written provisions of law—require much more interpretation than literary works.

These conclusions led Waśkowski to describe the task of legal interpretation as follows: Interpretation should reconstruct the concepts and notions associated with an author's provision. Because these concepts and notions constitute the meaning of the provision, while at the same time expressing the author's idea and intention in writing the provision, the task of interpretation can further be specified as that of identifying the contents of a provision, or extending its meaning, or explaining the legislator's idea and intention. This is the direct task of interpretation. In addition, interpretation encompasses the task of drawing conclusions from the interpreted text, or, in other words, establishing the logical consequences deriving from the legal provision. This operation is called by Waśkowski the "logical development of provisions."

So, on Waśkowski's account of legal interpretation, this activity comprises both interpretation in the strict sense, which is reduced to explaining the meaning of a legal provision, and the extraction of *consequences* from that provisions. These consequences are understood to have the same binding force as the provision from which they are drawn. In this approach to the tasks of interpretation lies the basis on which to distinguish the operations that make up interpretation in the strict sense.

Waśkowski distinguishes between the verbal (*słowny*) stage of interpretation (treating this stage as primary) and the factual (*realny*) stage (treated as secondary), and on this basis he distinguishes between verbal (linguistic) and factual (nonlinguistic) interpretation. Only after we go through these stages of interpretation will it be possible to proceed to extract a provision's logical consequences, that is, its "logical development."

As we have noted, what Petrażycki taught at the University of Warsaw was not legal theory but sociology. He trained a group of younger scholars who in the 1930s established the Leon Petrażycki Society. Its main purpose was to publish Petrażycki's *Nachlass*. This activity resulted in several volumes based on Petrażycki's manuscripts, mostly of a general philosophical character. People involved in the Petrażycki Society also did their own research in various areas of legal theory, but the war interrupted this momentum. Eugeniusz Jarra (1881–1973; he lived outside Poland after 1939) was professor of legal theory in Warszawa. He published a long treatise, *Ogólna teoria prawa* (General theory of law: Jarra 1920), which is conceived as a textbook. This work was rather eclectic, and the same qualification applies to the whole of Jarra's views.

Szymon Rundstein (1876–1942) was a distinguished lawyer. Because he was Jewish, he could not hold any academic position, but he was admired for his huge stock of knowledge. At the beginning of his carrier he followed the so-called *Freirechtsbewegung*, or free law movement. He then switched to Kelsenism and published a book titled *Zasady teorii prawa* (Principles of legal theory: Rundstein 1924), in which a radical version of the pure theory of law is expounded. Władysław Leopold Jaworski (1865–1930), professor of administrative law in Kraków, was another proponent of Kelsenism in Poland. He sought to combine this theory with elements of the Christian tradition of natural law. Neoscholastic legal philosophy was dominant at the Catholic University of Lublin (KUL), and Czesław Martyniak (1906–1939) became the leading scholar in this circle. He published an extensive monograph on Kelsen (Martyniak 1939), as well as a posthumous programmatic booklet (Martyniak 1949): The monograph offers a detailed analysis and criticism of Kelsen; the booklet develops the principle of neo-Thomistic legal philosophy. As much as Martyniak was wholeheartedly Thomist, he tried to combine this philosophy with ideas borrowed from other philosophical schools. Lvov had no distinguished legal theorist in the interwar period. Makarewicz, previously mentioned, became professor of criminal law at the University of Lvov. He lectured in the history of legal philosophy but was not active as a researcher in the theory of law. Antoni Peretiatkowicz (1884–1956) organized the school of law in Poznań and became a professor there in 1919. He was also active as a politician of moderate rightist persuasion. Peretiatkowicz's views were eclectic and worked together Kelsenism, sociologism, and the natural law tradition.

Last, but not least, we should mention Czesław Znamierowski (1888–1967).[17] He was trained as a philosopher and a lawyer and was appointed professor of legal theory at the University of Poznań. He published two books before 1939, namely, *Podstawowe pojęcia teorii prawa*, *Układ prawny i norma prawna* (Fundamental legal concepts, Part 1: Legal construction and legal norms, Znamierowski 1924) and *Prolegomena do nauki o państwie* (Prolegomena to the theory of the state: Znamierowski 1930). In these books, as well as in numerous papers, he strongly criticized some contemporary theories, especially Petrażycki's psychologism and Leo Duguit's social solidarism. Znamierowski's own theories were set on definite methodological, philosophical, and sociological foundations. He objected to confining legal theory to a purely conceptual and formal analysis, and stressed the need to investigate the social functioning of legal systems and their social genesis. His idea was to offer a grand synthesis of the theory and sociology of law.

From the perspective of legal theory, certain conception of Znamierowski's are particularly valuable (cf. Czepita 1988). He lay great emphasis on conceptual clarity and the need to avoid conceptual confusion, so his works were in

[17] On Znamierowski see also Section 20.2 in Tome 2 of this volume.

good part devoted to conceptual analysis. Partly under the influence of G. E. Moore, he introduced an important distinction between thetic norms (*normy tetyczne*), the basis of whose validity is that they are issued by an authorized power, and axiological norms (*normy aksjologiczne*), which instead appeal to values. This distinction allowed him to present an interesting analysis of the differences between law and morality and exerted a sizable influence on Polish metaethics. Even more important is his concept of so-called constructive norms (*normy konstrukcyjne*), which are thetic norms but stand in opposition to imperative norms (*normy imperatywne*). Although this concept is influenced by the work of Hans Kelsen and Adolf Reinach,[18] it is very similar to the concept of constitutive rules introduced in the post-war period in British analytical philosophy, and in the context of legal theory it resembles H. L. A. Hart's concept of secondary rules. Constructive norms in Znamierowski's sense have the function of ascribing a "conventional meaning" to certain actions and things: They create (or construct) new actions that would not otherwise be possible, and these actions belong to single class, that of "thetic actions" (*działania tetyczne*). Constructive norms so understood can be observed in various spheres of human activity, such as games, the rules of social organization, and law. Each action, to which such conventional meaning is ascribed by a constructive norm, is underpinned by a psychophysical substrate. The performance of such an action triggers an effect that Znamierowski calls a "thetic state of affairs" (*tetyczny stan rzeczy*). In this sense, Znamierowski can be said to have anticipated J. L. Austin's theory of performative utterances. He further analyzed various types and levels of constructive norms. His analysis of legal systems clearly demonstrated the significance of constructive norms in each legal system, anticipating Hart's view of the nature of legal orders (see Czepita 1988). Particularly interesting is his analysis of competence norms. He argued that, even though constructive norms do not order or prohibit anything, a conventional action constructed by such a norm can sometimes be required or prohibited by other norms in a legal system. The concept of constructive norms strongly influenced Polish legal theory in the post-war period, and in particular Zygmunt Ziembiński and his school of legal theory.

Znamierowski used the concept of a constructive norm in his theory of the legal system. He introduced the idea of a "legal constellation" (*układ prawny* in Polish), understood as a coupling of constructive and coercive norms (this certainly anticipates Hart's views), and held that this properly counts as a *legal* constellation only if the coercion is at least to some extent effective (this introduces a realistic component in his theory). But although this is a necessary condition for something to count as law, it is not sufficient: To this end a constellation must also regulate the whole sphere of activity of the addressees of norms and must define the boundaries of these addressees' freedom.

[18] On Reinach see Section 4.2 in this tome.

16.3. The Period after 1945

Poland's situation after World War II was extremely difficult. The country lost six million citizens, as well as 60 billion U.S. dollars' worth in material resources (in today's equivalent of 1938 prices). Industry and agriculture were ruined, and so were many cities. For example, in the Warsaw Uprising of 1944, the city lost 200,000 residents and 80 percent of its buildings and infrastructure. This huge toll also affected Polish academic circles. Just by looking at the dates provided in the previous section, one can easily estimate how many legal philosophers lost their lives from 1939 to 1945. The youngest generation, consisting of students or scholars starting their work, was hit the hardest. Moreover, Polish universities (and secondary schools as well) had been shut down by the Nazis in 1939, and the occupiers prohibited the publication of scholarly and scientific works and journals. Although Poles organized a powerful system of clandestine education, this activity could not fill the gap resulting from the interruption of regular teaching at universities and high schools. Polish scholars had no access to foreign academic literature. Many libraries and private collections were destroyed. Several works remained unfinished or perished during the war. This brief and very simplified report shows that Polish academic life had to start almost from scratch in 1945.

The organization of Polish academic life was also dependent on territorial changes and the resulting great migration of academic milieus, even more far-reaching than those witnessed after 1918, in the aftermath of World War I. Due to changes in Polish borders, the universities in Lvov and Vilna now fell outside Poland (both previously in the Soviet Union, now in Ukraine and Lithuania, respectively). Four new universities were established in 1945 or shortly thereafter: the Universities of Lublin (a state university), Łódź, Toruń, and Wrocław.[19] Perhaps the most influential factor was that Poland was included in Europe's Communist Bloc. The consequences of this inclusion were not immediate for academic life. But three sub-phases can be distinguished in tracing out the role of Communist ideology in shaping Polish research and scholarship. The first sub-phase went from 1945 to 1948–1949 and carried forward the prewar model, at least in principle. The second sub-phase, from 1950 to 1956, was characterized by the domination of orthodox (i.e., Stalinist) Marxism, coupled with severe restrictions on the freedom of education and research. The third sub-phase began in 1956 (with Polish October, when political changes in Poland led to de-Stalinization of the regime) and ran to 1989, that is, to the end of Communism in Poland and in other countries of the Soviet Bloc. Generally speaking, this was the period of liberal Marxism, allow-

[19] Several other universities were established in the 20th century: in Białystok, Gdańsk, Katowice, Opole, Rzeszów, Szczecin, Warszawa (the University of Cardinal Stefan Wyszyński, a Catholic university), and Zielona Góra (the order is alphabetical).

ing compromises with other intellectual currents, and also making it possible to do purely analytical research. To be sure, a more nuanced picture would reveal that the period from 1956 to 1989 was not uniform: Academic policy could be more or less liberal depending on the political situation domestically and abroad. But in any event, the government sought to more or less intensively control intellectual and academic life, especially the humanities and the social sciences. The situation radically changed in 1989, with the fall of the Berlin Wall, whereupon full freedom of research was introduced. However, one should note the remarkable fact that Polish Marxism was fairly pluralistic even before that time, with plenty of discussions on the foundations of law and state.

We can skip the first sub-phase (from 1945 to 1948–1949) and go straight to the second (from 1950 to 1956), where the situation of legal theory and philosophy in Poland can be described roughly as follows. Except for Lublin Catholic University (KUL), where neo-Thomistic legal philosophy continued to be taught, legal theory was introduced into the social sciences, mainly understood through the lens of historical materialism (in the Marxist sense).[20] A problem arose as to how to treat scholars who were not of Marxist persuasion and did not convert to this philosophy: Some were suspended from teaching, as happened with Znamierowski (though he was readmitted in 1957), while others, like Lande, were tolerated and could lecture according to their own standards, provided that they did not express openly anti-Marxist views. The situation changed considerably after 1956, because several scholars declaring themselves to be Marxist claimed that legal theory should be problem-oriented, not ideology-driven. This attitude created some tension between orthodox Marxists and those whose approach to legal theory was by comparison modernist. Departments in general jurisprudence were set up as departments in the theory of law and the state (the term *general jurisprudence* replaced *legal philosophy*, which ceased to denote a discipline, and its use was restricted as a term referring to philosophical problems and investigations in law), and so the situation could roughly be described as follows (this is clearly only a snapshot, and so is not without exceptions): Theorists of law were either non-Marxists or modernist Marxists, but theorists of the state were more orthodox.[21] In general, openly anti-Marxist views were suppressed (including by censorship), whereas non-Marxist views were tolerated (though not encouraged). Although

[20] Note, however, that the KUL School of Law was shut down in the 1950s and reduced to the teaching of canon law, and legal philosophy thus became a specialization within general philosophy. The situation changed in 1989. The main legal philosopher at KUL was Father Antoni Kość (1949–2011), a specialist in comparative legal philosophy, particularly knowledgeable in Far Eastern thought.

[21] We are not reporting on the theory of the state in Poland. It added nothing particularly interesting to typical Marxist doctrine as presented in this volume in the chapter on Russia: See Chapter 17 in the tome.

the line between anti-Marxism and non-Marxism was vague, and hence could not be clearly drawn every time, this division worked quite well as the background against which to strike compromises among different theoretical attitudes. In any event, Polish legal theory and philosophy remained pluralistic in spite of the official position of Marxism as the ruling ideology.

Polish legal theorists in the period after 1956 worked on many different topics. In our view, the following problems and topics can be regarded as distinctive, considering how they attracted most of the Polish scholars' attention: (*a*) the multilayered conception of law, (*b*) the question of how to integrate investigations of law, (*c*) legal interpretation, (*d*) the theory of lawmaking, (*e*) the problem of rationality in law and legal science, (*f*) legal language, and (*g*) legal positivism and the antipositivist turn after 1989. Let us consider each of these in turn.

16.3.1. The Multilayered Conception of Law

Beginning in 1945, a new approach to the study of law was developed by Lande (1959) which became very useful as a basis for identifying the problems of legal theory. Lande distinguished three levels on which to investigate the legal phenomenon: a normative level, a sociological one, and a psychological one. This idea was further developed by Lande's students, namely, Kazimierz Opałek (1918–1995, professor in Kraków), Jerzy Wróblewski (1926–1990, professor in Łódź), and Wiesław Lang (professor in Toruń).[22] The standard version of the so-called multilayered theory of law can be described as follows. Three levels are distinguished: a logico-linguistic level, a psychological one, and a sociological one. These layers are understood either ontologically or methodologically. On the ontological understanding there arises a very difficult problem as concerns the unity of legal phenomena as existing entities. We can consider the law a complex ontological structure composed of language, psychical phenomena, and social factors, or we can regard each level as existing independently of the others. Both hypotheses were developed in Poland, but here we cannot go into detail (see Opałek 1962, Opałek and Wróblewski 1960, J. Wróblewski 1989, and Ziembiński 1974). The second understanding, the methodological one, is more straightforward. It concerns the types of investigations into law. If we are investigating norms, we will use methods derived from logic and linguistics; hence the name for this layer (logico-linguistic). We can also investigate legal consciousness or the social causes and effects of law: Investigations into legal consciousness lie on the psychological level and are obviously related to Petrażycki's ideas, while investigations into the social causes and effects of law will form a sociology of law. In this way, Lande

[22] For the period after 1945, we will only mention scholars who studied law as professors. This is certainly biased, but there is no way to include other people without being likewise biased.

sought to integrate various theories of law. On this approach, Petrażycki was working on the psychological and sociological levels, but again, his psychologism neglected the normative level. Lande's pupils thus argued that legal theory should integrate all these layers rather than focusing on specific legal theories. Of course, they very much appreciated Petrażycki, but thought that account should be taken of several other traditions, such American functionalism or Scandinavian legal realism. Marxism figured in this picture as contributing to the sociological layer. Hence, Polish legal theorists published many books and papers ranging across the contemporary landscape, addressing thinkers and currents that included Kelsen (who has traditionally been a focus of analysis in Poland), American jurisprudence, natural law theory, Duguit, Scandinavian legal theory, Hart, and egological philosophy of law (for examples of this literature, see the bibliographies in Opałek 1962 and Opałek and Wróblewski 1969). In general, Western legal theory was well known in Poland.

16.3.2. Integrating Inquiries into Law

Starting from the early 1960s, two problems arose in Poland concerning the integration of inquiries into law. A distinction needs to be drawn in this regard between external and internal integration: Internal integration seeks to synthesize results achieved over the course of inquiries carried out on a particular level; external integration, by contrast, brings other disciplines into the picture, including logic (one might recall here that Poland has a strong tradition in logic), general sociology, general psychology, and other technical disciplines, among which cybernetics, communication sciences, and economic sciences. In any event, successful integration, internal and external alike, was considered a condition *sine qua non* of a good legal theory. These methodological principles were extensively fleshed out in Opałek 1962, Opałek and Wróblewski 1969, J. Wróblewski 1989, and Opałek and Wróblewski 1991. Yet a contentious issue remained, namely, what was to be the proper place of legal axiology. Wróblewski (J. Wróblewski 1989) even proposed a separate axiological level but ultimately abandoned this idea. Lande's followers took a positivist line and argued that an axiological evaluation of law falls beyond the province of science. Of course, several authors investigated in various ways the relation between law and morality, but they usually confined their investigations to descriptive accounts (Ziembiński 1972, J. Wróblewski 1973, and Lang 1989). Let us add that these problems have since resurfaced, their importance recognized anew with the recent discussions on the death penalty, abortion, euthanasia, and other, mostly bioethical, problems. Perhaps symbolic of the development after 1989 is that the term *legal philosophy* regained its institutional place as the name for the discipline, and several departments changed their designation from "Department of Theory of Law and the State" to "Department of Legal Philosophy" or "Department of Legal Theory and Philosophy."

16.3.3. Legal Interpretation

Problems of legal interpretation have become a focus of particular interest in Polish theory of law since the mid-1950s. The discussion, still ongoing, was opened in 1959 with Jerzy Wróblewski's publication of the book *Zagadnienia teorii wykładni prawa ludowego* (The problem of the theory of interpretation of the people's law: Wróblewski 1959).

World War II cut short any wider discussion on Waśkowski's "traditional" conception of legal interpretation or on Frydman's realist conception (on which see Section 16.2). The redefinition of values brought about by the war itself and its aftermath—the ensuing territorial, political, and ideological transformations—were all factors that played an important role in shaping attitudes and philosophical views, and in particular philosophico-legal views. This did not leave the concept of interpretation unaffected, either. The totalitarian experience of the war and post-war years did much to influence the concepts of interpretation formulated in the Polish philosophy of law. But there were other influences, too. One of them, difficult though it may be to quantify, was a certain tradition in legal philosophy that goes back to the interwar period and shaped the way scholars engaged in this sort of reflection, laying emphasis on psychological and sociological concepts rooted in philosophical positivism: This approach informed the theory and philosophy of law in the post-war period, which accordingly took an anti-speculative turn after World War II. Much support for this traditional approach came from the burgeoning analytical philosophy and the related linguistic studies: In a 1953 article titled *Definition and Theory in Jurisprudence*, H. L. A Hart (1953) explained the need to build an analytical philosophy of law, thus confirming that there was a range of possibilities to be exploited in applying analytical methods to the philosophy of law. Here it seems one cannot overestimate the impact the Lvov-Warsaw school had in bringing analytical philosophy to bear on legal philosophy (see Woleński 1989). What also needs to be taken into account, however, is the role of external factors, especially political and ideological ones, whose force was particularly strong until 1956, and which tended to lead scholars to abandon axiological problems (occupying an important place in the philosophy of law), and also to discontinue in part their research in the social theory as it relates to legal analysis. This philosophical minimalism limited the risk of formulating statements in conflict with the officially recognized Marxism, even if this sometimes came at the cost of excessive formalism. As a consequence of all these factors, which conspired to shape the academic environment and atmosphere, the first post-war concepts of interpretation were formulated in the spirit of analytical philosophy of law: It is only since the beginning of the 1980s that research could be observed to shift its interest toward less formalized, primarily hermeneutical and argumentative concepts of interpretation (Stelmach 1995).

Wróblewski's theory of interpretation (J. Wróblewski 1959, 1990) has played a very important role in the development of contemporary Polish ideas in legal theory, becoming a reference point for almost all research in legal interpretation. This concept of legal interpretation was qualified by Wróblewski himself as "clarificatory," and only later, over the course of subsequent discussion, was it termed a *semantic concept* (*semantyczne pojęcie interpretacji*), due to the essential role played in it by the notion of meaning. Still later, it came to be called *intensional*, primarily because, on account of the then-prevailing concept of meaning, the need arose to distinguish it from the semantic concept of legal interpretation that Woleński formulated in 1972, where an extensional conception of meaning was used.

The meaning of the term *norm* in Wróblewski's concept of interpretation is approached by analogy to the meaning of non-normative sentences, and in particular of sentences in the logical sense. Wróblewski explicitly refers to the concept of meaning put forward by Kazimierz Ajdukiewicz (1985). The meaning of a sentence is defined by Ajdukiewicz as a judgment *w* in the logical sense (*sąd w sensie logicznym*). The distinction between meaning in a psychological sense and meaning in a logical sense makes it possible to accordingly distinguish a judgment in the psychological sense and one in the logical sense: In a psychological sense, a judgment lies in mental phenomena, which Ajdukiewicz also describes as "processes of judgment"; in a logical sense, by contrast, a judgment is understood as the "meaning attributed to a sentence in a language."

Norms are treated by Wróblewski by analogy to the way sentences are treated in the logical sense. Wróblewski considers it useful to distinguish sentences in the logical sense and to refer to their meanings as judgments. It therefore becomes necessary to correspondingly distinguish norms as linguistic expressions from their meanings. The meaning of a norm is a mode of required behaviour. What is characteristic of a mode of behaviour constructed as the meaning of a norm is its being an obligation. Legal norms treated as linguistic utterances of a certain kind form a semantic category apart from descriptive sentences and therefore require a specific "sense directive" (*dyrektywa sensu*) adequate to normative utterances. Wróblewski's notion of sense directive refers to the directional concept of language advanced by Ajdukiewicz (1985). In this concept, three types of sense directives are identified, that is, axiomatic, deductive, and empirical. Sense directives make it possible to attribute to sentences the meanings appropriate to the language concerned. On Wróblewski's semantic theory of interpretation, Ajdukiewicz's directional concept of language is accepted as the analytical basis for the normative construction of the sense directive, a construction whose function for the semantic category of norms corresponds to the function the sense directive serves for descriptive sentences. This sense directive is based on the notion that a norm is realized by the way person behaves in specific circumstances. Assuming that a legal norm

is an utterance of the form "Under conditions *W*, person *O* should behave in manner *Z*," the normative sense directive will be as follows: "Anyone who sensibly uses a norm construed in the aforementioned manner will deem the norm realized when, under conditions *W*, person *O* behaves in manner *Z*" (see J. Wróblewski 1959).

The meaning of a norm is a mode of behaviour, and so, on this approach, the interpretation of law can be said to consist in our attributing a certain mode of behaviour to a norm as its meaning. The structure of the mode of behaviour is set by the structure of the norm. Since the structure of a norm in Wróblewski's sense is relatively conventional, that structure should be analyzed as consisting of a minimum range of elements, which might, for example, have us specify the norm's addressees, the conditions of its application, and the behaviour it requires. Clearly, the question arises as to whether every time we interpret a legal text we have to establish the meaning of (i.e., interpret) all these elements making up the norm's structure. There are two further issues that need to be considered before this question can be answered: The first of these is the situationality of our understanding and interpretation of law (the idea that norms cannot be understood outside the context or situation in which the relative language is used) and the other (which in a way follows from the first) is how to delimit the scope of the interpretive practice in such a way as to formulate an adequate concept of interpretation. Wróblewski constructs a concept of interpretation making reference to the interpretive practice of the institutions entrusted with applying the law, and he is thinking in particular of the courts.

For Wróblewski, the rationale behind this choice lies in the aforementioned situationality of our understanding and interpretation of law. The situationality of our understanding, as he understands this expression, consists of the language's semantic contextuality, such that we have to link the meaning of expressions in the language to the situations in which those expressions are used. The semantic contextuality of natural language is an outcome of the relationship between the semantics and the pragmatics of that language. This relationship is strong in the case of natural language, and as a consequence we wind up having a close connection between the meaning of expressions (semantics) and the different ways they are used in various situations (pragmatics). When we adopt the perspective of interpretive practice in applying the law, we will need to formulate a model on which basis to engage in interpretive activity, so as to establish a mode of behaviour unambiguous enough for the purpose of deciding on specific facts (a specific case). In the process of interpretation, in other words, only those ambiguities of a legal text need to be eliminated that can affect the resolution of the case at hand.

Hence, those who espouse the semantic concept use a notion and model of operative interpretation. Interpretation comes into play when we need to legally qualify specific elements of the case under consideration. The range of

interpretive activities will vary, depending as it does on the elements of the case and the difficulty involved in qualifying them. In extremely difficult cases, *all* the elements of a norm's structure have to be subjected to interpretive activity.

The critical discussion that followed Wróblewski's presentation of the semantic concept of interpretation led, *inter alia*, to the development of an extensional version of this concept by Jan Woleński (1972). For Woleński, Wróblewski's semantic concept of interpretation is substantiated by the concept's relation to semiotics, a relation emphasised in expressions of legal interpretation that make reference to the term *meaning*. Because *meaning* is a basic term in semantics, Wróblewski's conception may be described as an *intensionalist* semantic approach to interpretation (since Wróblewski equates the meaning of an expression with its intension). This particular notion of meaning, however, gives rise to numerous difficulties.

Woleński refers to opposing concepts of semantics: According to one of them—intensionalism—semantic considerations cannot do without the notion of meaning. According to the other concept—extensionalism—all semantic problems can be worked out within the framework of a theory of reference. Woleński stresses at the same time that legal theories of interpretation usually do not refer to any particular concept of meaning, but rather content themselves with the intuitive, lay understanding of the word *meaning*. One consequence to flow from this circumstance is that legal theories of interpretation aspiring to be described as semantic do not in fact go beyond pragmatics, and if they do they must accept intensionalism. Woleński thus seeks to define an adequate semantics for deliberating on norms, a semantics free from pragmatics and intensionalism. This means that the everyday term "the meaning of expressions" should be conceived as a notion belonging to the pragmatics of language and not to semantics, from which it follows that the semantic theory of legal interpretation should abandon its use of this term.

Woleński's aim is to explicate the notion of legal interpretation by applying the methods of logical analysis. This explication consists in transforming a given notion of legal interpretation, more or less imprecise, into a precise one—or in replacing one with the other. Thus the *explicandum* is the notion of legal interpretation to be explained, while the *explicatum* (the resulting notion) is the logical semantic notion of interpretation in its extensional version.

As a consequence of applying this logical notion of interpretation, Woleński formulates an extensional conception of legal interpretation. On this conception, the object of legal interpretation is not the meaning of a legal text: Legal interpretation rather consists in determining the *scope* of legal norms. This conception of legal interpretation links directly to the logical notion of semantic interpretation. In everyday speech, legal interpretation is about specifying the *class of situations* in which the sentences distinguished by the legislator hold true, and not about the *meaning* of those sentences.

Competing with the semantic concept of interpretation (in both its intensionalist and its extensionalist version) is an idea that has played, and continues to play, a major role in the discussion, not only the theoretical discussion but also the scholarly and judicial ones: That idea is the is the so-called derivative conception of interpretation (*derywacyjna koncepcja wykladni* in Polish).

The derivative conception was developed in 1960, when Zygmunt Ziembiński introduced a strict conceptual distinction between a legal norm (*norma prawna*, a sort of norm of conduct) and a legal regulation (*przepis prawny*), understood as a grammatical sentence contained in a legal text. It is on the basis of that distinction that Ziembiński (1966) presented his derivative conception of interpretation, a conception which was subsequently developed in detail in 1972 by Maciej Zieliński (Zieliński 1972), and which he continued to develop thereafter (Zieliński 2002).

According to the derivative conception, all that is termed "legal interpretation" in jurisprudence makes reference to two notions: that of the interpretation of regulations, on the one hand, and legal texts, on the other. To interpret a legal regulation is to rely on a set of rules R to replace a legal regulation P with an expression N that under R is equivalent to regulation P, where N is a norm of conduct or an element of that norm. To interpret a legal text, on the other hand, is to rely on R to replace a legal text T with a set of norms of conduct that under R is equivalent to that legal text.

On the derivative conception of interpretation, the distinction between a regulation and a legal text has the status of an axiomatic assumption, and can be stated as follows: A legal regulation is a grammatical sentence contained in a statute; a legal text, on the other hand, is an aggregate of regulations, and in particular of all the texts contained in the statutes enacted and promulgated up to a given point in time.

The derivative conception of interpretation has been revised many times. One of these revisions concerns the number of interpretive stages and the method for carrying out these stages. In the contemporary version of the derivative conception of interpretation, the first interpretive stage is called "organizational interpretation" (*faza porzadkujaca*), which consists in the activity of eliminating the consequences flowing from the variability of legal texts. This is done by establishing both (*a*) the validity and (*b*) the wording of the regulation at the time it is being interpreted.

A central task around which the activities of the organizing stage revolve is that of validation. This, coupled with the recognition of the notional distinctness between validating and interpretive findings, was the argument on which basis the organizing stage was qualified as preinterpretive. At the same time, however, in setting out the validating-derivative conception of interpretation, Leszek Leszczyński (2001) suggests that the activities undertaken to establish the legal status of a text, and to reconstruct the normative grounds for a decision, ought to be straightforwardly referred to as "validating interpretation,"

in distinction to the next phase, which he terms "derivative interpretation" (*wykładnia derywacyjna*).

The activities by which the contents of legal norms of conduct are reconstructed make up a process appropriately referred to as the "reconstructive" stage (*faza rekonstrukcyjna*) of interpretation. These activities, as well as the directives requiring that they be performed, aim to reconstruct the norm-setting expression with its syntactic structure, and the process through which this structure is reconstructed comprises the activities of identifying (*i*) the addressee A (the agent or entity to which a requirement or a prohibition is addressed) and (*ii*) the circumstances O in which a specific behaviour Z will be required or prohibited. The expression so reconstructed, on the basis of the regulations contained in legal texts, can be ambiguous and is thus treated as a norm-setting expression rather than as a legal norm. As a sort of norm of conduct, a legal norm is understood on the derivative conception of interpretation as an expression that *unambiguously* requires or prohibits a clearly specified behaviour in clearly specified circumstances by a clearly specified addressee. The main reason why the reconstructive stage of interpretation is necessary lies in the features of legal texts, and in particular their multilayered structure, the grouping of norms into regulations, and the division of norms into regulations. This means that, on the one hand, a given legal provision may contain elements of various legal norms and, on the other, that the elements of one norm may be (and usually are) contained in more than one legal provision. Therefore, a legal norm must be reconstructed from the legal text.

The final stage in the interpretation of a legal text is called perception (*faza percepcyjna*). On the derivative conception of interpretation, a distinction is made between primary and final perception. Primary perception is the preliminary, intuitive, *prima facie* understanding of a legal text. This understanding constitutes the preliminary part of the perception stage of interpretation. Final perception, on the other hand, is the crowning of interpretation, since it consists in attributing sense to an expression in a legal text by applying the rules that make up the classic canons of legal interpretation, namely, the linguistic, systemic, and functional canons.

The perceptive stage of interpretation gives us the final perception of a norm-setting expression. The derivative conception of interpretation assumes that the activities by which the meaning of a norm-setting expression is established are undertaken only upon completing the activities in the reconstructive stage of interpretation, for only then will the interpreter have fully reconstructed the norm-setting expression—one that is logically and normatively complete—as having the structure "A (addressee), O (circumstances), n/z (requirement or prohibition), Z (behaviour)." Even if a norm-setting expression so reconstructed contains all the necessary elements, it is still ambiguous. Hence, the interpreter will have to apply the aforementioned interpretive canons in order to make the norm-setting expression unambiguous. The canons used in

the derivative conception of interpretation are applied in the traditional order: we first strive to make the expression unambiguous by using linguistic rules of interpretation, and if that does not work, the interpreter will apply the systemic canon and then the functional one in that precise order (Zieliński 2002). However, regardless of whether the norm-setting expression can be made unambiguous by applying the rules forming any one of the canons in the perceptive phase of interpretation, it will still be necessary to apply the rules making up all the other interpretive canons.

The derivative conception of interpretation is a valuable contribution to the theory of legal interpretation, for it underscores the need for interpretive activities that are usually neglected, and in particular those aimed at reconstructing a legal norm from the elements contained in the various fragments of a legal text. In this sense, legal interpretation is not confined to removing ambiguities by the use of classical canons of interpretation. If the final purpose of interpretation is to answer the question "Who should do what and in which circumstances?" then we will need the reconstructive stage of interpretation that precedes the use of those canons.

16.3.4. Theory of Lawmaking

Research on the theory of lawmaking was successfully initiated by Leon Petrażycki (1995), who developed a conception of lawmaking referred to as legal politics (*polityka prawa*). According to Petrażycki, the task of legal politics is to predict, in a scientifically justified manner, the consequences to be expected when certain legal regulations are introduced, and to design regulations whose introduction into the system of law would yield the desired effects. Legal politics so described can be classified as a practical science based on an empirical theory of law. Petrażycki's theory of law combines with the practical legal politics in such a way as to make it possible to predict the consequences of the legal regulations introduced, all the while formulating directives stating the way in which to attain the desired goals by the most rational legislative means. The objectives to be attained by legislators are characterized by Petrażycki in maximalistic terms: The final goal of legislation is to achieve the ideal of love (*ideał miłości*). The achievement of this ideal—the ultimate good—crowns the lawmaker's legislative activity. What it means for society to achieve the ideal of love (as Petrażycki understands this ideal) is to achieve a high ethical level, where the members of society can act altruistically, while being conscious of their own dignity and rights. This condition can be realized by developing psychic motivations to engage in specific activities. Various cultural factors are involved in developing these psychic dispositions, but a central role is played by law. Hence the importance of framing an appropriate legal politics.

When Poland had regained its independence in 1918, the need to build the legal order from scratch set off an animated discussion on the quality of

legislation and on codification and legislative technique. In the late 1920s and early 1930s, several studies were published on legislative and codification techniques. Especially worthy of mention in this regard is Roman Hausner, who in Hausner 1932 mostly concerns himself with technical issues, but who also points us to research of a more general, theoretical nature, such as Eugeniusz Jarra's *Ogólna teoria prawa* (General theory of law: Jarra 1920), analyzing, among other things, the problems of codification.

After World War II, Adam Podgórecki (1957) developed the conception of legal politics by construing it as a certain legislative and codification technique. On his view, legal politics should take a minimalist approach, meaning that it should aim for axiological neutrality. Podgórecki understood legal politics as a form of social engineering. The starting point for building the conception of legal politics lies in an analysis of the existing system of acts of law from the standpoint of their legislative correctness. This critical representation makes it possible to draw up a catalogue of legislative defects in the system of law and an accompanying catalogue of legislative and codification directives whose application is supposed to make it possible to eliminate these defects in the future. The causes of legislative defects in the legal system are both objective (independent of the quality of legislative work) and subjective (owed to a lack of accurate knowledge on the legislator's part or to legislative mistakes). They can be eliminated by applying legislative directives—and in particular codification directives—in a methodologically correct manner. The attainment of optimal lawmaking depends on the ability of lawmakers to apply legislative directives in a duly organized norm-making process that comprises (*i*) the use of directives on the diagnosis, substantiation, and construction of a normative act, (*ii*) a retrospective assessment of the consequences of that normative act, and (*iii*) an evaluation of the act itself (Podgórecki 1957).

Podgórecki's research set in motion a broader discussion that was carried on in the 1970s and 1980s, at different levels of intensity, generating results in the form of several conceptions of lawmaking and theories of legislation. In particular, theoretical accounts of rational lawmaking were developed in Poznań, Łódź, and, Toruń.

In Poznań, critical analysis was devoted to studying the lawmaking process and the mechanisms governing acts of law, and this work encouraged Ziembiński to address issues in the theory and policy of lawmaking. In particular, he offered a theoretical account of the lawmaking process (describing how laws are constructed) and of policy-making: This twofold theory he conceived as a practical science whose task is to construct teleological directives of social engineering setting out the way to achieve specific social, economic, or political objectives through an appropriate enactment of laws. He emphasized the interdependence between these two research areas, all the while highlighting the theoretical and methodological shortcomings of the theory of lawmaking. The construction of a methodologically correct, coherent, and complete theory of lawmaking makes

it necessary to systematize two types of statements (Ziembiński 1980). Statements of the first type describe how statutes are actually created, that is, they describe (*i*) what motivations and other reasons drive the people who actually decide about the contents of legislation, (*ii*) what social factors shape legislative decision-making, and (*iii*) what legislative principles are needed to ensure that legal texts and the system of law are both rational and free of technical defects. Statements of the second type describe what makes legislative decisions in the legal system effective and why these decisions may fail to gain social acceptance. Only in combination, as a duly organized set, do statements of these two types provide the basis on which social engineering can show the best way to frame laws so as to achieve the proper policy objectives. Lawmaking theory and policy proceeds on the assumption that legislation is a rational process. Ziembiński accordingly considers it necessary to construct a model of rational lawmaking.

The analysis of rational lawmaking was significantly developed and expanded in Poznań by Sławomira Wronkowska (Wronkowska 1982), whose primary objective was precisely to build a rational model of lawmaking. In pursuit of this objective she draws primarily on the views presented in the works of Wróblewski, Podgórecki, and Ziembiński. The starting point for Wronkowska is the positivist definition of law as a set of "general and abstract norms of conduct established in appropriate forms by competent state institutions" (Wronkowska 1982, 11; our translation). The critical elements of her theory are a conceptual analysis, a method, and an account of the status of research on lawmaking. On this basis she outlines both the normative principles and the regulations that govern the lawmaking process in Poland, and she also describes lawmaking practice, especially as concerns the drafting of normative acts. What follow are two models she constructs, one for rational lawmaking and the other for drafting normative acts. The first of these is particularly interesting, distinguishing the following stages in the process of rational lawmaking: (*a*) we identify and describe the objectives to be reached, as well as (*b*) the legal and/or nonlegal means by which to reach those objectives; we then (*c*) choose a specific means, (*d*) accurately set out the objectives the proposed normative act is supposed to achieve—while also pointing out alternative ways of framing texts of law aimed at the same purpose and (*e*) evaluating both the consequences and the costs of these alternative modes of regulation, so as to choose the best of these modes—at which point we can (*f*) draft the normative act and (*g*) formally enact it (Wronkowska 1982, 150). The investigation of lawmaking initiated by Ziembiński and carried on by Wronkowska, and later also by Zieliński (Wronkowska and Zieliński 1993), has turned out to be of practical significance, having made it possible to bring the principles of lawmaking technique to bear on the legal system so as to give that system the form of generally applicable legal rules.

In constructing a model of rational lawmaking, Wronkowska drew in part on Wróblewski (J. Wróblewski 1973, 1978a, 1978b, 1979, and 1980). Wróblewski's work on the way to optimize the lawmaking process by making it ra-

tional is crowned in J. Wróblewski 1985, which is not confined to setting out a rational model, for it also brings into the picture a much wider range of considerations. More to the point, Wróblewski builds his theory of lawmaking on the basis of assumptions about lawmaking policy, the lawmaker, and the legal system, as well as on the basis of assumptions and typologies that come into play in building a model representation of the lawmaking process.

The methodological organization of the problems involved in lawmaking makes it possible to present both theoretical and normative models of lawmaking. A distinctive feature of the former of these models lies in their cognitive nature, through which they put us in a position where we can actually take rational legislative decisions. Normative models, on the other hand, are characterised by practical functions, such as their setting criteria by which to evaluate the lawmaking practice and the enacted normative acts this practice results in. These models also point out the values for the lawmaker to use in setting out the aims of lawmaking activity.

The rational lawmaking model (*model racjonalnego tworzenia prawa*) makes it possible to combine these two functions. We can thus use this model according to its cognitive function—approaching lawmaking as a process through which to make rational decisions—or we can use it according to its practical function, making it possible to give normative guidance in lawmaking. On Wróblewski's model of rational lawmaking, we are asked to (*a*) set out objectives clear enough that we can then select appropriate means to those ends, (*b*) establish the links between the classes of phenomena that may be described as means and the classes that may be taken as objectives, (*c*) identify the legal means by which to attain the chosen objectives, and (*d*) choose the most appropriate means and write the text for the relative normative act. Wróblewski's approach to the rational lawmaking model is universal enough to make it possible to present the various relations the lawmaking process brings into play, considering in particular the relation of lawmaking to (*i*) legal validity, (*ii*) legal interpretation, (*iii*) axiology, (*iv*) procedural values, and (*v*) the effectiveness of lawmaking itself.

16.3.5. Rationality in Law and Legal Science; the Methodology of Legal Dogmatics

Discussion on the problem of legal rationality was initiated in Poland by Leszek Nowak (1944–2009). In his doctoral dissertation (the revised version is Nowak 1972) he presented an original and illuminating conception to some extent based on the ideas on scientific method put forward by the Poznań school (Kmita 1971). For Nowak, the fundamental assumption which necessarily must be adopted in the process of interpreting and applying the law is that of the legislator's rationality. Rationality is understood by Nowak in its epistemic-technical sense. On the principle of rationality, someone having non-contradictory knowledge, and whose preferences are asymmetric and transi-

tive, will choose the course of action that, in light of said knowledge, will bring about the desired effect. In the process of applying and interpreting the law, we must assume the legislator to be rational in the sense just specified. In fact, there is an even stronger assumption we must make, namely, that the legislator is perfect. A perfect legislator is one who (*i*) is rational in the aforementioned sense, (*ii*) has perfect linguistic competence, (*iii*) knows all the relevant facts and legal rules, and (*iv*) has the best possible moral justification for his or her preferences. Obviously, this assumption (as its name suggests) is empirically false, since no actual legislator can meet those requirements. But it is an assumption that jurists interpreting the law have to adopt even so, for otherwise the applied rules of interpretation would have no basis. As a matter of fact, jurists frequently ascribe their own knowledge and preferences to the legislator, both, since they believe that knowledge to be accurate and those preferences to be morally justified.

Nowak believes that the assumption of rationality is a necessary assumption in the human sciences. The specific feature of legal science is that it makes the stronger assumption that the legislator is perfect and that this assumption can never be falsified. On this basis Nowak embraces a naturalistic position in the method of science. The human sciences (including legal science) are empirical sciences and have the same basic structure as natural science, and their role is to provide explanations. The assumption of rationality in the *explanans* is an empirical assumption and is therefore subject to falsification. The specific feature of the human sciences is that no one is going to set about falsifying this empirical assumption in that area of knowledge.

The conception of rationality as the fundamental assumption of legal interpretation strongly influenced not only Polish legal theory (and in particular Zygmunt Ziembiński's Poznań school) but also the practice of Polish courts, which frequently refer to the assumption of the legislator's rationality in providing reasoned arguments for their rulings. Ziembiński (1974) concedes that the assumption of rationality is something of a fiction (since actual legislators are never fully rational and certainly not perfect), but it is a fiction that plays an important role in legal science and legal practice. The task of legal science is to present the law as a consistent system of norms having an axiological justification and as based on an adequate knowledge of the relevant facts. The fiction of a "rational legislator" serves to justify the jurists' rules of interpretation, validation, and inference. Disputes and controversies relating to questions of interpretation and validation can be explained by pointing out that different jurists ascribe different beliefs (about what is the case: knowledge) and different preferences to the legislator.

Nowak's conception (further developed by other members of Ziembiński's Poznań school) is still widely accepted in Polish legal theory, but it has been come under criticism. This goes in particular for the thesis that the law must be based on epistemic-technical rationality, a thesis challenged by Lech

Morawski (1988), who compared three conceptions of rationality: epistemic-technical, rhetorical-topical, and communicative. Morawski argues that those three different conceptions are not only different techniques for justifying decisions but also different ways of rationalizing the social relations created by law. The first conception is focused on ensuring that social processes can effectively be controlled, the second on ensuring that the legal order commands general acceptance, and the third on ensuring that communication through social interaction is free of repression and force. As can be appreciated, Morawski's sympathies (under influence of Jürgen Habermas) lie with communicative rationality.[23] Similar objections against epistemic-technical rationality as the exclusive basis of law have been raised by Marek Zirk-Sadowski (2000), who describes a wide range of possible approaches to rationality in law. It can be observed that the conception of communicative rationality has become increasingly popular in Polish legal theory over the last decade, even though other approaches are also present (Brożek 2007).

Polish legal theory has not widely embraced Nowak's conception of legal science as an empirical science: It is rather an anti-naturalistic approach that prevails, even though it must be mentioned that a broad spectrum of views exists (see, for example, Stelmach 1995, Pulka 2005, and J. Leszczynski 2010).

16.3.6. The Language of Law

Bronisław Wróblewski's 1948 book *Język prawny i prawniczy* (Legal and juristic language: B. Wróblewski 1948) initiated research on the language of law in Poland. As the very title of the book suggests, Bronisław Wróblewski distinguished "legal language" (*język prawny*)—the legislator's language such as it appears in the statutes—from "juristic language" (*język prawniczy*), the language used by the jurists. Further distinctions were later introduced in juristic language, which was made to also include the language of legal practice and the language of legal science. Research on the language of law has focused on a number of general and particular topics. The two most important general topics are discussed below.

(*i*) *The specificity of the language of law in comparison with ordinary language and its linguistic natur*e. Bronisław Wróblewski stressed the specificity of the language of law by reason of its vocabulary and semantic rules. Further research, partly by use of sophisticated statistical methods, made it possible to more accurately characterize those features of the language of law as a stylistic variety of ordinary (natural) language. It has also been argued, contrary to what Bronisław Wróblewski held, that the language of law is also marked by certain important *syntactic* peculiarities.

[23] On Habermas see Sections 10.3.5 and 10.4.3.2 in this tome, and Sections 10.4 and 25.3 in Tome 2 of this volume.

The relation between ordinary language and the language of law has been accounted for in various ways. Accounts made through the lens of the distinction between natural and artificial language have proved to be unsatisfactory (Gizbert-Studnicki 1986). The same goes for the traits peculiar to the language of law as an idiolect (individual language) of the legislator, as a dialect of the juristic community, or as a specialized language. The view has been expressed, taking up the famous distinction introduced by Ferdinand de Saussure, that the language of law ought to properly be classified not as *langage* but as *parole* (ibid.). This means that the language of law cannot be conceived of and analyzed as an abstract system composed of a vocabulary coupled with syntactic and semantic rules, in such a way as to make it possible to generate an infinite set of sentences. The language of law belongs to the domain of *parole*, or linguistic performance, and it can be characterized only as a *finite* set of *actual* (as opposed to potential) utterances (ibid.). Therefore, the language of law—to be viewed in the context of the variety of ethnic languages—bears the status of a linguistic register, as opposed to being a dialect. This means that the specific linguistic features of legal texts are determined by the sociolinguistic situation in which those texts are formulated.

The relationship between legal language (the language of statutes) and juristic language has also been characterized in various other ways: juristic language as a meta-language, juristic and legal languages as performing distinct illocutionary functions, etc. (ibid.).

(*ii*) *The method of research*. Initially, the main methodological controversy when it came to investigating the language of law mirrored the fundamental controversy in Anglo-Saxon philosophy of language: that between descriptivism and formalism. At issue was the usefulness of logical methods and formalisms in analyzing the language of law. Both approaches—the descriptivist and the formalist—have been defended and implemented in Polish legal theory. Those who advocated the formalist approach stressed the ambiguity, vagueness, and context dependence of the utterances and sentences making up the language of law and saw logical analysis as a way to correct those defects. On the other hand, those who advocated the descriptivist approach held that any formalist analysis is bound to dismiss important semantic intuitions linked to the analyzed text, in such a way as to change its meaning. The purpose of analysis should rather be to grasp as many intuitions and possible: Legal theory should be concerned, not with improving the logical features of the language of law, but with *describing* that language as it is. If legal theory is to be useful to legal dogmatics, it should abandon the formalistic approach, since legal dogmatics needs to be descriptive if it is to perform its functions (Ziembiński 1974). This dispute gave rise to an intermediate position between formalism and descriptivism: It came to be known as moderate formalism, and its point was that formalization ought to be introduced only when necessary, that is, not for the sake of logical correctness as such but in an effort to grasp as many

linguistic and juristic intuitions as possible (Ziembiński 1974). It is worth noting that closely bound up with the descriptivist approach was an interest in the *pragmatics* of the language of law, with a focus on performative utterances, the theory of illocutionary acts, etc. (as can be seen in Ziembiński 1966 and Opałek 1986).

Until the late 1970s, analytical philosophy (mostly Anglo-Saxon) held sway as the dominant theoretical framework for research on the language of law (crowding out other approaches). The rapid development of linguistics (as an empirical discipline) began to influence Polish legal theory relatively late. Research based on the methods and conceptions of contemporary theoretical linguistics was focused on specific problems rather than on the general theory of the language of law. Noteworthy in this regard is a book by Wojciech Patryas (2001) where Noam Chomsky's transformative-generative grammar is applied to the analysis of the structure of legal norms. As previously mentioned, the language of law was later also analyzed by bringing to bear the methods of sociolinguistics (Gizbert-Studnicki 1986) and of linguistic statistics (Malinowski 2006). This shows that the interest of Polish legal theory in the language of law is multidimensional and integrative.

16.3.7. Positivism and the Anti-Positivist Turn after 1989

As previously mentioned, Polish legal theory before 1989 can be characterized as being overall positivist. This does not mean that all the positivist theses from the English-speaking countries and the Continent were accepted across the board. The positivist attitude of Polish legal theory can be rather encapsulated in six theses as follows.

(1) The law is created by the legislator (this does not also hold for customary law, but its role is marginal).
(2) The task of legal science is to *find* the law (such as it already exists), not to *make* law.
(3) The courts apply *existing* law: They do not create *new* law.
(4) Legal science (as a descriptive discipline) should be distinguished from legal criticism: It is not the role of legal science to evaluate existing law in light of criteria of justice or fairness or on the basis of any other values.
(5) Legal theory is an analytic-descriptive enterprise and should accordingly remain axiologically neutral: It should not be in the business of morally evaluating the law.
(6) Legal theory does not ask practical questions about what *ought* to be done, nor does it seek to answer such questions.

The natural-law approach was almost universally rejected, with the exception of Christian legal philosophy, taught at Catholic universities, and of the neo-

Kantian approach, though its influence was marginal (in which regard see, for example, Szyszkowska 1970, 1972).

On the other hand, however, emphasis has been laid on the need to evaluate law by recourse to values as part of the process of interpreting and applying the law, and an effort has been made to analytically describe that process. The evaluative component of legal interpretation and application is highlighted in all theories of interpretation and application. On Ziembiński's (1980) so-called "expanded doctrine of the sources of law" (*rozwinięta koncepcja źródeł prawa*), the question What is law? cannot be answered simply by identifying the social facts recognized to be law-creating (such as a parliament's enactment of a statute) and by describing and analyzing the powers of government authorities (see above Section 16.3.4). A theory of sources of law must also include, as necessary components, the rules of interpretation and inference current in the legal culture, as well as the rules designed to eliminate inconsistencies between legal norms. These components of the doctrine of the sources of law are independent of the legislator, since they are embedded in the prevailing legal culture. The legal culture, however, does not contain a fully consistent set of rules of interpretation and inference: Some of these rules contradict one another. One needs to do some evaluating in choosing the rules by which to interpret and state what the law is. And the rules themselves frequently make their own application dependent on values.

Even Wróblewski's theory of the interpretation and application of law—an analytic-descriptive theory—highlights the need for evaluation in the interpretive process (J. Wróblewski 1959; see Section 16.3.3). Specifically, Wróblewski introduces the concept of a "normative theory of interpretation" (*normatywna teoria wykładni*), a theory that any legal interpreter needs to adopt as a method by which to solve conflicts between competing rules of interpretation. The choice we make in committing to one normative theory of interpretation rather than another is by nature axiological. Wróblewski argues that it is not for legal theory to make such evaluations: Legal theory must only concern itself with identifying and analyzing the areas and problems of legal reasoning where the need for evaluative judgment arises.

There appear to be at least two reasons for the dominance of the positivist approach in Polish legal theory until 1989. The first one lies in the strong influence analytical philosophy exerted in that period on legal theory, especially at the Lemberg-Warsaw school. Also, the achievements of English analytical philosophy in the post-war period almost immediately attracted the attention of Polish legal theorists. And, second, although Poland was much more liberal than other countries in the Communist Bloc, it was practically impossible under Communist rule to do political philosophy and develop moral and legal ideas departing from the official ideology: A retreat into purely descriptive analytical legal theory and philosophy was the only way to avoid ideological connotations.

The analytic-descriptive attitude of Polish legal theory held sway until the political turn that took place in Poland in 1989. After this date, legal positivism ceased to dominate as the prevailing attitude of Polish legal theorists. This turn can be ascribed in the first place to the radical change in the political environment and the concurrent need to establish the moral grounding for the new democratic and pluralistic system and to develop the idea of the rule of law. In the second place, this turn to some extent mirrored the development of Western legal theory, and in particular it was influenced by the theories of Ronald Dworkin, and later of Robert Alexy.[24] Although in our assessment the positivistic attitude as just described is still strong even today, new approaches have begun to take hold. Here we will only mention three developments (fully aware that the list is not exhaustive): (1) a critique of positivism from a hermeneutical standpoint (Stelmach 1995); (2) a critique of positivism from the standpoint of the theory of argumentation and communicative rationality (Morawski 1999); and (3) an increasing interest in the German debate, looking, for example, at Alexy's nonpositivist concept of law or at Radbruch's formula (Zajadło 2001, Grabowski 2009).[25]

16.4. Epilogue

The foregoing overview of the main topics and discussions in Polish legal theory after 1956 is by no means exhaustive. It only covers those topics with which legal theorists were in our opinion overwhelmingly consumed: By no means does it give a full picture of the achievements of Polish legal theory, for it leaves out important thinkers and works. So in this epilogue we are going to pass in review some of the other scholars who we think have made significant contributions to Polish legal theory.

We begin with Józef Nowacki (1923–2005), who taught in Łódź and thereafter in Katowice and devoted himself to a variety of topics, including the *analogia legis,* presumptions in law, the distinction between private and public law, and the rule of law. See Nowacki 1966, 1976, and 1995. His work is carried on by Zygmunt Tobor, his successor in Katowice (see Tobor 1998).

Wiesław Lang (1928–2012), who taught in Toruń, made an important contribution to the problems of legal validity and the relation between law and morals, among other important topics (see Lang 1962, 1989).

The department of legal theory at Lublin State University was founded after 1945 by Grzegorz Leopold Seidler (1913–2004), a pupil of Jerzy Lande,

[24] On Alexy, see Sections 10.3.2.2 and 10.4.3.1 in this tome, and Sections 1.5.4.1, 10.3 and 25.4 in Tome 2 of this volume.

[25] On Radbruch's Formula see Section 10.2.2 in this tome, Sections 1.1.3.2 and 9.1, and Chapter 2 in Tome 2 of this volume.

and very much influenced by Marxism. His indirect successor is Leszek Leszczynski, who teaches in Lublin and has written important books on general clauses in law, on the axiology of law, and on legal interpretation, among other topics (see L. Leszczynski 2000, 2001). Also affiliated with the same department are Andrzej Korybski, whose research is focused on alternative dispute resolution, and Roman Tokarczyk, who has written numerous books on the history of legal philosophy, the theory of comparative law and bioethics, among other topics (see Tokarczyk 2008, 2009).

An important school of legal theory was founded in Wrocław by Stanislaw Kazimierczyk. The members of this school are Andrzej Bator, Włodzimierz Gromski, Zbigniew Pulka, Adam Sulikowski, and the late Artur Kozak (1960–2009). They have written important books on a variety of topics including the method of legal science, the instrumentalization of law, the autonomy of law, and the theory of legislation, as well as on discretion in law (see Kazimierzyk 1978, Kozak 2002, Bator 2004, Pulka 2005, Sulikowski 2008). An important feature of the Wrocław school is its interest in postmodernist thought.

The successor to Jerzy Wróblewski in Lódz is Marek Zirk-Sadowski. In the period after 1989 his research focused, among other topics, on the problem of legal culture in the context of Poland's accession to the European Union (Zirk-Sadowski 1998). His colleagues in Lódz (Małgorzata Król, Bartosz Wojciechowski, Jerzy Leszczynski, and others) contributed importantly to the discussion on various topics in legal theory, including the finality of legal decisions, discretion in law, the philosophical foundations of criminal law, and the functions of legal dogmatics (see Król 1992, Wojciechowski 2004, and J. Leszczyński 2010).

The head of the department of legal theory in Szczecin is Stanisław Czepita, a pupil of Zygmunt Ziembiński and Maciej Zieliński. He has made valuable contributions on the legal philosophy of Czeslaw Znamierowski (Czepita 1988) and on constitutive rules in law (Czepita 1996).

Zygmunt Ziembiński had also a strong influence on the department of legal theory in Poznań, where his pupils teach. Among them is Sławomira Wronkowska, who was previously discussed in the context of the theory of legislation (see Section 16.3.4), but who also works on other problems, such as subjective rights and conventional acts in law. Also in Poznań are Wojciech Patryas, who has significantly contributed to the problem of definitions and performatives in law, as well as to the concept of action and to the problem of the structure of norms (see Patryas 2001); Marek Smolak, who has written on various topics, including institutional legal positivism (see Smolak 1998); and Stanisław Świrydowicz, who has successfully worked on deontic logic and later moved to the School of Mathematics in Poznań.

The successor to Kazimierz Opałek in Kraków is Tomasz Gizbert-Studnicki. In 2008, the department of legal theory and legal philosophy was split into two departments, one devoted to legal theory and the other (directed by

Jerzy Stelmach) to the philosophy of law and to legal ethics. The research out of Kraków is focused on legal hermeneutics (Stelmach 1991, 1995), law & economics (Stelmach, Brożek, and Załuski 2007), legal argumentation (Brożek 2007), the validity of law (Grabowski 2009), liberal political philosophy (Polanowska 2008), the interpretation of law (Płeszka 2010), and the application of the theory of evolution in law (Załuski 2009), among other topics. In the 1970's and 1980's, Franciszek Studnicki (1914–1994, professor of civil law in Kraków) pioneered the study of legal informatics in Poland. Also teaching in Kraków are Jan Woleński (with a focus on deontic logic and analytical philosophy), though he later moved to the Kraków University Institute of Philosophy, and Tadeusz Biernat (at the Akademia Frycza-Modrzewskiego, a private university in Kraków), who works on various topics relating to legal and political theory (Biernat 2000).

Legal philosophy in Warsaw is focused on constitutionality and the theory of the state (Piotr Winczorek) and on neo-Kantian legal philosophy (Szyszkowska 1970), as well as on the theoretical problems connected with public registers and on various aspects of legal argumentation (Stawecki 2005).

The department of legal theory and philosophy in Gdansk, headed by Jerzy Zajadło, focuses on a range of issues in law, with an interest in its ethical implications: the topics of investigation include Radbruch's formula, the moral aspects of international law, human rights, and bioethics (Zajadło 2001).

We have made no reference in this chapter to Polish sociology of law. This discipline developed at a rapid pace after 1956 (the year of Polish October) and gained an international reputation.

Quite a lot of important Polish legal philosophers have worked or are still working abroad: We should mention here Aleksander Peczenik (1937–2005) who taught in Lund; Wojciech Sadurski, who teaches in Sydney; and Krzysztof Grzegorczyk, who teaches in Paris.

It was a remarkable development that legal theory and philosophy went through in Poland in the 20th century. This was due to a combination of factors: a very good start with Leon Petrażycki and his ideas; a serious effort to support science and its organization in Poland after 1918, and then again after 1945; a strong philosophical background, considering not only the Lvov-Warsaw school but also phenomenology, Thomism, and even Polish Marxism (a more open strand of Marxism than in other Communist countries); a plurality of interests, owed in part to the multifaceted investigations undertaken in philosophy; a practice of close cooperation with sociologists and specialists in other fields; and the high regard in which legal philosophy and theory has been held by students of law and practicing lawyers (as can be illustrated by sharing this anecdote, that one of the coauthors of this chapter was browsing through the shelves of a second-hand bookshop one day when he chanced upon a copy of one of Jhering's works, an on it was stamped the name and business address of an attorney practicing in a small town in Poland). Polish legal theorists and

philosophers, like Opałek, Wróblewski, and Ziembiński, or who have a Polish background, like Peczenik and Sadurski, have played an important role on the international intellectual scene, and the same could be said of the present generation. This was attested by the fact that the 23rd IVR World Congress IVR took place in Kraków in 2007.

Chapter 17

RUSSIAN LEGAL PHILOSOPHY IN THE 20TH CENTURY

by Mikhail Antonov

17.1. Introduction

The 20th century seems to be the most fruitful time for the philosophy of law in Russia, considering the contribution that Russian and Soviet legal thinkers have made to this discipline, and the role they have each played in the development of the international debate, despite the severe political impact that legal studies have suffered in Russia, not only in the Soviet period but also before the Revolution. It was impossible to find in 20th-century Russia a lawyer engaged in pure theoretical investigations without thinking of their ramifications in the contemporary political situation. As elsewhere, there has been a certain discrepancy between, on the one hand, the theories the local (Russian and Soviet) jurisprudence popularized for their political content and, on the other, the theories that revealed their importance on theoretical grounds alone. The overpowering ideological background of Soviet science could not but contribute to this effect and deeply conceal the state of affairs in national legal theory. Much less could Soviet science keep from defining evaluative criteria that largely depended either on the view of this or that accredited theorist—witness the crucial influence of Lenin's views or those of Vyshinsky, who was attorney general under the Stalin regime and set out a naive command theory of law that could hardly be taken to have any real explanatory value—or on the compatibility of a theorist's conceptions with Marxist dogma. Although true Marxists disdained law, the role their legal theories played in official ideology and in political practice cannot be ignored. That is why the selection that follows is made from both a theoretical and a practical perspective, considering each conception not only on its own merits but also in light of its relevance for the further development of Russian debates and practices as concerns the law. Some of the philosophers discussed here belong to both the 19th and the 20th century, and the decision to include them was made by taking into account the period when their principal works were published and influenced the scholarly community. Two main periods will be distinguished: (1) the prerevolutionary period, where the conceptions developed by the Russian emigrants will also be studied, because they are the natural continuation of the discussions initiated before 1917; and (2) the Soviet and the post-Soviet periods, which yielded different outcomes in contemporary Russian philosophy of law. I am aware of the impossibility of covering all aspects of legal philosophiz-

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ing in Russia, and so I will focus on the most prominent actors of Russian legal philosophy in the 20th century. For the sake of brevity, I will leave out minor details, and where advisable I will refer the reader to the research available in English, French, or German.

17.2. The Prerevolutionary Period

Russian legal philosophy traditionally developed in the mainstream of natural-law conceptions. But at the end of the 19th century the powerful impact of secularization splintered Russian academic culture and turned it into a struggle among liberals, radicals, and traditionalists in all branches of social science, including the science of law. The threadbare labels "positivism" and "idealism" can be applied only on condition that this distinction does not necessarily denote any definite political affiliation, even though almost all thinkers tended to bring their theoretical findings to bear on the political debates. The disputes centred on the question of the development of society, culture, and religion; and quite often, those who sought legal and political reforms were idealists (like Pavel Novgorodtsev), while those who stoutly argued for the immutability of the existing system were positivists (like Gabriel Shershenevitch).[1] It is true, on the other hand, that the imperial government of Russia promoted idealism combined with traditionalism and mysticism as the basis of its official ideology, and tended to banish the positivist philosophy, which challenged the sacred official ideological formula "Orthodoxy, Autocracy, Nationality" (*Pravoslavie*, *Samoderzhavie*, *Narodnost'*). However, the effect seemed to go exactly in the opposite direction: The tsarist censure, surveillance, and reprimands could not but contribute to the ever-growing popularity of the positivist ideology in Russian society.

The overall situation in Russian legal philosophy at the turn of the 20th century was marked by this polemic among several groups of scholars and thinkers. Powerful political offices were held by the monarchists, who espoused traditionalism but did not initially fall into the extreme nationalism and anti-Semitism characteristic of the *tchernosotenniki* (the Black Hundred).[2]

[1] Pavel Novgorodtsev (1866–1924) took up Rudolf Stammler's idea of a "natural law with changing contents" by laying emphasis on the problem of political and social ideals and their crucial role in the development of law. After emigrating to Czechoslovakia, he worked on the correlation between law and religion, examining specific traits of the Russian people's legal consciousness. Gabriel Shershenevitch (1863–1912), for his part, is controversially famous for his thoroughgoing positivist account of law. For Shershenevitch, as for John Austin, law is nothing but a command of the sovereign, and on this premise he pursued (before Hans Kelsen) a program intended to purify legal science of all values and ideologies. In this sense, Shershenevitch can be considered a theoretical antipode to Novgorodtsev and his school. More information on these two authors will be given in what follows. On Stammler, see Section 1.3 in this tome and Section 2.2 in Tome 2 of this volume.

[2] This is a collective name for a variety of small conservative groups that resisted the revo-

Among the partisans of the monarchist ideology two authors can be singled out: Konstantin Pobedonostsev (1827–1907) and Lev Tikhomirov (1852–1923).[3] Pobedonostsev was prominent as the author of several important papers, but he was also influential as Ober-Procurator of the Russian Orthodox Church (serving in that capacity for twenty-five years) and as the tutor of the young Nicolai II. Pobedonostsev opposed liberal reforms in Russia, for in his opinion they were contrary to the Orthodox canon (cf. Pobedonostsev 1965). After the first Russian Parliament was summoned in 1905, Pobedonostsev resigned from his post in protest and thus lost most of his influence (cf. Byrnes 1968), but he did remain the principal theorist of traditionalism at the beginning of the 20th century. Tikhomirov, for his part, initially opposed the tsarist regime, even taking part in several terrorist attacks against its officials, but afterwards he authentically adhered to monarchism (Tikhomirov 1888). In 1905 came his voluminous book *Monarkhitscheskaja gosudarstvennost'* (Monarchic statehood: Tikhomirov 1905), which marked the highest point of development of official monarchist theory in Russia, and which is thought to be its most representative statement. In it Tikhomirov ardently criticizes the liberal ideology as chanting slogans (equality, universality) that contradicted its actual practices (inequality, oligarchy), and as originating from Western legal psychology, which favours "the power of quantity" (Tikhomirov 1905, 23; my translation). Against this psychology Tikhomirov sets the Russian Orthodox mental outlook, which instead appreciates "the power of quality" (ibid.) and makes no distinction between power and a tsar, the latter being a symbol of political unity in the eyes of people, and at the same time the guarantor of civil rights and liberties (see Tidmarsh 1961). Another important representative of monarchism was the Belorussian philosopher Ivan Solonevitch (1891–1953), who emigrated to Argentina and took a more rigid nationalist stance, making anti-Semitic and anti-Western assaults and thus demonstrating how, in Russian legal philosophy, the monarchist ideology degraded into nationalism (see Solonevitch 1952).

This monarchist mainstream was opposed by its natural opponent: liberalism. The ideas of liberal ideology were being developed in the numerous works of its fountainhead, Boris Chicherin (1828–1904). Chicherin was re-

lutionary upheavals of the first Russian Revolution in 1905 and in the following years. As revolutionary propaganda was mostly associated with the Jewish *intelligentsia*, the *tchernosotenniki* turned mainly against the Jews, organizing pogroms in fits of collective anger; and they also attacked the members of opposing political parties. The *tchernosotenniki* positioned themselves as defenders of orthodoxy and monarchism. The name "Black Hundred" is a historical allusion to 1612, when the Russian national hero Kuz'ma Minin gathered a militia from the "black hundred" (peasants and craftsmen) to drive the Polish troops from Moscow.

[3] The second author's given name is so transliterated (as *Lev*). This is different from the way Tolstoy's given name is transliterated (as *Leo*), even though their spelling and pronunciation in Russian is in both cases the same: *Lev*.

garded as the most knowledgeable specialist in the political doctrines of Western Europe and Russia, and as the originator of Russian liberal legal philosophy (cf. Gamburg 1992; Walicki 1987, 105–64). This thinker followed the outlines of Hegelian legal philosophy but stressed the "absolute and indefinite dignity of the human being" (Chicherin 1998b, 60; my translation). The deepest nature of each human being resides in liberty, whose external manifestations are administered by legal regulation, and the internal ones by moral regulation. It is on the notion of legal (and moral) personality, and on the distinction between law and morals, that in the 1890s his famous dispute took place with Vladimir Soloviev,[4] who supported an organic and holist conception of social regulation (cf. Gurvitch 1922). This credo of Chicherin led him to affirm liberal values and ideals, and it is by this contribution that his significance in Russian legal philosophy is to be measured (see Chicherin 1998a).

Alongside these two mainstreams in Russian legal philosophy there existed two other approaches which from a theoretical standpoint cannot be treated as significant as the liberal and conservative ones, but which proved to be of utmost importance in political life. They are Marxism and anarchism, whose subversive ideologies were the main inspiration of the October Revolution in 1917 and of the ensuing Civil War. In the second half of the 19th century, anarchist ideology exercised a quite remarkable influence on the political life of Russia. The activity of Mikhail Bakunin[5] and his followers stoked the Russians' traditional scepticism of the state and the law. The chasm between the religious ideological background of power and of the laws issued by it, on the one hand, and the actual content of these laws and their practical implementation,

[4] Vladimir Soloviev (1853–1900) was the most prominent figure in Russian philosophy in the second half of the 19th century (his family name can take any of several spellings in English: *Soloviev*, *Solovjov*, *Solovyov*, *Solov'ev*, or *Solovyev*). He criticized what was then a commonly accepted tenet of neo-Kantian philosophy, namely, the separation between the empirical and spiritual worlds, but at the same time he also rejected the Hegelian push to spiritualize the material world. For Soloviev, these "Abstract Principles"—his doctoral thesis is titled *Kritika otvletchennykh natchal* (Critique of abstract principles: Soloviev 1880)—must be merged by cognition into an All-Union (*Vseedinstvo*) where opposing and conflicting principles are worked together into a higher synthesis. Proceeding from this highest reality, Soloviev (1897) then sets out to develop a system of social philosophy with which to explain social cohesion and interaction by virtue of a spiritual unity of mankind (*sobornost'*). In this system, law was conceived as a "moral minimum" (*minimum nravstvennosti*) necessary to promote such "hyperempirical" unity at every stage of social development. See Soloviev 1897, 328. Cf. D'Herbigny 1918, Sutton 1988.

[5] Mikhail Bakunin (1814–1876) is one of the founders of anarchism. After emigrating from Russia in 1840, where he was persecuted for his anti-étatist beliefs and revolutionary propaganda, he still remained influential among the Russian intelligentsia. In 1851 he was extradited to Russia from Saxony and spent ten years in prison and in exile. He fled from Russia again in 1861. His political aim was to have the means of production collectively owned, and to have the state abolished in favour of many independent social groups (see Bakunin 1971). He and his supporters strenuously criticized Marx's ideas about the ways to implement the social revolution and establish a new social order.

on the other, was fertile ground where anarchism could stir up various popular movements. These movements, and the idea of repudiating the legal sphere as incompatible with moral and religious beliefs, found powerful support in the literary work of the Russian novelist Leo Tolstoy (1828–1910). Tolstoy had a great impact extending beyond Russian literature: His moral indictments and criticisms against the state and the law became one of the main factors in the development of Russian legal philosophy at the turn of the century. Most of the works he wrote at that time expressed a resolute rejection of any power (political, legal, etc.) other than the power of God. Even though in his illustrious literary works Tolstoy aimed his attacks at the Russian legal system, his actual target was not just this or that particular regime or set of laws but the very idea of coercion incarnated in the state and the law (see his famous philippics against state coercion in Tolstoy 1970, 1989). Many became the followers of his anarchist doctrine (*tolstovtsvo*) of noncoercion (*nenasilie*), who gathered in communities claiming freedom from any legal regulation. Even if Tolstoy's criticisms revealed plenty of inconsistencies and contradictions in his doctrine, his anti-law and anti-state ideas remained widespread and influential in Russia until the 1917 Revolution.

Another ideologist of anarchism, Peter Kropotkin (1842–1924), developed a different strategy, suggesting that the state and the law would *inevitably* melt away under the pressure of social revolutions. In the first quarter of the 20th century, Kropotkin became the intellectual and political leader of the "militant" Russian Anarchists,[6] and his ideas about the aim of revolution (to destroy all coercive mechanisms in society) acted during the Civil War as a powerful intellectual counterpoise to Lenin's doctrine of dictatorship of the proletariat (see Kropotkin 1927; cf. B. Morris 2004). During the Civil War, which began to really batter Russia in 1918, anarchism became a political and military power to be reckoned with, so much so that black (the colour of the Anarchists' flag) became the war's third colour, along with red (the Bolsheviks) and white (the Monarchists and Republicans). Defeated by the Bolsheviks in the Civil War, the Anarchists lost the people's support, and their doctrine ceased to play any significant role in Russian legal philosophy.

The first steps of Marxism in Russia did not give promise of any extraordinary success, nor did they give any hint of the influence this ideology would later exercise in Russian history. The Russian Marxist Party—called *Osvobozhdenie truda* (Liberation of labour) and headed by George Plekhanov (1857–1917)—was born in the 1890s as a branch of the *Narodnik* (Populist) movement. It was not initially a numerous and powerful party, however, since the few industrial workers and radical intellectuals who joined it made up too narrow a social base by comparison with the nobility, peasantry, clergy, and other

[6] This was in contrast to the "peaceful" anarchism of Tolstoy, who eschewed all contact with political life.

influential social strata in Russia. Convinced of the unavoidability of social revolution, Plekhanov advocated progressive, step-by-step reformative groundwork through legislation, a process destined to lead to industrial and political development in Russia and to the consequent growth of the working class: This, in turn, was bound to change society's production system and to eventuate in subsequent social changes. That is why Russian Marxism at its inception espoused many liberal principles, and the protection of liberties by law was regarded by the first Marxists as an indispensable mechanism for achieving their political objectives. This position was not unanimously shared by all of the party's members, and at the very outset of the 20th century a schism took place among the Legal Marxists headed by Plekhanov, the Mensheviks, and the Bolsheviks[7]—the latter being persuaded of the futility of any bourgeois liberal legal reforms, which would accomplish nothing but to divert the working people from revolutionary activity.

This Leninist mainstream in Marxism was counteracted by another trend started by a group of philosophers guided by the ideas of Vladimir Soloviev: They came forward with their credo in 1902 (Askol'dov et al. 1902), pointing out the weak theoretical points of Marxism. Several years later, in 1909, a new book came out under the ambitious title *Vekhi*—or "Landmarks" (Berdyaev et al. 1994)—where the criticism against Marxism was renewed with even greater insightfulness and resonance.[8] First and foremost, the authors accused the revolutionary intelligentsia of a contemptuous attitude to law, criticizing the legal nihilism of Lenin and his followers. This book gained widespread support among Russian intellectuals and contributed to further discussions on law's importance for social development, becoming the Russian revolutionists' most dangerous ideological opponent (see Brooks 1973, 25ff.). When the Russian social system collapsed in 1918, the authors of *Vekhi* published another book (Askol'dov et al. 1918), this time making known their negative attitude to the events of 1917 and expressing strong traditionalist convictions.

When the Civil War was over, several younger philosophers put out a bold new work titled *Smena Vekh*, or "Change of Landmarks" (Kluchnikov 1921).[9]

[7] See the debates listed in *Protokoly Vtorogo Kongressa Rossiiskoi sotsial-demokraticheskoi partii* (Protocols of the Second Congress of the Russian Socialist-Democratic Workers' Party), July–August 1903 (Moscow: Gospolitizdat, 1953).

[8] Contributing to this work were Nikolai Berdyaev (see below), Sergey Bulgakov (1871–1944, who started out as an active Marxist and then, in 1909, turned to religious conservatism and developed a social philosophy based on the Orthodoxal dogma), Semen Frank (see below), Peter Struve (1870–1944, a politician, member of the Constitutional Democratic Party, and an economist who initially espoused the Marxist theory but then did a complete turnabout in 1909 and sharply criticized it), Bogdan Kistjakovsky (see below), Alexander Izgoev (or Aron Lande, 1872–1935, an ardent Marxist as a student, he later joined the People's Party of Liberty and became a political adversary of the Bolsheviks), and Mikhail (or Meilikh) Gershezon (1869–1925, a famous literary critic, though not involved in politics).

[9] Contributing to this work were Juri Klutchnikov (1886–1938, professor of international

They asserted that the Revolution occurred because of the cosmopolitism furthered by the previous regime, which tried to introduce Western legal values in Russia without questioning whether these values are compatible with the Russian people's ethos. These authors considered Bolshevism a natural reaction against such Westernization, believing it would be overcome by a strong state consolidated through customary law. This logic was followed by Eurasianism (see Suvtchinsky et al. 1921), which insisted that Russia belongs to neither Europe nor Asia, and continues the legal practices of Byzantium and of Tartary, all the while creating its own legal reality based on cultural patterns inherited from history and geography (cf. Halem 2004, Laruelle 2008). The most remarkable legal thinker among the Eurasianists was a disciple of Novgorodtsev at Moscow University by the name of Nikolai Alekseev (1879–1964) who developed a phenomenological conception of law seeking to combine phenomenology with Soloviev's ideal-realist conception of law (see N. Alekseev 1924).

Nikolai Berdyaev (1874–1948) took an active part in the development of *Vekhi* principles, criticizing the radicals for advocating a rejection of legal regulation in the name of greater human prosperity. But as early as 1918 Berdyaev changed his position and vehemently denounced democratic, liberal values as the philosophical background for extreme cruelty and for the inhumanity of revolutions. In this book (Berdyaev 1990) Berdyaev viewed law as playing a new role—that of establishing and maintaining inequality among the different strata of society. He exploited the evangelic hyperbole "Kingdom of God" and "Kingdom of Caesar" to illustrate the unbridgeable gap between "internal" and "external" ways of regulation, claiming that law is impuissant without recourse to religion, and will sooner or later turn into theocracy. In his later works Berdyaev turned his attention from political and legal issues to existentialist philosophy, stressing on the importance of liberty as the primary fact of existence (see Berdyaev 1935, 1939) and trying to reassess the Communist ideology from the vantage point of the realization of human liberty (see Berdyaev 1937).

Also a participant in the *Vekhi* movement was Semen Frank (1877–1950), stressing that the rejection of legal regulation could not result in a higher moral regulation but would inevitably bring society to collapse and disintegration. In

law and a member of the People's Party of Liberty), Nikolai Ustrjalov (1890–1937, professor of public law and an active member of the Constitutional Democratic Party), Sergey Luk'janov (1888–1938, a philologist and journalist), Alexander Bobrizsev-Pushkin (1875–1937, a lawyer and a member of the "Union of October 17th" Party), Sergey Chakhotin (1883–1973, a biologist and physician), and Juri Potekhin (1888–1937, a literary critic and member of the Constitutional Democratic Party). These thinkers all left Russia after the Bolshevik Revolution but in 1923 returned to the Soviet Union (all of them except Chakhotin, who served on trade missions of the USSR in 1923–1927). They believed that the Bolsheviks could realize the Russian people's national ideals, and this is why they came back and tried to cooperate with the Soviets. All of them except Chakhotin were declared "enemies of people" and executed in 1937–1938, as were more than 100,000 other returnees who in the 1920s followed the ideological call of *Smena Vekh*.

1915 Frank published his principal epistemological work (Semen Frank 1915, translated in French as Semen Frank 1937), arguing that consciousness and being form a unity secured by the world's ideal dimension, a dimension which human beings perceive intuitively, and which (following Soloviev) he labels *Vseedinstvo* (All-Unity). After emigrating (to Germany, then to France, and finally to England) Frank applied his epistemological findings to some basic problems of social regulation. Developing the ideas of Émile Durkheim, he concluded that social regulation can work in two ways: as a mechanical community (*obzhnost'*) or as a spiritual communion (*sobornost*). The task assigned to law is to combine these two ways of social regulation into a synthesis suited to each distinct society (see Semen Frank 1930). Later, reflecting on World War II, Frank changed his views and revealed profound scepticism in regard to the concept of a natural law, believing that positive law is endowed with its own spiritual value and does not need any moral or religious justification (see Semen Frank 1949). In so doing, Frank criticized natural law theory for setting forth supra-positive criteria on which basis to evaluate positive law, thus undermining the latter's validity. Natural law, on this view, threatened to destroy the minimal guarantees of legality for the sake of the unclear spiritual values of a "higher law." In his later writings, in an effort to preserve these guarantees, Frank blamed this "higher law" for its role in the resurgence of formal law. It is remarkable that this apology of positive law was offered from the standpoint of religious philosophy.

Another outstanding scholar who took up the "Vekhi idiom" was the Russian-Ukrainian lawyer and philosopher Bogdan Kistjakovsky (1868–1920). He recognized that Russian legal nihilism, i.e., the failure to understand and recognize the social significance of law, can very well be explained by pointing to the Russian authorities' long history of despotism. The way out of this situation, however, is not to take down the legal system; rather, the first task of the intelligentsia is to nurture the people's legal consciousness, thereby contributing to perfecting legal and social structures. Kistjakovsky's legal ideas were extensively developed in *Sozialnye nauki i pravo* (The social sciences and law: Kistjakovsky 1916), which set out a project for the "integration" of legal philosophy. Kistjakovsky advocated a pluralistic approach in the legal sciences, where an integrative method could combine the various methodological tools—some of them seemingly irreconcilable—proper to the natural-law, psychological, normative, and sociological approaches to law. As a foundation for this integrative methodology, he suggested a critical analysis of normative communication, believing that this could integrate different aspects of law (see Kistjakovsky 1916, 195ff.). Kistjakovsky insisted that sociological and psychological approaches only make it possible to discover *causal* relations in law, this in contrast to the normative approach, which makes it possible to see the *teleological* element, providing the ultimate aims of law. He thought that this normative approach shows law to be something valuable and reasonable in itself, and thus sought to find an *a priori* foundation for this axiological element

of law. He saw this foundation in social communication, a practice viewed as based on the idea of justice. The content of this idea varies from society to society, but its form remains the same, resolving itself into an imperative requirement to balance the interests of the individual against those of the social, a balancing reflected in the idea of human rights. So, the ultimate validity of the positive law is predicated on its congruence with human rights (or with natural or divine law, however one might choose to call this *a priori* foundation). In their turn, human rights are dependent on there being forms of social communication. These forms are examined from a twofold perspective, for on the one hand we rely on transcendental methods to arrive at a *normative* formulation of justice as an idea reflected in the legal consciousness, whether individual or collective, while on the other hand we look to empirical methods (ibid., 615–23), taking the route of sociology or psychology, or any other causal science, and seeing how the same idea finds expression in *concrete* human interaction. This combined approach to law is described by Kistjakovsky as "integral."

Alongside these "idealist" legal theories there grew the Revived Natural Law movement (*vozrozhdennoe estestvennoe pravo*), which became prevalent at Russian universities before the Revolution. This movement in Russian legal thought was associated for the most part with Vladimir Soloviev's school of legal philosophy. Pavel Novgorodtsev (1866–1924) was the most distinguished representative of the Revived Natural Law School in Russia. Like Soloviev, Novgorodtsev understood natural law as an equilibrium of private and public interests, and hence as a prerequisite for the free development of personality on both an individual and a collective level (see Novgorodtsev 1909). The political and social turmoil of his time he imputed to what he called the "demise of the idea of paradise on earth," the dream of arriving at a perfect model of social organization. The basic misconception, for him, lay in considering this perfect model an end in itself, rather than a means to other ends. In fact, the problem for him is precisely that of striking an interim equilibrium, a relative balance between the conflicting values of individualism and collectivism, liberty and equality. This equilibrium cannot be regarded as anything concrete or substantial, with a formula that holds good once and for all: Humankind will always be making and remaking this equilibrium anew, gauging the ultimate end in light of the circumstances specific to each situation. Human rights, constitutionalism, democracy, and other values are only relative, intermediate remedies, acquiring their spiritual meaning only if viewed as conducive to the "attainment of human dignity" (ibid., 13ff.; my translation). Novgorodtsev's most important research appeared in 1917 (*Ob obzhestvennom ideale*, On the social ideal: Novgorodtsev 1917), with a detailed and insightful criticism of the utopian ideals underpinning socialist ideology, which is found guilty of confounding absolute and relative values. This confusion, according to Novgorodtsev, leads to social cataclysms similar to that of 1789 in France or that of 1917 in Russia. After 1917 Novgorodtsev criticized as utopian not only *socialist* legal

philosophy but also its *democratic* counterpart (with its ideals of a liberal, egalitarian regulation), arguing that there cannot exist any absolute ideals in the legal domain, because the only authentic values and ideals are religious (see Novgorodtsev 1917). Whereas, in his prerevolutionary works Novgorodtsev gave evident primacy to individuality as the sole bearer of freedom and moral dignity, after emigrating he took a position closer to Slavophiles's traditionalism, focusing especially on the role of religious and communitarian values in law (see Novgorodtsev 1922, 1926). With the experience of the revolution and the ensuing war, Novgorodtsev grew sceptical of the moral forces of humankind, no longer seeing the ultimate basis of law in the "attainment of human dignity," and turning instead to a theological conception of law: "Instead of autonomous morality we posit theonomous morality, instead of democracy and self-government we posit hagiarchy, or the authority of the holy shrines" (Novgorodtsev 1926, 70; my translation). This sliding from liberal ideals to conservative views was characteristic not only of Novgorodtsev but also of many other proponents of idealist philosophy of law, whose works are described below.

Another illustrious disciple of Soloviev was Evgeny Trubetskoy (1863–1920).[10] Trubetskoy's legal conception became one of the last versions of Revived Natural Law in Russia. In his view, natural law should be understood as "ought" in the legal sphere, as a criterion for evaluating the positive laws. This "ought" is equivalent to human freedom, such as is acceptable in a given society at a given time, and measured against existing norms—in such a way that "law is a freedom offered and delimited by norms" (Trubetskoy 1911, 102; my translation). Natural law thus preserves the core of the human being, namely, the liberty which cannot be suppressed without simultaneously suppressing legal regulation. Similar ideas were developed by Alexander Jazshenko (1877–1934), who taught at Saint Petersburg University, and after emigration to Kaunas University in Lithuania, and who in 1912 published another masterful investigation of Soloviev's legal thought (Jazshenko 1999a), this along with *Teoria federalisma* (The theory of federalism: Jazshenko 1999b), presenting his own research. These two books proceeded from the same premise: that the philosophical understanding of law hinges on a synthesis of different approaches to law, and that in this way the equivalence will be recognized between individuality and society (see Jazshenko 1999b, 56). He stressed that empirism is reconcilable with assertion of a higher morality, they can be built into

[10] Trubetskoy brilliantly laid out his teacher's ideas in the two-volume work *Mirosozertsanie Vladimira Solovieva* (Vladimir Soloviev's worldview: Trubetskoy 1913). And since Soloviev was the brightest philosophical star of Russia's cultural Silver Age (the last and first quarter of the 19th and 20th centuries, respectively), his ideas, including his legal conception, exerted great influence on philosophical development in Russia. This was the reason why many thinkers would refer to Soloviev's intellectual heritage to frame their own conceptions.

the ultimate principle of interindividual cooperation, which as its supreme goal has to create "normal social conditions" (Jazshenko 1999a, 50; my translation).

Jazshenko argues that morality can never be constrained by human subjectivity, for it necessarily transcends one's personal life and subjective feelings: Each member of society is to implement the objective values this society pursues. That is why, in Jazshenko's opinion, we each intuitively cherish some ideal model of society (a blueprint framing a view of "normal social conditions"). We thus rely on our insight to put together provisional schemes of interaction through which this ideal model is implemented, but this can be done only insofar as we can agree on, and consequently pursue, a common set of aims achieving which realizes our social being. Of course, no such agreement can ever be unanimous: It can at best be partial. But Jazshenko does not take this to mean that human interaction is arbitrary. Quite the opposite: No interaction can happen without first securing the social participants' mutual agreement and engagement—the very basis of law. And, what is more, there is an intuitive and unconscious drive that induces us to agree and interact, seeking to communicate with others in such a way that the individual and the collective (Me and the Other) will be in equilibrium and on an even keel. Law is produced through a synthesis of shared feelings in the collective psyche; these feelings coincide—because directed at the same ideals—and as a result they can be framed into standard normative forms (see Jazshenko 1999b, 78–101).

The same overall goal—that of applying Soloviev's philosophy to law—drives the conception of the Russian-Ukrainian philosopher Evgeny Spektorsky (1873–1951), who greatly contributed to the historical analysis of law, arguing that such analysis can provide a tool of social control (see Spektorsky 1939). Spektorsky makes a compelling case that each legal system exists in the first place as a cultural environment where human beings communicate through signs, symbols, and concepts. Humans for the most part behave in keeping with cultural models and patterns, such that we need not threaten sanctions to bring into line those who stray from the model: We need only provide a context where their behaviour will cohere with the basic patterns of interhuman relations (where "basic" is understood by reference to the prevailing mores in a concrete society in a given epoch). A paradigmatic example, for Spektorsky, lies in European legal culture: "A European is for us a 'jural man,' one who has developed a legal consciousness and strongly protects his rights and liberties. [...] This kind of man could not have appeared without the impact of Christian anthropology [...], which spiritually brought into being the very idea of legal personality" (Spektorsky 1925, 37; my translation). In this book, Spektorsky offers an accurate account of how normative constraints prove ineffective as a means by which to shape society, for they act as impediments to cultural development: Sweeping legal and political reforms would be much easier if only their proponents would take the cultural patterns of their society into account. Though strongly influenced by American legal

realism and European sociological jurisprudence, his ideas were also rooted in the Russian legal discourse of the early 20th century, thus characteristically combining a metaphysical approach to law with certain realist tendencies (cf. Walicki 1979, 371ff.).

Idealism in law does not necessarily lead to the assertion of democratic values, and this has been the case with Russian legal philosophy, too (cf. Pribytkova 2009). Thus, pursuing the idealist premises of Hegelianism, Ivan Iljin (1883–1954) developed an autocratic legal conception in many respects similar to the conception of Carl Schmitt.[11] Iljin's approach to law initially proceeded from the aim of refuting Leo Tolstoy's anarchist and nihilist conception, thereby protecting law from a nihilist intrusion that might undermine the value of legal regulation (see Iljin 1995). Iljin asserts that law is propped up by communitarian spiritual values that bring individuals together in legal communions. This conception was developed in Iljin's most remarkable book, *O suzhnosti pravosoznanija* (On the essentials of legal consciousness: Iljin 1994a), investigating the nature of legal consciousness. In his opinion, this consciousness coincides with the will to obey the authorities' commands, so long as these commands are legitimated. The legitimization of these commands can be achieved in either of two ways: through equality or through hierarchy, a distinction that Iljin accounts to be essential in distinguishing two main forms of government, namely, the republic and the monarchy, the subject matter of his book *O monarkhii i respublike* (On monarchy and the republic: Iljin 1994b). In the former case there appears a "republican legal consciousness" (ibid., 440–87), which favours individual independence and is distinctive to Western civilization; in the former case we instead have a "monarchic legal consciousness" (ibid., 488ff.), which in Iljin's view supports collective harmony and perfectly matches the Russian cultural archetypes. Praising this latter form, Iljin claimed that limitations must be placed on liberal rights and freedoms until a people fully integrates its cultural values and grows into a spiritual entity capable of making a wise use of its freedom: "Until we go through a spiritual regeneration, any attempt to introduce a coherently democratic regime in the country [Russia] must be regarded as inevitably leading either to mob rule or to a new rightist totalitarian tyranny" (Iljin 1993, 24; my translation).

Alongside the "idealist" current in Russian legal philosophy—and competing with it—there also existed a "positivist" current, in which there can be distinguished several approaches: a normative one, a sociological one, and a psychological one, among others. A typical representative of the normative approach in Russia, as well as its most illustrious representative, was Gabriel Shershenevitch (1863–1912), who followed the ideas of John Austin and other advocates of the command theory. He insisted that the basic characteristic of legal norms lies in the state's coercion and in the sanctions the state's officials

[11] On Schmitt, see Chapter 8 in this tome and Section 8.8 in Tome 2 of this volume.

may impose, and so that the state logically and historically precedes law. Law is the people's reaction to uncertainty, in that they guard against uncertainty by issuing obligatory norms and directives; from which it is inferred by Shershenevitch that the ultimate criteria of law lie in its predictability and openness (see Shershenevitch 1911, 290ff.). Although Shershenevitch and his followers did not bring forth anything original by comparison with their Western European counterparts, they did mark an important phase in Russian liberalism.

The sociological approach caught on particularly well in Imperial Russia. Sociological thinking was looked upon by the authorities as revolutionary thinking, and for this reason the teaching of sociology was officially banned until the fall of the political regime in 1917. Thus, it was only in Paris that the famous Russian-Ukrainian sociologist Maxim Kovalevsky (1851–1916) could open his Russian Institute of Sociology (*Institut Russe de Sociologie*), as it was then impossible to open a sociological institution in Russia. Internationally recognized as a leading legal anthropologist at the turn of the century, Kovalevsky followed Emil Durkheim's philosophy of solidarism and masterfully demonstrated how legal regulation in human societies slowly develops patterns, and how these become relatively uniform. This process of "legal expansion" does not come to an end with the appearance of the state—social groups do not cease to form such patterns, continuing to independently develop them vis-à-vis the authorities (see Kovalevsky 1938). The sociological approach was carried on in the work of Veniamin Khvostov (1868–1920), a professor at Moscow University. Following evolutionism, Khvostov argued that social life is based on a plurality of different regularities (psychological, economic, etc.) producing conflicts which are to be settled through law, the latter being a mode of spiritual coordination of human behaviour (see Khvostov 2011). Given the unpopularity of tsarism among intellectuals, many were attracted by the possibility of studying law not as a divine command or as a government-issued command (such was the official legal ideology), but as a result of the way the social powers combine, a process that follows the objective laws of social evolution.

A vital contribution for the development of legal positivism in Russia was made by Leon Petrażycki (1867–1931) and his school. We will not consider here Petrażycki's own psychological conception of law, since that subject is thoroughly examined in this volume by Jan Woleński and Edoardo Fittipaldi,[12] but we will consider three illustrious disciples of Petrażycki. Pitirim Sorokin (1889–1968) began his carrier at Saint Petersburg University as a professor of criminal law, and after emigration he gained prominence as a professor at Harvard University. His first investigation in 1913 (Sorokin 1999) secured for him a good standing in Russian legal science, and the publication of his textbook on legal theory (Sorokin 1919) only strengthened that position. In this period

[12] See Section 16.2 in this tome and Chapter 18 in Tome 2 of this volume.

Sorokin was mainly engaged in fighting in the Civil War with the Socialist Revolutionaries, and after the Bolsheviks captured him, only personal amnesty by Lenin saved him from a death penalty in 1921. Having expatriated from Soviet Russia in 1922 aboard the famous "ship of philosophers,"[13] Sorokin continued his research in Europe and the United States: It is in this latter country that he came out with his brilliant study *Social and Cultural Dynamics* (Sorokin 1937), where the law is considered from the standpoint of social mobility. Georges Gurvitch (1894–1965) started out as a lecturer at Petrograd University, and after emigration achieved fame as a professor at the Sorbonne. After several interesting articles in Russian (cf. Antonov and Berthold 2006, Gurvitch 2006), he published *L'idée du droit social* (The idea of social law: Gurvitch 1931), which was his French doctoral thesis. Gurvitch insisted that existing alongside positive and natural law is a social law: a particular legal reality residing in collective intuitions. This masterly investigation was followed up with several supplementary studies and summarized in English in 1942 under the title *Sociology of Law* (Gurvitch 1942). In his subsequent works Gurvitch worked for the most part on the problems of general sociology, and only in this context did he return to law (see Gurvitch 1960, 173–206). The third famous disciple of Petrażycki was Nicolai Timasheff (1886–1970), who taught at Saint Petersburg University (from 1914 to 1917) and at the Petrograd Polytechnic Institute (from 1916 to 1920), and who after emigration pursued a successful career at Fordham University (in the United States). He started studying the sociological perspectives of law simultaneously with his Petrograd colleagues Gurvitch and Sorokin, and launched his lectures on the sociology of law immediately after the February Revolution of 1917 lifted the ban against the teaching of sociology. In these lectures, Timasheff anticipated the conclusions reached in his opus magnum, which appeared in 1939 under the title *An Introduction to the Sociology of Law* (Timasheff 1939).

17.3. The Soviet and Post-Soviet Period

The first years of the new Bolshevik regime could be characterized as tumultuous in all spheres of social life, including that of intellectual debate. Bolshevism was nominally committed to suppressing such tools of class exploitation

[13] The ships were in reality two, the *Oberbürgermeister Haken* and the *Preussen*, both of them German. In October and November 1922 they set sail from Petrograd (now Saint Petersburg) in Soviet Russia, carrying about two hundred Russian intellectuals who had been rounded up and accused of "supporting the counterrevolution." Aboard the two ships were prominent figures of international fame, and the Soviet Union therefore stood to lose credibility if it decided to execute them. It was under Lenin's orders that they were expelled, and they were sent to Stettin, in Germany. In Leo Trotsky's words, it was a "humanitarian action that made it possible to save the lives of people who otherwise would have had to be shot" (Interview published in the newspaper *Izvestija*, August 30, 1922; my translation).

as the law and the state, but in reality, after the 1917 coup d'état, it sought to reinforce the state's powers and its administrative machinery. It was in order to work out this contradiction that in 1918 the Bolsheviks' leader, Vladimir Lenin (1870–1922), wrote his famous *Gosudarstvo i revoljutsija* (The state and revolution: Lenin 1974), which provided the blueprint for the development of Marxist-Leninist legal philosophy for many years to come. Lenin maintained that in order to overcome class exploitation, it is necessary to first suppress the competing classes by setting up a strong and powerful state controlled by ideological authorities. The authorities' commands had to replace the legal machinery of the former tsarist regime. Lenin did not overestimate the virtues of law, which "imposes a common measure on different people [...], and so, while aiming at the accomplishment of justice, results in inequality and injustice" (Lenin 1974, 93; my translation). For Lenin, there was no room for law in the Soviet state, the reason being that law was reckoned among the superstructures typical of economic formations based on private property. As soon as the means of production are nationalized, law remains applicable only in the narrow sphere of private relations and will fade away (see ibid., 96–7).

This rigorous line of thought was diligently developed by Evgeny Pashukanis (1891–1937), famous for his "exchange conception of law" (*menovaja teorija prava*). This conception was first set out in outline in 1924 in his work titled *Obzhaja teorija prava i marksism* (The general theory of law and marxism: Pashukanis 1926), where Pashukanis asserted that law is intrinsically bound to the exchange of goods and cannot exist apart from this exchange. Moreover, between the logic governing commodities as a form of exchange and the logic governing the form of law there exists a homology that makes it possible to describe law in economic terms: "The basic legal abstractions—produced through the development of legal thought, and most accurately defining the legal form—generally reflect specific and very complex social relationships" (Pashukanis 1926, 33; my translation). What explains this homology is that the fundamental legal abstractions inevitably reflect social relations and at the same time solidify these relations into legal categories. Pashukanis accepted law only as civil law: Public law for him was a contradiction in terms because it bears no connection to any exchange relations. Legal relations are always formed by written or oral contracts that set out rules for private transactions, and there is no legal reality outside of these contracts. Even a statute issued by the public authorities is nothing but a symptom on which basis one can predict what the law will be. For Pashukanis, law lies in the coordination of the conflicting volitions of sellers and buyers; he was convinced that bourgeois law is flawless and perfectly fulfils the exigencies of the flow and exchange of goods. As the socialist state does not seek to promote exchange relations, there is no need for law. Law can be tolerated by the Soviets only as long as private property exists, and will disappear once the state takes full control of economic relations. There will be no proletarian, Soviet socialist law

in lieu of the capitalist, bourgeois law bound to die away: Legal norms will then turn into pure administrative regulations, effecting a "direct, i.e., technico-administrative, management by a procedure of subordination to the general economic plan" (ibid., 78; my translation), and because these regulations do not coordinate independent volitions, they do not amount to genuine law (see Sharlet 1978).

The Russian-Latvian thinker Peter Stuchka (Pēteris Stučka, 1865–1932)—one of the ideologists of the New Socialist Legality (*Novaja sotsialistitcheskaja zakonnost'*), as well as the chief justice of the Supreme Court of Soviet Russia (1923–1932)—studied law from the standpoint of class theory. He stressed that the function of law is to furnish an ideological background for the commands of the governing class, and hence to justify the de facto inequality among the classes (see Stuchka 1964, 58). As long as there is more than one class in a society, society is bound to have law. This explains why even Soviet Russia has its own "proletarian law," which reflects the dominance of the proletariat over the other classes (see Stuchka 1931, 70). Claiming that it is the will of the governing class which shapes the contents and the form of the positive law, Stuchka sought to demystify law as nothing but the domination of one class over another. Liberty, equality, and other values of bourgeois legal philosophy are just fetishes serving to control the dominated classes (ibid., 79). This understanding of law as a tool of class suppression underpinned the practice of the revolutionary tribunals and explains other extreme coercive measures taken during the Civil War.[14] In the 1920s Stuchka led the normative approach in Soviet jurisprudence: As the head of the Justice Committee (*NarKomJust*), he promoted a definition of *law* as "a system (an order) of social relations which corresponds to the interests of the governing class and which is protected by the organized power of this governing class" (Stuchka 1964, 58; my translation).[15] Stuchka's ideas deeply influenced the development of the Soviet legal system, and particularly the judicial doctrine that established class interest as the main criterion for civil adjudication and penal proceedings.

A psychological version of Marxist legal theory was elaborated by Mikhail Reisner (1868–1928).[16] A professor at Petrograd University and a follower of Petrażycki, he tried to "engraft psychological theory of law onto a Marxist foundation" (Reisner 1908, 45ff.; my translation). After 1917 Reisner rose to

[14] It is precisely this understanding of the law that informs, among other decrees, the one issued on 5 September 1918 under the title "On Red Terror" (*Postanovlenie SovNarKom RSFSR "O krasnom terrore"*), authorizing the extermination of people solely on the basis of class membership.

[15] This definition was officially recognized during the *NarKomJust* session of December 1919, and it became legally binding once it was included in the Consolidated Statutes of the Russian Soviet Federative Socialist Republic (1919), no. 66, article 590.

[16] These ideas of Stuchka were severely criticized by Mikhail Reisner for their ideological and untheoretical character (Reisner 1922, 175–91; see Stuchka's reply in Stuchka 1923, 120–71).

prominence as a leading Soviet legal theorist, using the psychological theory of law to justify the lawless practices of the new political regime. His main idea was that each class intuitively defines what is just and appropriate with regard to its position in society and to its objectives in the class struggle. These intuitions give rise to a specific class law which is a product of the collective legal consciousness. It is vital that Reisner marks his distance from Petrażycki's conception by emphasizing that what he calls for is "not an intuitive law [...], but a genuine class law which under the guise of intuitive law is formed by the subjugated and exploited masses without regard to any official frameworks" (Reisner 1925, 20; my translation). In Reisner's opinion, there are two basic aspects of law: The volition of the classes, which reflects the classes' subjective laws, and contraction among these classes, which creates an objective law. Both aspects are coordinated into the overall system of law through the classes' struggle for fairness and equality in society, these values being themselves the relative products of class consciousness. The dominant class imposes its legal consciousness and hence its law on the subjugated classes by taking control of the ideological mechanism, which influences formation of the overall legal consciousness. As legal consciousness can directly affect social relations, without the intermediation of positive law, the new proletarian law will not need any statutes, regulations, or edicts, for it will be able to govern by psychological suggestion alone. In light of this ideological background, such psychological suggestion will make individual legal intuitions uniform and will result in a single prevailing "revolutionary consciousness"[17] capable of determining the shape of legal relations and resolving legal conflicts. Reisner agrees that legal regulation will cease when the class struggle will come to an end and Soviet society will accordingly become a mono-society consisting of a single class, that of the proletariat (Reisner 1923): "The history of law is therefore nothing but the history of its fading away" (Reisner 1925, 274; my translation)—and the same also goes for proletarian law.

Another disciple of Petrażycki at Petrograd University was Jacob Magaziner (1882–1961), who in his lifetime was known by and large as civil-law researcher, since his main theoretical works (Magaziner 2006) have been kept in private archives and were first published only several years after his death. The key idea that Magaziner developed in the context of the psychological theory was that of distinguishing two forms of law depending on two kinds of psychological realities: collective and individual. Individual psychological representations can give rise only to subjective law based on beliefs and intuitions, and

[17] This idea of Reisner informed the first decrees issued by the Soviet Government in 1918 (Decree No. 1 of 29 January 1917, and Decree No. 2 of 15 February 1918), abolishing all the laws of the previous regime and ordering revolutionary courts and commissars to thenceforth decide all cases without reference to any laws, being guided only by their "revolutionary legal consciousness." This antilegist practice persisted until the end of the Civil War.

so they have no support in objective reality: This is what Magaziner calls intuitive law, in a sense quite different from that used by Petrażycki.[18] Only collective ideas and representations are real, since they produce legal consciousness, which pulls society together and can properly be called law (see Magaziner 1997, 104ff.). It is symptomatic that although Magaziner did not subscribe to the conception of class law, he did agree that the ideals of the dominant social groups often shape the legal consciousness. A similar though essentially different approach was developed by Isaak Razumovsky (1893–1937). This philosopher argued that law is a form of collective consciousness which through a given ideological framework reflects the relations among social classes. This reflection results in the creation of abstract legal sentences and propositions, in such a way that "the order of social relations [...] becomes differentiated from the material conditions of life and obtains its complex ideological development in a system of legal norms" (Razumovsky 1925, 50; my translation). Razumovsky shares the conviction that law is bound to perish as soon as the ideological class dominance will cease and "communist society becomes rationally regulated through a system of reproduction of social behaviour" (ibid., 23; my translation). In general, the psychological approach was favourable to the economic reforms of the mid-1920s, but after the collapse of the New Economic Policy (*Novaja ekonomitcheskaja politika*: NEP) it was banned as antisocialist. The earliest conceptions of socialist law were antiformalist in outlook, rejecting bourgeois legal bureaucracy: Law, or rather "proletarian law," was conceived as fundamentally different from bourgeois legality, that is, as having an innate quality, something that could be grasped by intuitive feeling, open to human understanding without the mediation of legal constructs, even without any textual form (for otherwise this understanding could not be properly called a "proletarian legal consciousness"). The legal form was found to be an illusory, unnecessary tool, somewhat in sympathy with Plato's conception according to which humans need not have any formal laws to be righteous and govern themselves and others accordingly. Petrażycki's psychological theory was fully congruent with these ideals, and in the years of the NEP millions of people, defying the official stance against private property and entrepreneurship, took part in commodity exchange and intuitively created *ad hoc* norms to govern their mutual relations. It seemed that formal law (law *stricto sensu*) was on the point of withering away, with the state about to dissolve into society. But the "antibourgeois" reaction of the mid-1920s showed that public authori-

[18] For Petrażycki, intuitive law was a part of a real basis for legal relations. He distinguished this reality from the beliefs of people bound to obey the law. Unlike what Petrażycki thought, it appeared to Magaziner that this psychological reality could not in itself give rise to law: The intuitive understanding of rights and obligations we come to have in the course of daily life do form a web of psychological links, but these cannot rank as legal until they grow into a "legal consciousness of the people."

ties were unlikely to loosen their grip over society, and the new ideology of "protecting the achievements of the Revolution" (*zashita zavoevanij revoljutsii*) required a different understanding of social control: a directorial mechanism incompatible with the psychologist negation of central regulation.

At the end of the 1920s Soviet legal science saw a period of flourishing: Several alternative approaches to law had developed that not only competed on theoretical grounds but also vied for influence in politics and in legal practice. The theoretical discussions had an evident impact on the implementation of political programs such as collectivization and the NEP. One of the principal issues concerned the rule of law: The question was whether there is a special rule of socialist law (as Stuchka and his followers argued) or whether there can be no rule of law in the socialist state, which is governed by the new authorities without recourse to any actual law, as Pashukanis and his school claimed (cf. Engle 2010). These debates received a certain amount of feedback from the political regime, which was becoming increasingly practical-minded about the prospect of realizing true communism in Russia, and so tended to revert back to the traditional ways of governing, including through the legal machinery. The groundwork for a monist theoretical approach to law was laid during the First Congress of Marxian Legal Theorists in 1931.[19] The aim of this congress was to establish a united approach to law that would echo the general policy of the Communist Party. This objective was not reached immediately, and the debates continued until the mid-1930s.

But as was suggested by the official ideology adopted by the Communist Party of the URSS, the philosophical background for each investigation had already been laid out in the classics (those of Marx, Engels, Lenin, and Stalin), and legal scientists were thus "exempted" from philosophical speculation and reflection: They were just expected to apply the Marxist-Leninist dogma to legal reality. This explains why the philosophy of law in the 1920s was completely displaced by the theory of law, which was intended to have an exclusively instrumental function. Broad philosophical reasoning about law had been condemned by Lenin and other political leaders as hallmarks of the decadent bourgeois legal science (designed to deceive the working class and divert its attention from class struggle)—and so it was that the philosophy of law saw its last days in Soviet jurisprudence. The new socialist legal science was to take only one aim as its object: To help design the laws and decrees that would implement the will of the working class. There evidently was no point for a lawyer to reason about what exactly the will of the working class was and whether it coincided with the will of the governing Soviet elites.

[19] The official consolidated position of the academic community was first set forth in the proceedings of this congress (cf. *Rezolyutsia Pervogo Vsesoyuznogo s'ezda marksistov-gosudarstvennikov i pravovikov*, Resolution of the First United Congress of Marxist Theorists of Law and the State. *Sovetskoe gosudarstvo i revolutsija prava* 4 [1931]: 129–33).

Characteristically illustrating this pragmatism are the writings of an influential Soviet jurist of the time, Dmitry Magerovsky (1890–1939), who in a 1920 article titled *Sotsial'noe bytie i nauka prava* (Social existence and the science of law: Magerovsky 1920), in a realist manner insisted that with the new socialist era came the exigency to transcend objective idealism—a rubric under which he subsumed a range of jurisprudential orientations: the normativist, the sociological, the psychological, and natural law—and move toward a dialectical materialism in the science of law. In contrast to the idealism of traditional philosophy of law, the new Soviet theory of law must be pragmatic, instrumental, and free of any metaphysical speculation. It must include "positive reasoning," analyzing the norms of positive law; "axiological reasoning," assessing positive legal norms in light of the objectives of class struggle; "coercive causation," evaluating norms by their capacity to bring about the desired changes in the social reality; and "political reasoning," examining the different legal orders distinctive to different types of societies, e.g., proletarian, capitalist, colonial (Magerovsky 1920, 1–45). But even this limited discretion allowed for lawyers seemed too bold, and two years later, in a paper titled *Sovetskoe pravo i metody ego izutchenija* (Soviet law and methods for its study: Magerovsky 1922), Magerovsky insisted that jurisprudence must take Marx's dialectical materialism for granted, so as to focus on questions of practical implementation following the axiomatic blueprint of Marxist philosophy. In Magerovsky's view, when lawyers set out to examine jural relations, interpret and create legal norms, and carry out similar other operations in legal thinking, they must completely remove their subjective selves from what they are doing and apply the rules of legal dogmatics, turning to political organs whenever an uncertain case comes up that calls for any interpretation (Magerovsky 1922, 24ff.). This anti-discretionary stance was typical of other Soviet lawyers, too, who dared not challenge the philosophical (ideological) foundations of the new social order.

The Stalinist regime could not tolerate intellectual diversity in any field of thought, including legal philosophy, and dissenting theorists had to join the mainstream of legal theory as shaped by Stuchka and carried on by his disciples. As early as 1927 Pashukanis was forced to acknowledge his "political errors" and to agree that there must be a socialist law which would supersede the previous forms of legal regulation (see Pashukanis 1926), a view that he would reiterate in 1936 (see Pashukanis 1967, 320ff.). Many other theorists faced the same necessity to revise their "erroneous and deficient" conceptions, although even this revision did not spare them from tribunals and camps. The integrated legal ideology was summed up in 1938 during the "Colloquium on Some Issues concerning the Soviet Science of Law and the State" (*Sovezhanie po voprosam nauki sovetskogo gosudarstva i prava*), held from July 16 to 19 of the same year, and summoned by the attorney general of the URSS, the Soviet theorist of Polish origin Andrei Vyshinsky (1883–1954). Having condemned the "counterrevolutionary findings" of Pashukanis and his followers—accused

of plotting against the URSS together with Trotsky and Bukharin—this colloquium proclaimed the official legal ideology of the Soviet state (see Fuller 1949, 1157–66, for an analysis of this ideological and conceptual opposition between Pashukanis and Vyshinsky). This ideology was based on the narrow-minded command theory of law summarized in Vyshinsky's famous definition of law: "Law is an embodiment of the rules of behaviour which implement the will of the ruling class—as well as an embodiment of the customs and rules of community life—and which are laid down by lawmaking or are sanctioned through the state's authority, and whose implementation is guaranteed by the state's coercive force, designed to protect, consolidate, and develop such social relations and structures as favour and serve the ruling class" (Vyshinsky 1938b, 37; my translation).[20] This definition would persist as the indisputable benchmark in Soviet legal science for many years to come. Only during Khrushchev's Thaw could this approach be challenged by some legal theorists. Naturally, in this situation of conceptual clarity and certainty about what is law and how it works there was no great need for reflection about law, and theoretical thinking became sparse (let alone that it was extremely dangerous). Two remarkable lawyers of the time—Mikhail Strogovitch (1894–1984) and Sergej Golunskij (1895–1962), both professors of criminal law—insisted that it made no methodological sense to engage in a theoretical science of law, since there could only be one method, the dialectical materialism of Marx and Lenin, applied to different spheres of social life (Golunskij and Strogovitch 1940). So the theory of law had no raison d'être: It had to give way to the different "branches of legal science" (*otraslevye diszipliny prava*), such as criminal or labour law. This idea was then proffered even more outspokenly in 1961 by two outstanding professors of civil law, Olimpiad Ioffe (1920–2005) and Mikhail Shargorodsky (1904–1973) (see Ioffe and Shargorodsky 1961), who were persuaded that the theory of law was not in any way a *science* of law, but simply consists in extracts of philosophical ideas culled from the "classics" of law (which means, in the view of these authors, "classical authors of the Marxist philosophy"). Under such pressures, the theory of law came to rest on shakier and shakier ground (see another assessment of the innovative trends of the Soviet legal theory in Quigley 2007).[21]

The watershed moment came in 1963, when the 22nd Congress of the Communist Party proclaimed that the dictatorship of the proletariat had run

[20] This definition differs slightly from that announced during the colloquium (Vychinsky 1938a, 6). Essentially, this approach reveals an understanding of law as an instrument of coercion, as an "accelerator pedal for innovation" (Vychinsky 1938b, 165; my translation) designed to extirpate classes and ideologies in competition with the dominant ones.

[21] It is worth noting, en passant, that this line of argumentation, dating from the 1940s to the 1960s, can still be observed to persist in the interdisciplinary debates among contemporary Russian lawyers discussing the practicality of theoretical thinking about law. One authoritative example is Kozlikhin (2006), who does not hesitate to claim, "We must concede this undoubtable fact, that the general theory of law and state has become obsolete" (ibid., 40; my translation).

its course and that socialism had thereby already been built in the URSS.[22] This implied that there was no longer a need for too rigorous a command regulation, and that some limits would be established by Soviet law against repressions like those of Stalinism. The groundwork for this declaration was laid in the debates initiated in the late 1950s between, on the one hand, those who advocated a "wide approach" to law, arguing that law cannot be reduced to the state's authoritative commands, and, on the other hand, those who embraced a "narrow approach," insisting that there is no law outside the rules and regulations enacted by the state. The former were quite numerous and urged a definition of law that would also take into account legal relations and the legal consciousness, thus going back to the ideas of Pashukanis, Reisner, Razumovsky, and other thinkers of the 1920s. Thus, Stepan Kechekjan (1890–1967) considered law a norm realized through an actual legal relation (see Kechekjan 1958), and consequently maintained that legal relations precede legislation, which recognizes only such norms as have already been created through these relations. Another version of the "wide approach" was put forward by Alfred Stalgevitch (1897–1983), who considered law a unity of legal norms, legal relations, and legal consciousness, and who thereby contested the prevailing command theory (see Stalgevitch 1957). The discrepancies among the "wide" and "narrow" approaches found their expression during the 1979 colloquium "On the Understanding of Soviet Law," where the "wide" approach gained a greater following than the command theory of law.[23] A Professor at Leningrad University, Lev Javitch (1919–2004) was the first who dared to criticize the class theory of law, insisting on the priority of the rights of individuals over the law of the country (see Javitch 1976). This vision of law led the thinker to conclude that the state, even the omnipresent socialist state, is not empowered to create law at its discretion and is bound by the citizens' rights (see Javitch 1985). This was the first affirmation of human rights in official Soviet legal philosophy, an affirmation that was carried forward in the following years under *Perestroika*, which began in 1986.

Instead, as sociology seemed to be compatible with Marxism, whose traditional orientation called for an investigation of social structures, socio-legal studies could begin to develop without going against any ideological taboos. So, the 1970s and 1980s saw much sociological research being applied to law (particularly in criminology), and two strong socio-legal schools appeared in Leningrad (with Lev Spiridonov, Yuri Grevtsov, and others) and in Moscow

[22] See *Documents of the 22nd Congress of the CPSU*, Vols. 1–2. Compare the declarations appearing in the proceedings of the subsequent congress of the Communist Party, the 23rd: *23rd Congress of the Communist Party of the Soviet Union*, Part 3. Moscow: Novosti Press Agency Publishing House, 1966.

[23] See the proceedings of this colloquium, published in *Sovetskoe gosudarstvo i pravo*, 1979, Volumes 7 and 8.

(with Vladimir Kazimirtchuk and Vladimir Kudrjavtsev, among others). Peter Nedbajlo (1907–1974) worked out an interesting vision of law as the normative nexus of economic relations (see Nedbajlo 1971), a vision that would further be developed by his Ukrainian disciples (Peter Rabinovitch, Alekej Surilov and Sergey Maksimov, among others).

The political and economic changes did not translate into corresponding changes in legal theory. The dominant approach in contemporary Russian jurisprudence is still the command theory, with no more than some slight modifications and amendments by Mikhail Baitin (1921–2009) (see Baitin 2005, 2006)[24] and Valerij Lazarev (1940–) (Lazarev 2001), among others. Quite many are those who carry forward the "wide approach to law," enriching it with some elements from Western legal thought and from prerevolutionary Russian legal philosophy. A noteworthy example is Leonid Mamut's (1929–) reciprocal theory, an attempt to understand law as a set of exchange relations based on a footing of equal social wealth among members of society. Taking up Pashukanis's ideas, Mamut argues that this exchange in turn becomes possible only if the members of society can address to one another reciprocal claims to a share of the social wealth necessary for them to continue engaging in social activity. It is this set of exchange relations, coupled with the relative reciprocal claims, that for Mamut (2011) properly constitutes law, something he sharply distinguishes from legislative law as a system of enactments. A similar conception—similarly sociological but devoid of the reciprocity of exchange envisioned by Mamut—is the one put forward by Yuri Grevtsov (1942–) (Grevtsov 2001) and Lev Spiridonov (1929–1999). Spiridonov insists that the main function of law is to permit or prohibit certain modes of behaviour in the sphere of exchange relations, the latter understood as the existential basis of any society. Spiridonov argues that law serves to integrate society through its members' self-referential normative organization. What distinguishes this kind of organization is its ability to secure social cohesion by consolidating basic social values such as fairness and equality of outcomes under the law (Spiridonov 2002). Also worthy of mention is Anatoly Vengerov's (1928–1998) synergetic theory, underscoring the probabilistic and stochastic elements in law and suggesting that it would be useful to study law as a special kind of social energy (Vengerov 1998, 313–31).

There is still another tendency in Russian legal theory, a revival of natural law. Examples can be found in Georgy Mal'tsev (1931–2013) (Mal'tsev 2008)—offering a sociocratic theory where the attempt is to integrate the moral dimension of law with its social function—as well as in the work of Sergey Alekseev (1924–2013) and Roman Livshits (1929–1997). In a somewhat out-

[24] Given that we are writing in the second decade of the 21st century, the Russian legal philosophy of the 20th century is being discussed here by taking into view the latest ideas and works developed both before and after the turn of the 21st century.

dated way of conceiving natural law, Alekseev locates the existential mainstay of law in the idea of human rights and depicts law as a system with which to safeguard individual freedom (S. Alekseev 1998), this function serving as the basis for the distinction between law and nonlaw (S. Alekseev 2002). Similarly, but from a different sociological angle, Livshits examines law's integrative function, understanding law as the complex of all the mechanisms of social control conducive to an arrangement among interacting individuals and groups united by a common understanding of justice (Livshits 2001). An outstanding figure of post-Soviet Russian legal philosophy is Vladik Nersesjants (1938–2005), who laid the foundation for a libertarian conception of law and inspired a group of many talented scholars, among whom Vladimir Grafsky (1938–), with his integrative theory of law (Grafsky 2000), and Valentina Lapaeva (1952–) (Lapaeva 2012) and Natalia Varlamova (1952–), both of whom continue to defend the libertarian conception, which has now gained quite some momentum in Russia. Nersesjants's conception of law was based on the thesis of the formal objectivity secured by the principle of legal equality—the principle that free and independent subjects of law enjoy the same quantum of liberty (they do so in a sense both descriptive and normative, for it is Nersesjants's view here that the *Sein* coincides with *Sollen*). This equal quantum is established by law, which provides everyone with the possibility of social action, thereby replacing the arbitrary power of each with the legal power of all. Such equal distribution of liberty among subjects of law embodies the idea of justice, which forms the basis of law (Nersesjants 1998, 40–9).

Also worthy of mention—as we follow the theme of how Russian legal theory has grown with elements drawn from contemporary philosophy—is the communicative theory of law developed by Andrej Polyakov (1954–) (Polyakov 2003), who teaches at Saint Petersburg State University and has offered a restatement of legal theory based on the ideas of Jürgen Habermas, Niklas Luhmann, and other contemporary thinkers in communicative philosophy.[25] Polyakov considers communication a dynamic force holding people together in society, a force mediated by texts (both written and unwritten). If communication is structured by correlated mutual duties and obligations, if it is based on generally recognized texts, and if it is coherently realized in social practice, it will then acquire a normative dimension, and the texts in question will be validated as sources of law (Polyakov 2003, 274–85, 674–87). This is the way law is created and exists. Working in the same direction, but with a different emphasis, is Ilia Chestnov (1964–), a legal theorist also based in Saint Petersburg, who offers a dialogical theory of law positing three basic dimensions of legal reality: legal rules, their perception in human cognition, and their effectuation in human behaviour. These three dimensions are not a closed sys-

[25] On Habermas see Sections 10.3.5 and 10.4.3.2 in this tome, and Sections 10.4 and 25.3 in Tome 2 of this volume.

tem but rather form an open emerging system of interaction, reciprocity, and synchronization, all of which attest to the dialogical nature of law (see Chestnov 2008). This intellectual pluralism and diversity contributes to overcoming the Soviet legal heritage, which still carries weight in Russian legal thought (see Antonov 2007).

17.4. Conclusion

Of all the social sciences in modern society, jurisprudence seems to be the most ideologically laden (because it serves a regulative function that political authorities can seize on), and of all legal disciplines, legal theory is by far the one most amenable to intellectual innovation (because it is not so bound to existing systems of law, such as civil or criminal law). This place that legal theory occupied in imperial Russia explains why all important social issues at the beginning of the 20th century became a subject of investigation in legal philosophy and were also importantly discussed as legal issues from the perspective of legal philosophy. This philosophy offered insights and ammunition for those on either end of the sociopolitical spectrum: for those who wanted to bridle social development, fearing its unpredictability (this was the conservative wing of *intelligentsia*), and for those who sought to bring about change in society, either through legal reform (this was the majority view of the time among intellectuals), or through a social revolution (the Bolsheviks and the Anarchists), or again through an ideal of personal perfection (Leo Tolstoj). In the first years after the October Revolution of 1917, legal theory continued to play an important role in the country's intellectual life, and many important social developments were closely tied to developments in legal philosophy, one example being the new system of social control influenced by the psychological theory of law, and another the NEP, influenced by the exchange conception of law. But the rigid ideological control owed to the political realities of the USSR led to catastrophic sequences for this discipline, which was pressed into service as a tool of communist ideology beginning in the early 1930s. In the following sixty years of Soviet rule, legal theory thus existed in isolation, through the action of an ideological iron curtain that kept it forcibly cut off from the rest of the world (except for the Soviet Union's satellite countries). The discipline became a mishmash of contradictory precepts and scattered idioms sourced from the "classics" (Marx, Engels, Lenin), stewing in their own juice and seasoned with some schemes and conceptions derived from prerevolutionary legal science. This stew would take a variety of flavours, and in fact it was given to many terminological nuances understood to have far-reaching implications in the intellectual debates of the time. But the inevitable ideological confines of the Marxist-Leninist social philosophy were such that nothing methodologically or conceptually new could come out. The trouble with this situation became apparent to legal theorists even in the 1980s. The *perestrojka*

of the 1990s spurred a true flurry of intellectual activity among Russian theorists of law, who rushed to package conceptions of their own. Some of these theorists took into view the development of legal philosophy across the world and unwittingly repeated the commonplaces: Their "new" schemes therefore turned out to be ineffectual, failing to contribute anything either original or useful to a worldwide debate. The majority of legal philosophers instead chose not to stray from their course, discarding the precepts of Soviet ideology but keeping the rest, thus working on traditional Soviet dogmatic jurisprudence. This strategy is still apparent in most of the textbooks on legal theory, which reproduce the theoretical schemes of the Soviet era and invest them with new ideological content (human rights, freedoms, democracy, and the like). In the 2000s, it was the latter trend, the "traditionalist" one, that still held sway in academia (and no discussion has been devoted to the authors in this camp, precisely because they keep reiterating threadbare schemes, with no theoretical innovation to offer). As concerns the theorists in the other camp, those who have embraced the new, their numbers are growing, and they are striving to keep pace with the development of legal science across the world. The most important of these thinkers were selected for discussion in the part on post-Soviet jurisprudence.

Chapter 18

20TH-CENTURY LEGAL PHILOSOPHY IN CZECHOSLOVAKIA, THE CZECH REPUBLIC, AND THE SLOVAK REPUBLIC

by Alexander Bröstl

18.1. The State and the Legal Framework

At the beginning of the 20th century, the territories of the contemporary Czech Republic and the contemporary Slovak Republic were parts of the Austro-Hungarian Empire. With the empire's dissolution after World War I, on October 28, 1918, the Czechoslovak Republic was established.

After the Munich Agreement of September 30, 1938, Czechoslovakia could no longer freely shape its future constitutional history. Under this agreement, part of the territory and its people were ripped from Czechoslovakia and annexed to Germany. The country was subsequently forced to cede further territories to both Hungary and Poland.[1]

A so-called independent Slovak state was later declared (on March 14, 1939) with the support and influence of Hitler's Germany. On the same day, Hitler forced the president of the Czechoslovak government to sign a document accepting a German protectorate over the remainder of Czechoslovakia (which was named the Protectorate of Bohemia and Moravia).

After World War II, in 1945, Czechoslovakia was almost restored to its prewar borders, and after the coup d'état in February 1948, the Communist Party seized power and established its monopoly and the dictatorship of the proletariat. Following the occupation of Czechoslovakia by the armies of the Warsaw Pact on August 21, 1968, a constitutional act for the Czechoslovak Federation was passed which went into effect on January 1, 1969.

The breakdown of the communist regime after November 17, 1989, was accompanied by a peaceful revolution (the so-called Velvet Revolution, or *Nežná Revolúcia*).

In 1990, a specific name was chosen for the newly joined country: It was called the Czech and Slovak Federative Republic. But soon, following the outcome of the general elections of 1992 and the further development in negotiations, the process by which to dissolve the federation was begun, and in January 1, 1993, two separate countries were established, namely, the Czech Republic and the Slovak Republic.

Since 1918, the legal order of the Czechoslovak Republic operated under a principle of legal continuity providing for the temporary validity of Austrian

[1] Greater details in Pavlíček and Kindlová 2006, Bröstl 2006.

E. Pattaro, C. Roversi (eds.), *A Treatise of Legal Philosophy and General Jurisprudence*,
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and Hungarian laws. This state of so-called legal dualism meant that the civil law of the *Allgemeines Bürgerliches Gesetzbuch* (ABGB)[2] would be valid in the Czech lands, while Hungarian customary law would be in force in Slovakia. In criminal law, the Criminal Code of 1852 would be valid in the territory of the Czech Republic, while the Hungarian Criminal Code of 1878 was valid in the territory of the Slovak Republic during the period of the first Czechoslovak Republic.

At the end World War II, in 1945, the two separated parts of the previously liberated Czechoslovakia came together again, and thus began the programmatic destruction of private law, which was considered an evil. There came a new Civil Code and a new Code of Civil Procedure, both enacted in 1950, focusing on revolutionary changes and on "socialist property with its two forms (state socialist property and cooperative socialist property), which differ only quantitatively. State socialist property has nothing in common with the property law of a bourgeois state and its organs" (*Občiansky zákonník* [Civil Code], 218; my translation).[3] This enactment was followed by the introduction of more changes both *into* these codes, in 1963, and *through* them, in 1964, with the aim of strengthening economic and other social relations and the unity of the socialist economy.

In criminal law, the Criminal Code and the Code of Criminal Procedure were adopted in 1950, later renewed in 1961 (with no further changes until 1990). The first code was heavily influenced by Stalin's theses on class struggle in the transitional period in which socialism would be constructed, and it expressed the class-centric character of criminal law, meaning that the purpose of criminal law was to protect the people's democratic republic, its socialist construction, and the interests of working people and individuals, as well as to educate them to obey the rules.

After the breakdown of communism, real changes took place in the period from 1990 to 1992, first with the adoption of a new *Grundnorm* in 1991 and a Charter of Fundamental Rights and Freedoms (a constitutional act), and then with two constitutions for two independent states in the second half of 1992.

18.2. Two Main Legal Journals Survived

The oldest Czech legal journal, called *Právník* (The Jurist), was established in 1861 in Prague, which at that time still lay within the territory of Aus-

[2] ABGB of 1811 became valid law in Czechoslovakia on October 28, 1918, and was called *Československý obecný zákonník občanský* (Czechoslovak General Civil Code). See in this regard the insuperable commentary Rouček and Sedláček 1935–1937. Indeed, this can also be considered a great work of legal philosophy dealing with basic concepts in the theory of private law. From that point on, the theory of civil law became the source and "driving force" of legal theory in the 20th century in Czechoslovakia (codes of positive law were used as textbooks in teaching legal concepts).

[3] The text is drawn from *Občiansky zákonník* (Civil Code). Bratislava: Martinus.

tro-Hungary. This initiative was realized through the effort of a group of intellectuals led by the great 19th-century Czech writer, lawyer, and historian Karel Jaromír Erben (1811–1870); the patriot Rudolf, Prince of Thurn-Taxis (1833–1904); and the representative of a young generation of practicing lawyers, Jan Jeřábek (1831–1894).[4] The aim of this new legal journal was to help rejuvenate Czech legal science and contribute to the development of Czech legal research and discussion. In 1864, *Právník*'s editorial board joined forces with *Jednota právnická* (The Unity of Lawyers), a newly established professional association of lawyers, and the journal began to reflect modern approaches to law and legal science. The journal's editorial activity was subsequently linked to two men: Jakub Škarda (1828–1894), a practicing lawyer, and Antonín Randa (1834–1914), a professor at Charles University in Prague (*Karlova Univerzita*) and one of the great Central European experts in private law who influenced the development of the Czech and Czechoslovak school of civil law.

In the 1950s, the journal was taken over by the Ministry of Justice, which became its publisher. It was then published by the *Ústav státu a práva Československé akademie věd* (Institute of State and Law of the Czechoslovak Academy of Sciences) in Prague, and then, after the dissolution of the Czech and Slovak Federal Republic, in 1993, it was put under the control of the *Ústav státu a práva Akademie věd České republiky* (Institute of State and Law of the Academy of Sciences of the Czech Republic), also located in Prague.

In July 1917, the oldest Slovak legal journal, *Právny obzor* (Law Review), put out its first issue in Budapest. The journal was established by Emil Stodola (1862–1945), a lawyer who also served as its editor-in-chief. In 1918, this journal moved to Bratislava, where it continued to be published until 1920 thanks to the support of the previously mentioned association *Právnická jednota* (The Unity of Lawyers). The aim of this journal was to create a Slovak legal terminology and use it in practice, while helping to spread knowledge of (valid) positive law and to cultivate jurisprudence.

Právny obzor went through peaks and valleys, with a period stagnation linked with apologetics and service to the party in power, the Communist Party of Slovakia. But the journal also stands as testament to the fact that in difficult periods for the freedom of ideas there have always been streams capable of carrying progressive European legal thought.

18.3. On the Brno Normativist School of Law

At the beginning of the 20th century there existed various streams in legal science in the later territory of Czechoslovakia (this in a similar way to what

[4] For greater details, see Krupar 2006, recently expanded in Krupar 2011.

was happening in other countries). Even with the traditional schools in place, several attempts at legal modernism gained ground (this time in the direction of sociological jurisprudence).[5] The sociological school's theoretical approach was considered unsatisfactory when it came to the problem of dealing with the concepts of normativity and teleology: A new theory directed against the two streams just mentioned, the traditional one and the modern one, was constructed on the foundations laid by two great theorists of law, namely, Hans Kelsen in Austria and František Weyr in Czechoslovakia (see Kubeš 2003).[6]

18.3.1. František Weyr as the Leading Intellectual in Czechoslovak Legal Philosophy

Even though several basic ideas of Kelsen's pure theory of law were first expressed by František Weyr (1879–1951) in two works dating to 1908—namely, *Příspěvky k teorii nucených svazků* (Contributions to the theory of forced relationships: Weyr 1908a) and *Zum Problem eines einheitlichen Rechtssystems* (On the problem of a unified legal system: Weyr 1908b)—it is Hans Kelsen (1881–1973) who is generally acknowledged as the real founder of this theory, the first thinker to have elaborated and presented the blueprint for this school (normativism). From 1919 to 1948, Weyr was among the founding fathers of Masaryk University in Brno, the first dean of its law school, professor of constitutional law, and the leading intellectual of the *brněnská normativní škola právní teorie* (the Brno normativist school of legal theory). He was a friend of Kelsen, and the contacts between them as heads of the Vienna and Brno School, respectively, were intensive.[7] Both had a prominent role in the framing of the first constitutions of their respective countries: As a member of parliament, Weyr took part in the preparatory works and the writings of the Czechoslovak Constitution of 1920, and, in parallel, Kelsen became the founding father of the Austrian Constitution of 1920 and the *spiritus agens* for the model based on constitutional review with a constitutional court. Weyr also founded the legal journal *Revue international de la theorie du droit* (International review of legal theory), published in Brno and beginning in 1926.

According to Vladimír Kubeš (2003, 9), the common features between Kelsen's and Weyr's theories can be essentially appreciated in the following:

[5] A Czech professor of legal philosophy and international law from this period was Josef Trakal (1860–1913), whose first interest lay in the relation between legal history and natural law. See Trakal 1904.

[6] On Weyr see also Section 2.1 in this tome.

[7] On the *Wiener Rechtstheoretische Schule* see Chapter 2 in this tome.

- Both are influenced by Immanuel Kant's critical theory.[8]
- Both posit a dualism of two worlds, i.e., that of the *Sein* and that of the *Sollen*.
- Both draw a strict distinction between the cognitive sphere and the volitional.
- Both subscribe to value relativism, with a consequent anti-ideological stance.
- Both posit a requirement of "purity."
- Both have a positivist tendency.

The basic problem and starting point for both Weyr's and Kelsen's normativism is that it is impossible, proceeding from a scientific method, to prove the absolute validity (normative existence) of norms, whether ethical or legal: This validity can only be assumed. In this way the normative theory relativizes the importance of its own knowledge, but at the same time it rationalizes this knowledge in the sense of making it equal to that of the natural sciences. Norms become the strong Archimedian point of legal theory conceived as a normative theory, a theory that cannot create norms simply on the basis of its knowledge but can only *recognize* those norms.

The central concept of the normative view so far is therefore the concept of a norm (Weyr 1920, 18; my translation). A norm, to begin with, can generally be described as an expression of something: of something that *ought* to be. In Weyr's opinion there have been no successful attempts to define legal norms in terms of other norms (*moral* norms in particular) on the basis of the criterion of content (that is, of that which they set forth), because it is clear that legal norms can take any content, in that *anything* can be set forth in them: Anything can become the content of a legal norm.[9] Thus, for example, a definition of legal norms as norms regulating people's outward life cannot be satisfactory, since this life can also be regulated by accepted ethical (moral) norms. Moreover, according to Weyr, "it is not enough to use coercion as a decisive conceptual criterion for legal norms." He thus maintains that

> in order for any norm to be legal, it must be equipped with a sanction (i.e., with the threat of a penalty or sentence that is then carried into execution), since there is a class of norms that are considered to be legal even though they cannot be enforced that way (these are the so-called *leges imperfectae* of Roman Law). (Weyr 1946, 30; my translation)

The exponents of the Brno normativist school do not agree with Kelsen's doctrine on the sanctionative structure of the legal proposition (*Rechtssatz*).[10]

[8] It must be stressed, however, that in Kubeš's view, Kelsen was influenced by Hermann Cohen's interpretation of Kant's philosophy, while Weyr was looking at Kant by the "lenses of Arthur Schopenhauer": see Kubeš 2003, 12–3.

[9] Incidentally, this also means that, in Weyr's view, the concept of an "act in the law" (a behaviour carrying legal consequences) has no reason to exist without any relation to a legal norm.

[10] On Kelsen's theory of sanction see Section 8.3 in Tome 2 of this volume.

Weyr objects that, on this view, only the state would be a subject of duties. Citizens would have *no* duties: They would simply be left with an option between two kinds of behaviour—a prescribed one and a proscribed one—only one of which (the proscribed one) gives rise to a duty of the state to issue sanctions (Weinberger 2003, 41). He resists the notion that backed into the substance of a norm there needs to be the threat of sanctions or the promise of a reward. That is why, in contrast to Kelsen, he does not consider sanctionless norms to be *leges imperfectae*, or imperfect norms.[11] It is Weyr's view that because it is not possible to use the criterion of content (and there is no third possibility: *Tertium non datur*), it is necessary here to turn to the *formal* criterion, and so we must consider legal those norms that originate from a certain norm-creating subject, which in this case is the state. In conclusion, the specificity of a legal norm—what distinguishes it from other kinds of norms—lies not in its structure (as in Kelsen's view) but in its dependence on the state as a norm-creating subject. According to Ota Weinberger (2003, 43), Weyr's efforts led to an attempt to reduce the traditional distinctions among kinds of norms (such as the distinctions between public and private law, cogent and dispositive norms, or constitutive and declaratory norms) to a basic, unified structure.

Weyr also tried to define the concept of a norm by relating it to other, very similar concepts, first among them those of *zákon* (a causal law of nature), *pravidlo* (a rule), *imperativ* (an imperative), and *maxima* (a maxim) (see Weyr 1920, 18–30).

The difference between a norm and a law in the aforementioned sense is generally known. A law of nature can be understood as an instance of the general law of causality: as the application of such a general law to a certain occurrence. The idea is that the same consequences follow from the same premises, and real occurrences in the outside world are interpreted accordingly. That is why the method where a single natural law is brought within the scope of the general law of causality is called the explicative method.

According to Weyr, the concept of a rule in the sense of a *Regel* has nothing to do, methodologically, with the concept of a norm. But a norm does overlap with a law of nature (in the sense just described), in that neither admits of any exception to its own validity. The logical consequence of isolating both points of view—the causal and the normative—is that no event in the outside world can have any influence on a norm's validity: Only its *effectiveness* can change as a result of such an event. According to Weyr, noncompliance with a norm is an exception not to its validity (*Geltung*) but to its effectiveness (*Wirkung*). The

[11] Another criticism of Kelsen's sanction theory of norms by a Czech author can later be found in the work of Ota Weinberger, who in this regard writes that "Kelsen's structural definition of a legal norm as a sanctionative norm is not very successful. His opinion that a norm of conduct (a secondary norm) is superfluous is logically untenable" (Weinberger 1973, XXIII; my translation).

importance of a norm from the causal point of view is exhausted by its function as a motive of behaviour, that is, by its capacity to affect the human will.

As concerns the relationship between norms and imperatives Weyr notes that, when we consider a norm as an object of recognition, we can first of all consider it as an *expression* of that which ought to be. In this way we remain exclusively within the normative point of view. An imperative is instead one of the *forms* through which it is possible to express a normative imagination, that is, a normative idea. But an imperative is not the *only* such form, so it would be a mistake to conceptually equate a norm with an imperative.

A norm can also be compared with a maxim, which is an imagination (an idea) by which we are considering (judging) the world as it is: It is possible to have an imagination of a false *maxim*, but not of a false *norm*. The importance of a norm lies entirely in its causal effects in the outside world.

In his considerations on legal science and sociology, Weyr criticizes the attempt to deduce what *ought* to be from what *is*, for in his opinion a norm's existence, i.e., its validity, is dependent on whether a real consequence follows from it. But this goes against the basic logical formula that the existence of a norm (i.e., its validity) ultimately lies exclusively in the existence of *another norm*—never in the fact that something actually *is the case*. An example of this methodological error can be found in a famous maxim in Paulus, "*Non ex regula jus sumatur, sed ex jure, quod est regula fiat*", if the phrase "*jus, quod est*" is interpreted to refer to real behaviour in relation to norms. Weyr underlines that just the opposite holds for a true normativist view: "*Non ex jure regula sumatur, sed ex regula jus fiat*."

The noetic essence of the concept of a norm does not include among its defining traits its having an *real* effect as a motive of behaviour (as having a force of an imperative). The real effect of a norm is rather *psychological.* In other words, the question whether, why, and how a norm will gain recognition depends on whether there are any means by which that norm can have a psychological effect. But, even more importantly, the question depends on the *sanction* built into a norm.

Weyr then proceeds to consider one of the most important antinomies involved in the endeavour to attain a normative knowledge of law, namely, the antinomy between law in an *objective* sense and law in a *subjective* sense. *Objektivní právo* (objective law, or simply law) is generally understood as the set of legal norms that make up the legal order as a whole, whereas *subjektivní právo* (subjective law, a right) is generally defined as the set of concrete rights and duties arising under objective law. But, according to Weyr, on closer investigation this distinction reveals itself to be trickier than it may appear at first sight. He did not consider the concepts of a right and of a duty to be equally important in the realm of the normative: He took the concept of a duty to be the necessary foundation of all normative considerations, whereas the concept of a right is of secondary importance. Moreover, as Weyr points out, the

concept of a duty (*povinnost*) has no place in the realm of causal-explicative knowledge: It always presupposes a normative view, and so it is a typical element that needs to be taken into account in normative recognition, that is, in recognizing something as a norm. The imagination of a duty without the concept of a norm has no sense.

18.3.2. Later Generations in the Brno School: Jaroslav Krejčí, Adolf Procházka, Zdeněk Neubauer, Ota Weinberger, and Vladimír Kubeš

There are many important Czech legal theorists and lawyers, aside from Weyr, who belong to the Brno normative school or who have been influenced by it in some way. In fact, Czech jurisprudence, especially in the period from 1918 to 1948, is largely the product of this school. Of course, the influence of the Brno normative school was not restricted to the Brno School of Law (Masaryk University, based in Brno): It has also reached Bratislava and Prague.

Jaroslav Krejčí (1892–1960) and Zdeněk Neubauer (1901–1956), together with Adolf Procházka (1900–1970), to whom Weyr attributed the epithet "the Czech Merkl," can be situated in the "middle generation" among the exponents of the normative theory of law. Krejčí was basically interested in two problems in normology (understood as the logical analysis of norms): material error in the *content* of legal acts (acts *of* the law) and *formal* defects in legal proceedings. One of Krejčí main works, *Právní jevy v čase* (Legal phenomena over time: Krejčí 1937), attracted great attention. The author used the term *legal phenomena* in a broader sense than "legal norm," "act of the state," or "act of the law." He argued that legal phenomena include general legal norms—issued in the form of a statute or a decree, or any provision issued in the same form as a general legal norm—but they also include individual administrative and judicial acts of any nature, concrete facts that carry legal consequences in the legal order, acts of individuals (subjects), and even any fact deemed relevant under the legal order (Krejčí 1937, 6–7).[12]

Neubauer's basic work is *Problém vůle v normativním a teleologickém poznání* (The Problem of the will in normative and teleological knowledge: Neubauer 1930), after which he published *Státověda a theorie politiky* (The Science of the state and the theory of politics: Neubauer 1947): This is considered to be an important amendment to Weyr's theory (a theory primarily concerned with the question of the state as a legal order), and it offers the first Czech contribution to the science of the state. It deals not only with traditional topics in the theory of the state (the topics discussed by thinkers like Plato, Aristotle,

[12] Compare this position with that of Adolf Merkl: "Without addressing the foregoing terminological controversy, I should point out that the term *legal phenomena* [*Rechtserscheinung*] seems to me a suitable expression for any process or event [*Geschehen oder Geschehnis*, i.e. *fieri et factum*] of legal relevance" (Merkl 1923, 218 n. 1; my translation).

or Jellinek) but also with problems that had arisen in the decades leading up to World War II and in the period immediately thereafter. By connecting traditional and modern approaches he came to a new systematization in which a range of basic concepts—the state as a legal order, political and state ideologies, forms of government—are tied in with the main issues in democracy.

Adolf Procházka dealt with problems concerning the intertemporality of law and of law making and law-finding. His research on the dynamics of law may attract some interest in legal theory. In *Základy práva intertemporálního* (Foundations of intertemporal law: A. Procházka 1928) he demonstrated that a derogating posterior norm (*lex posterior*) and a derogated prior norm (*lex prior*) do not stand in the contradiction they may at first appear to be in. But probably more important is his theory of so-called automatic law making, which has often been discussed. Procházka's view is based on a broad framework for law making understood as the overall realization (or unfolding) of the procedures through which legal norms are created. These procedures can be divided into two groups: procedures in which a decisive role is played by human acts and those in which that is *not* the case. Here is Procházka in his own words:

> Such making of norms that is realized without human participation can be described as automatic. [...] It is evident that in many cases there are outside causal processes, and there are not human actions. These procedures are usually merged with substantive human behaviour (with acts and omissions), but there are cases in which a higher norm attaches binding legal consequences to these processes alone. This means that the derived norms become "members of the legal order," and so, even though these are norms whose legal existence we may not become aware of, they can still be recognized: They are discovered by subsuming their content under an objectively given creation norm. (A. Procházka 1937a, 107–8; my translation)[13]

Two outstanding thinkers who were closely associated with the Brno normative school but then turned away from it are Karel Engliš (1880–1961) and Jaroslav Kallab (1879–1942).

Engliš developed an account, known as *teorie myšlenkového řádu* (theory of ordering ideas), on which all our mental creations are historically conditioned (and hence variable) purpose-oriented means that help us to explain and understand reality. Norms and postulates are different from judgments (which result from causal cognition) expressing the human will in a certain manner. Engliš introduced a "trialism" of the ways of thinking (orders of ideas), identifying a sphere of teleological rationality understood as a third sphere different from the two spheres recognized by the representatives of the Brno normative school (that causal rationality and that of normative rationality).

This is how Engliš introduces his three spheres of thought:

[13] Procházka also presented and discussed Weyr's theory internationally: see A. Procházka 1937b.

A. ONTOLOGICAL ORDER OF THOUGHT	B. I. TELEOLOGICAL ORDER OF THOUGHT Subject of the will
Basic Knowledge: **Something is**	Basic knowledge: **Something is wanted** (postulate)
Understanding: **Cause - effect**	Understanding: **Purpose - means** (finality)
	II. NORMOLOGICAL ORDER OF THOUGHT Subject of duty
	Basic knowledge: **Something ought to be (norm)** Understanding of validity: **Lower norm - higher norm** (normological reason)

(Engliš 1992, 24; my translation)

Kallab, a professor of criminal law and legal philosophy, contributed to the methodology of the normative theory with his *Úvod ve studium metod právnických. Základní pojmy: Kniha první. Hlavní směry: Kniha druhá.* (Introduction to the study of legal methods. Book 1, Basic concepts. Book 2, Main directions: Kallab 1920–1921). The main difference between Kallab and Weyr is whether, aside from *právní věda* (legal science) in Weyr's sense, aimed at recognizing the positive law, there also exists a legal science understood as an endeavour aimed at offering an objective knowledge of what ought to *objectively* be.

The first normativist in the theory of civil law was Jaromír Sedláček (1885–1945): His philosophical treatise *Občanské právo československé: Všeobecné nauky* (Czech Civil Law: General theories), published in 1931, clearly bears the mark of Kant's philosophy. A true achievement was his previously mentioned commentary on the Czechoslovak General Civil Code (a commentary cowritten with František Rouček: Rouček and Sedláček 1935–1937).

Ota Weinberger (1919–2009) was a disciple of Weyr and Engliš, and the question most closely associated with his professional life was the Jörgensen's dilemma, the question of the logical analysis of norms, namely, how can norms be subjected to logical analysis if they can neither be true nor false?[14] After the Soviet occupation of Czechoslovakia in 1969, he left the country for Austria, where he became chair at the Institute of Legal Philosophy in Graz (from 1972 to 1989). In 1990, he went back to Czechoslovakia many times and helped to restore legal philosophy in the country.

According to Weinberger, one possibility in solving Jörgensen's dilemma is to distinguish between cognitivist (descriptive) and noncognitivist (prescrip-

[14] On Weinberger see also Section 10.3.3 in this tome.

tive) concepts of norms.[15] What distinguishes *cognitivist* concepts is that in them lies a connection between the concept of a norm and that of truth, a connection that by contrast is absent from noncognitivist concepts. What defines a noncognitivist norm is its connection to a norm-creating authority, understood as an authority empowered to command a certain conduct on the part of those who are subject to it. Weinberger further divides noncognitivist theories of norms into those theories which assert the possibility of a logical description of normative thinking (normologic optimism) and those which reject that possibility (normologic scepticism), a distinction that according to Holländer (2010) he was concerned to draw because he was himself an adherent of normologic optimism.

Weinberger's logical analysis of norms quite significantly influenced European legal theory and philosophy. Already exceptional in this respect was his 1958 *Sollzsatzproblematik in der modernen Logik* (The problem of ought statements in modern logic: Weinberger 1958). Instead of offering ideological arguments, he laid out a program for rational discourse stripped of any politically apologetic context, emphatically claiming that "*ex autoritate* arguments should be left out!" (Weinberger 1967, 864; my translation). As Holländer underlines, he was the first one in Czech legal theory to have replaced the concept of truth with that of practical certainty.

He was inclined toward legal positivism, and in his polemic against *ius naturale* he objected that "simply *stating* that natural law exists is completely meaningless: Only a *justification* of valid principles of natural law—principles that can be used as arguments in legal argumentation—is relevant for legal philosophy and legal methodology" (Weinberger 1993, 193; my translation, italics added). The solution offered by Weinberger is as follows:

> However, neither in ethics nor in law is the enactment of norms a matter of arbitrariness. As Hart has shown, in society under the modern state, law must in any case frame certain relationships and perform certain functions. But this functional determination of law is not a natural-law element of the legal order, because it is not cognitively determined [...]. There exist certain natural reactions and modes of behaviour that I would consider natural rudiments of justice. But this is not natural law: It is rather a reference to a natural basis that forces us to create norms and institutions in that way, since they arise from natural anthropological reactions and structures, and since, at the same time, we always make evaluations in light of the postulates of justice. (Weinberger 1993, 201–2; my translation)

Weinberger's formally finalistic theory of action (a theory developed in Weinberger 1996), is based on the view that action is behaviour determined by information, meaning that agents act by processing this information, which thus acquires structure, and it is on the basis of that structure that their action can be explained. So, in his view, this formally defined concept of action can be applied to the actions of individuals, and hence to the actions of institutional entities. Institutions create the framework for our actions. Forms of action and

[15] On the Jörgensen's dilemma see Section 26.4 in Tome 2 of this volume.

human interaction thus depend on institutions: While institutions are *created* by humans, human behaviour is in turn *determined* by institutions. Institutions can be normative and pertinent (they are institutions-as-things). They are each characterized by a guiding idea (*idée directrice*),[16] and they define institutional facts and the roles of people in social institutions, and over the course of history they also retain a certain stability and dynamism.

On the neoinstitutionalist theory of law, which Weinberger developed with Neil MacCormick, law is understood as a system of pieces of practical information that determine the structure and behaviour of the state and of its institutions (MacCormick and Weinberger 1986). What imparts validity to the legal order is that its system of norms determines the organization and functioning of legal institutions.

Neoinstitutionalism can be identified as a kind of legal logicism. It investigates the structure of legal norms and their dynamics, distinguishing between different types of legal rules: rules of behaviour, legal principles, conferring rules, etc. Legal dynamics is understood as a set of norms, facts, and actions (first among which are legal transactions).

In his theory of argumentation,[17] Weinberger compares established theories and underlines the difference between two "types of argumentation": the relevant validity of a thesis and the processes of intersubjective motivation. The motivating effect of argumentation depends not only on relevant reasons but also on other circumstances. That is why it is greatly important to be able to subject eristic methods to critical scrutiny,[18] because marketing and false methods of motivation make their way into political life and begin to threaten the functioning of the open society.

Finally, there is the theory of democracy (Weinberger 1996; 1993, 257–80). According to Weinberger, democratic life cannot be guaranteed only by way of formal rules: Democracy should be constructed within the framework of an open system of substantive principles on which basis to arrive at principles for democracy as an institution.

In 1945, when the University in Brno reopened after World War II, a new *Institute of civil law and legal philosophy* was established under the chairman-

[16] Weinberger is using the concept of *idée directrice* in the sense in which it had been used and explained by Maurice Hauriou (1856–1929), the best-known representative of the theory of institutions (institutionalism): See for example Hauriou 1965. On Hauriou see also Section 12.2 in this tome and Section 1.1.4.2 in Tome 2 of this volume.

[17] Weinberger explains his overall approach to the theory of argumentation in a very detailed manner in Weinberger 1995, an article based on a lecture delivered at Karl Franzens University in Graz on April 19, 1995.

[18] Eristic (from the ancient Greek word *eris*) refers to argumentation where the contending parties quarrel without any reasonable aim, just for the sake of argument itself, rather than to seek to resolve the issue in dispute. It is also seen as the ability to argue for any position just by way of logical dexterity, and also as the art of arguing in such a way as to preserve the truth of the premises (*per fas et nefas*).

ship of Vladimír Kubeš (1908–1988). Kubeš is sometimes described as the most influential Czech legal philosopher in the second half of the 20th century after Weinberger. As a disciple of Weyr and Sedláček, his starting point was the pure theory of law, but in the late 1930s he was strongly influenced by the critical ontology of Nicolai Hartmann. After his unsuccessful attempt to join Marxism in March 1948, and a later attempt to leave the country, he was imprisoned (from 1949 to 1956). During the Prague Spring (1968–1969) he was for a short period (from 1968 to 1969) professor of legal philosophy and of civil law, and then he retired early (1971). Afterwards he became a visiting professor of legal philosophy at the University of Vienna (1976–1981).[19]

Two stages can be identified in Kubeš's theory in connection with his philosophical development. At the first stage, when he was focusing mainly on civil law, he subscribed to the views of Weyr and Sedláček, and his conception thus fell within the pure theory of law.

He clearly distinguished two questions as concerns legal validity: the question of the validity of a norm as a part of a system of norms known to be valid, and the question of *pozitivní sekundární právo* (secondary positive law), a concept he introduced in the pure theory of law to explain the legal nature of a judicial decision based on principles of natural law (referring to Article 7 of the *Allgemeines Bürgerliches Gesetzbuch*, as well as to other similar provisions).[20]

The second stage in the development of Kubeš's thought begins with his landmark *Právní filosofie XX. století* (Twentieth-century philosophy of law: Kubeš 1947), addressing Kantianism, Hegelianism, phenomenology, and Engliš's theory of the tripartite order of ideas. He gradually moved beyond the narrow confines of the pure theory of law, shifting his focus to systematic philosophy, influenced in the first place by the critical ontology developed by Nicolai Hartmann (whose lectures he had attended in Berlin in 1932).

Legal philosophy is understood by Kubeš (2003) as a strict science, a system of ideas aimed at truth and correctness. Legal philosophy should in his view perform five tasks as follows:

[19] In 1980, during his Vienna period, Kubeš published *Die Brünner Rechtstheoretische Schule (Normative Theorie)* (The Brno school of legal theory [The normative theory]: Weinberger and Kubeš 1980; see also Weinberger and Kubeš 2003) with Ota Weinberger, and he also published a work on legal duty titled *Die Rechtspflicht* (On legal obligation: Kubeš 1981). His last work, *Theorie der Gesetzgebung* (The theory of legislation: Kubeš 1987), was also published in Vienna. A selection from his unpublished material on legal sociology was edited by Pavel Hungr in 1991 for use at the law school in Brno (Kubeš and Hungr 1991). In 1994, the law school also published a biography of Vladimír Kubeš titled *... A chtěl bych to všechno znovu* (... And I would like to make all happen again: Kubeš 1994).

[20] Article 7 of the ABGB reads as follows: "Whenever a legal case cannot be decided on the basis of the literal meaning of a statute or on the basis of its commonsense understanding, then it will be necessary to look to similar cases clearly adjudicated in a previous decision, as well as to the grounds for decision set forth in other related statutes. If the case still remains doubtful, it must be decided in light of carefully collected and thoroughly balanced circumstances on the basis of natural legal principles" (my translation).

1. To identify the essence of law, a legal-ontological and legal-noetic task.
2. To explain the normative idea of law (the ideas of justice, certainty, purposiveness, and freedom).
3. To determine the concept of law and other legal concepts. This is a logical task, laying the foundation for the logic of law and the philosophy of legal concepts. But ontology must take precedence over these concepts. Legal-ontological research is important in noetic and logical research (as well as when investigating the logic of norms).
4. To explain the sense and purpose of law.
5. To interpret the legal view of the world as an open system, a gradual construction of ideas, a construction atop which lies the real idea of law. This real idea of law is a dialectical synthesis of a concrete individual's ideas of justice, legal certainty, purposiveness, and freedom, expressing what that individual—an actually thinking person living in the real world—believes about the components of the real idea of law, or how that person understands and specifies that idea.

18.4. Forty Years on, after 1948

Soon after the coup d'état in February 1948, the normativist school was dismantled, and then in 1950 the Brno School of Law was closed on ideological grounds. Among the leading Czech legal theorists of that period was Viktor Knapp (1913–1996), whose authority has sometimes been compared to that of Antonín Randa, and whose career in law was linked to Prague.

Knapp considered the Brno School of Law "philosophical" and normativist (at times neo-Kantian), and he contrasted it with the Prague School of Law, which he characterized as *non*-philosophical and close to positivism (sometimes sociological, sometimes historical),[21] in the spirit of the dictum *Dura lex, sed lex*. He became professor of civil law but also studied philosophy, sociology, and history, and in 1951 he joined the law faculty of Charles University in Prague, teaching there until the 1990s. In his early *Problém nacistické právní filosofie* (The problem of Nazi legal philosophy: Knapp 1947), he offered a systematic interpretation of Nazi legal philosophy, in what he characterized as a logical but not a sociological analysis of this phenomenon after World War II.

In the February 1948 coup d'état Czechoslovakia was enveloped within the Soviet zone as a "people's democracy," and especially in the early years the country adopted official textbooks on legal theory. So, for example, in 1949 the Institute of Law of the Academy of Sciences of the Soviet Union published in Moscow a theory of law and the state, and these books were translated into Czech and Slovak and introduced into academic institutions such as universities and the Slovak Academy of Sciences (cf. Aržanov, Kečekjan, et al. 1950)

[21] This opinion was expressed by Viktor Knapp (1998, 18–21).

Under Soviet influence, the Marxist-Leninist theory of law and the state was presented as the only true, scientific theory of law and the state, on a par with the revolutionary turn in that field. The definition of law from this period read as follows:

> Law is a set of rules (norms) of behaviour determined and enforced by power of the state, expressing the will of the ruling class, and whose compliance is secured through the state's coercive power, their purpose being to protect, strengthen, and develop social relationships and orders for the convenience and advantage of the ruling class. (ibid, 109; my translation)[22]

As an expert in civil law, Knapp was among the main authors of the "middle version" of the Civil Code (the 1950 version), which was also based on the new concept of property (ownership) in a Soviet-style people's democracy. In 1967, he published his second work on legal philosophy, *Filosofické problémy socialistického práva* (Philosophical problems of socialist law: Knapp 1967). Apart from discussing the possibility of framing a Marxist concept of law, the work also, and for the first time in a Marxist context, took on topics like gaps in the law and civil disobedience.

In the same year Jiří Boguszak (1927–) came out with a textbook titled *Teorie státu a práva* (Theory of state and of law: Boguszak 1967), published in two volumes. Volume 1 offered a systematic and analytical interpretation of all important general questions relating to law and the state—the state's power; state sovereignty; the forms of state; law and legality; the sources of law; legal norms; the structure, types, validity, and effectivity of law; legal relations; the application and interpretation of law; and the legal system—while Volume 2 dealt with contemporary types of state and law, emphasizing their sociological aspects.

After 1968 and in Czechoslovakia's period of normalization (mainly in the Czech Republic), the standard textbook in use was by Eduard Kučera (1928–2010), chair in the general theory of law and the state at the Charles University School of Law in Prague. The book, published in two volumes, was titled *Obecná teorie státu a práva* (General theory of the state and of law: Kučera 1976–1977), and it also included studies on the criticism of the bourgeois theories of law and the state, including the normativist theories.[23]

[22] The definition goes with the definitions that Andrei Januarjevitsh Vyshinsky set out in Vyshinsky 1938c, 36–7; 1950, 36. On Vyshinsky, see Section 17.3 in this tome.

[23] The textbook draws inspiration from the Soviet *Marksistsko-leninskaja obščaja teoria gosudarstva i prava* (The Marxist-Leninist general theory of the state and law), published in four volumes from 1970 to 1973 by Viktor M. Čchikvadze and others (Čchikvadze, Aleksandrov and Bratus 1970–1973). Among the critics of normativism was Lubomír Kubů, professor of legal theory at the Purkyně University, School of Law in Brno. See, for example his work from 1977 *Ryzí náuka právní v kontextu buržoazního právního myšlení* (The pure theory of law in the context of bourgeois legal thought: Kubů 1977).

18.5. The Story of Slovakia (1919–1989)

The Czechoslovak State University in Bratislava was established on July 11, 1919, replacing the previous Hungarian University, and on November 11 of the same year its name was changed into Comenius University. Under the act by which it was established, lectures had to be delivered either in Czech or in Slovak. The Comenius University School of Law was established in 1921: Bohuš Tomsa (1888–1977) was appointed as the first professor of legal philosophy at the law school, but without tenure. He was in charge of a seminar in legal philosophy from 1922 to 1938 (and was subsequently dismissed, being a Czech professor). The legal status of Comenius University was then changed, principally in 1940, when the new act regulating Slovak universities repealed the previous act (the one under which the Czechoslovak State University was established in 1919): This meant that Comenius University would henceforth no longer be classed as Czechoslovakian.[24] To mark the "new beginning," the Slovak University in Bratislava (*Universitas Slovaca Istropolitana*) announced that it would accept Slovak and Latin as its official languages for teaching and exams. The *seminár právnej filozofie* (seminar on legal philosophy) was reshaped into the *Inštitút právnej filozofie* (Institute for Legal Philosophy), and beginning in 1942 it was headed by Vojtech Tuka (1880–1946), who also served as president of the Slovak University (from 1939 to 1942). His main work on legal philosophy was published in 1941 in Berlin and Vienna: It came out in German under the title *Die Rechtssysteme: Grundriß einer Rechtsphilosophie* (Legal systems: Outlines for a legal philosophy, Tuka 1941), and in it he laid out his own typology of systems of law.[25]

In the same wartime period, in 1941, Jozef Ratica (1906–1960) published *Súd a tvorba práva* (The courts and the making of law: Ratica 2009), which criticizes the normativist view of law. In this book, Ratica looks for a unified concept of law useful to the courts' decision-making practice, and in summarizing the features of normativism he asserts what follows:

[24] In the so-called Slovak state (which as mentioned was established in 1939), this step also expressed the attitude to the former common Czechoslovak Republic and to the ideology of "Czechoslovakism," the view that there is only one uniform Czechoslovak nation across the territory, and no Slovak nation at all. The Czech professors initially invited in 1919 (most of them recruited from Charles University in Prague) to help establish the Czechoslovak State University (which would soon continue as Comenius University) were dismissed on the ground that they were not well-disposed to "Slovak affairs," and that they even sought to hold back the development of Slovak culture. In 1954, the Slovak University changed its name back to Comenius University.

[25] Tuka's classification includes (left as in the German version, because it is, in my opinion, impossible to translate this epithets explicitly into English) "the karmine, domine, merzine, artine, tumultine und vizine Rechtssystem." Tuka described his own work as a study in the *sociology* of law (*Rechtssoziologie*) rather than in the philosophy of law (*Rechtsphilosophie*) (Tuka 1941, IX). Tuka served as prime minister of the Slovak Republic throughout its existence (from 1939 to 1945): In a post-war trial he was sentenced to death as a war criminal and was executed in 1946.

From the fact that the normative theory has put an insurmountable abyss separating the world of what is from the world of what ought to be, it self-evidently follows that in the effort to understand what is generally considered to be law, that theory proceeds from assumptions and concepts drawn from the nature of the norm as a form. As is clear from the foregoing, the concepts so obtained are too narrow, and even their pure formality is overall doubtful. [...] The pure theory of law starts out by recognizing as law only what is generally considered to be such, and it sees the plurality of norms in the law [but] it cannot seize their content. The variability of content hinders the effort to create a set of norms on the basis of the principle of content itself: That is why [on the normative theory] only a formal principle can be taken into account. (Ratica 2009, 74; my translation)

In 1939, Štefan Luby (1910–1976) joined the university again as an untenured professor with the work *Obyčajové právo a súdna prax* (Customary law and judicial practice: Luby 1939). For his tenure he later produced his famous *Dejiny súkromného práva na Slovensku* (History of private law in Slovakia: Luby 2002)—the general part came out in 1941 and the completed version in 1946—and then he came out with *Prevencia a zodpovednos* (Prevention and responsibility: Luby 1958), a work addressing theoretical problems in civil law. Then, in 1959, he left the university for the Academy of Sciences, where he worked at the Institute for Law and the State.

In 1963, a chair in legal theory was established at Comenius University in Bratislava. At that time, Slovak legal theory was essentially the work of Ján Bakiča (1925–2012). After the Prague Spring of 1968, Pavol Dojčák (1928–) published a textbook titled *Teória štátu a práva* (Theory of state and law: Dojčák 1977). It was like the earlier, similarly titled (and previously mentioned) textbook by Eduard Kučera, in that it was likewise modelled on the same Marxist-Leninist general theory of law and the state, and in many respects it copied the existing mainstream theory developed by Jiří Boguszak in Prague, for it was aimed at preserving the unity of the entire legal curriculum in Czechoslovakia, and in practice it survived until the Velvet Revolution of 1989.

18.6. Shortly after 1989: Again Two Stories from the Philosophy of Law

Recently, over the last two decades—after the 1993 dissolution of Czechoslovakia into the Czech and Slovak Republics—the theory and philosophy of law have seen a revival in both countries' universities and law schools, and seminars have also sprung up dealing with a range of issues in these two disciplines.

18.6.1. The Slovak Republic

The first attempts in legal theory are linked to Jozef Prusák (1942–), who first served as professor at Comenius University in Bratislava (1989–1999) and then as the first dean of the newly established Trnava University School of

Law (2000–2007). He is the author of *Teória práva* (The theory of law: Prusák 1995),[26] which is a standard textbook in the Slovak Republic and covers the theory of public and private law alike, while also serving as an introductory overview of the discipline.

In the 1990s, Alexander Bröstl (1953–), of the Košice School of Law,[27] published *Právny štát: Pojmy, teórie a princípy* (The *Rechtsstaat*: concepts, theories, and principles, Bröstl 1995), and Eduard Bárány (1955–), of the Institute for Law and the State of the Bratislava Academy of Sciences,[28] came out with *Moc a právo* (Power and law: Bárány 1997). Bárány also wrote *Pojmy dobrého práva* (Concepts of good law: Bárány 2007), presenting concepts which make for good law (or which designate four values inherent in the idea of goodness in law): These are natural law, human rights, legal principles, and justice/equality. One of the theses the book argues is that "legal positivism, on a par with the theory of natural law, can strive for good law, and their concepts equip them with appropriate means by which to do so" (Bárány 2007, 7; my translation). Alexandra Krsková (1942–), who came to be known as the "first lady of Slovak legal philosophy," has investigated the psychological aspects of law, working with Pavel Hungr of the Brno School of Law (Krsková and Hungr 1985). She then published *Štát a právo v európskom myslení* (State and law in European thought: Krsková 2002), which was also translated into Czech.[29] Shortly thereafter Radoslav Procházka (1972–), a member of the younger generation of legal theorists, came out with a book that develops his dissertation: It is titled *Dobrá vôľa, spravodlivý rozum* (Good will, just reason: R. Procházka 2005). And he recently also came out with *L'nd a sudcovia v konštitučnej demokracii* (People and judges in a constitutional democracy: R. Procházka 2011).

18.6.2. The Czech Republic

In the 1990s, important contributions to various areas in the theory and philosophy of law were made through a number of works published in the Czech Republic: Prominent among these are the essential works of Pavel Holländer

[26] Another work by Jozef Prusák (from the 1980s) is *Právo v spoločnosti* (Law in society: Prusák 1980), which takes more of a sociological angle to the study of law. Essays in honour of professor Prusák were published in 2012 by his students and colleagues in R. Procházka and Káčer 2012b.

[27] Two textbooks also written by Bröstl and others are *Základy štátovedy* (Foundations of the science of the state) and *Teória práva* (Theory of law), both in the Košice School of Law since 1991.

[28] Another Slovak legal philosopher, and former director of the same institute is Peter Colotka (see Colotka 1993).

[29] She later came out with an expanded version in Krsková 2011. In 2012, her students and colleagues published a collection of essays written in her honour to mark her anniversary (R. Procházka and Káčer 2012a).

(1953– , who was initially teaching at the Comenius University School of Law in Bratislava),[30] starting from *Rechtsnorm, Logik und Wahrheitswerte: Versuch einer kritischen Lösung des Jörgensenschen Dilemmas* (Legal norm, logic and values of truth: A critical solution of Jörgensen's dilemma, Holländer 1993) and continuing with *Základy všeobecné státovědy* (Foundations of the general science of the state: Holländer 2009), *Nástin filosofie práva: Úvahy strukturální* (Outlines of legal philosophy: Structural considerations, Holländer 2000; with a German edition of 2003), *Filosofie práva* (Philosophy of law: Holländer 2006, 2012), and many others. All these works combine to offer a coherent philosophical theory on the central questions and structures of law (legal principles and legal norms): Treating a range of questions from the concept and structure of law to the fundamental assumptions in legal thought, the author sets out to look for solutions to the problem of justice.

Holländer believes that Jörgensen's dilemma has played a positive role in the effort to investigate the logical properties of norms and the distinguishing features of legal thought, and that the dilemma has also shown the need to answer the question of the peculiar features of logical conclusions in the normative sphere.[31] There are two questions the dilemma can give rise to: Are there logically describable thought processes in which norms are contained? And can logic describe mixed, heterogeneous conclusions containing both norms and sentences, of statements of fact (as in the example of conclusions obtained by subsumption)? Holländer proposes a possible solution in developing his ideas on sentences and the truth, on the theory of legal norms, on the drawing of logical conclusions, and on norms and normative contradiction. He also discusses the question of broadening the concept within which to fit the drawing of logical conclusions, and he reconsiders the logical value of validity and compliance. His final considerations concern the question of reducing duty to necessity and to the problem of truth: truth as compliance with a norm, truth as a norm's alignment with the will of the norm-maker, and the truth of norms as a reflection of reality. In coming to a conclusion on the last problem, he agrees with Chaïm Perelman:

> The question of truth in our behaviour (its principles) is meaningless, because our actions and decisions cannot be true. They can be described as reasonable, just, thoughtful, in accord with moral norms or enactments of law. [...] They are self-evidently based on information containing facts. This information may be true or false, and its truth or falsity can influence our modes of behaviour. (Perelman 1972, 49; my translation)[32]

The second edition of Holländer's *Filosofie práva* (Holländer 2012) focuses on crucial questions like the concept of law, legal norms, legal principles, the lan-

[30] Pavel Holländer has been a justice of the Constitutional Court of the Czech Republic since 1993, serving as its vice president since 2003, until 2013.

[31] On the Jörgensen's dilemma see Section 26.4 in Tome 2 of this volume.

[32] On Perelman's conception of legal reasoning see Section 23.2 in Tome 2 of this volume.

guage of law, and the problem of justice. The main idea behind his work is expressed as follows:

> My aim is to link considerations on partial questions with two basic connecting moments—namely, (*i*) a rejection of reductionism and (*ii*) an acceptance of the (ontological) claim asserting the plurality and nonreducibility of basic principles—while endorsing the (noetic) need to find the right measure for things. (Holländer 2012, 15; my translation)

He draws attention to the relationship between natural-law theory and legal positivism in what concerns the social concept of the legitimacy of power (ibid, 14).[33] In dealing with the open texture of law, he comes to the problem of judicial law making as a consequence of the uncertainty of normative premises. He finally turns to the so-called Böckenförde thesis—the view that the "liberal secularized state is living on premises that it cannot itself guarantee"—discussing the ultimate consequences of that thesis and its impact on the concept of justice (ibid, 110).

In the 1990s, the law schools of the Czech Republic used Viktor Knapp's textbook *Teorie práva* (Theory of law: Knapp 1995) or other versions of it like *Základy teorie práva a právní filozofie* (Foundations of the theory and philosophy of law), by Vladimír Veverka, Jiří Boguszak, and Jiří Čapek (1996). These were then displaced by the revised *Teorie práva* (Theory of law: Gerloch 2007), written by Aleš Gerloch (1955–), dean of the Charles University School of Law in Prague. The law school hosted international conferences like *Právní principy* (Principles of law: Boguszak et al. 1999), *Problémy interpretace a argumentace v současní právní teorii* (Problems of interpretation and argumentation in contemporary legal theory and legal practice: Gerloch and Maršálek 2003), and *Zákony v kontinentálním právu* (Statutes in continental law: see Gerloch and Maršálek 2004), and the debates held within that framework wound up significantly contributing to the overall development of the theory and philosophy of law in the Czech Republic.

Jiří Přibáň (1967–), also affiliated with the Charles University School of Law in Prague, has been working at the Cardiff Law School, University of Wales, since 2001. He has gradually expanded his work on many questions in the philosophy and sociology of law. A few examples are *Sociologie práva: Systémově teoretický přístup k modernímu právu* (Sociology of law: The system-theoretical approach to modern law, Přibáň 1996), *Hranice práva a tolerance* (Frontiers of law and tolerance: Přibáň 1997), *Rule of Law in Central Europe* (Přibáň 1999), *Disidenti práva* (Dissidents of law: Přibáň 2001), and *Systems of Justice in Transition* (Přibáň 2003), along with numerous other writings on law and justice.

[33] It was Holländer who took exception to Přibáň's essay on legal positivism published in 2010 in the Czech newspaper *Lidové noviny* (People's daily), and who thus initiated the first debate after the fashion of that between Hart and Fuller, a debate dealing with the "never-ending story" of the legitimacy of legal positivism or natural-law theory (see Přibáň and Holländer 2011).

Zdeněk Kühn (1973–) is a member of the law faculty in Prague.[34] His thesis—titled *Aplikace práva ve složitých případech: K úloze právních principů v judikatuře* (The application of law in hard cases: On the role of legal principles in adjudication, Kühn 2002)—was followed by another work titled *Aplikace práva soudcem v éře středoevropského komunizmu a transformace: Analýza příčin postkomunistické právní krize* (The judges' application of law in the era of central european communism and transformation: An analysis of the causes of the post-communist legal crisis, Kühn 2005). The system of law is understood by him as

> something continuously created through predictive system-based techniques by working from the presently existing body of law (inclusive of statutory and judge-made law; traditional law and developing components of relatively autonomous legal reasoning; legal values; principles; other legal elements; and an aggregate of relationship between the legal system and extra-legal systems), all this occurring through a continuing practice carried out by the implementing bodies as well as by the addressees of legal norms. (Kühn 2002, 390; my translation)

Kühn further focuses on the normative impact of decisions handed down by courts in continental Europe, looking for answers to two important questions: Whether a hard case ceases to be a hard one if an essentially similar case has been decided by the supreme court in the same hierarchy, and whether a prima facie easy case can become all things considered a hard one, in light of relevant factors and on the basis of established continental European case law that seems to offer a straightforward, noncontroversial solution to a case once thought to be complicated (ibid, 394).

After 1989 the law faculty of Masaryk University in Brno reestablished its traditional connection with the normativist school, a connection that had been severed under communism, and even in recent debates the faculty has taken up some fruitful suggestions coming from this school. The textbook in use in the classroom is *Teória práva* (Theory of law: Harvánek 2008), written by Jaromír Harvánek (1955–). Miloš Večeřa (1949–), holder of the chair in legal theory at Brno, addresses the problems of the social state in *Sociální stát* (The social state: Večeřa 1993), where he also discusses justice in law and certain topical aspects of the teachings of Weyr, Weinberger, and Kubeš.[35] Tatiana Machalová (1959–), who also works under the same chair, has regularly contributed to the effort to interpret the teachings of Weyr and Kelsen, in part working in cooperation with the Hans Kelsen Institute in Vienna (see Machalová 2003, Machalová and Horák 2010). She asks in particular, proceeding from Niklas Luhmann's systems theory of law, whether the *Grundnorm* could

[34] He has recently been appointed as a judge of the Supreme Administrative Court of the Czech Republic in Brno.

[35] Večeřa has published a series of articles concerned with these teachings (see Večeřa and Miloš 2008).

work itself out into an autopoietic concept of law. She has also investigated the concepts of the legal subject and of legal duty in Kelsen's pure theory of law.

Further, and finally, there is a young generation of legal theorists and philosophers from Brno and Prague—among whom Tomáš Sobek, Filip Melzer, Libor Hanuš, Radim Polčák, Martin Škop, and Jan Tryzna—who are mainly focused on the methodology and theory of legal argumentation (see, for example, Hanuš 2008, Melzer 2010, Polčák 2012, Sobek 2008, 2010, 2011, Škop and Macháč 2011, and Tryzna 2010).

Chapter 19

20TH-CENTURY LEGAL PHILOSOPHY IN HUNGARY

by Csaba Varga

19.1. Introduction

The first half of the 20th century in Hungary is marked by the prevalence of neo-Kantianism and its development into an almost exclusive jurisprudential orientation (Jakab 2008, 2010). This came as a backlash against legal positivism, which stood as a stronghold in the background, exerting a dominant influence throughout most of the 19th century and replacing the earlier breed of natural-law doctrines, mostly of Austrian origin.

Hungary did experience a brief recovery after World War II, but it was derailed and brutally cut short by the Communist dictatorship, which spread into the country by way of the Soviet expansion, and whose main conclusion lay in the accords of the Yalta Conference. The Marxism that came to be imposed by Moscow—a Marxism reduced to Soviet Russian use—could only be superseded by the fall of the regime. The new initiatives that have formed since then are attempts at synthesizing some abiding theoretical experiences with the international mainstream.

19.2. The Period before World War I: Bódog (Felix) Somló (1871–1920)

Somló's oeuvre greatly influenced the development of neo-Kantian legal philosophy to become the dominant trend in Central Europe, thus also prevailing in Hungary, under the impetus of the modernization of domestic legal theoretical thought (cf. Somló 1999).

The first stage of his activity—which he summarized in a paper on the law's value standards (Somló 1909–1910)—is characterized by a reassertion of Herbert Spencer's doctrines, concomitantly with an espousal of Gyula [Julius] Pikler's (1864–1937) sociological approach, naturalistic and utilitarian at the same time (see, e.g., Pikler 1897), which was based on a strictly scientific, psychologically coloured outlook within the framework of a materialist philosophy of history. He could thus complete Ágost (Augustus) Pulszky's (1846–1901) endeavour to lay the philosophical foundations of legal positivism in the country (see in particular Pulszky 1888). It is only later, in the second stage of development, that his work took a definite neo-Kantian turn. Initially, he had still seen legal philosophy and legal sociology as equal in standing, but neo-Kantian conceptualization also made it necessary to separate them—regardless of whether they are interconnected fields.

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He first criticized contemporary authors from a natural-science perspective inspired by positivism and evolutionism. He then reconsidered the increased role the state had to play when capitalism, having changed into a monopolistic scheme, demanded a reformulation of all the relevant functions and institutions of law (Somló 1903).

When he set out to systematize these ideas and concerns in his masterly *Juristische Grundlehre* (Basic theory of law: Somló 1917)—differentiating the pure sciences from the applied ones (the latter of which were to include the normative sciences as well)—he proceeded on two fronts, on the one hand (1) proposing a definition of law's preconditions (considering what the concept of law could be in a basic doctrine), while at the same time also (2) searching for rightful law (*richtiges Recht*) by developing a full legal axiology. It is this very search that necessitated the neo-Kantian turn, on the model defined by Rudolf Stammler[1]. Reasoning in line with John Austin's *Jurisprudence*,[2] and to a lesser extent with Fritz Berolzheimer's *Rechtsphilosophie*, Somló offered an analysis of the concept and conceptual components of law, without regard to content.[3] Concluding from the Kantian approach, he first distinguishes *a priori* "basic concepts of law" (*juristische Grundbegriffe*) from "valid notions" of jurisprudence (ibid., par. 4; my translation). Then, he will identify law as norms that embody *Sollen*, norms which are empirical and heteronomous, that is, drawn from the "highest power" (*höchste Macht*). For sure, this *Sollen* "is the notion of a must-to-be [*Geschehen-Sollens*], and not of the regularity of anything being [*Regelmäßigkeit des Geschehens*]" (ibid., 107; my translation). On the final analysis, "law will thus mean the norms of a customarily followed, comprehensive and stable highest power [*einer gewöhnlich befolgten, umfassenden und bestandigen höchsten Macht*]" (Somló 1917, 105; my translation). As to the law's sources, ones coming from the "legal power" (*Rechtsmacht*) itself can either be (1) primary and expressed (*primare ausdrücklich*) and (2) primary and non-expressed (*primare nichtausdrücklich*); and ones coming from the organs of the "legal power," (3) secondary and expressed (*sekundare nichtausdrücklich*) and (4) secondary and non-expressed (*sekundare nichtausdrücklich*). The first two sources are exemplified by written constitutions and constitutional customs, which he placed on equal standing (ibid., chap. 11).

[1] On Stammler, see Section 1.3 in this tome and Section 2.2 in Tome 2 of this volume.

[2] As to the roots of Anglophilia in Hungary, the proximity of the Magna Carta (1215) and the Bulla Aurea (1222), the admiration of English parliamentarism as well as the non-codified quasi-precedential development of Hungarian private law are to be mentioned. As to all its echo in jurisprudence, educated within a political émigré's family in England, Pulszky made already an early translation of Henry Maine's *Ancient Law* in 1875, "copiously annotated" with a series of references to Austin. As the common-law orientation continued until the Communist takeover in 1948, "the connection with English jurisprudence and political science was for many years somewhat closer in Hungary than in Germany" (A. B. Schwarz 1934, 198; cf. Szabadfalvi 2001).

[3] On Berolzheimer, see Section 5.2 in this tome.

In the contemporary continental debate on whether law was considered a system open or closed, Somló strongly argued for the law's logical closure. The only exception he admitted was the chance of a "gap without agent of decision [*Lücke ohne Entscheidungsinstanz*]" (ibid., 414; my translation). This, as he continued at once, could exclusively be the case of a gap in constitutional law, fillable in no other way if not through illegitimate law making (*illegitime Rechtssetzung*).

The enthusiasm he raised in German-speaking countries urged him to lay the philosophical foundations for an axiology of his own. He did not live long enough to complete this endeavour, but his students did manage to edit and publish the book-length preparatory fragments he left behind (Somló 1926).[4]

His *Juristische Grundlehre*—with its grounding of a general theory of law describing a conceptual structure that is continuously evolving in modern formal law—is now considered a classic, a masterpiece in the company of other pioneering works (Funke 2004).

19.3. The Interwar Period

19.3.1. Gyula (Julius) Moór (1888–1950)

Moór's oeuvre is best characterized as having a "comprehensive nature" with some features of eclecticism (Szabadfalvi 1999).

Early on, after making Stammler's acquaintance at the University of Berlin, he began challenging Hans Kelsen with corrective remarks investing every part of his theory.[5] Seeking to develop a framework for a complex approach (Moór 1923), he acknowledged as independent, albeit interrelated, research topics (1) the concept of law (its definition within a foundational doctrine), (2) the kind of social causality the law may generate (an investigation in legal sociology), and (3) rightful law, or law according to justice (as the main concern of legal axiology), a trichotomy he would later expand by the addition of (4) the methodology for the study of statutory law.

Striving to elaborate a system of legal philosophy of his own inspired by the Baden School, and in particular by Wilhelm Windelband and Heinrich

[4] Throughout his life, Somló played the fermentative role of a leftist progressist. An idealist who espoused the republicanism that was gaining momentum at war's end, he committed suicide when, owing in part to the idealism of his cohorts blindly trusting in the Wilsonian principle of peoples' self-determination up to the dead end with its implementation denied, his "beloved Kolozsvár" [now re-named as Cluj-Napoca] was lost to Romania. Somló's personal archives have been processsed and, as to his diary and correspondence, partly published in German in Funke and Sólyom 2013.

[5] In fact, the close relationship of trust between Moór and Kelsen may help explain how Moór's offer to translate Kelsen encouraged Kelsen to commit himself, in 1927, to the first of his two intellectual *Selbstbiographien* (see Varga 1995c, 15–23, and Jestaedt 2006, 8–10, 21–29).

Rickert,[6] Moór rebuilt a theoretical connection—rather than a merely declared antagonistic separation—between reality (*Sein*) and value (*Sollen*). He accordingly classified law as belonging to a "reality valued [*értékes valóság*]" (Moór 1945, 61; my translation). At the same time, in order to rejuvenate legal philosophy as a new cultural tendency based on a synthesis between neo-Kantianism and neo-Hegelianism, he had to turn to Nicolai Hartmann. In this final vision, even law builds as a kind of *Sein*: An aggregate of enacted abstract norms owing their content to human activity in its daily affairs, law builds through a process in the course of which intellectual representation will turn into some specific (legal) reality (Moór 2006).

For it was during the war years that in his neo-Kantianism the mature Moór progressed from the Marburg school to the Baden school on the one hand, while on the other turning especially to Nicolai Hartmann in order to "find the path leading from the philosophy of Hegel to the one of Kant" (Moór 1943, 93; my translation). He realised that social and historical phenomena are made up of human actions which are, in addition to given meaning and purpose, i.e., intellectual contents, to embody corporal-spiritual (or psycho-physical) reality themselves. From this double-layer-existence—breaking down Hegel's "objective spirit" (*objektiver Geist*) (Moór 1942, 245)—he concluded that one has to count with three kinds of fields of existence: (1) nature, (2) culture as reality valued, and (3) pure value (Moór 1945, 61). As a synthesis of Kantian dualism with Hegelian monism (Moór 1943, 94), he eventually established that

> The spiritual (*szellemi*) component of law lies in those ideas and regulations that provide for the contents of the law's provisions. At the same time, it has corporal-spiritual (*testi-lelki*) component as well, partly in those psychical processes through which men take notice of legal regulations and let their own will influenced by the latter and partly in those bodily motions that manifest themselves as the external, bodily realisation of the will aimed at implementing legal rules. Such corporal-spiritual processes do belong to the law's historical and social reality so much as the intellectual message of the content of legal provisions does. Without them law would remain mere paper-law with no role played in the life of human societies. (Moór 1942, 247; my translation)

The same consideration seem to lurk behind the key notion underlying the concept of law itself. Accordingly,

> all social powers as much as all social phenomena have spiritual contents in addition to their corporal-spiritual reality, for human forces transformed into power are cemented together by common goals, ideas and evaluations. (Ibid., 250; my translation)

The years of upheaval following World War II, combined with his personal persecution at the hands of the Communists about to seize power in the country, effectively prevented him from erecting something like a grand theory (see Varga 2005, 82–6). Despite all that, by comparing different theories relating to

[6] On the neo-Kantianism of the Baden School see Section 1.1 in this tome.

power and force, Moór was successful in transferring the idea of social reality into the realm of law, thereby opening new perspectives on the kind of sociality that lurks behind the law.

19.3.2. Barna Horváth (1896–1973)

Horváth started out as Moór's assistant and went on to gain a professorship at Szeged, only to become Moór's rival, with a "synoptic theory of law based upon a synoptic method" (*synoptische Methode, synoptische Rechtstheorie*; *szinoptikus módszer, szinoptikus jogelmélet*) he advanced step by step.

Inspired by Kelsen, Horváth took up as a precondition the separation between facts (*Sein*) and values (*Sollen*), a separation that neo-Kantian philosophy had deduced from Kant's epistemological distinction between transcendental, *a priori* knowledge (based on the form of all possible experience) and empirical, *a posteriori* knowledge (based on the content of experience). But in Horváth's formulation, the separation deduced on this basis shows itself to be a logical contradiction. Accordingly, he concludes,

> every judgment that can be directly or indirectly reduced to statements asserting that (1) a sheer fact is valid, (2) a sheer value is fact, or (3) an object of cognition is sheer fact and value at the same time is logically contradictory. (Horváth 1937, 94; my translation)

Horváth was in a unique position, having at first studied in Vienna—where he attended Kelsen's lectures and became acquainted with Alfred Verdross—and having then moved on to London, where he met Harold Laski (who would channel his political views) and Leonard T. Hobhouse (whose understanding of social development made quite an impression on him): With this background, he could be expected to counterpoise Germany's dominant cultural influence in Hungary. And indeed the synoptic view he developed is an attempt at transcending the dualism between *Sein* and *Sollen* by effecting a synthesis that would dissolve the traditional antagonism between the Anglo-Saxon and German traditions. Kelsen's reductionism, which had launched the logic of norms as the sole method of legal cognition, was found by him to be too sterile; he thus looked for a compromise solution:

> For a theory seeking to meet the proper requirement of methodological purity, while espousing the theoretical approach that views law as a conglomerate of norms and facts, there is but one conclusion to be drawn. That is, law is not an object of cognition but is rather the way in which, in accordance with a given scheme, norms and facts as exclusive objects of cognition can be seen in their endless mutual reference; and, accordingly, law is that which will be socially objectified out of such a perspective. This is the basic idea of the synoptic method:[7] the parallel view of these two sides taken together in mutual projection of one upon another. (Ibid., 8; my translation)

[7] Horváth contrasts here synopsis with synthesis which, according to Kelsen, could already amount to methodological syncretism.

And if law is not an object of cognition, the same goes for synopsis conceived as a method to describe law: It, too, cannot be an object-constitutive method of cognition. Rather, synopsis may be taken to be

> merely a particular technique for combining natural- and norm-scientific methods; or the technique for combining these two methods by actually observing how they mutually refer to one another; or, again, the technique for functionally experiencing *Sein* and *Sollen*. Synopsis, in short, is the method of methods. (Horváth 1934, 63; my translation)

The foregoing considerations, if applied to the judges, mean that their mode of thinking has a synoptic structure. Judges, in substantiating the claims made in their own judgments, proceed in two opposite directions, on the one hand filtering their knowledge of norms in light of the facts they select, and on the other filtering their knowledge of facts in light of the norms they select. This latter statement can be extended to all social and cultural domains shaped by human behaviour, because here, too, there is a mediator necessarily wedged between nature and values. Moreover, "norms" is just a sign standing for law here. For "proposition of law" not yet "positivated" in a "case of law" is still a "half-finished" product. And the interpretation its finishing needs amalgamates reproduction and creation through combining elements specific of the classical understanding of both applying and making the law (Horváth 1937, par. 236).

For Horváth, what is synoptic in methodology will be qualified as a procedural approach in theory. This is based upon the same duality:

> The essence of the procedural approach to law lies in the idea that law is neither mere proposition (or norm) nor mere fact but their combination, that is, an abstract standard of behaviour and a corresponding actual behaviour. And these two linked together intellectually is already a procedure [...]. This is why according to a procedural legal theory law will be defined as the most developed social procedure. (Ibid., 7; my translation)

As Horváth concluded at a time when he still had a voice in Hungary, the social reality of law can be traced to the regularity and order that can be observed in human conduct—a regularity that can also empirically be observed in society and measured as a mathematical average. And on a societal level, social order is reached as a complex of interlocked levels of institutions and processual schemes. Of all these levels, law is the most developed procedural structure (Horváth 2006).[8]

[8] It was clear by this time, in 1949, that what had been a promising outlook for post-war Hungary had turned gloomy. Or at least this is how it must have appeared to Horváth: As the most senior applicant for the chair in legal philosophy left vacant in Budapest as a result of Moór's expulsion, Horváth expected to be appointed to that post but was instead rejected in favour of Imre Szabó (discussed below in Section 19.4.1), at that time an unnoticed Communist academic. Horváth thus left the country and emigrated to the United States, where he became af-

19.3.3. The Szeged School

19.3.3.1. József Szabó (1909–1992)

As Moór's student at Szeged, Szabó later became acquainted with Horváth. But the latter's renewed admiration for common-law and English legal theory drew the enthusiasm of his more advanced disciples, so much so that they would eventually found their own Szeged School. Szabó was also awarded a grant to enrol in Alfred Verdross's course in Vienna, and the two thus wound up forging a lifelong friendship, fruitful in theoretical sensitivity as well.

In a number of papers (e.g., J. Szabó 1948), Szabó criticised the neo-Kantian approach by drawing for the most part on David Hume and American legal realism. In a "neorealistic" doctrine he formulated looking to common-law casualism, he drew a parallel between the British case-law approach and "traditional" models of judicial reasoning in Hungary, a country then known as a civil-law empire without a civil code.[9] Supported by Jerome Frank, Edward Robinson, and Thurman Arnold, he ascribed the belief in the certainty of law to the faulty logic erected by legal philosophers. His "fact-scepticism" and "rule-scepticism" was in this way sublimated into a theory based on the eventuality of the judicial event, whose contexture is dependent on "psychological circumstances" as well (cf. Varga 2006, 81–133).

In his unfinished oeuvre (J. Szabó 1999), he offered pragmatic explanations of classic neo-Kantian paradigms, sometimes with a streak of eclecticism.[10]

19.3.3.2. István Bibó (1911–1979)

Bibó studied under Horváth at Szeged. After making visits to Vienna for lectures delivered by Verdross, Adolf Merkl, and Felix Kaufmann—and travelling to Geneva to listen to Kelsen (in the company of Paul Guggenheim, Maurice

filiated with the New School for Social Research in New York, but it was a rough start and a bitter end for him at this school, which at just about this time was placing less and less emphasis on its members' formal academic credentials. He had a family to support, and was thus persuaded to seek employment as an analyst at *Voice of America*, where he remained until his retirement in 1964. His repeated lecture tours in Europe did, however, result in a collection of selected writings, and these were later republished (Horváth 1971).

[9] The Hungarian Civil Code was not promulgated until 1959, as Act IV of the National Assembly of Hungary.

[10] Szabó and his wife attempted to seek refuge by crossing the border, after his teacher succeeded in doing so after the Communist putsch in 1949, but they were caught and imprisoned for years. Then, his health failing, and struggling for his life, he managed to survive only thanks to commissions received for academic translations. The couple was then imprisoned a second time—for "counterrevolutionary acts" allegedly committed in 1956—and they continued in intellectual exile, and extreme poverty. A government interdiction meant that Szabó could only publish abroad, aided by Verdross, but this too was illegal at the time.

Bourquin, and Guglielmo Ferrero) teach at the *Institut des Hautes Études Internationales*—he made a translation of Kelsen's *Reine Rechtslehre*, thus becoming the first scholar to translate the work in extenso (and with the author's approval for its posthumous edition: Kelsen 1988).

In a neo-Kantian perspective, he contrasted the functional links among liberty, constraint, and law with Henry Bergson's idea of spontaneity and Nicolai Hartmann's ontology and ethics. Superseding his teacher's synoptic view, he introduced the law of spontaneity (*spontaneitás törvénye*) as playing an important role in law. According to him, a certain balance necessarily obtains between constraint and freedom in the practical workings of the law. By a seeming paradox, it is law that provides at once the most objective constraint and the most objective freedom, considering that any area freed from constraint is ipso facto the realm where freedom finds its most objective (i.e., the least subjective) manifestation (Bibó 1935). Therefore, law must perforce be Janus-faced. It is in this tension between these two forces that law's genuine power lies, and this is the specificity that distinguishes it from any other arrangement of social rules (cf. Varga 2006, 11–77).[11]

19.3.3.3. Tibor Vas (1911–1983)

Vas—his eyesight gradually deteriorating in his youth, so practically blind when entering the profession—was a classmate of Bibó.

His award-winning paper on the significance of transcendental logic for legal philosophy—published in both German and Japanese (Vas 1935)—defended Horváth's synoptic method and Georges Gurvitch's ideal-realistic one for recognizing the duality inherent in law, thus having the intellectual potential to move beyond the logic that had been developed by classic transcendentalism. Then, in a short paper (Vas 1936), he presented Horváth's *Rechtssoziologie* (or sociology of law) as the conclusion to be drawn from the concession that Kelsen makes in his *Pure Theory* by conceiving law as a "twofold object," in which facts are reflected in values and vice versa. The upshot of this reasoning was that the logical approach cannot have a significant role in law without taking sociological and evaluative aspects into account and working them into a single overall perspective (cf. Varga 2006, 137–241).[12]

[11] During and after World War II, Bibó became involved in political debates as an author and in reforming government administration as a specialist and high-ranking official. His academic career was cut short by the Communist seizure of power in 1949, and he had to survive both intellectual exile and long imprisonment (as minister of state in Imre Nagy's revolutionary government of 1956). For the rest of his life, he mostly concerned himself with issues in the philosophy of history and with world-power dependencies in Central and Eastern Europe.

[12] Vas would probably not have survived the persecution years if Moór, a member of the Upper House, had not interceded in his behalf with the governor, Admiral Miklós Horthy, who officially exempted Vas from the race laws. With the Soviet occupation of the country, however,

19.3.4. István Losonczy (1908–1980)

A recipient of the governor's golden ring award as *doctor iuris sub auspiciis gubernatoris* at the University of Pécs, István Losonczy attended Verdross's class in Vienna and subsequently met Giorgio del Vecchio in Rome.[13]

In line with his ambition to supersede legal positivism through a solid scientific realism, Losonczy sought to lay the study of law on new foundations by borrowing from the sciences (Losonczy 1937) and adapting the methods and principles of science to law (Losonczy 1941). In an innovative manner, he based his "realistic" account on a two-pronged approach, differentiating the ontic layers of existence, on the one hand,[14] from the neurophysiological aspect, on the other, and developing in this latter respect an explanation he would later complement and detail by exemplifying the way neurophysiological stimuli are networked in humans. In legal philosophising proper, he treated in detail those logical *a priori* presuppositions (e.g., 'law', 'punishment', 'possession', 'privity') which, mostly without being logified and made conscious, are floating in mind as the sine qua non logical components for that whatever legal order can be thought. Borrowing the term from Otto Weininger, he qualified them as of a "henid" state of consciousness (Losonczy 2002, 34). In this effort he relied on his own medical studies and worked in cooperation with leading local physiologists. To be sure, this promising start would soon be quashed,[15] but he did firmly believe in the project, persuaded that in this way the question of determinism and indeterminism in law, the enigma of causation in law (especially criminal law) as well as the variety of complicity in crime could be set on a scientific foundation (for a general overview of the period, see Szabadfalvi 2003).

19.4. The Post-war Period (Communism)

The Marxist dictatorship began with the Communist takeover in 1948. What it meant, among other consequences, was an ideological totalization with a view to transplanting Stalinism in Hungary. Which in turn meant that Stalinism had to be translated into a legal conception, a task entrusted to Andrey

Vas abruptly converted to Stalinist orthodoxy and held key positions, never again committing to paper anything of lasting value.

[13] On Del Vecchio see Section 11.2.1 in this tome.

[14] The physical, chemical, biological, psychical, social, cultural, as well as supernatural are the "modes of subsistance" (*Subsistanzweise*) recognised by him. His developments in this first area were summarized in a paper commissioned by Verdross in late 1948 for *Österreichische Zeitschrift für öffentliches Recht*. The manuscript was sent without ever reaching its addressee, however, as the Iron Curtain had in the meantime come down (see the posthumous Losonczy 2002).

[15] When the Communist takeover froze the air around him, he changed course and in 1950 took the chair of criminal law. Despite all his work, he was forced to retire at sixty-six (cf. Varga 2005, 86–94).

Vyshinsky, and which eventuated in a doctrine called socialist normativism.[16] What came out of this was a narrow-minded, almost exegetic legal positivism (reminiscent of that which had developed especially in France, pushed by the enthusiasm of the new Civil Code, in the first half of the 19th century), combined with a materialist and determinist view of social history as developed by Marx and Engels and "congenially redeveloped" by Lenin and Stalin. This end product did "primitivize" research and the pursuit of knowledge across the board, to be sure, raising also the issue (perceiving as troubling) of whether or nor past achievements in theoretical development in a critical reassessment of the Vienna school, on the one hand, and pioneering in sociological approach to law, on the other—both having the potential of erecting a future Budapest school—could be continued under the Communist regime. In other words, was classical legal positivism destined to perish, or could it develop into early postpositivism (giving way to the free-law movement, among other developments)? And did the sociological approach have any chances of surviving, or even thriving, despite the fact that it had been blamed from the outset as counterrevolutionary? Tacit questions they were, but implied by works of restart, rendering a moral, political and deeply theoretical account of past and present as well (cf., among others, Moór 1947).

19.4.1. Imre Szabó (1912–1991)

Imre Szabó grew up in East Hungary, a successor state to Hungary, from which it was detached in 1920 to become part of Czechoslovakia, and then of Ukraine in 1945. His personal development was twice pushed into a position of minority. It was in this context that Szabó, having graduated in 1937 from Charles University in Prague, would go on to write in his youth as a leftist Zionist, publishing in a comparatively open way, mostly in a Magyar journal based in the city of Kolozsvár (ceded to Romania, which at that point was already known as Cluj). In the post-war period, however, the Communist Szabó identified with the mission of consolidating as perfectly as he could Vyshinsky's doctrine of socialist legality. He brought jurisprudential thought into conformity with Soviet "socialist normativism," insisting in this way that no provision of the law can say anything other than what had already been textually embodied in the law itself (I. Szabó 1960; see also I. Szabó 1963, translated into Russian as I. Szabó 1964).

Later on, taking up the challenge of returning to the young Marx—a challenge that came to form part of the mainstream in Eastern and Western Europe alike at the time—he undertook an implicitly ontological reconstruction of Marx's early thought (I. Szabó 1981). Before that, based upon partly the

[16] On Vyshinsky see Section 17.3 in this tome.

Marxian pattern and partly Pashukanis's quasi-ontological approach[17], he had set out to reconstruct legal relations as a reflection of social relationships (I. Szabó 1971, translated into French as I. Szabó 1973 and into Russian as I. Szabó 1974), without, however, being able to make a genuine breakthrough, either at home or abroad.[18]

19.4.2. Vilmos Peschka (1929–2006)

Peschka studied under Imre Szabó at the Eötvös Loránd University in Budapest and then continued at the Institute for Legal Studies of the Hungarian Academy of Sciences (*Magyar Tudományos Akadémia Állam- és Jogtudományi Intézete*). He later joined the editorial board of the *Archiv für Rechts- und Sozialphilosophie* (a member since 1978) and cofounded the Hungarian National Section of the International Association for Philosophy of Law and Social Philosophy (IVR), serving as well as the section's first president.

Peschka devoted his entire scholarly life to a thorough study of the foundational issues—mostly philosophical and methodological—with which philosophising *in* and *on* law is concerned. Had he not been a Marxist, he would have been a conceptual analyst, for he took law to be a serious notional game standing for some abstraction in his epistemological realism. Theory was mere conceptual analysis for him, with no interest extended to either practical workings of law or its historical development or comparative variety. His sole interest lay in Marx, Engels, Hegel, Lukács, Weber, and Kelsen, within a conceptual world which he brought to near perfection, but this also meant that the categorial realm he designed was bound to remain a dry world, not inspirited by the greenness of life his beloved Goethe spoke of.

A conclusion which Peschka first reached with his doctoral dissertation (Peschka 1960), and which he would go on to develop, was that legal relationships actualized in practice are prior to any formal enactment of law that may have preceded them: He thereby implicitly rejected Vyshinsky's stance based upon a rigid statutory positivism with the state as an exclusive centre, enacting law and sanctioning whatever disobedience. Five years into his development of these ideas, Peschka (1965) expounded his policy desideratum as concerns the question whether the supreme court's rulings for legal uniformity should at

[17] On Pashukanis, see Section 17.3 in this tome.

[18] Even with all of his shortcomings, Szabó must be reckoned among the brightest legal minds of the orthodoxy of socialist Marxism. At one time the only jurist in the Soviet Academy of Sciences in Moscow, he was also internationally renowned as a legal comparatist. Relatively conservative as a thinker and open-minded in his institutional role in the academy—where he also served as director—Szabó made possible the diversification which got underway with Kulcsár and Peschka and which continued with the next (or third) generation of legal philosophers and other scholars at the academy. On the legal-philosophical achievements of his directorship, see, e.g., Péteri 1968 and 1984 and Tumanov 1969.

the same time be deemed lawmaking acts, by virtue of their role in guiding the process of making the case law uniform: In breaking with the view upheld by political voluntarism— according to which with no limitations party dictates as law posited via competent state organs should prevail over reality without the chance of being interfered by the judiciary—Peschka asserted and substantiated that such rulings should be so considered.

His critical overview of contemporary Western legal philosophy (Peschka 1972, translated into German as Peschka 1974 and into Japanese as Peschka 1981) became a classic of Socialist literature in Hungary. This was followed by an assessment of Weber's sociology of law (Peschka 1975), after which point he concerned himself with various topics and then eventually steered toward ethics, with a study in which he reconsidered Aristotle and Kant (Peschka 1980).

Once George Lukács (1971–1973) had expounded his social ontology, the stage had been set for turning "Marxist (and Leninist) theory of law" into a legal ontology.[19] Peschka took up the challenge by setting out a conception of legal norms in terms of causality and teleology, taking law as a particular reflection of objective reality (Peschka 1979). Proceeding from a rereading of Hartmann and Karl Larenz, he went back to the idea of ontologizing *in* law and *on* law by way of a synthetic reassessment of all teachings and ideas he had ever developed on law (Peschka 1988, translated into German as Peschka 1989).[20] This line of thought was brought to a conclusion in Peschka 1992, where he reconsidered Friedrich Hayek's position and Kelsen's posthumous theory of legal norms in comparison with legal hermeneutics as developed by Wolfgang Fikentscher, Hans-Georg Gadamer, and Arthur Kaufmann.[21]

Peschka never managed to supersede Lenin's perspective in treating law as a reflection of reality. His only concession was that such reflection would eventuate in some transformation of various kinds, grades and developmental phases, from legal norms via legal acts up to legal relationships. Unlike what Lukács did, he could not symbolically return from Lenin to Marx. He did shift the emphasis from the lawgiver's individual will to the legal-technical mechanics of the transformation. But in the final analysis he could only see law emerging from social reality by "specific reflection" (*visszatükrözés*/*visszatükröződés*), in a process thought to yield a "correspondence" between law and reality. To be sure, he conceived of this specific reflection transforming reality into law to be gradual: The discretionary margins of the law's objectivation (phase of law making) will get actualised as valid in and for the given case by the recipient consciousness (phase of decision making).

[19] On Lukács see Section 7.3.1 in this tome.

[20] On Larenz see Sections 5.4 and 9.4 in this tome.

[21] On Gadamer, A. Kaufmann, and legal hermeneutics see Section 10.3.5 in this tome and Section 23.4 in Tome 2 of this volume.

Despite his shortcomings, he eventually shed his self-inflicted scholarly rigidity by also integrating case law and hermeneutic moments into his system, constructing them as part of the process of law itself, which by their predominance might become the final moment of the law's development. As the Cold War wound down and the split emerged between Western Marxism and so-called Soviet Marxism, Marxism became both corrupt and politicized, and Peschka had fought both of such trends all along. He was the kind of Marxist you could easily approach in person: open-minded and always ready to engage professionally in discussion.

19.4.3. Kálmán Kulcsár (1928–2010)

A legal sociologist sensitive to theory from the outset, Kulcsár addressed the law's internal system of fulfilment (or the formal rules under which it is to be applied and through which it develops), while at the same time also taking into account its factual actuality (its actual use). He thus found the law to be a two-pronged phenomenon, one that could be viewed in parallel from the point of view of virtual homogeneity (its coherence and uniformity as a system of norms) and that of sociological role-playing. He argued that this is not a contradiction waiting to be resolved but is rather an ontic difference set against a background where we find, on the one hand, a normative idea (or ideal) of order, and on the other hand, some factual situation (Kulcsár 1960, translated into Russian as Kulcsár 1981; see also the revised edition Kulcsár 1976). He empirically also showed that the law's genuine effect is due for the most part, not to the mere fact of its having been enacted, but to its interaction within the overall social totality of which it is a part (Kulcsár 1980).

Having concluded the pioneering sociological incursion by which he broke through Stalinist dogmas, he undertook a comparative investigation into the factors at play in the attempts made across the world to achieve social modernization through the law. He warned that no reform can be successful without fully setting the whole of society on a new and solid foundation. Stated otherwise, once law develops into a complex phenomenon, there is only so much that can be achieved by the mere means of formal enactment (Kulcsár 1989, translated into English as Kulcsár 1992).[22]

[22] A role in removing the politically imposed ideological restrictions was played as well, from the 1960s on, by Mihály Samu (1929–) and Zoltán Péteri (1930–), among others. Samu came out with several monographs discussing the call for a socialist legal policy, a policy to be shaped by relying on both statutory enactment and legal scholarship (so as to mediate between the making and the application of law), the aim being to enable law's autonomy to strengthen social autonomy through further mediations wedged in social complexity for that the edge of political domination, characteristic of totalitarianisms, would somewhat be lost. Péteri, on the other hand, called for a socialist legal axiology (while also engaging in exercises in the methodology of comparative law) with the same aim, working tacitly in the background.

19.5. Contemporary Trends and Perspectives

19.5.1. Csaba Varga (1941–)

In the contemporary period, the parallelism has continued between the philosophical investigation of law and its sociological investigation. But the next generation was also faced with the problem of accounting for the law's complexity, while also having to explain what exactly it is that changes, and in what way, when the law is observed to change or when such change is otherwise provoked.

Csaba Varga (1991) started out with a historical comparative analysis investigating the objectification the law undergoes as it is codified to make it more rational, and he went on to develop an ontology of law on the model of Lukács's posthumous ontology of the social being (Varga 1985). These investigations became for him the basis on which to proceed in subjecting any epistemologizing of the law—i.e., any attempt to identify the law's power to reflect reality—to an overall ontological assessment of the law's structural makeup and operation. The lawyer's ideology (usually treated as a false ideology, along the lines of Friedrich Engels's *juristische Weltanschauung*) thus came to be one of the law's ontic components. For of ontic presence is what has effect in reality. And the way, dictated by the deontology of the profession, decision maker processes information of alleged facts and norms in his/her mind taken as a judicial black-box will have its imprint on the decision as an output. At the same time, he used his ontological reconstruction to respond to the "modernisation and law" enigma as well. Namely, if we accept that the law's complexity is owed in part to its ontology, then any built-in (ontological) element (impetus or stimulus) will inevitably march on as irreversible part of the law's overall process. This means that all-embracing reforms can be pursued, after all.

From the mid-1980s onward, he devoted himself to treating law as a language game in legal discourse, a game and discourse generating new conventionalizations in an endless sequence. Consequently, the law's identity is defined by the process that produces it rather than by the source of its validity. Or, stated otherwise, cognition and law alike—the former verifiable only by humans, the latter canonizable only by professionals—are autopoietic processes (Varga 1995a). Instead of viewing law in the developmental trichotomy of objectification, reification, and alienation alone—as Marxism has done not without justification (Varga 2013), but without the moment of human involvement—Varga now sets out to reveal law's genuine roots and the unavoidable responsibility we all share as to its future shape (Varga 1999, with an expanded edition in Varga 2012).

His conclusion was anticipated by two thinkers under whom he studied and with whom he thereafter maintained a friendship: Michel Villey (with his concept of *dikaion*) and Chaïm Perelman (with the praxis component of his

notion of *auditoire universel*).[23] It is a conclusion that Varga has complemented with the Thomistic conception of the fullness of the human being, active in every situation. The basic claim that legal positivism makes as to what is law thus turns out to be no more than a desideratum; for there is a never-ending rivalry—between (1) the officials entrusted with *making* law, on the one hand, and (2) those entrusted with *applying* it, on the other—as to who will control the way the law is to be defined, and the process is further complicated in society by the (3) spontaneous emergence of popular practices bearing on the same issue (Varga 1994).

In this connection there also emerges the problem of the historicity of law, with the opposition between universalism and particularism. Which is to say that such familiar constructs as "rule of law," far from belonging to the realm of the universal, are particular historical formations developed and applied in response to specific challenges under specific cultural conditions. Which in turn means that any final ideal of law cannot resolve itself into anything more certain or universal than the outcome of a responsible and responsive mediation, where law can actually balance conflicting rules, principles, interests, and values—a process that for this reason carries weight and must be taken seriously (Varga 1995b, 2008a; cf. also Cserne 2007 and Melkevik 2012).

As to European law, regarded as the model with adaptations for the future of continental domestic laws, he sees its actual working as exerting from the beginning a destructive impact upon the bounds once erected by the national laws' anchorage in the traditions of legal positivism. For and by its operation, the European law—whose efficacious operation is achieved by transposing the control on its central enactments to autonomous implementation and jurisdiction by member nations—dynamizes large structures, through which it transforms into order that what is chaos itself. Its whole construct as a kind of artificial reality construction is frameworked by an artificially animated dynamism (Varga 2011). To be sure, this idea of reaching order out of chaos is the one properly fitting in with the underlying philosophy of modern social theorising, multifactored and counting with statistical probabilities, producing result mostly as a final mass effect—contrasted to the individual paths of causal or quasi-causal chains, accostumed in the earlier phases of social sciences as well, as the traditional, Newtonian, legacy.

19.5.2. András Sajó (1949–)

Essentially a sociologist, Sajó has conducted methodical studies revealing that the apparently descriptive function of legal scholarship is frequently outweighed by the normative and formative impact which the conceptualization

[23] On Villey see Section 12.6 in this tome and Sections 1.3.3.4 and 3.3 in Tome 2 of this volume. On Perelman see Section 23.2 in Tome 2 of this volume.

and classification of law (along with all the other efforts to reconstruct and restate the law) may exert on the practical making and application of law. For this reason theoretical reconstruction can frequently intersect with the construction of factual reality (Sajó 1983).

In a series of books from 1978 to 1988 he then summarized his inquiries by drawing attention to the priority of social interaction in assessing the law's implementation or change. Otherwise stated, he puts forward the view that the sociological complexity of law is such that there is only so much the law's stimuli can account for: Their impact is at best subordinate and for the most part indirect. Or, after considering that neither the law's (or the law-giver's) authority and legitimacy, nor the interest or morality involved, nor the habitual practice of following rules, the lack of genuine alternatives or any negative sanction or consequence can guarantee the effective observance of law, his balance drawn will be reduced to stating that "It is impossible to effectuate a norm system by punishment only, without society approving it. Albeit no operation of a norm system is possible without calling those responsible to personal account" (Sajó 2008, 704; my translation).

19.5.3. Béla Pokol (1950–)

A disciple of Niklas Luhmann at Bielefeld, Pokol started out doing macrosociological theory, with an abiding interest in the layering of law that takes place in consequence of its differentiation (the *Ausdifferenzierung des Rechts*), a differentiation that continues to operate at the lower levels of the law as well (Pokol 1990, translated into English as Pokol 1991). According to his descriptive picture of law as the enacted law officially put into practice, what gives any working legal system its coherence and identity is the classificatory web of concepts making up its particular *Rechtsdogmatik*, or legal dogmatics: This is the stablest element of law, underlying its coherence and identity alike, and it also serves as a suitable framework in channelling its future shape (Pokol 2001).

In a series of inquiries into the origins and development of the doctrines expounding and reconstructing the various branches of law in Europe, he has come to the conclusion that *Rechtsdogmatik* exerts on the law a framework effect (Pokol 2008) as one of the quasi ontological components, in addition to the aspects and respective languages of the law as enacted, as officially enforced, as well as of law cultivated in *scientia iuris* (Varga 2008).

19.5.4. Hungarian Understanding of the Law Today

There is much additional work that can be found in legal philosophy in Hungary today.[24] If anything unifies this work—and the broader spectrum of cur-

[24] I should at least mention in this regard András Tamás (1941–), who in 1977 investigated

rent legal philosophy in Hungary[25]—it is the appreciation that law is a historical construct, shaped by anthropological conditions owed to an interplay of factors both social and cultural. What emerges in the outcome is a social totality and prevailing intellectuality within which to understand any given social actuality at any time. The dominant characteristic is the all-pervasive and mutual influence that can be observed among the various factors in question, without any fixed point or condition that can be pointed out as more foundational or as an absolute starting point. It is for this reason that if we are to arrive at a methodological scheme by which to survey and map out anew the vast territory across which the legal phenomenon extends, so as to gain a deeper understanding of it, we will have to enter into a historico-comparative investigation of legal cultures and of the manifold legal mind they shape (Varga 1992).

the role of legal consciousness in the law's implementation, and who has recently also contributed to what is known as *legistica*, the study concerned with the proper methods of legal drafting; Antal Visegrády (1950–), who in 1988 looked at the role that judicial practice has in the law's development, and who then focused on the question of the law's efficacy; Miklós Szabó (1951–), who has devoted himself to juridical methodology and with the trivium of law's grammar, logic, and rhetoric; and József Szabadfalvi (1961–), who has traced out a history of ideas having legal relevance, his focus being for the most part on Hungary. There are also the theoretical investigations undertaken by Péter Szigeti (1951–), Péter Takács (1955–), and Lajos Cs. Kiss (1955–). Then, too, Péter Paczolay (1956–) has concerned himself with constitutional philosophy, István H. Szilágyi (1963–) has worked from an anthropological perspective, and the newer generations have dealt in analytical jurisprudence, natural law, classic rhetoric, and history of ideas.

[25] The two main book series are *Jogfilozófiák/Philosophiae Iuris*, edited by Csaba Varga in Budapest and started in 1988 (collecting twenty-one titles in foreign languages and thirty-three in Hungarian), and *Prudentia Iuris*, edited by Miklós Szabó in Miskolc (with twenty-nine titles since 1995). See also Paksy and Varga 2010.

Chapter 20

20TH-CENTURY LEGAL PHILOSOPHY IN OTHER COUNTRIES OF EASTERN EUROPE

by Jasminka Hasanbegović, Ivan Padjen, Marijan Pavčnik, Vihren Bouzov, Adrian-Paul Iliescu, and Simina Tănăsescu

20.1. 20th-Century Philosophy of Law and General Theory of Law in Serbia (*by Jasminka Hasanbegović*)

It is an abiding characteristic of Serbian philosophy and theory of law that they reflect the leading and predominant ideas from abroad in an effort to transplant them into their own culture, and sometimes the effort is to critically shape their further development.

As for modern Serbia (i.e., the country as configured by its current territory), the philosophy of law started to develop in the final decades of the 18th century and the early ones of the 19th. Sava Popović Tekelija, or simply Sava Tekelija (also known by his Hungarian name, Sabba Tököl, 1761–1842), was among the first Serbs to have defended a doctoral thesis in jurisprudence, and in particular in legal theory and philosophy: This was in 1786 at the University of Pest, now Budapest (Tekelija 1786; 2009). However, the philosophy of law proper—as a clearly defined philosophical discipline in its own right, distinguished from, and independent of, related philosophical disciplines, such as political philosophy—did not emerge until the late 1830s (Basta 1991, 1).[1] Throughout the 19th century, the central preoccupation of Serbian legal philosophers was with natural law, which came to be understood in various ways, drawing on sources and ideas that ranged from the doctrine of the divine origin of natural law to rationalistic doctrines, including those arguing for the natural rights of man. The first century of Serbian legal philosophy was shaped by a series of authors who influenced the discipline both through their writings and, in some cases, their lectures: These authors are Pavle Julinac (or Đulinac, 1731 or 1732–1785), Petar Stojšić (born in 1790, died after 1846), Efrem Lazarović (born before 1770, died after 1815), Dositej Obradović (1739?–1811), Lazar Vojinović (1783–1812), Teodor Filipović (also known by his pseudonym, Božidar Grujović, 1778–1807), Jovan Stejić (1803–1853), Dimitrije Davidović (1789–1838), Jovan Filipović (1819–1876), Mihailo Hristifor Ristić (1839–1897), Jovan Sterija Popović (1806–1856), Dimitrije Matić (1821–1884), and Nastas Petrović (1867–1933). Other authors published in

[1] I would like to acknowledge my debt to Prof. Danilo Basta for helping me prepare this contribution, which is mainly based on his research on the history of legal philosophy in Serbia.

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legal journals such as *Pravda* (Justice), *Porota* (The Jury), *Pravo* (Law), *Branič* (The Defender), *Pravnik* (The Lawyer), and *Srpski pravnik* (The Serbian Lawyer), as well as in official or literary periodicals, such as *Srpske novine* (The Serbian Gazette), *Javor* (The Maple), and *Delo* (The Act): The bulk of these contributions consisted of translations or adaptations of the work of authors from abroad, though to a lesser extent it also included original research by Serbian authors.

Serbian legal philosophy and theory in the 20th century starts out with the lectures and writings of Gligorije Giga Geršić (1842–1918): These are collected in his *Enciklopedija prava* (Encyclopedia of Law: Geršić 1908–1909) in the form of lithographed notes taken of his lectures. To be sure, the philosophy and theory of law were not central parts of Geršić's scholarly work. But that was neither the only nor the decisive reason why the late 19th century and early 20th century saw legal philosophy and natural law losing ground to the project for the so-called encyclopedia of law, by which it wound up being almost completely replaced. Indeed, the encyclopedia tended to be scientific, so it took only "positive law, [...] and not some ideal law," as its object (ibid., 55–6; my translation). Geršić rejected natural law as unscientific, but he did recognize its political and social impact and significance, and he accordingly took a hostile attitude to "the abstract legal philosophy" of Fichte, Hegel, and Schelling, which he assessed as built on "ingenious misconceptions" (ibid., 59, 85; my translation). Geršić turned instead to the German historical school of law led by Gustav Hugo, and especially by Friedrich Carl von Savigny, but as much as he appreciated this school for its effort to move away from the abstract, he criticized it for attempting to replace legal philosophy with history (ibid., 73–102). Contrary to what was until then perceived to be the task of legal philosophy, Geršić believed that this discipline had to (*i*) investigate and logically define the elements common to various branches and fields of law, while setting out the general laws of their development; (*ii*) examine and demonstrate the ultimate foundations of all law, the necessity for the idea of law to emerge in the human spirit, and the relation of law to other factors of social life; (*iii*) define the place of law (as an intellective phenomenon) in the "noetic universe," as well as the essence of law and its necessary and permanent relation to the complete moral, intellectual, and social development of a nation and epoch; (*iv*) identify the highest principles of law, to this end relying on comparative and historical legal materials, understood in light of their broad ethnological and social background; and (*v*) be able to serve as "a criterion making possible a deep evaluation and critique of positive law" (ibid., 86–7, 95, 97; my translation). In brief, it is fair to say that the philosophy of law, in Geršić's treatment of it, turns into an anthropologically, sociologically, and historically grounded general theory of (positive) law that, by explaining the origin and essence of positive law, offers a standard by which to evaluate and critique concrete that law. By taking a *holistic* approach to law, Geršić strove to

explain positive law from the cosmic perspective of the empirical law of attraction and repulsion, a law understood to govern the whole universe, inclusive of both the stellar systems and social life, as well as the life of every individual, by maintaining an equilibrium in these systems between pairs of elements: (*a*) freedom and necessity, which are primary, followed by (*b*) instinct and reason, (*c*) the condition being in authority and that of being obliged, (*d*) rights and duties, and (*e*) legal sense or feeling and legal consciousness (ibid., 33, 37ff.). In taking this approach, he was among the first thinkers, if not *the* first one, to bring Serbian theory and philosophy of law into contact with the positivistic scientific spirit of the time, while also introducing a cultivated sociological and anthropological method. Before the *Encyclopedia of Law*, Geršić wrote another work relevant to the philosophy and theory of law: It was titled *Teorija o povratnoj sili zakona* (Theory of the retroactive force of law: Geršić 1883), and in it he emphatically argued that a retroactive law "is *not* a law—it is an absolute injustice, the abolition of the concept of law in general" (ibid., 29; my translation, italics added).

Whereas the questions that engaged the interest of Serbian theory and philosophy of law in the 19th century and the second half of the 20th century were of broad scope, the *first* half of the 20th century produced writings and lectures mainly concerned with *particular* branches or fields of law (private, criminal, public, and international law), and so Geršić seems to be not only a pioneer but also a standard-setter. The same applies to Živojin Perić (1868–1953), in whose work, remarkably diverse and copious,[2] a prominent role is reserved for the idea of statutes as the sole source of law and for the companion idea of legality—the two acting in combination as the most important guarantees of legal certainty (Ž. Perić 1899; 1915, 17–8). This legal and statutory rigorism is higher and more comprehensive than ethical rigorism—the view that "inobservance of a law amounts not just to illegality but to immorality" (ibid.; my translation)—and even though it is based on the idea of state authority and on the dogmatic-exegetic method, it avoids resolving in an étatist jurisprudence, due to the important role played in it by the ideas of individual rights, rationalism, and pacifism, as well as by his Christian-socialist ethics (ibid.; cf. Ž. Perić 1908). As much as the companion ideas of the statute and of legality figure centrally in Perić's approach, it is worth noting that he also addressed some other issues in his shorter articles, especially the question of nuances in law, the temporal dimension of law, and unsolvable legal problems, and he also discussed various legal schools (see Ž. Perić 1907, 1921, 1927, 1934, 1939).

In the first half of the 20th century, Serbian theory and philosophy of law were dominated by the French influence. Živojin Perić graduated in law in

[2] A good bibliography of Živojin Perić's works, with some 660 entries, can be found in the *Bibliografija Živojina Perića* (Živojin Perić bibliography), in *Arhiv za pravne i društvene nauke* 1–2: 245–70.

Paris, where three other scholars also successfully defended their doctoral theses before World War I: Milan Gavrilović (1882–1976), with a dissertation published under the title *L'État et le droit* (The state and the law: Gavrilović 1911); Ilija Šumenković (1882–1962), *Les droits subjectifs publics de particuliers* (The public rights of individuals: Šumenković 1912); and Živan Spasojević (1876–1938), *L'Analogie et l'interprétation: Contribution à l'étude des méthodes en droit privé* (Analogy and interpretation: a contribution to the study of methods in private law, Spasojević 1911). The starting point for Živan Spasojević was the approach developed by François Gény (1861–1959), which he radicalized by sociologizing the concept of a statute: This he did by emphasizing the teleological element that comes into play in reasoning by analogy from social needs, interests, and goals.[3] A direct influence on the theory of law can also be attributed to his essay *O jurisprudenciji* (On jurisprudence: Spasojević 1912), as well as to his *Nacrt jedne opšte teorije prava* (Draft of a general theory of law: Spasojević 1989), posthumously edited and published from his rich manuscript collection by his student Božidar S. Marković.

In contrast to Živojin Perić and Živan Spasojević, who were specialists in private law, Toma Živanović (1884–1971) specialized in criminal law. He, too, earned a graduate degree in Paris, where in 1908 he defended a doctoral thesis published under the title *Du principe de causalité efficiente en Droit pénal* (On the principle of the efficient causation in criminal law: Živanović 1908), and throughout his career he kept his focus on criminal law and on the philosophy of law, investigating as well their interrelations and attaining the highest accomplishments in both fields. In the theory of criminal law he rejected the bipartition between the two basic concepts of crime and punishment. In its place he introduced the tripartition crime, *criminal* (a criminal offender), and punishment, thereby subjectifying the science of criminal law by singling out a subjective element (the criminal) that had traditionally been incorporated in the concept of crime (Živanović 1909, 1910, 1916, 1929). In this way he not only revised the very foundations for the systematization of criminal law but also opened criminal law to nonlegal sciences and enabled its broader humanization. In his treatise *Osnovni problemi etike (Filozofije moralne)* (Basic problems in ethics [moral philosophy]: Živanović 1935, French edition 1937) he redefined ethics on the basis of the tripartite model. His *Sistem sintetičke pravne filozofije* (System of synthetic legal philosophy: Živanović 1921, 1927, 1951, 1959, French edition 1970) is a monumental, three-volume work offering the most comprehensive, exceedingly accomplished systematization of law and legal knowledge, both scientific and philosophical. That system has been divergently evaluated because it is grounded in contradictory foundations: Modeled on conceptual jurisprudence, it represents a system of dogmatic positivism, which, created by synthesis, and driven by the ideal of so-called scien-

[3] On Gény see Section 12.5 in this tome.

tific philosophy, would conceptually, synthetically, and systemically crystallize all knowledge of law and the legal sciences and the corresponding philosophies! We can see, then, that Živanović's constructions can sometimes appear stretched and anachronistic. However, working on his own, and independently of the logical positivists, Živanović did anticipate the difference between theory and metatheory, and with his tripartition he made an enduring contribution to the theory of criminal law.

A special place in Serbian theory of law belongs to Slobodan Jovanović (1869–1958), a professor of constitutional law and a versatile personality with a comprehensive and diversified *oeuvre*, whose main sphere of interest comprised political and constitutional theory, history, comparative studies, and political philosophy. His key work, *Država: Osnovi pravne teorije o državi* (The state: foundations of the legal theory of the state, Jovanović 1906), went through four editions over the course of three decades (1906, 1914, 1922, 1936), each bringing substantive revisions, and in Serbia it stands as the most advanced work in the legal theory of the state. But it is also a social and political theory of the modern state, while also addressing some fundamental issues in legal theory and philosophy (such as the validity of law, its legitimacy, and the social contract). Jovanović was also the first Serbian scholar to have written on totalitarianism, and was among the first to have done so even outside Serbia.

Many are the Russian immigrants in Serbia who have charted new paths in Serbian culture, and among them are two who have significantly contributed to the development of legal philosophy: Teodor (or Feodor) Taranovski (1875–1936) and Evgenije Spektorski (1875–1951). Taranovski, an expert in legal history with an exceptionally wide range of interests and a profound philosophical knowledge, is the author of the voluminous *Enciklopedija prava* (Encyclopedia of law: Taranovski 1923), presenting not only a richly informative theory of law corroborated by a wide range of sources, including literary ones, but also a distinctive philosophy of law. Spektorski, for his part, was professor of constitutional law, philosophy of law, and sociology: His range of interests and the scope of his scientific and philosophical knowledge and erudition were also impressive, and he enriched the Serbian (Yugoslav) intellectual landscape with a book about the state, as well as with a two-volume history of social philosophy and a series of valuable articles on the history of legal philosophy (see Spektorski 1932–1933, 1997). He was primarily a historian of legal philosophy, theory, and thought in general, and even though he did not explicitly set out a conception of his own or a distinctive theory of law, such a view could be reconstructed on the basis of his diverse and profound critical works (two paradigmatic examples in this regard are Spektorski 1930, 1931).

Among those who pursued doctoral law degrees in Paris after World War I was Božidar S. Marković (1903–2002), who graduated in 1930 defending a dissertation titled *Essai sur les Rapports entre la Notion de Justice et l'Élaboration*

du droit privé positif (An essay on the relation between the notion of justice and the development of private law: Marković 1930, 1995). This work is mentioned by Wilhelm Sauer (1936, 118), and after World War II, Ilmar Tammelo described it as "addressing the problem of justice on the basis of a dynamic conception of law", and "substantially under the French influence" (Tammelo, 1977, 142; my translation)—though the latter assessment may not be hermeneutically accurate. Being primarily a specialist in private law, Marković went into legal philosophy mostly by discussing the problem of *fairness*, understood as the justice involved in concrete cases. He investigated fairness as an idea, as a practice, and as a source of law, drawing a distinction among what he took to be the four basic functions of fairness: technico-legal, moral, economic, and evolutional (Marković 1993, 15–80). Although his conception of fairness is scattered across various articles, and so cannot be described as a *theory* of fairness proper, it is nonetheless comprehensive, versatile, complete, and consistent. It is interesting to note that this Serbian legal philosopher par excellence has challenged the very need for legal philosophy as a freestanding discipline with its own raison d'être.

The work of Đorđe Tasić (1892–1943) is considered to be the culmination of legal-philosophical thought in the period preceding World War II.[4] Tasić was the first Serbian lecturer and writer on the theory, philosophy, and sociology of law whose main concern was not with any *particular* area of (positive) law. This subsequently became the standard practice, and to this day it has remained a characteristic feature of Serbian (and Yugoslav) theory (philosophy, sociology, and history) of law in academia, which certainly does not mean that nonlawyers and legal experts in particular areas of law did not make significant contributions to Serbian (or Yugoslav) theory of law. What makes Tasić's work the culmination of Serbian legal philosophy is above all the open-ended nature and diversity of his academic and philosophical interests, coupled with his multi-methodological approach to law (Tasić 1920, 1921, 1924, 1925, 1931, 1938, 1941, 1984). Furthermore, he possessed a deep, multifaceted understanding of the major ideas of contemporary theory, philosophy, and sociology of law: He was especially knowledgeable about the theories of Léon Duguit and Hans Kelsen, so he could engage on an equal footing with the leading lawyers and legal philosophers of the day (including Duguit and Kelsen) in discussions on the most complex issues in legal theory and philosophy, recognizing the significance and greatness of their theories, while also being able to critique their extreme positions in a convincing and lucid manner.[5] And, finally, he could fruitfully combine intrinsically worthy elements, not simply by a com-

[4] For a good bibliography of Đorđe Tasić's works, including secondary literature on his *oeuvre* as well as on his individual writings, see M. D. Simić 1990.

[5] On Duguit see Section 12.3 in this tome. On Kelsen's theory see Section 2.3 in this tome and Section 8.4 in Tome 2 of this volume.

pilatory method, eclectic for its own sake, but rather in an original and nuanced way achieving a new synthesis of the material. With Tasić, Serbian (Yugoslav) legal philosophy thus found its way to Europe, not by mere acknowledgment of its existence but as a significant body of work in its own right. And what was particularly noticed were Tasić's complex methodological approach to law, his intellectual independence, and his refined critical and analytical attitude (see, e.g., Sauer 1936, 118; Del Vecchio 1937, 217–8).

Also worthy of mention is Novica Kraljević (1906–1942). He was a physician and graduated in Prague, but before going to medical school he had obtained a master's degree in philosophy in Vienna (1932). After graduating in medicine he studied law and was awarded a doctoral degree in law in Paris (1939). Because of his right-wing political views he was assassinated in 1942: For the same reason he was blackballed, passing into obscurity, and only recently, in 2004, did his work find a new lease on life (Kraljević 2004). In his thesis, *La portée théorique du glissement du Droit vers la Sociologie: La doctrine juridique au point de vue de la Connaissance et de la Sociologie* (The theoretical scope of the epistemological sliding of law toward sociology: legal science from the standpoint of knowledge and sociology, Kraljević 1939), as well as in his book *Predmet i smisao prava* (The object and purpose of law: Kraljević 1940), Kraljević claims that any attempt to create a legal science is methodologically and epistemologically futile and that law can be understood only within the sociology of law.

Just as the mid-20th century is in almost every respect (political, cultural, spiritual, etc.) shaped by World War II, so Radomir D. Lukić (1914–1999), a pupil of Tasić, is one of the last authors of the first half of the century to have had a shaping influence on Serbian (Yugoslav) theory and philosophy of law in the second half of the century. He was an outstanding jurisprudential figure from the very outset, with his Parisian thesis of 1939, titled *La force obligatoire de la norme juridique et le problème d'un droit objectif* (The bindingness of the legal norm and the problem of an objective law: Lukić 1939). Here, the term *droit objectif* ("objective law") denotes law as an ideal or value and is to be understood in distinction to *positive* law rather than in distinction to *droit subjectif* (or "subjective law", i.e., the rights a subject enjoys under the law). As for the second half of the century, Lukić was the most prominent and most influential legal theorist in Serbia (and Yugoslavia), especially in academic circles, and his work will surely remain unrivalled for some time to come.[6] Although he defines positive law as a set of norms enacted by the state, his approach to law is very complex, as can be clearly appreciated, for example, from his *Metodologija prava* (Methodology of law: Lukić 1977). For one thing, law is explained by Lukić as a social phenomenon interacting with all other social phenomena, such as the state, politics, the economy, social groups, the social

[6] For a good bibliography of Radomir D. Lukić's works, see Kostić 1995.

structure, the nation, social welfare, social struggles, social cooperation, organizations, churches, ideologies, cultures and subcultures, religion, and social pathologies (Lukić 1953–1954; 1960; cf. Lukić 1974b). For another thing, law as a normative phenomenon is not reduced to normativity: It is only one component in the legal order, which is made up not only of legal norms but also of legal acts (legislative acts, court decisions, treaties, contracts, etc.), legal relations (encompassing the whole range of rights, including human rights, powers, and correlative duties), legal objects, legal subjects, human behaviour (both commissive and omissive, lawful and unlawful), and events and occurrences (natural and social ones alike, such as the passing of time, births, deaths, and storms, as well as wars, hyperinflation, riots, epidemics, and demonstrations). This unreduced conception of normativity expounded by Lukić is reflected in his theory of legal interpretation and in his conceptions of constitutionality and legality, as well as in his notions of the validity, positivity, and efficiency of legal norms and in the relative criteria (Lukić 1956, 1961, 1966). And finally, law is conceived by Lukić as value-and-content-dependent: This, too, is a theme that can be observed from the beginning, in his doctoral dissertation (Lukić 1939), and later on it is developed by him both in scientific terms—as in his *Sociologija morala* (The sociology of morality: Lukić 1974a)—and in philosophical terms, particularly in his *Sistem filozofije prava* (System of legal philosophy: Lukić 1992), where his philosophy of law forms part of his elaborate general philosophy. Lukić's conception of law has been criticized as normativist (espousing an étatist approach to positive law) and Marxist, that is, as taking a class-based approach in explaining law as a social phenomenon. The criticism of Lukić's normativist-étatist approach to law is unlikely to stand, especially considering that his system of legal philosophy paradoxically has no place for norms, much less for a (philosophical) theory of norms, while in his (scientific) theory of law, his conception of the validity and positivity of legal norms ultimately rests on the efficiency of the legal order as a whole. Lukić's Marxist explanation of law as a social phenomenon, however, can be reinterpreted in the broader terms of social conflict without undermining the whole system of his theory of law, which to date is unsurpassed and is still waiting for an appropriately mature philosophical and theoretical critique showing the way it could be improved.

To be sure, there have been no systemic theory and philosophy of law since Lukić, but there has been some significant work on certain issues in legal theory and philosophy. This body of work can roughly be divided into two groups, one part of it being devoted to the *history* of legal philosophy and the other to *contemporary schools* of legal philosophy. Mihailo Đurić (1925–2011) investigated the Greek Sophists' idea of natural law and the history of political philosophy. Ljubomir Tadić (1925–2013) has explored the philosophical foundations of Hans Kelsen's legal theory, and written a pregnant review of the history of legal philosophy. Stevan Vračar (1926–2007) addressed the social func-

tions of the state and the legal order, and also discussed issues in legal methodology, as well as the theories of certain schools and authors in legal theory and philosophy, both within Serbia and without. Milijan Popović (1938–2008) set out to define the concept of rights, investigated the *Rechtsstaat* in relation to the totalitarian state, and also took up issues of post-socialism. Budimir Košutić (1941–) has written books on precedent (judicial decision as a source of law), on the great legal systems of the contemporary world, and on legal theory and jurisprudence. Kosta Čavoški (1941–) has written on the conception of the state in Marx's early writings, on constitutionality and federalism, on the philosophy of an open society, on the constitution as a guarantee of freedom, on constitutionality and the rule of law, and on absolute and tempered justice in Aeschylus' *Oresteia*. Todor Podgorac (1934–) has focused on Leon Petrażycki's theory of law. Danilo Basta (1945–) has explored the origin and purpose of the state in Kant's political philosophy, Ernst Bloch's philosophy, the natural law tradition, modern natural law in Fichte's early political philosophy, the complex personality and work of Slobodan Jovanović, and the idea of freedom in foreign and domestic legal philosophy. Tatjana Glintić (1946–1997) devoted herself to justice, freedom, and equality in the theories of John Rawls and Michael Walzer. Miroljub Simić (1947–2008) concerned himself with the domestic heritage in the theory of law. Gordana Vukadinović (1949–) has written monographs on the idea of natural law in Rousseau's work, on the law regulating worker self-management, and on the Serbian theorists' conceptions of *Rechtsstaat* in the first half of the 20th century. Radmila Vasić (1950–) has written books on Đorđe Tasić's conception of law, on the legal bindingness of customary law, and on the rule of law and the transition to democracy in the post-Yugoslav countries. Dušan Vranjanac (1952–) has explored Austin's legal positivism and Bentham's idea of legal norms. Dragan Mitrović (1953–) has written monographs on the relationship between the state and worker self-management law, on the content and forms of legality, and on chaos theory applied to law and legal theory. Jasminka Hasanbegović (1956–) has critically investigated the philosophical foundations and practical scope of the conception of legal logic that Chaïm Perelman developed in his theory of the new rhetoric; she has also researched the history of the theory of topics and its renewal, its relevance to law, and its role in shaping legal reasoning; she has also pointed out and logically demonstrated the main misconceptions about the logical structure of legal norms and clarified misconceptions about the scope of the imperative conception of legal norms. Miodrag Jovanović (1971–) has written monographs on the anthropological roots of law, on collective rights in multicultural communities, on the constitutionalization of secession in federal states, and on federalism and decentralization in Eastern Europe.[7]

[7] An overview of most of the works from this period can be found in Stepanov and Vukadinović 2002.

20.2. Croatian Legal Philosophy and General Jurisprudence in the 20th Century (*by Ivan Padjen*)

Legal education in Croatia can be traced back to the 13th century, but only in 1776, with the founding of the Law faculty (*Facultas juridica)* of the Royal Academy of Sciences in Zagreb (*Regia Scientiarum Academia Zagrabiensis*), did law become an academic discipline proper, systematic and continuous. In 1874, the faculty was reconstituted as the University Faculty for the Sciences of Law and the State (*Pravoslovni i državoslovni fakultet*: Čepulo 2007), and it was renamed Faculty of Law in 1926.[8] In the first half of the 20th century, the faculty taught political economy, finance, and, with the first chair in Austria-Hungary (endowed in 1905), sociology and criminology and even practical philosophy, the last of these a required course lasting three terms taught by a philosopher. Still, because Austrian legal education was grounded in Roman law and German legal history (see Simon 2007), the philosophy of law and the theory of law were offered solely as elective courses until 1933, when the *Enciklopedija prava* (Encyclopaedia of law), renamed Introduction to legal sciences, became compulsory (see Metelko 1996, 95, 97; Čepulo 2007, 136–7; Pokrovac 2006; Pavić 1997a, 773–80; Pavić 1998, 1023–30).

20.2.1. History qua Philosophy

Legal philosophy was initially institutionalized in Croatia with a course titled *Opća pravna povijest* (General legal history). The course was introduced into the curriculum on the theory that Slavic laws could be a vehicle for the development of law, in that the latter was thought to be inherent in the former. However, the theory was discredited before the course got underway (Kostrenčić 1970, 264). Hence, the course and its offshoots served several interrelated functions. The first one, taken from Hungarian legal education, was that of studying European legal developments with a view to preparing a "return" to the European legal-cultural framework. The second function was to provide not merely a positivistic overview but also a grounding in the philosophy of legal history, and a Hegelian one in particular. The third function was to ground the Encyclopaedia of law as a program of study and body of knowledge concerned with the concept of law, with legal systems, with the

[8] Croatia came into being as a political entity in 812 and became an independent kingdom in 925 (see Čepulo 2012, 48–9). It entered into a union with Hungary in 1102 (ibid., 52) and also with Austria in 1527 (ibid., 59), while parts of Croatia were under Venetian and Ottoman rule. Croatia became a part of the first Yugoslavia in 1918 (ibid., 257–8), and during World War II it became a republic having internal sovereignty within the second Yugoslavia, which was governed under a communist regime but has been independent of the Soviet Union since 1948 (ibid., 293–308). The Republic of Croatia adopted a liberal democratic constitution in 1990, declared independence in 1991 (ibid., 351–5), and gained full control over its entire territory in the war of 1990–1995.

systematization and sources of law, and broadly with legal history (Mikulčić 1869). Finally the course, retaining a vestige of its original intent, was meant to explore distinctly Croatian legal institutions as social laws, while investigating their relation to modern laws, largely transplanted. These functions remained central to Croatian legal scholarship throughout the 20th century. Whereas legal theory and legal dogmatics in Croatia were professedly positivistic—exclusively concerned with positive law, while keeping philosophy at arm's length—legal history relied heavily on philosophical assumptions that made it a genuine sociological jurisprudence, and it remained a cornerstone of Croatian legal scholarship and legal education.

The hypertrophy of Western history had a far-reaching impact. Until 1945, the continuity of law was taken to be self-evident. Croatian law was considered Western; what mattered was the thought of major Western authors; hence there was no pressing need for legal philosophy *qua* legal theory concerned with legal systems and with trans-systemic relations; erudition was valued above originality; the theory of public law, especially in the realm of international law, served the functions of the theory of the state and, together with private international law, the functions of the theory of law itself. However, legal history generated the idea of social law (*socijalno pravo*, *društveno pravo*), an idea which was reinforced by the experience of the conflict between Western law and the Croatian tradition, and according to which law is a unity in which "grassroots" norms and actions (created by local communities, economies, and the like) are coupled with the reason and logic inherent in law, however imperfect and culturally inflected such reason and logic may be. Mainstream Croatian legal theory has been resolving this conflict through a concern with law in action, while disregarding law in books and the theory of law.

That idea is central to Eugen Ehrlich's sociology of law, where the development of law is explained as a function not of the state but of society—the main engine of that development (Ehrlich 1913)—and where law is defined as "an intellectual thing" (Ehrlich 1916, 848; my translation).[9] Ehrlich recognized Baltazar Bogišić's concern with living law (Bogišić 1874, Čepulo 2006, 2010) as one of his precursors (Ehrlich 1911; 1913, 299), and in turn he probably inspired Ivan Strohal (1871–1917) (see esp. Strohal 1915). Baltazar Bogišić (1833–1908), who was a member of the Yugoslav Academy of Sciences and Arts in Zagreb and sought a teaching position at the Zagreb Faculty of Law (Čepulo 2011), was the foremost Croatian (as well as Montenegrin and Serbian) student of social law (see Bogišić 1967, 1999), who belonged intellectually to the 19th century (Đivanović 1985, Zimmermann 1962, Čepulo 1992). Some remarks on Strohal's work are given later (Section 20.2.2).

[9] The German original: "ein gedankliches Ding." On Ehrlich see Section 3.3 in this tome and Sections 1.1.4.1 and 22.3.1 in Tome 2 of this volume.

A source for the idea of social law is the so-called "peasant home," a communal family that in the Constitution of the Neutral Peasant Republic of Croatia figures as the basic constituent of what is referred to as the peasant state. That constitution was drafted by Stjepan Radić (1871–1929) (Radić 1995, sec. B.5.5; Cipek 2001, 163): A law student in Zagreb and Prague, he went on to gain a graduate degree in political science in Paris, and later founded and headed the Croatian Peasant Party, which would regularly sweep up ninety percent of Croatian votes in the First Yugoslavia between the two world wars. The peasant home provided the unintended functional missing link between peasant customs and the "basic organizations of associated labour," described in the Croatian and the Yugoslav constitutions as the basic units of socialist self-management, and hence as constituents of the socialist economic and political system.[10]

The idea of social law can also be derived in part from Hegel's *Philosophy of Right*, where the thesis is put forward that a class and its corporation link a person to a universal (Hegel 1821, pars. 200–208, esp. 207), and where the idea of logos in history is investigated (ibid., *Vorrede*, XVIII-XX; Gans 2005; 1995, 102). Hegel's ideas had formed the core of the course titled General legal history taught at the Zagreb Faculty of Law, and they reemerge when Berislav Perić (1921–2009), teaching Theory of law and the state from 1949 to 1992, built a Marxist philosophy of law on the basis of Hegelian dialectics (B. Perić 1962; c.f. B. Perić 1996). Perić expanded his philosophy by bringing into it the idea of social law that Georges Gurvitch (1932) developed on the basis of the experience of Soviet and workers' factory councils in the first stage of the Russian Revolution of 1917 (Hunt 2009, 164ff). Perić used the idea to both explain and justify Yugoslav socialist workers' self-management (B. Perić 1964, chap. III F).

According to Eugen Pusić (1916–2010)—of the Zagreb Faculty of Law, where he taught administrative science from 1955 to 2010—workers' self-management had a chance of developing in working groups of specialists regulated primarily by technical rules: Examples included research, surgical, and project teams (Pusić 1968, 56–95, esp. 92). Ivan Šimonović explored Pusić's framework for self-management after its demise (1992). Pusić applied his theory to the university (Pusić 1970), thus coupling inherited academic self-government with student participation in university governance and socialist workers' self-management. This gave a new twist to the idea of social law.

[10] See članak 14 Ustava Socijalističke Republike Hrvatske. *Narodne novine* 8/74 (Article 14 of the Constitution of the Socialist Republic of Croatia, *Official Gazzette of the SR Croatia*, 8/74); članak 14 Ustava Socijalističke Federativne Republike Jugoslavije. *Službeni list SFRJ* 30/74 (Article 14 of the Constitution of the Socialist Federal Republic of Yugoslavia, *Official Gazzette of the SFRY* 30/74).

Relying on a wide variety of sources, including Marxism, Nikola Visković (1938–) recognized legal pluralism as both a reality and an idea (Visković 1981, 237–44), while adding his own account of Yugoslav law on self-management (ibid., 325–46). His study of legal argumentation bespeaks his concern with reason in law (Visković 1997).

Aleksandar Goldštajn (1912–2010) studied the sources of autonomous international commercial law against the background of the idea of social law, but he approached this idea without the idealization typical of high theory (Goldštajn 1986).

That understanding of the idea of social law was also backed by Peter Winch in his *Idea of a Social Science*, arguing that "a principle of conduct and the notion of meaningful action are interwoven" with the criteria of logic which arise out of ways of living or modes of social life, and which are intelligible only in that context (Winch 1990, 63, 100). Ivan Padjen (1947–) has drawn on Winch's *Idea*, among others, to explain the distinctiveness of hermeneutic disciplines, including legal scholarship (Padjen 1984, 1988a), and so to pave the way for the Croatian Constitutional Court's recognition in 2000 of the autonomy of every academic discipline taught at the universities (Padjen 2000, sec. A.2.1.2.2.ac).[11]

Social law and legal pluralism were infused with new meaning at the end of communist rule when scholars in Croatia as well as in other parts of Central Europe explored the idea of civil society with a view of setting the stage for political pluralism. Among these scholars was Zoran Pokrovac (1955–), who has used that idea to separate civil society from the state, and thus accommodate the exercise of the freedom of association, first by nongovernmental organizations and then by political parties (Pokrovac 1988a, 1988b, 1990a, 1990b, 1991).

After the Republic of Croatia adopted a multiparty political system in 1990, and gained international recognition in 1991–1992, it entered into four international agreements with the Holy See in 1997–1998. The criticism was raised that these agreements violated the equality of all religious communities before the law (Padjen 1999b, 200–4):[12] This meant that the Catholic Church in Croatia abandoned its role as a unit within a transnational legal system having the status of social law, and thus morphed into a cosovereign. When the Republic of Croatia entered into similar public, albeit not international, agreements with a dozen other religious communities in 2002, the agreements, together with

[11] Ustavni sud Republike Hrvatske. Odluka i rješenje U-I-902/1999. od 26. siječnja 2000, Obrazloženje II.6, *Narodne novine* 14/00 (Constitutional Court of the Republic of Croatia. Decision and Ruling U-I-902/1999 of January 26, 2000, Reasons II. 6, *Official Gazzette of the Republic of Croatia* 14/00).

[12] See članak 41. stavak 1. Ustava Republike Hrvatske. *Narodne novine* 56/90 (See Article 41 Section 1 of the Constitution of the Republic of Croatia, *Official Gazzette of the Republic of Croatia*, 56/90).

a similar development in Hungary (Schanda 2003, 125), were interpreted as a significant building block toward a revival of legal pluralism, or at least as a sign of such a revival (Padjen 2004, 106), despite what Berman and Witte (1987, 495) had previously argued.

When all is said and done, it may well be the legal status of religions that explains the proclivity of Croatian lawyers for the idea of social law. Just as a religion is defined by law (Padjen 2010), so is Croatia. While that may be true of any nation *by definition*, what distinguishes Croatia is that the law defining Croatia in the past millennium was more often than not merely an autonomous law, that is, a social law, and at times merely a memory of such a law (see Čepulo 2012). Viewed against the backdrop of Croatian participation in networks of legal orders (especially those of the Austro-Hungarian Empire and Yugoslavia), the concern with social law may be recognized as a central problem of legal theory, in that law is not merely a legal system (see Raz 1970, 2; Kelsen 1961, 3) but also a web of trans-systemic normative relations (Padjen and Matulović 1996, 28–9).

20.2.2. Methods and Concepts

In light of the foregoing remarks, a brief characterization can be provided of other salient features of Croatian legal philosophy in the 20th century, focusing primarily on the legal methods that come out of that tradition and on the ways in which it has interpreted the concept of law.

In light of Bogišić's and Kantorowicz's views, Ivan Strohal analyzed the discrepancies between the transplanted Austrian civil law and the relations within extended families in Croatia. Strohal criticized not only naturalist but also positivist doctrines, including Savigny's and Bogišić's, for failing to recognize that law is created on a foundation of rights, rather than the other way around (Strohal 1908, 1910, 1915, Maurović 1918, Pavić 1997b, 651–8).

Natko Katičić (1901–1983) conceived the state as a unity of norms and facts, criticizing the one-sidedness of historicist and normative conceptions alike (Katičić 1928).

Stanko Frank (1883–1953) conceptualized law and the state as a normative structure created by social life, and hence as needing coercion only when law is wanting, especially when it is a transplant (Stanko Frank 1925a, 1925b, Pavić 1997a, 117–46; 1997b, 369–79).

Mihajlo Lanović (1882–1968) wrote an introduction to legal sciences (*Uvod u pravne nauke*: Introduction to legal disciplines, Lanović 1942) where he distinguished three disciplines in the study of law, namely, dogmatic jurisprudence, legal history, and legal philosophy, the last of these concerned with the ground or values of law, and he defined law as "a set of norms issued under a continuous power that by force of custom, and with greater success than any other power, comprehensively and deeply regulates the life and living relations

of its subordinates." Since "continuous power" was equated by him with sovereignty, international law could not be law (ibid., 26–8, 86, 318, my translation; Pavić 1997a, 265–72; 1997b, 461–74).

Ivo Krbek (1890–1966) wrote a treatise on administrative discretion (Krbek 1937, Pavić 1998, 563–97; 1999, 341–54) that is still relevant today in both theory and practice, and under the communist regime he developed a Marxist-Leninist conception of law (Krbek 1952), and he also put out a study investigating various theories of sovereignty (Krbek 1964).

A draft for a new civil code—annotated with a full panoply of doctrinal and comparative considerations—appropriately marked the end of the era (Eisner and Pliverić 1937).

Due to Soviet communism, theory and philosophy of law became a cornerstone of Croatian legal education. Russian (originally German) legal theory was transplanted into Yugoslavia, including Croatia, already by Teodor Taranovski (1923), an émigré from Bolshevik Russia. Theory of law and state (*Teorija države i prava*) as well as General history of law and state (*Opća povijest države i prava*), both marxized, became compulsory first-year courses in 1946, after the communist victory in World War II in Yugoslavia (Metelko 1996, 101). The courses remained a pivot of the law curriculum after the Soviet-Yugoslav rift of 1948. Elective courses in the philosophy and methodology of law were offered. The theory of law and the state was progressively departing from Marxism, in Croatia as well as in other Yugoslav republics (Padjen 2013), but the theory's concern with the social context of law, which upgrades the idea of social law, has outlived socialism. In taking that direction, Croatian legal theorists made little use of the voluntaristic Marxism characteristic of Stalinism—on which law simply expressed the will of a ruling class as implemented by a state, thus leaving no social space for anything like social law (see esp. Vyshinsky 1949)—nor did they rely much on the economistic Marxism of Evgenii Pashukanis (1926), on which law reflects the exchange of commodities on the open market, and in this sense is an expression of social law (the one and only such law, since there is no social law other than that based on the exchange of commodities). As noted, Croatian theorists built their ideas on the self-management of workers' councils, which was of dubious Marxist provenance, and most definitely non-Bolshevik. The departure from Marxism was prompted by institutional as well as political and intellectual developments. By the end of the 20th century, there were four university law faculties in Croatia (Zagreb, established in 1776; Split, in 1961; Osijek, in 1973; and Rijeka, in 1973), employing about two hundred faculty members, including about one hundred teachers of legal disciplines (Padjen and Matulović 1996, 16 n. 30). The theory of law and state became one of a dozen disciplines/habilitations in legal science (alongside Roman law, civil law, international law, etc.) taught by seven teachers at the four law faculties just mentioned and at the Zagreb University Faculty of Political Science. Two periodicals were devoted in part to legal theory (*Pravo i društvo* [Law and Society],

1982–1992, and the *Croatian Critical Law Review*, 1996–1999), while several other journals would occasionally publish contributions to the discipline: Worthy of mention in this regard are *Zbornik Pravnog fakulteta u Zagrebu* (Collected papers of Zagreb Law Faculty), *Zbornik radova Pravnog fakulteta u Splitu* (Collected papers of Split Law Faculty), *Pravni vjesnik* (The journal of law), *Zbornik Pravnog fakulteta Sveučilišta u Rijeci* (Collected papers of the Law Faculty of the University of Rijeka), *Dometi* (Achievments), *Naše teme* (Our themes), *Filozofska istraživanja* (Philosophical investigations), *Synthesis Philosophica* (English edition of *Filosofska istraživanja*), *Pogledi* (Views), and *Pitanja* (Questions).

Berislav Perić broke new ground with a doctoral dissertation on autonomy and heteronomy in law in Immanuel Kant's and Rudolf Laun's philosophies (B. Perić 1955), at a time when his colleagues were writing on Marx and Plekhanov. In his habilitation, however, Perić attempted a Marxist philosophy based on Hegel's dialectics (B. Perić 1962; cf. B. Perić 1996, Miličić 1992). His attempt ran contrary to the Praxis school (at the time a very influential group of Croatian and Yugoslav philosophers), since these intellectuals, following in the footsteps of the young Marx, engaged in philosophy as a radical critique of all things existent (see Greuenwald 1983), and thus claimed that there could be no such thing as a Marxist philosophy of law. Perić's textbook (B. Perić 1964)[13] is more conventional. It defines law as a unity of legal norms and social relations, and discusses themes that cannot be made to fall within the range of Marxist legalism: The continuity of legal systems on Yugoslav soil; the structure and role of customary law, especially in commerce; and the role of equity and "the nature of things" in judicial reasoning; the formative impact of both legal scholarship and the legal profession on modern legal systems. Perić's analysis of Hans Kelsen's pure theory of law may well express the later *communis opinio* of Croatian jurisprudents, but it does not necessarily express their reasons. Perić considered Kelsen's theory essentially unacceptable as a theory offering "a very narrow and one-sided truth about law" (B. Perić 1974, 302, 305). However, some tenets of the pure theory, especially as developed in the theory of international law—namely, the unity of law and the state, of general and individual norms, and of law and rights—were considered by him acceptable to "the contemporary dialectical philosophy of law" (ibid., 299–300, 304–5).[14] In *Pojam prava* (The concept of law: Visković 1981), Nikola Visković constructed an integral theory of law (*integralna teorija prava*) on which law is defined by taking the professional experience of lawyers into account, but with a view to enabling lawyers to be critical of ideology (ibid., 49–52). The definition (ibid., 41–5) identifies three elements of law—namely, positive le-

[13] Cf. B. Perić 1981, superseding Mandić 1960–1961, in turn superseded by Metelko 1992, Visković 1995, Vrban 1995 and Miličić 1999.

[14] On these aspects of Kelsen's theory see Section 2.3.2 in this tome and Sections 8.3. through 8.5 in Tome 2 of this volume.

gal norms, extra-positive values, and social relations (all supported by inherited conceptions)—that together make up the content of law (ibid., 46–7). This three-dimensional content correlates with three criteria of validity (ibid., 47–50) derived by analyzing the relationship between the is and the ought on three levels, an ontological one, a socio-psychological and epistemological one, and a linguistic one (ibid., 64–70), the last one in turn dividing into semantics, syntax, and pragmatics (ibid., 168–75). Hence a norm is legal if (*a*) authorized by another norm; (*b*) consonant with extra-positive values (like peace, security, and justice, as well as determinacy, completeness, and coherence of legal norms); and (*c*) adequate to the facts, meaning that the norm (*i*) is intended to regulate highly conflictual social relations amenable to public control and (*ii*) is part of a normative system that on the whole is efficacious (ibid., 254–7, 273–87). Such integration of the content and criteria of law commits one to methodical pluralism (ibid., 50–2). As much as Visković may be professedly committed to Marxist dialectics (ibid., 53), his own sympathies are attested by his reliance on Carlos Cossio's egology (Visković 1990), and by his studies on law and language (Visković 1989) and on argumentation in law (Visković 1995).[15] Visković's impact in Croatia is evidenced by the fact that all Croatian specialists in the discipline (e.g., Miličić 1999, Vrban 1995) accept the integral legal theory in one variant or another (in this way Croatian legal theory added axiology to deontology), as well as by a wide use of his textbook (Visković 1995; 2006) and by an international symposium in his honour after his retirement.[16]

In the 1980s, the *Radna grupa 'Pravo i društvo-temeljna istraživanja'* ("The working group 'Law and society—fundamental problems'") of the Yugoslav Academy of Sciences and Arts, led by Natko Katičić and Eugen Pusić, engaged in a Croatian-styled *Methodenstreit*, or dispute on method.[17]

In Pusić's view, "the fundamental sciences of the classical epoch—law, medicine, pedagogy, politics, rhetoric, astronomy—basically amount to a systematization of experience, coupled with the skills developed through that experience" (Pusić 1989, 18; my translation). They are applicable as long as their

[15] On Cossio's egology see Section 26.2.1.2 in this tome.

[16] The symposium (*Pojam prava: Viskovićevo integralno poimanje prava*, The concept of law: Visković's integral conception of law), took place at the *Pravni fakultet Sveučilišta u Rijeci i Hrvatska udruga za pravnu i socijalnu filozofiju* on November 27, 2010.

[17] See *Pravo i društvo*: *godišnjak Radne grupe 'Pravo i društvo—temeljna istraživanja,'* Vol. 1 (1982), Vol. (1983), Vol. 3 (1984); Vol. 4 (1985); Vol. 5 (1989); Vol. 6 (1992). Zagreb: Jugoslavenska a akademija znanosti i umjetnosti. The original "battle on method," which took place among German scholars in the late 19th century, involved three points of disagreement. "First, it involved questions of subject matter in relation to whether values would be dominant over facts; second, it involved a choice in the type of investigative methods to be pursued in the social sciences; and third, it involved decisions about what the main purpose and aim of the social sciences would be" (Morrison 2006, 340). The Croatian dispute over method was closer to a related German controversy over the study of law, especially as concerns the relation of law to other aspects of society such as the state, politics, and the economy (see Koch 1977).

boundary conditions obtain. Consequently, if a change is made to a constitution or to a basic legal institution, such as private ownership of the means of production, "entire libraries become wastepaper" (ibid.; my translation; cf. Kirchmann 1848). Pusić argued that a paradigmatic (*in nuce* naturalistic) social science could replace juristic and other commonsense identifications of social phenomena (ibid., 21–2). While recognizing that "the development of the area of social sciences as a whole has perhaps not matured for a synthesis," he claimed that it was possible to make an inventory of problems—and he proceeded to do so (ibid., 93ff.; my translation). His understanding of the relation of theory (rationality, science) to practice (law, morality) is encapsulated in the view that the dependence of a community on normative regulation ("counterfactual expectations") is inversely proportional to the sum total of reliable knowledge ("realistic expectation": ibid., 159; my translation; cf. Luhmann 1972, 40–53).

Ivan Padjen advanced a diametrically opposed argument, derived from an inquiry into international law and morality in light of the early Kelsen's insight that not only legal science and ethics but also grammar is a normative science (Kelsen 1916, 38), an argument that draws as well on the later Kelsen's criticism of Weber's sociological concept of law (Kelsen 1928), and on Peter Winch's use of the later Wittgenstein (Winch 1990). The argument runs as follows: Normative explanation, i.e., the identification of an object by reference to the norms (rules, reasons) constitutive of the object, is the basic method for scientific as well as commonsense inquiries into social phenomena; modern social formations and systems (firms, nation states, etc.) are primarily constituted by legal norms; for this reason, the empirical sciences of modern societies (sociology, political science, etc.) presuppose that their subject matter be identified jurisprudentially; when legal norms designed to constitute a social system are secret or ineffective, this does not only make for sterile legal scholarship but also makes fruitless the empirical sciences of the system (Padjen 1984; cf. Cotterrel 2001).

The argument is echoed in Zoran Pokrovac's reminder that the dependence of legal sociology on legal dogmatics was first recognized by Hermann U. Kantorowicz, and that it might even have been recognized by Semen V. Pachman (1986). Relying on Hans Jauss's theory of aesthetic reception (Jauss 1970),[18] Pokrovac pointed out some failings in the literature on Kantorowicz: He thus set out to reconstruct the latter's views on law, free law, the sources of law, and gaps in the law, outlining in detail the flaws he detected in the idealized self-image of lawyers, and especially of judges, as automata of legal application, while also criticizing the accompanying tenet that all judgments must be grounded in a statutory foundation. The advocacy of free law, analysed in the

[18] Cf. Jauss 1982, 15: "Literature and art only obtain a history that has the character of a process when the succession of works is mediated not only through the producing subject but also through the consuming subject—through the interaction of author and public."

context of contemporary theories of judicial activity, turned out to be a social movement rather than a mere doctrine (Pokrovac 1995, 1992).

Miomir Matulović (1957–) has edited *Ljudska prava. Zbornik tekstova iz suvremenih teorija ljudskih prava* (Human rights: A collection of texts in contemporary theories of human rights, Matulović 1989), a work through which the focus of Croatian legal philosophy, in what was still a country under communist rule, moved closer to contemporary liberal, chiefly American, philosophy of law and politics. In *Ljudska prava: Uvod u teoriju ljudskih prava* (Human rights: Introduction to the theory of human rights, Matulović 1996), he argues that a complete theory of human rights needs to solve the problem of justifying human rights and their content, while working out the conflicts among different human rights as well as between human rights and other values (ibid., 12–4). To this end Matulović probes into classical theories of natural rights (those of Thomas Hobbes, John Locke, and Thomas Paine, especially in light of the objections raised by Edmund Burke, Jeremy Bentham, and Karl Marx), while also drawing on contemporary theories of human rights (those of John Rawls, Robert Nozick, Alan Gewirth, and John Finnis) (ibid., 35–205). Matulović puts forward a modified contractarian theory as a solution to the problem of justifying the human rights to freedom, welfare, and culture (ibid., 241–77; Matulović 1988b). His solution to the problem of content relies on the work that Hella Kanger carried out applying Stig Kanger's normative and logical analysis of rights to the rights listed in the United Nations Declaration of Human Rights (H. Kanger 1984; Matulović 1996, 311–22). Building on the theories of Rex Martin (1985, chap. 7) and John Rawls (1982, 57), Matulović works out a procedure for solving the conflict among human rights, and he illustrates that procedure by looking at the conflicts involving freedom of the press (Matulović 1996, 323–37).

Branimir Lukšić (1935–)—of the Split Faculty of Economics, where he taught commercial and maritime law from 1986 to 2005—attempted to bridge the gap between the "contextual" component of value judgments, which is subject to change, and their "essential" or "textual" component, which by contrast is nonsubjective (Lukšić 1995, 215; 1981, 1983, 1986, 1988, 1991, 1994). His arguments that positive law is linked to substantive natural law run parallel to arguments put forward by other thinkers linking positive law to (*a*) procedural natural law and its presuppositions (Padjen 1976, 1988a), (*b*) natural human rights (Matulović 1988b, 1996), and (*c*) morality (Babić 1987, Metelko 1999).

Some Croatian jurisprudents regularly participated in the Group for Legal Theory headed in the 1970s and 1980s by Radomir Lukić at the Serbian Academy of Sciences and Arts in Belgrade. Nikola Visković was the most active participant from Croatia. He introduced his colleagues from other Yugoslav republics to the integral conception of law and to research on law and language. Another influential participant was Vjekoslav Miličić (1943–), whose primary

concern lay with issues in the methodology of law. Pokrovac introduced their Yugoslav colleagues to the German *Freirechtsschule* (Free law movement), while Matulović advanced Angloamerican theories of human rights.

Several legal philosophers and theorists left Croatia for good. René Marčić (1919–1971) was at the University of Salzburg from 1963 until his death in 1971, where he taught philosophy of law and state, constitutional law and political science. He developed an ontological philosophy of law that from the being and lifeworld (or *Lebenswelt*) of humans deduces dignity as the basis of justice and human rights, which in turn form the basis of legal orders (Marčić 1971, Marcic and Tammelo 1989, Mayer-Mally and Simons 1983). Ivo Lapenna (1909–1987) taught comparative law at the London School of Economics from 1955 to 1980. He analysed Soviet theories of international law at the height of the Cold War (Lapenna 1954) and compared Soviet and Yugoslav theories of law and the state that moved increasingly apart after the Soviet-Yugoslav rift of 1948 (Lapenna 1964; Pavić 1999, 375–8). Mirjan Damaška (1931–) moved from the University of Zagreb to the University of Pennsylvania Law School in 1971, and to Yale Law School in 1976, where he became Sterling Professor in 1996. His *Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Damaška 1986)—a work that gained him both fame (see, e.g., Jackson, Langer and Tillers 1998) and influence (see, e.g., Ackermann 2009)—may be recognized by Croatian readers to have been built on the comparative history of criminal procedure traced out by his teacher at Zagreb, Vladimir Bayer (1943). Following a well-trodden path, Bayer set up a contrast between two types of procedures in adjudication: The adversarial procedure characteristic of Anglo-American law, and the inquisitorial one characteristic of the law of continental Europe. Damaška replaced the two types with two oppositional pairs that link court procedures to the policy aims and political institutions of modern states: He called these (*a*) the reactive state versus the activist state and (*b*) hierarchical versus coordinate officialdom, illustrating the heuristic use these pairs can be put to in investigating several Western legal systems (Damaška 1986). Vladimir Vodinelić (1948–) moved from the Split Law Faculty to the Belgrade Law Faculty in 1975, and then to Union University Belgrade in 2002. While still at Split, he began his dissertation on the relationship between public and private law (Vodinelić 1986). His numerous works on civil law include theoretical introductions to the subject (see, e.g., Vodinelić 1991). Igor Primorac (1947–) has published widely on the philosophy of punishment (see, e.g., Primorac 1980, 1990), though he has also analyzed patriotism and secessions (Primorac and Pavković 2006); he moved to Hebrew University in Jerusalem in 1983, where he became professor emeritus of philosophy. Some jurisprudents moved in the opposite direction. Among them is Anton Perenič (1941–), who investigated the concept of law in a book (Perenič 1981) that moves parallel to Visković's book on the same topic (Visković 1981). Duško Vrban (1938–) returned from his doctoral stud-

ies in France and Germany to teach theory of law and state at the Osijek Law School (see Vrban 1995).

At the end of the 20th century came a turning point, and what paved the way for it was the criticism of Marxist theories (Padjen 1975, 1977; Miščević 1978a), in concert with an interest in contemporary theories ranging from cybernetics (Anzulović 1971) to the economic analysis of law (Kregar and Šimonović 1996), as well as in the theories of major 20th century legal philosophers, among whom Rudolf von Jhering and Leon Duguit (B. Perić 1964, chap. 4.3), Hans Kelsen (B. Perić 1962, 225–65; B. Perić 1974, Padjen 1984, 1988b), Rudolf Laun (Perić 1955), Mario G. Losano (Anzulović 1971, Losano 1990), Carlos Cossio (Visković 1990), Lon L. Fuller (Padjen 1977), Norberto Bobbio (translated in Croatian by N. Visković and Ž. Anzulović: see Bobbio 1988), H. L. A. Hart (Matulović 1983, 1985a, 1986), Ronald Dworkin (Matulović 1985b), and John Rawls (Matulović 1996, 2000). Two lawyers contributed to the historiography of earlier legal philosophy: Matija Berljak (1978) and Pavo Barišić (1988, 1996). Matulović edited special issues of periodicals on legal philosophy (Matulović 1985a, 1986–1987, 1988a), a collection of essays on theories of human rights (Matulović 1992), and a collection of papers by John Rawls (Rawls 1993). Matulović also had many excellent translations to his name. Two milestones in this whole development have been (*a*) the recognition that Marxism as a philosophy had ceased to be a viable solution (Puhovski 1984) and no longer made sense (Pokrovac 1987), and (*b*) the reception of analytical philosophy of language and action (Mišćević 1978b, Mišćević, Smokrović and Mrakovčić 1983, Padjen 1984, Matulović 1986, Puhovski 1987).

Several theorists have worked on themes and problems of interest to specialists: the nature of socialist legal systems, especially the secrecy of laws (Padjen 1977); the prospects for the rule of law (Padjen 1989); the *Rechtstaat* (Pokrovac 1989); the legal system in comparison with other systems (Padjen 1991); the incoherence of Marxist theory of property (Padjen 1983), and the post-communist Croatian Constitutional Court's use of that theory to justify the nationalization of social property as an extra-legal fact (Padjen 1992, Petričić 2000);[19] the irrelevance of property to socialism, since socialism is geared towards the production of surplus-power rather than surplus-value (Puhovski 1988); the justification of punishment, with a focus on theories of retribution (Primorac 1980, 1990); a framework for empirical inquiries into the self-images of Croatian judges (Pokrovac 1993); a reconstruction of how the Croatian Constitutional Court operates without a theory of human rights (Padjen and Matulović 1996, 37–53); the revival of Fascism and the Western legal tradition

[19] See Ustavni sud Republike Hrvatske, Rješenje U-I-137/1992. od 24. lipnja 1992. *Narodne novine* 43/92 (See Constitutional Court of the Republic of Croatia, Ruling U-I-137/1992 of June 24, 1992, *Official Gazzette of the Republic of Croatia* 43/92).

(Padjen 1997b); Catholicism and nationalism among Croats from the perspective of the integral theory of law (Padjen 1999a); multiculturalism (Matulović 1998); Catholicism and liberalism (Matulović 1999); the creation of states in international law (Padjen 1997a; Padjen and Matulović 1996, 53–74) and relative and unequal sovereignty in international law (Šimonović 2000a, 2000b). A case apart are the contributions made to cultural zoology, addressing issues such as the legal protection of animals (Visković 1996) and medical ethics (Miličić 1996, 2000).

International lawyers have made contributions to the general theory of law. Juraj Andrassy (1896–1977) argued that state sovereignty is limited by law (Andrassy 1927) and so that it could be attributed even to the League of Nations (Andrassy 1938). While defining the international community as the community bound by international law, he linked the validity of such law to its effectiveness (Andrassy 1976). His students wrote on the sources and interpretation of law (Degan 1963, 1970, 1997, Vukas 1975, Metelko 1982, 1992, Padjen 1988a, 65–89), as well as on the new subjects of international law (Lapaš 1999). Bakotić argued that decreases in substantive sovereignty correlate with increases in the breadth of sovereignty (Bakotić 1972), and he also taught that all legal problems worthy of study are trans-systemic (Padjen and Bakotić 1972). Katičić (1977) explored the trans-systemic functions of private international law.

Some other specialists have also made contributions to the general theory of law, especially with investigations on the general part of that theory, on the sources and interpretation of civil law (Vuković 1953, 1959, 1961), on the general part of criminal law (Bačić 1978), on adjudication as a source of constitutional law (Stefanović 1965, 63–5); on tort theory (Klarić 1991), and on truth in judicial procedure (Uzelac 1997).

However, despite all these investigations, Croatian jurists in the 20th century by and large ignored the theory and philosophy of law and were scarcely acquainted with it (Padjen and Matulović 1996, 9–22).

20.3. 20th-Century Philosophy of Law in Slovenia (*by Marijan Pavčnik*)

20.3.1. The State and the Legal Framework

At the beginning of the 20th century, the territory of the Republic of Slovenia was a part of the Austro-Hungarian Empire, which dissolved in 1918 (see Štih, Simoniti, and Vodopivec 2008). On October 29, 1918, Slovenia became a constituent part of the State of Slovenes, Croats, and Serbs, which on December 1 of the same year changed into the Kingdom of Serbs, Croats, and Slovenes. At the time, Yugoslavia comprised six separate jurisdictions that maintained their legal peculiarities until new legislation was passed. Slovenia and Dalmatia formed the area of Austrian Law, where the amended Austrian Civil Code was in force.

No new civil code was passed in the Kingdom of Yugoslavia. The law in other areas was made significantly uniform, most intensively in 1929 and 1930, when general statutes on substantive criminal law, criminal procedure, and civil procedure were passed. In spite of these efforts to achieve cohesive legislation, the differences from one jurisdiction to the next were such that in order for the supreme court of cassation to perform its functions, it had to establish branches in each of the six jurisdictions. The Supreme Court in Ljubljana was established in 1939.

After the transition from the Kingdom of Yugoslavia to the Democratic Federative Yugoslavia, and then to the Federative People's Republic of Yugoslavia in 1945 and 1946, the principle of legal discontinuity was implemented. What followed was the emergence of extensive legal gaps, but the repealing statute made it possible to fill those gaps by enabling the courts to bring back legal rules from the prewar period, so long as those rules were not in conflict with the new constitutional order, and the case at hand concerned an unregulated matter or involved unregulated legal relations. Under these premises the courts in Slovenia also subsequently followed the rules of the Austrian Civil Code. This applied to the general part of civil law, as well as to property law and the law of obligations, which were mainly regulated by statute in 1978 and 1980.

When the independent state of Slovenia came into existence in 1991, the Constitution laid down the principle of legal continuity. Under this principle, those federal rules that were in force in the Republic of Slovenia at the time the Constitution came into force would apply *mutatis mutandis* as rules of the Republic of Slovenia, on condition of not being contrary to the republic's legal order, and unless otherwise provided by the Constitution itself. Practically all basic laws of the Slovenian legal system have been introduced in this way so far, and by now the system has been rounded out.

20.3.2. The Question of Legal Positivism

Historical experience teaches that legal dogmatics (legisprudence), methodologically specific to the individual sciences of positive law, can never be self-sufficient. Or at least the science must continuously check to see whether positive legal regulation expresses the "normative power of the factual" (*die normative Kraft des Faktischen*). Positive legal regulation is always informed by certain values and sociological backgrounds: The social and value contexts codetermine our understanding of the statutes and act as the social reality in which legal behaviour, legal violations, and legal decision-making unfold. These reasons, along with numerous others, bear out the intuition that the science of positive law must not live in an ivory tower of normativity. If it does, it can easily turn into a dead letter or into an ideological ornament at the service of political authority.

The situation regarding positive legal science is anything but easy, because legal scholars have to study the valid law of the day. The attitude of positive legal science turns unscientific whenever it uncritically defends the positive legal system of the day (apologetic legal positivism), whereas it is scientific when based on the generally accepted tradition of the science in question (e.g., civil law or criminal law). Scientific legal positivism is not in the business of judging the value of (i.e., evaluating) the content of the positive law of the day. The task of scientific legal positivism is rather to study, analyze, and interconnect this content by established scientific methods (see Pavčnik 2005, 17ff.).

Between the two World Wars, Slovenian legal science came under the strong influence of Austrian-German legal positivism, based on the normative-dogmatic method, and legal-comparative, sociological, and axiological methods gradually became important as well. After World War II, the development was not uniform. In some critical periods and certain areas of the law, it was an apologetic legal positivism that to some extent gained prominence. This brand of legal positivism was especially strong in areas of the law that sought to radically break with the traditional Roman-Germanic legal family, a family coextensive with non-socialist law in continental Europe. Those areas were especially worker self-management law, collective labour law, and constitutional law.

It should not be overlooked, however, that legal positivism also served as a *defensive barrier* against the invasion of legal science by political irrationality and despotism. The establishment of several new institutes and departments at the Ljubljana University Faculty of Law fostered the development of a growing number of sciences (such as criminology, sociology of law, political economics, and public administration), which noticeably broadened the knowledge of law. Also important was the development of several new research areas (all comparative, such as comparative commercial law, industrial property law, and market law), and among the classical legal sciences, some (like criminal law) have gained by the addition of new methods (such as the sociological, axiological, and comparative methods). The legal-comparative method in particular has been gaining wide acceptance in all areas of civil law, and in constitutional law.

A specific question is the attitude toward the positive law that was previously valid in the socialist era. It would not be correct to maintain that no critical legal thinkers existed at the time. Responsible theorists were concerned to ensure the quality of their original science even when dealing with the so-called "new" legal areas, and some of these theorists were also very critical. A case in point is the work on social property done by Alojzij Finžgar (1902–1994): While not rejecting the concept of social property per se, this astute expert on civil law constantly clarified and analyzed that concept by drawing on the instruments of civil law, and especially of property law. The final result is well-known in Slovenia: Although social-property law is no longer valid law

in the country, Finžgar's theory stands, and it can also explain how social property can be transformed into other forms of property (Finžgar 1992, 5ff.).

20.3.3. Perspectives on the Philosophy and Theory of Law

The development of the philosophy and theory of law in Slovenia is closely bound up with the Law Faculty of the University of Ljubljana, which was founded in 1919. The first dean of the faculty was Leonid Pitamic (1885–1971), who gained international fame as a follower and critic of Kelsen's pure theory of law. Pitamic's fundamental contribution to the pure theory was his treatise *Denkökonomische Voraussetzungen der Rechtswissenschaft* (Economy of thought as a precondition of legal science: Pitamic 1917). In the foreword to the second edition of the *Hauptprobleme der Staatsrechtslehre* (Kelsen 1923c), Kelsen explicitly emphasized that Pitamic had importantly contributed to the question of how to define the basic norm as a presupposition of legal cognition.

From the very start, Pitamic doubted that the theory of law could take purity as its object. He instead based law on the facts of being (on the is, the German *Sein*), in which law is realized as a norm, and which through the mediation of the language influence our understanding of the law. He also maintained that the inductive-empirical method is compatible with the deductive-normative method, but that we must be careful not to "conflate" the two. If we allow these two methods to "support each other," we can, as Pitamic put it, "move closer to what we must strive for by all—with the best intentions *all*—means: *cognition*" (ibid., 367; my translation).

The final result is that Pitamic's understanding of the basic norm differs fundamentally from that of Kelsen, who draws a clear distinction between the concepts of morality and law. Pitamic takes another path, and as concerns the question of what it is to have an understanding of law, he appropriately connects the positive law and the natural law conceptions of the nature of law. The essential elements of law are identified by him as consisting in an order coupled with human behaviour. These elements are interdependent, in that an order is dependent on legal norms regulating external human behaviour. So it is an essential point that law ceases to be law when its norms cease to be at least *grosso modo* effective (Pitamic 1956, 192–3). Moreover, not just *any* order can function as an element of law: The condition is that it be an order prescribing "only external humane behaviour, while not prescribing or allowing its contrary, namely, 'inhumane behaviour,' for it would otherwise lose its legal standing" (ibid., 194; my translation).

However, a legal norm "ceases to qualify as law when its content seriously threatens the existence and social interaction of the people subject to it" (ibid., 199; my translation). But in order for this state of affairs to come about, it will take more than just any kind of egregiousness in the content of the legal norm

(e.g., unreasonably high taxes): There needs to be "a conspicuous, obvious, or severe case of inhumanity" (Pitamic 1960, 214; my translation), such as the mass slaughter of helpless people. There has to be a "crude disruption" (such as the extermination of the members of another race), something interfering so forcefully with law as to negate its nature as law (Pitamic 1956, 199; my translation).

His most important treatises written in German were translated into Slovenian and published in both languages as *Na robovih čiste teorije prava / An den Grenzen der Reinen Rechtslehre* (On the fringes of the pure theory of law: Pitamic 2005).

Pitamic also contributed to the theory of the state. In his book *Država* (The state: Pitamic 1927) he developed a normative theory of the state. This work was slightly revised and expanded for its English edition (Pitamic 1933). Pitamic defined the permanent core of the state as "a juridical organization of men" (ibid., 27). At the core of the state we find, once again, legal norms that tell us which territory, people, and organs are to be considered as belonging to the state, and which organizations fall outside that domain: The state is thus "a juridical organization of men which is (1) established on a certain territory, which is (2) subject directly to international law, but which has (3) authority over all juridical organizations on its territory save those which depend directly upon international law" (ibid.).

Between the two world wars, the philosophers of law active in Ljubljana were Djordje Tasić (1892–1943), Evgenij Spektorskij (1875–1951), and Boris Furlan (1894–1957). Tasić—a Serbian professor who taught in Ljubljana from 1922 to 1930—is best known for his encyclopedic *Uvod u pravne nauke* (Introduction to the legal sciences: Tasić 1941). Spektorskij—a Russian professor who taught in Ljubljana from 1930 to 1945—wrote a two-volume work called *Zgodovina socijalne filozofije* (History of social philosophy: Spektorskij 1932–1933), which was translated into Slovenian. Furlan was professor in Ljubljana from 1930 to 1941 (cf. Kušej 1958); after World War II he resumed teaching until May 30, 1947, when he was removed from his post for political reasons. Furlan's most important papers are collected in the book *Problem realnosti prava* (The problem of law's reality: Furlan 2002). Like Arthur Kaufmann (cf. A. Kaufmann 1982), Furlan accepted the view that analogy was an essential element of law: "It is not the principle of absolute identity that applies to law but rather that of similarity, stated in the gloss under the formula *per similibus ad similia*" (Furlan 1933–1934, 46; my translation). Here Furlan proceeds from the premise that no two things can be absolutely identical in reality, and that the same therefore applies to law as well. It follows that to some extent we always have a similarity between the reality of life, and what is normatively provided (by law), that is, between the relevant *factual* elements, and the *normative* constituent elements applicable to the former. That means that the contents of a legal decision can only be justified by setting out persuasive arguments demonstrating how factual and normative states of affairs have been

construed as to their meaning within the legal framework, and how legal consequences are made to flow from the normative state brought to bear on the factual, and so how those consequences have been concretized. An optimum legal decision is achieved when the closest fit is achieved between the two states, that is, when the factual state is subsumed under the normative state to which legally relevant facts (the factual state) correspond most closely (see ibid., 46; A. Kaufmann 1982, 18).

An important link between the era before World War II and the first decades after can be found in the work of Gorazd Kušej (1907–1985). He was among the best professors of legal theory in Slovenia, and a lecturer and supervisor for forty-three years. He participated in shaping Slovenian legal culture, developed a normative understanding of law, and examined its social background. In the period between the two world wars he was already drawing attention to the sociological background of law. He defined law as a permanent, supreme, and inviolable socially binding will determining the permissible aims of the individual subordinate wills and aspirations and the permissible adequate means to achieve those aims (Kušej 1931–1932, 265ff.). His most important work of legal philosophy is *Uvod v pravoznanstvo* (Introduction to jurisprudence: Kušej 1960), which was published in five revised editions (the last one in 1976).

After World War II, especially in the first decades, several discussions were held concerning the nature and importance of Marxist philosophy of law and the state. The orthodox school of thought favoured a self-sufficient Marxist theory of law and the state without any room for any special philosophy of law. Anton Žun (1917–1978) argued that the evaluative element of law (especially the theory of justice) belongs to the philosophy of law, the factual element and/or relation to the sociology of law, and the normative element to the legal science (Žun 1968, 225ff.). The most important criticism of law in the socialist era was contributed by Anton Perenič (1941–).The law's distinctively legal (normative) structure is not something that intrudes upon facts; rather, the need for legal regulation is shaped by human thought as a part of human practice: When human thought takes the form of a specific social norm, it returns to facts and gives them legal meaning (Perenič 1981, 66ff.).

Over the last two decades several monographs have been published dealing with specific groups of problems relevant to legal theory and legal philosophy. Marijan Pavčnik has written monographs about interpretation and argumentation in law. In his view, the judge's decision is a value synthesis assessing the normative starting point with regard to the factual starting point, and vice versa. Pavčnik has analyzed the elements of the normative concretization of the statute, i.e., the elements and arguments making sure that legal decisions are sound and substantiated (Pavčnik 1991, 1993). Furthermore, the legal practitioner (e.g., the judge) is always beyond legal positivism. Legal rightness is a necessary and initial element of law (Pavčnik 1997, 17ff.). Legal rightness, at least in our day and age, is measured by looking at whether the law protects

basic human rights and whether the state operates under the rule of law and the principles of democracy (ibid., 461).

Two books by Boštjan M. Zupančič (Zupančič 1990, 1995) deal with the questions of the rule of law and of legal culture. Zupančič is especially interested in the discourse on justice as a way of life: "*We each have our own way of being just and truthful, yet none of us can achieve adulthood and maturity* without having experienced *truth and justice directly*" (Zupančič 1990, 6; my translation).

Also deserving mention are Cerar's book on the multidimensionality of human rights and duties (Cerar 1996) and the collective work on fundamental human rights titled *Temeljne pravice* (Fundamental human rights: Pavčnik, Polajnar-Pavčnik and Wedam-Lukić 1997).

In the 1990s came the first comprehensive treatment of legal theory in the Slovenian language (Pavčnik 1997). The work addresses the fundamental concepts and problems dealt with by the theory of law: The legal norm, the legal relation and its elements (rights, duties, the legal subject, the object of a legal relation), legal acts (i.e., acts *in* the law and *of* the law), the sources of law, gaps in the law, the application and interpretation of the law, the systematization of law, and main theories about the nature of law. The ambition of the monograph is to contribute to our understanding of law. The factual starting point for a legal decision can be of any kind; its normative starting point can be of any kind. But the point *connecting* the two, and the legal decision itself, always lies in human acts for which one is responsible—and it is in that connecting point that law in the fullest sense of the word is created. Commentators have described the work as "a new Slovenian synthesis of the theory of law" (V. Simič 2000, 234; my translation) and as an original contribution to discussions on the philosophy of law (see Holländer 1999, 139ff.).

Important contributions to the philosophy of law have also been made through a number of doctoral theses. Worthy of mention in this regard are those by Miro Cerar, *(I)racionalnost modernega prava* (The [ir]rationality of modern law: Cerar 2000); Marko Novak, *Delitev oblasti: Medigra prava in politike* (The separation of powers: An interplay of law and politics, M. Novak 2001); and Aleš Novak, *Narava in meje zavezujoče moči prava* (The nature and limits of the binding force of law: A. Novak 2003).

20.3.4. Closing Remarks

It would be impossible, within the allotted space, to enter into individual works in any greater detail than has been done (see also Vilfan 1968 and Pavčnik 1989). Scope of Slovenian philosophy and theory of law is commensurate with the size of Slovenia as a central-European country. The works in question analyze the fundamentals of the issues mentioned and presented. I should also like to add that Slovenian philosophy and theory of law are well

informed about what is happening in the world (especially in continental Europe and in the Anglo-American debate). It is important as well that some foreign works that shaped the 20th century were translated into Slovenian. Among these are Gustav Radbruch's *Rechtsphilosophie*, Hans Kelsen's *Reine Rechtslehre*, H. L. A. Hart's *The Concept of Law*, and various works by Ronald Dworkin—including *Taking Rights Seriously*, *A Matter of Principle*, and *Law's Empire*—edited by Aleš Novak.

20.4. 20th-Century Bulgarian Philosophy of Law: From Critical Acceptance of Kant's Ideas to the Logic of Legal Reasoning (*by Vihren Bouzov*)

20.4.1. Bulgarian Philosophy of Law before 1944

In Bulgaria, there exist no more than a handful of studies on the development of the country's own philosophy of law and its accomplishments. These studies are far from comprehensive, even as a group: Only brief outlines of that development have been published, dwelling on specific ideas put forward by representative thinkers active at various times (cf. Popov 1970, Nenovski 1998). My analysis here is an attempt to bring out the main through-line in the development of Bulgarian philosophy of law today.

A proper account of Bulgarian philosophy of law in the 20th century requires an attempt to find, on the one hand, a solution to epistemological and methodological problems in law and, on the other, a clear-cut influence of the Kantian critical tradition. Bulgarian philosophy of law follows a complicated path, ranging from acceptance and revision of Kantian philosophy to the development of interesting theories on the logic of legal reasoning.

The development of philosophy in Germany exerted a major influence on the nature of philosophical discussions in Bulgaria before World War II: That was an important aspect of the broader cultural and political influence that Germany had on Bulgarian social life, as well as on its political development and legal system.

During that period, philosophical life in Bulgaria was overwhelmingly dominated by German idealist philosophy (Hegelianism and Kantianism), and in particular by the dualist philosophy of Johannes Rehmke (1848–1930), as interpreted in an original way by Dimiter Mihalchev (1880–1967), a renowned Bulgarian philosopher (Rehmke 1923, Mihalchev 1933). After 1951, these philosophical interests were shelved at the country's universities and at the Bulgarian Academy of Sciences—all of them crushed under the ideological steamroller.[20] In the first half of the 20th century, the analytic orientation, and

[20] From 1944 to 1949, Bulgaria became a communist country, once it destroyed the multiparty system and established a planned state economy. Marxism was imposed as the official ideology in philosophy and politics.

especially logical positivism, had no following in Bulgaria: It only drew criticism (Bouzov 2003a, 558–9).

Indeed, it is possible to speak of the existence of original ideas and genuine achievements in Bulgarian philosophy of law from the first half of the 20th century. The development of significant studies in Europe and beyond was dominated by realist and natural-law theories.

Historically, the first Bulgarian legal scholars after the country was liberated from Ottoman rule in 1878 graduated from German universities. Philosophical and methodological discussions on law in the country were initially dominated at that time by legal positivism, not in original interpretations. Its main opponent in Bulgaria was Tseko Torbov (1889–1987). As a philosopher, a jurist, and a university professor of law, he was the most prominent follower of Kantian philosophy in the country and was the first translator of Kant's works, developing as well his philosophical theory of law. Torbov studied law and philosophy at the University of Göttingen, Germany, where he graduated in 1929. While studying there he became close to Leonard Nelson, and their longstanding friendship is described in his memoirs (cf. Torbov 2005). In Germany Torbov defended his doctoral thesis in philosophy in 1929. His translations of Kant's basic works became universally known across Bulgaria and Germany in the 1970s. In 1973, he became an honorary member of the Kantian Philosophical Society in Mainz, Germany. A honorary gold doctoral degree in law was conferred on him by the University of Göttingen in 1974 (see Torbov 1991, 5–6).

Torbov's interpretation of the essence of natural-law theories and legal positivism is indeed fairly original. He contends that natural-law theories proceed from "rational or philosophical knowledge" in their seeking to formulate law, whereas legal positivism proceeds from empirical knowledge, looking to account for the de facto force of a given social system in action (Torbov 1992a, 13). So, in interpreting the nature of the principal discussion in contemporary legal philosophy, he starts from an epistemological point of view, understanding that discussion as predicated on an initial choice between rational and empirical knowledge. He draws the conclusion that legal positivism cannot arrive at a theory or philosophical conception of law, because it cannot reveal the properties of its development (ibid., 15–6).

Torbov further developed Kant's theory of law in a systematic way. He criticized Kant for his formalistic interpretation of the main principle of law, a principle that Kant borrowed from the classical school of natural law (Torbov 1991, 47): Kant, he argued, failed to extract the main principle of juridical law from the meaning of *moral* law.

Torbov drew a line of demarcation between the formal theory of law and its material theory. He thought that it is the task of a philosophical theory of law to set out and call for certain requirements adequate to the legal circumstances of a given society. In his view a system of law should be based on the practi-

cal necessity of mutual restrictions in the sphere of freedom among persons bound by mutual relations. The formal theory of law incorporates an analysis of the *form* of law, a form given by its correspondence to requirements or principles formulated on the basis of analytic and synthetic principles determining the nature of law. The latter principles are those of equality before the law and of the legal distinctness and autonomy of subjects of law (juristic persons): These principles make up the framework of relations among such subjects, in turn understood as rational beings with corresponding interests and obligations. The formal theory of law also formulates the principle of legal objectivity, offering as well an account of the possibility of imposing that objectivity on life. According to the principle of legal rigorism, the need for legal obligation is not determined by any goal. And according to the principle of legal indeterminism, the application of law covers a sphere of values outside of the realm of law (ibid., 80–4).

The synthetic principle, forming the basis of Torbov's formal theory of law, postulates the existence of juridical law, a view set out in Kant's *Critique of Pure Reason*. According to Torbov the minor premises of the formal theory of law are given by some subsumptions in which there are no elements of the essence of legal law, nor are there any empirical elements. These premises are based on the idea that legal law only pertains to relations among rational beings. The first subsumption deriving from those premises is the one defining the need to express thoughts by means of language; the second subsumption posits the need to provide for a definite distribution of possessions. The possibility of making mistakes in the process by which law is known is itself a subsumption, and in that possibility lies the difference between juridical law—which belongs to the practical realm—and the laws of nature. The possibility of making mistakes for lack of good will is also a subsumption stating a thesis of the same type (ibid., 84–8).

In action, the main principle of law and the subsumptions set out above lead Torbov to the formulation of the four postulates of his formal theory of law. These postulates are as follows: (1) Rational beings must recognize a single compulsory language for use in their mutual relations; (2) possessions must have a distribution based on a definite scheme; (3) rational beings must accept the resolution of legal disputes on the basis of public law as applied by courts of law, where decisions are made under the provisions of that law; (4) legal security must be guaranteed, meaning that society must enforce the law so as to thwart the intentional violation of laws (ibid., 90–3).

Torbov's material theory of law, as distinguished from the formal one, is concerned with determining the *content* of legal law. The theory is characterized in the first place by the idea that justice is a right, and that as such it defines a genuine rule of law. Justice defines a rule under which individual liberties are delimited in their interrelationships; this means that everyone is equal and that no one can claim any special privilege. The dictate of justice is

an expression of the operation of juridical law; it is of an *a priori* nature as the foundation of law (Torbov 1992b, 217–41). The postulates of the material theory of law define an obligation of people to govern the form of their relations by means of contracts; it also flows from these postulates that people have to comply with those provisions of law under which possessions are distributed. According to these postulates, people have to accept the distribution of possessions and the principle of equality, as well as the principle of redress as the foundation of penal law (Torbov 1991, 97–102).

The philosophical conception put forward by TsekoTorbov is a brilliant reaction to the spirit of the legal positivism that was holding sway in legal science and legal practice in Bulgaria before World War II. It marked a turning point, when an authentic critical tradition began to take hold in legal and philosophical debate in the country.

Mention should be made here of the ideas developed by Venelin Ganev (1880–1966), a leading legal theorist before World War II, since he exerted a remarkable influence on the mainstream of Bulgarian legal philosophy, irrespective of his affinity for legal positivism and normativism. Having graduated in philosophy, law, and music from the universities of Leipzig and Geneva, he returned to Bulgaria and taught philosophy of law at St. Kliment Ohridski University of Sofia over a ten-year period. He was a cabinet member, then Bulgarian ambassador to Paris, and then a member of the Council of Regents until the dissolution of the Bulgarian monarchy in 1946. His two-volume *Uchebnik po obshta teoria na pravoto* (Textbook on the general theory of law: Ganev 1990), published in 1932, contains a relatively comprehensive definition of the philosophy of law and an original conception of the nature of law as a whole.

In contrast to many legal theorists, Ganev drew a distinction between the philosophy of law and the general theory of law, a distinction based on their object and scope. According to him, a philosophical analysis needs to be aimed at investigating "the place of law in the whole of the existent, the first cause of its genesis and its givenness, and its ultimate nature" (ibid., 9; my translation), and it must also seek to explain its meaning in the context of human life, truth, justice, and the good. The general theory of law, by contrast, does *not* take on this task: It only seeks to achieve a synthetic unification of the special and the general knowledge of law; this amounts to saying that the general theory of law is concerned with studying the legal phenomenon in its most general aspects (ibid., 9–10).

Ganev developed an original conception of the nature of the legal phenomenon as a unity of (*i*) legal facts, (*ii*) legal consequences, (*iii*) the subject and object of law (i.e., the persons and things that law applies to), and (*iv*) the legal norm. He does not equate law and the object of the general theory of law with legal norms, as legal positivism does; rather, he equates them with the relations among legal subjects (the juristic person), defined in sociological and naturalistic terms, or with certain psychological or value elements. He holds that these

elements are all "normatively processed" in the legal phenomenon. He therefore espoused a "definite eclecticism" (Nenovski 1998, 37; my translation), drawing on the different traditions in legal philosophy to identify the basic elements of the legal phenomenon and bring out their interrelations. Following the Kantian tradition, he held that one can define the object content of legal reality by methodological study; he did not see much value in metaphysical or speculative projects. In light of this integrative context we ought to understand his definition of legal reality as "mentally sociological," by which he meant to refer to a "normative sociological reality" (Ganev, 1990, 13; my translation).

Vitali Tadjer, a prominent legal theorist from the communist period in Bulgaria, rightly remarked that Ganev's works set "a very high, perhaps *the* highest, standard" in Bulgarian legal theory (see Tadjer's introduction to Ganev 1990; my translation). Ganev's ideas importantly influenced the concepts of law espoused by an entire generation of Bulgarian legal theorists who held academic positions in the age of totalitarian communism: Prominent among these theorists were Neno Nenovski, Vitali Tadjer, and Zhivko Stalev (see Nenovski 1983, Tadjer 1998, Stalev 1997). All too regrettably, however, the general theory of law was soon to be removed from university curricula, beginning in 1949, when it was replaced by Marxist theory of state and law.

20.4.2. Bulgarian Legal Philosophy and General Jurisprudence from the Communist Period and after 1989

The idea of bringing up for discussion the conception of the multidimensionality of law as a complex ontological phenomenon was put forward for the first time by Zhivko Stalev (1912–2005), an outstanding Bulgarian legal theorist and practitioner and head of the Constitutional Court in his lifetime. According to him, law exists in four different types of being (four ontological dimensions): He thus identified normative, social, material, and psychical law, ascribing priority and a decisive role to the psychical dimension. The ontological existence of a legal norm is only existent in the human mind and has a physiological correlate, too (Stalev 1997, 18-9). His development of a modernized version of legal realism backed by a psychological interpretation can be described as his most important contribution to the theory of law.

The idea of the multidimensional nature of law is well known in the Polish psychological school as well: It can especially be appreciated in the works of Jerzy Lande, a proponent of the conceptions put forward by Leon Petrażycki (Wolenski 1999, 4–5; Lande 1959), as well as in works by other Polish theorists of law.[21] Lande espouses the "cherished" positivist thesis that legal norms cannot be formulated on the basis of factual statements: He, just like some of his followers, views the law as a normative system and a socio-psychological

[21] On Lande see Chapter 19 in Tome 2 of this volume.

phenomenon. Stalev tries to develop a more general conception than that of traditional psychologism. Much like the German legal philosopher Georg Jellinek, Stalev gives a quite broad interpretation to what he calls "the normative force of facts" (Stalev 1997, 36; my translation), for he understands that force to mean that the normativity of law is dependent on the external facts of objective reality. But he also goes on to *list* those facts, classifying them as natural (geographical, climatic, ecological), biological (genetic heritage, instincts), psychical (different types of belief), and social. Other dimensions of law (the psychical and the social) can also influence its being normative: These dimensions are no doubt available in the world of existence. The normative force of facts results from a totality of different causal relations that hold between the facts of objective reality and the normativity of law, namely, its being normative (ibid., 36–7).

In Bulgaria, there exists a definite tradition that attempts to fashion the conception of causality in legal and philosophical thought into a comprehensive interpretation of law. In the 1960s, Venetsi Buzov (1906–1983), a professor at the Institute of Legal Sciences of the Bulgarian Academy of Sciences, sought to develop a theory of criminal law premised on Marxist postulates. According to him, a legal conception of causality must include not only physical causation but also psychological dependencies, such as the intentionality behind action. In criminal law this causal link also covers (*i*) an act, (*ii*) its consequences in a situation of social danger, and (*iii*) the conditions of causation, discoverable in the characteristics of the *corpus delicti*. The functioning of this link can be understood taking into account the influence of psychological factors (cf. Buzov 1964, chap. 2).

Mention should be made here of the work of Neno Nenovski (1934–2004) for his attempt to develop an axiological theory of law (cf. Nenovski 1983). Nenovski was a founding member of the Bulgarian section of the International Association for Philosophy of Law and Social Philosophy (IVR); in 1985, he became its head and would carry on in that role for many years to come. It was his ambition to define the essence of law as a mental phenomenon and its values as criteria of law itself. According to him, values are the "ideals" of law and are defined by specific social needs and interests. He championed the subjectivist thesis that values are always rationalized: No value exists outside consciousness. Value, he thought, is a form in which reality is reflected, and he defined values as the point of view of different interests.

The years of democratic transition in Bulgaria after 1989 saw a significant positive development in Bulgarian philosophical and legal thought, since it did away with the ideological tutelage of Marxism, abandoning its dogmas and postulates. As a result, departments of law and philosophy at various national universities now offer courses on the philosophy of law and the logic of legal reasoning, and the basic grounding in Marxist theory of law and the state has been replaced with training in the general theory of law. And with the growing

influence of English across the world there has developed a growing interest in familiarizing with the analytic tradition and with analytical methods in philosophy.

Joint work and cooperation among philosophers and legal theorists in discussing on problems in the philosophy and theory of law is a new phenomenon of the past few years. If this process develops, the works of legal theorists will no longer be dominant in legal philosophy. I would think it reasonable if, in the interest of advancing knowledge at large, the textbooks used at secondary schools and universities discussed the achievements of Bulgarian philosophers; and in the same spirit an effort could be made to bring their work to a wider international audience, though I should not underrate the role these textbooks played in the 1990s in the teaching of legal philosophy at secondary schools: Some interesting ones came out during that time, along with some interesting programs (see Stojanov 1993, Yotov 1994, Bouzov 2001). At secondary schools, legal philosophy has now been replaced by courses on ethics and on the fundamentals of law.

In 2004, the Union of Jurists and the Institute for Philosophical Research of the Bulgarian Academy of Science held a joint conference titled *Truth and Justice in the Criminal Trial*. It was its aim to bring into focus and do away with the existing tension between these two concepts—truth and justice—and to define and accept a procedural theory for the legal process during Bulgaria's democratic transition (cf. Velchev 2006).

Two trends can tentatively be identified in the development of Bulgarian philosophy of law and general jurisprudence:an analytic trend and a hermeneutic one. The first of them can be related to the analytic tradition in current philosophy of law: In it one can trace out the influence of legal positivism and institutionalism, with the focus of theoretical attention being on problems involving normative systems and legal epistemology. The hermeneutic trend is instead focused on legal discourse and legal interpretation.

Included in the first research field are the theory of norms, the logical study of normative systems, and some epistemological problems in law. In contrast to hermeneutics, these investigations are largely based on linguistic and logical methods. Daniel Vulchev (1962–), a lecturer in the theory of law at St. Kliment Ohridski University in Sofia—as well as a good interpreter of European philosophy of law (cf. Vulchev 1999) and a former minister of education and science from 2005 to 2009—tried to define the place of the legal norm as a basic interpretive schema through which to gain legal knowledge. He argues that the legal norm is not a sufficient criterion of law: The law can be considered a spontaneously developing and relatively centralized legal order understood as a complex social organization. In support of his conception, he points to the withering away of the national state and the erosion of the international legal order in the globalized world. As concerns legal positivism, he puts forward the thesis that the idea of justice as an ideal of law, rich in content and value,

needs to be replaced with peace as a formal ideal effected by consensual resolution of social conflicts (cf. Vulchev 2003).

Studies on the concept of the normative system can be considered and assessed in light of various theoretical attempts to develop a comprehensive theory of legal norms. Vihr Kiskinov (1953–), a professor of legal informatics at the University of Sofia, holds that normative systems exist in an individual's consciousness. As bearers of information, such systems have definite structural qualities. Legal knowledge is imparted through a knowledge of normative structures (cf. Kiskinov 2007). Rossen Tashev (1953–), a leading specialist in the theory and philosophy of law at the Department of Law of the University of Sofia, upholds a dogmatic theory of legal interpretation: In two books (Tashev 2006, 2007) he lays out a systematic theory of law within the conceptual framework of legal positivism. He thinks that legal interpretation had specific characteristics of its own, and that a doctrinal legal theory specific to it should accordingly be brought to bear on it. Tashev puts forward an original procedural understanding of legal interpretation starting out from the relevant Bulgarian tradition (cf. Apostolov 1946, Stalev 1997). The interpretation and application of law involve both art and method. He draws a dividing line between linguistic methods of interpretation and logico-systematic ones, each governed by its own set of rules (cf. Tashev 2007). Reasoning along similar lines is Tencho Kolev (1949–), professor at the Sofia University, Department of Law, who maintains that in order for a legal decision to be fair, it must be justified, and this shows the importance of truth in judicial investigation (Kolev 2011).

Svetut na normite (The world of norms: Bouzov 2006), one of the books published by Vihren Bouzov (1966–), could well be indebted to the same tradition. It presents a grounded analysis of the achievements of the contemporary deontic logic and the theory of norms with an emphasis laid on legal norms. In it Bouzov sets out conclusions about the non linguistic theory of norms of Jan Wolenski (1982, chap. 3), and about a possible way in which this theory can be applied to axiological discourse.[22] In Bouzov's view, the problems of the deontic logic relative to attempts to build up an adequate theory of norms can be resolved by means of their consideration in a wider context of decision logic. Norms are decisions by a normative authority (Bouzov 2004). In *Scientific Rationality, Decision and Choice* (Bouzov 2003b), Bouzov argues that this conception can be a methodological means by which to explain the nature of the norms of scientific rationality. Scientists make decisions to accept or reject rational norms when such decisions fall within their own understanding of the aims and problems of science, as well as within the understanding accepted by their own scientific community (ibid.). The specific characteristics of legal discourse are an argument in favour of detaching the logic of legal

[22] On Wolenski see Section 16.3.3 in this tome.

reasoning from applied logic. The logic of legal reasoning calls for systematic development of its formal, methodological, and epistemological aspects (cf. Bouzov 1999, 2008).

In Bulgaria there exists a strong tradition in the informal analysis of legal discourse from a hermeneutical and a phenomenological standpoint. As mentioned, this is the second line of inquiry in the philosophy and general theory of law. The nondogmatic study of law in Bulgaria is in fact rooted in a book by Mihailina Mihailova (1937–) titled *Pravoto: Smisl, senki, protivopolojnosti* (Law: sense, shadow, contradictions: Mihailova 2001). In it she says that law " has senses following in succession" (ibid., 78; my translation). Zhana Sharankova's (1960–) book *Juridicheskoto mislene: Proekt za interpretativna teoria* (Judicial thought: A project for a theory of interpretation: Sharankova 2001), published in 2001, has been described by Neno Nenovski as the first comprehensive study of the development of judicial thought in Bulgarian legal literature. Sharankova is a jurist and a teacher, and this book carries forward and expands on her philosophical dissertation of 2000. She does not accept the dogmatic understanding of legal interpretation as a set of procedural rules; rather, she views legal hermeneutics as a method of legal thought whose function is to help us further our understanding the law. A similar view has been advanced by Luchezar Dachev (1952–), a professor at the University of Sofia, who depicts legal dialogue as a meeting and mutual relationship of positions occupied by subjects of law with respect to the objects of law. Law develops dialogues by means of accepted rules; these rules are a multitude of models of discourse. Dachev considers Kelsen's positivist ideas anachronistic. In his view, the law is not the totality of norms, but the totality of discourses (Dachev 2004).

The ideas presented above reflect a great change in the development of contemporary discussions on the philosophy of law: They reflect the shift to the so-called dialogical view of law. On this view, law is considered a dialogue, a tool with which to resolve social conflicts consensually (cf. Morawski 1999, chap. 4). These conceptions can be instrumental to understanding law in the present day, when great social change is underway and the world is becoming increasingly globalized.

In conclusion, it is fair to say that the topical problems in the philosophy of law and general jurisprudence have now found an important place in the theoretical discussions of Bulgarian jurists and philosophers. But one would hope that these intellectuals could make themselves and their achievements and original ideas known to a wider public by means of publications in foreign languages and by an effort to expand cooperation among researchers on an international basis.

20.5. Legal Philosophy and Theories of the State in 20th-Century Romania (*by Adrian-Paul Iliescu and Simina Tănăsescu*)

20.5.1. Philosophy of Law

The philosophy of normative fields (legal philosophy, political philosophy, moral philosophy) was in general visibly underdeveloped in Romania during both the 19th and 20th centuries. As late as 1936, one of the few Romanian legal philosophers acknowledged that his field had "until recently" been "almost completely neglected" (Speranţia 1936, 250; my translation). Entire tracts of legal-philosophical reflection, such as the British and American philosophy of law, remained essentially unknown to Romanian theorists: Major figures like John Austin or Oliver Wendell Holmes, and classic books like John Chipman Gray's *The Nature and Sources of the Law*, were almost completely unknown in this part of Eastern Europe. Traditionally, the dominant influences on legal thought were German and French, and Kant undeniably was the best-known classic. After World War I, an Italian influence was added to the older ones, namely, Giorgio Del Vecchio, perhaps the most widely known foreign legal philosopher in Romania before 1945.[23] Of course, after World War II, ignorance in the philosophy of law deepened, as Marx, Engels, and Lenin were officially proclaimed to be the main sources of legal wisdom.

One striking feature of Romanian discourse in the philosophy of law is its heterogeneity. Even the most important authors—Mircea Djuvara (1886–1945), Eugeniu Speranţia (1888–1971), and Vespasian Pella (1897–1952)—frequently admix legal considerations with epistemological, anthropological, historical, or sociological ones. They often speak as if there was an unproblematic and unquestionable continuum between anthropology, the social order, and the legal order, assuming that epistemological ideas and sociological facts can directly establish the truth in matters of legal philosophy. Kant's principles in the philosophy of knowledge and Henri Bergson's theses (in Djuvara's case) and Émile Durkheim's or Gabriel Tarde's ideas (in Speranţia's case) are taken to be in themselves capable of justifying conclusions in the philosophy of law. Differences between legal concepts and various epistemological or sociological concepts, and between factual and normative matters, do not seem to have much relevance in this kind of discourse; sometimes it is explicitly claimed that "normativity derives from the laws of Life," i.e., from the empirical laws of human life (Speranţia 1936, 10–1; my translation). Superficial analogies—like "physics deals with relationships between bodies, law with relationships between persons" (Djuvara 1939a, 23; my translation)—lead to superficial analyses simply meant to support the prestige of law (no less scientific than "natural science").

[23] On Del Vecchio see Section 11.2.1 in this tome.

The disappointing result is that even the most prominent works abound with general and vague formulations, like "justice is as objective as nature" (Djuvara 2005, 167; my translation) or "life creates norms" (Speranţia 1936, 12; my translation), which are supposed to derive from undeniable descriptive accounts of "human experience," "historical evolution," or "social order." The most problematic topics are often settled by decree: "Good and Evil exist as principles in themselves, like day and night" (Dissescu 1915, 183; my translation). In most cases, conceptual controversies are not understood to spring from real theoretical difficulties or dilemmas, but are rather understood as results of mistakes made by this or that author; the feeling one gets is that in the end there is nothing deeply problematic in the field. Conceptual argumentation is either missing or else very superficial, and conclusions are very often eclectic if not incoherent. Thus, Mircea Djuvara sees nothing problematic about claiming, on the one hand, that legal truth is as unique and objective as truth in natural science (Djuvara 2005, 317) and, on the other, that "there are no universal legal norms for a people, but only norms and institutions" (Djuvara 1941, 57; my translation). Djuvara seems to agree both with Kant's universalism and with von Savigny's historicism, without having any concern about the possible incompatibility between these two paradigms. The distinction between "rational law" and "positive law" is mentioned, but it tends to be forgotten when conclusions are drawn. Extensive and uncritical recourse is made to speculative notions like "the spirit," "human reason," and "the natural law of evolution." In many cases, efforts are dedicated to defending a certain cause, rather than to analyzing or constructing arguments; for instance, Speranţia insists on defending the position that the true legal order must be founded on the Christian creed: "The Christian creed [...] includes and presupposes some great imperatives inevitably acknowledged and adopted by all reasonable beings," and consequently "true 'valid Law' cannot be conceived in the absence of sincere religious belief" (Speranţia 1942, 14–6; my translation). In general, the authors' ideological stance is quite visible; in most cases (at least until 1945), they aimed at defending natural law against legal positivism (the former being the dominant tradition in the area: see Varga 2000, 17), conservatism against liberalism, and authority against what they considered to be certain regrettable anarchical tendencies. Finally, one shortcoming of almost all Romanian works in this field is that trivialities abound: Witness "outside society there can be no law" (Djuvara 1941, 55; my translation); "life cannot be sustained regardless of conditions" (Speranţia 1936, 10; my translation); or "war is not a fatality" (Pella 1928, 84; my translation).

Surprisingly enough, the best-known contributions of Romanian legal philosophy are to be found in the field of international law. Nicolae Titulescu (1882–1941), former president of the League of Nations, is well known for his contributions to the definition of the concepts of aggression and aggressor and to international activities in support of collective security, the international le-

gal order, and pacifism. Unfortunately, all these contributions, no matter how remarkable from a diplomatic point of view, are not very significant from a theoretical or conceptual one. For instance, the definition of the concept aggressor, though perhaps useful for some practical purposes, provides little more than an enumeration of undesirable international acts, and in itself it is of little philosophical interest.

More interesting as a thinker, though not necessarily much more profound, was Vespasian V. Pella (1897–1952), who is hailed in Romania as the founder of international penal law. In 1919, Pella published an unusual work, titled *Delicte îngăduite* (Tolerated delicts: Pella 1919), that makes very obvious the characteristic weakness of the legal-philosophical arguments usually advanced in Romania. For instance, Pella argues that suicide should be deemed an offence, simply because "the right to life is natural" and "violating it is the gravest offence against the natural order" (ibid., 70; my translation). He simply finds "revolting" the fact that attempts to commit suicide normally go unpunished, and does not feel the need for more-sophisticated inferences. In his argumentation, vague formulas like "man is slave to Life" (ibid.; my translation) are used in all seriousness. Pella is best known for his campaign in favor of outlawing war, a campaign based on the premise that aggressive wars are simply crimes that should be imputed to states. But, no matter how good his intentions were, the arguments used were very poor. Thus, Pella thinks that states can and should be charged for starting wars simply because (*a*) states are real beings, having continuity over time; (*b*) they are "palpable"; and (*c*) they have "souls" (*Volksseele*), as Tarde and other scientists have "demonstrated" (Pella 1925, 181–2; my translation). Hans Kelsen has described Pella's argument as "a hopeless attempt to demonstrate that the state as a juristic person is not a legal fiction, but a real being, a super-individual organism" (Kelsen 2000c, 73). Even if one rejected the radical idea that the state is a legal fiction, one could not be satisfied by the speculative and superficial character of Pella's arguments, which are founded on little more than a simplistic analogy between states and persons.

20.5.2. Theories of the State

All through the 20th century, Romanian scholarship on the theory of the state merely adapted and reformulated concepts and ideas that were circulating abroad. However, due to historical circumstances, this meant a switching back and forth between democratic and totalitarian theories of the state.

In the early 20th century, Romanian jurisprudence was taking up and incorporating legal concepts used in Western Europe, particularly in France, but also in Germany and Great Britain. As early as 1884, the debate in legal theory was framed by Constantin G. Dissescu (1854–1932) as a methodological debate on the nature of legal science on the basis of the opposition between "the

deductive method and the natural sciences," on one hand, and the "inductive method and the social sciences," on the other (Dissescu 1884, 90–2). This line of inquiry, focused more on method than on substance, continued with the majority of authors all through the first half of the 20th century (Negulescu 1900, 3; Dissescu and Dumitrescu 1903, 29).

The theory of the state was focused on the opposition between the state as a goal and the state as a means (ibid., 172–3; Dissescu 1915, 24–6; Negulescu 1927, 170–2), and at the same time it depicted the historical evolution of the state from its "embryo, namely, the family" (Dissescu 1915, 9; my translation), to the modern concept of the *Rechtsstaat*. In a nutshell, the debate was conceived as an opposition between the French and the Anglo-Saxon jurisprudence. In the French tradition, the state was considered an end in itself, and the human individual merely a "means" to that end. From this flowed the importance of public life for the citizens of ancient Greece and Rome (*Salus reipublicae suprema lex*), and Dissescu thought that this idea also guided the French revolutionaries who in 1793 organized the *Comité du Salut Public* (Committee for Public Salvation), while Paul Negulescu (1874–1946) argued that in Germany "the concept of the state is dominant and the individual is more like a tool for the development of state" (Negulescu 1927, 171; my translation). In the Anglo-Saxon tradition, the state was an instrument at the service of individuals: It was created "to guarantee individual security and property, to ensure the freedom of each"; the state is "constituted for the greater *private* happiness of all" (Dissescu and Dumitrescu 1903, 172; my translation). However, by the turn of the 20th century, both approaches were already considered obsolete by the majority of Romanian authors, who embraced Johann Caspar Bluntschli's integrative theory, according to which the state was at once a goal and a means.

This presentation of main ideas and concepts continued during the unstable period from 1938 (when a Fascist constitution was adopted which lasted only two years) to December 30, 1947, with the establishment of the Popular Republic of Romania (*Republica Populară Română*). However, due to the quite conservative attitude of lawyers in general, and of scholars of public law in particular, most authors simply carried forward theories established before Fascism and National Socialism penetrated the political institutions of the Romanian state. Highly regarded authors, such as Negulescu, merely included a chapter on the racial policy of the state (Negulescu and Alexianu 1942–1943, 309–60), while in the two volumes of his important treatise on public law, he expounded a theory of the state conceived in terms almost identical to what he had previously done. Little attention, if any, was paid, on the theoretical level, to concepts specific to National Socialism (Drăganu 1941, 5–33).

This approach completely changed with the advent of communism, when a different source of inspiration was found in the writings of Soviet authors, in turn inspired by Lenin. Starting in the 1950s, the general theory of the state

and of law (*teoria generală a statului şi a dreptului*) became a discipline distinct from constitutional law (*drept constituţional*), to be taught in all law departments of Romanian universities. A main objective of the communist theory of the state lay in the analysis of "the essence and typology of the state," meant to explain the deterministic relation between the economic and social system of society as a "base" or "structure" and the state as a "superstructure" (Ceterchi et al. 1967, 5–6; my translation). The communist theory of the state traced the origins and historic evolution of the socialist state and explored its possible future, while presenting it as an instrument of (social) class domination and coercion. Voluntaristic and contractarian theories of the origin of the state were resolutely rejected. The state was analysed as a manifestation of force, as an instrument based on coercion, aimed at facilitating a "popular and centralised democracy." A detailed presentation of the so-called bourgeois theories of the state in virtually every textbook on the theory of law and the state served only as basis for strong criticism of those theories. Starting in the 1980s, an osmosis between the state and the Communist Party was strongly advocated in Romania under the label "theory of the state and party organs" or "double-natured organs," but this concept did not originate in Romanian jurisprudence (Ceterchi and Luburici 1983, 261–2).

A wave of democratization swept across Romania at the end of 1989, leaving a vacuum in the theory of state. During the decade to the turn of the millennium, Romanian scholars barely managed to analyze the transformation of the state's institutions, elaborating no theories or concepts to that end.

Part Four

The Nordic and Low Countries

Chapter 21

SWEDEN: LEGAL PHILOSOPHY IN THE 20TH CENTURY

by Uta Bindreiter[*]

21.1. Introduction

The evolution of legal philosophy in Sweden in the first half of the 20th century basically coincides with the history of the so-called Uppsala School, which will be treated extensively in Tome 2 of this volume, in the part devoted to legal realism. Here I will be dealing with Swedish legal philosophy after that period, from the early 1940s onward, when the hitherto dominant influence of the philosophy advanced by the Uppsala school was definitely on the decline.[1] Apart from the generational shift marked by the death of the philosopher Axel Hägerström in 1939, there were other factors that accounted for this decline—most prominently, perhaps, the ramifications of World War II and the consequent shift in interest, among Swedish legal philosophers, from Germany to the United Kingdom and the United States. Furthermore, there was the fact that in the 1940s, quite a few of Hägerström's followers (such as Ingemar Hedenius and Anders Wedberg) were inclined to take a more independent stance toward his teachings.

Thus, with the diminishing influence of the Uppsala school of philosophy,[2] Swedish legal scholars became interested in current international trends in philosophy and were often eager to embrace those trends.

This is where the present contribution comes in. Its purpose is twofold, for in the first place it is intended to show that Swedish jurisprudence, after the heyday of the influence exerted by the Uppsala school and throughout the 20th century, is characterized by a reflection on major trends in the international philosophical debate; and consequently, in the second place, it highlights the intellectual background against which jurisprudence (*allmän rattslära* in Swedish)[3] has developed as an academic discipline at Swedish law faculties.

[*] I would like to express my warm thanks to Professor Åke Frändberg, of Uppsala University, for his valuable advice on the structure and content of this contribution. I am further indebted to Assistant Professor Christoffer Wong, of Lund University, for many clarifying and stimulating discussions.

[1] On the Uppsala School see Chapters 13 through 17 in Tome 2 of this volume.

[2] After Vilhelm Lundstedt's death in 1955, the Uppsala school can be said to have had any further influence only on Manfred Moritz and Tore Strömberg.

[3] The expression translates literally to "general doctrine of law," but that is misleading. The accepted translation of *allmän rättslära* is "general jurisprudence" or simply "jurisprudence."

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There are three problems, however, that come up in working to achieve this twofold purpose.

First, Swedish legal thought received impulses from theories that proved to be both strong, that is, widely discussed and applied,[4] as well as stable over time. Examples that stand out are analytical philosophy, formal logic, and modern Anglo-Saxon philosophy of language. Influences of this type I will call *strong and abiding influences*.

Second, there were theories which certainly drew interest when they were introduced in Sweden, but which nonetheless proved to be unstable in the long run and either fell into oblivion (as in the case of logical positivism and neo-Marxist legal theory) or, at best, resurfaced at different times. Influences of this type I will call *transitory influences*.

And third, there were influential theories which date back to the early 20th century, but which Swedish legal scholars did not consider seriously until much later, a case in point being Hohfeld's theory of rights.[5]

In view of these circumstances, and intent on preserving a chronological order in tracing out the influences on Swedish jurisprudence, I have decided to organize the discussion as follows.

There will be two main parts (Sections 21.2 and 21.4) covering the period from 1940 to 1960 and from 1960 to 2000, respectively.

Within each of these two main parts, there will be a discussion of the influences on Swedish jurisprudence in accordance with the two main classes previously distinguished: I will thus be considering, on the one hand, what I am calling strong and abiding influences, and on the other what I am calling transitory influences.

Between these two major parts, there will be a middle section (Section 21.3) where I will sketch out the origin of the development of jurisprudence in Sweden as an academic discipline (circa 1960).

I will not be characterizing the various influences themselves, that is, the influential movements,[6] but will rather be discussing the significance of the major works by the more outstanding Swedish representatives of the influence in question.[7] For the big picture, I will take as my point of departure the com-

[4] I say this judging by the number of doctoral dissertations, textbooks and course readings, and monographs and articles devoted to the theory or approach in question.

[5] As described in Section 21.4.1.1.1, Hohfeld's theory of rights would be taken up by Manfred Moritz, Stig Kanger, and Lars Lindahl.

[6] Two further criteria for inclusion will be as follows: (*i*) The movement in question must have left an impact on Swedish jurisprudence by the beginning of the 20th century (though it proved necessary to make a few exceptions), and (*ii*) the issue of jurisprudence as an academic discipline will be considered only in connection with the three major law faculties, namely, those in Lund, Stockholm, and Uppsala.

[7] Exceptions will be the philosophers whose work has already been covered elsewhere in this *Treatise*. This applies to Ingemar Hedenius, Per Olof Ekelöf, and Tore Strömberg, respectively discussed in Sections 17.3, 17.2, and 17.1 in Tome 2 of this volume.

prehensive survey of 20th-century Swedish legal theory and legal philosophy offered in Åke Frändberg 2005.

So here, in summary, is how we will proceed in this discussion. We start out in Section 21.2 considering the two most important influences on Swedish legal thought from 1940 to 1960, namely, analytical philosophy and logical empiricism, a period book-ended on the one hand (1940) by a shift in generations as well as in orientation among Swedish legal scholars, and on the other (1960) by the birth of jurisprudence as an academic discipline in its own right at the law faculties in Lund, Stockholm, and Uppsala through the creation of three chairs in jurisprudence. This event will accordingly become the focus of Section 21.3, where the views of three professors on the nature of the new discipline and its tasks are briefly described as a way to introduce some of the perplexities this discipline was bound to encounter. That will pave the way for Section 21.4, where I consider the influences on Swedish legal thought from 1960 to 2000. As far as strong and abiding influences are concerned, I take up modern Anglo-Saxon philosophy of language, formal logic, and the continuing influence of analytical jurisprudence. Finally, in Section 21.5, I take stock of the developments discussed by offering some final observations.

21.2. Influences from 1940 to 1960

21.2.1. Strong and Abiding: The Influence of Analytical Philosophy[8]

The "Swedish golden age of analytical philosophy" (Nordin 1984, 171; my translation) was to last from the mid-1940s to the mid-1960s. There are four philosophers who deserve mention in this context: Ingemar Hedenius, Anders Wedberg, Konrad Marc-Wogau, and Manfred Moritz. Ingemar Hedenius is covered elsewhere in this *Treatise*,[9] so I will turn immediately to Anders Wedberg, entering more closely into his main contribution to Swedish jurisprudence under the influence of analytical philosophy.

21.2.1.1. Anders Wedberg (1913–1978)

The Swedish philosopher Anders Wedberg has become famous for his contribution in philosophy and *legal* philosophy alike.[10]

Wedberg studied at Uppsala under Axel Hägerström, among others, and was impressed by the program of conceptual analysis that had been set out by the Uppsala school of philosophy. He was nonetheless open to other current

[8] On the entry of analytical philosophy into Sweden, see Nordin 1984, 146ff.

[9] On Hedenius see Section 17.3 in Tome 2 of this volume; see also Frändberg 2009a.

[10] Wedberg taught theoretical philosophy at *Stockholm Högskola* (Stockholm Academy, later Stockholm University) from 1949 to 1976. For biographical data, see Dahl 1955.

philosophical trends as well: According to Wedberg's (1966) own account, he was most influenced by the analytical philosophy coming from Cambridge, by logical positivism, and by the Oslo school,[11] in that order.

Wedberg's sojourn in the United States, from 1939 to 1943,[12] proved to be highly fruitful for his further career, for he came into closer contact with various schools of analytical philosophy as well as with modern logic.[13]

In philosophy, Wedberg's two most important works are *Plato's Philosophy of Mathematics* (Wedberg 1955) and *Filosofins historia* (The history of philosophy), the latter in three volumes published from 1958 to 1966 (Wedberg 1958–1966).[14]

Wedberg's *History of Philosophy*—his magnum opus and an enterprise that has been described as unique in Sweden—is an impressive attempt to outline the whole of Western philosophy through the methods of modern analytical philosophy: It was Wedberg's intention, as he put it, to present the "ideas of the past in a more precise way than they were described by their originators" (Wedberg 1980, 187).

This was a novel approach, and it gave rise to much criticism from the more traditional quarters (such as the departments of history of ideas). Wedberg thus felt compelled to explain as well as defend his method, and this he did in his *Introduction* to the second edition of *The History of Philosophy* (1968):[15] His method, he asserted, amounted to seeing the classical philosophers as contemporaries and to establishing whether or not their philosophical results were "correct" and their arguments "valid." The arguments put forward by the classical philosophers had to be validated by subjecting their theses to a strict schematization, that is, by formulating those theses as sentences made "more precise" with the help of the method developed by the Oslo school (cf. Nordin 1984, 184).

In legal philosophy, Wedberg made a contribution whose significance has been acknowledged ever since. Two major aspects can be pointed out.

The first lies in his distinction between "external" and "internal" sentences. The initial inspiration for this distinction came in 1941, in that Wedberg developed it by drawing on Ingemar Hedenius's distinction between *äkta* and *oäkta*

[11] The Oslo school was a philosophical movement in Norway whose fountain-head was the philosopher Arne Naess. This school investigated the function of ordinary language ("empirical semantics"), and it interestingly crops up in a textbook by Jan Evers (1993) that was highly appreciated by students of jurisprudence in the 1970s and 1980s.

[12] Wedberg had received a grant from the Sweden-America Foundation and subsequently gave lectures in philosophy at Cornell University in New York.

[13] It bears mentioning here that Wedberg, at an early age, was impressed by Hans Kelsen's theory as well: It was Wedberg who translated Kelsen's 1945 *General Theory of Law and State* into English.

[14] This history (Wedberg 1966) was translated into English and published by Oxford University Press in 1982–1984. In Sweden, the work was reprinted by Thales in 2003–2004.

[15] Mentioned in Nordin 1984, 184ff.

(genuine and spurious) legal sentences (Hedenius 1963).[16] Wedberg's distinction had important implications and would subsequently make its way into the legal theories of both Hans Kelsen and H. L. A. Hart. It will be considered more closely below.

And the second aspect, which attracted considerable attention, lies in Wedberg's treatment of the concept of rights. According to Wedberg, the term *right* designates a so-called intermediate concept and as such is without independent meaning. The concept serves an important function, though, which is to match a set of legal consequences to a set of legal grounds.

In 1944, Wedberg presented this view in a lecture he gave at the Uppsala Law Club.[17] The lecture was titled "Om juridikens grundbegrepp" (On the fundamental notions of jurisprudence).[18] In the time that followed, Wedberg's views on the concept of a right were further developed by Per Olof Ekelöf,[19] whose 1945 article would set off the curiously long-lived debate that came to be called the Scandinavian debate on rights.[20]

The idea of a right as an intermediate concept gained international recognition. However, it was not Wedberg who was credited with the idea,[21] but the Danish legal philosopher Alf Ross, who made use of Wedberg's views in his famous essay *Tû-Tû*. (Ross 1951).[22]

Let us return to what, in Sweden, is considered to be Wedberg's outstanding achievement under the influence of analytical philosophy: his distinction between "external" and "internal" sentences.

In 1951, the renowned Swedish journal of philosophy *Theoria* published what would become Wedberg's most famous article, i.e., *Some Problems in the Logical Analysis of Legal Science* (Wedberg 1951). In this article, Wedberg deals with the problem of a rational reconstruction of legal science:[23]

[16] On genuine vs. spurious legal sentences, see Hedenius 1963, 56–8.

[17] It should be pointed out, however, that this view of rights can already be found in embryo in Östen Undén (1928), as well as in Ivar Strahl (1941). It is interesting to observe that while Undén conceived of the right of ownership as shorthand for a set of legal *consequences*, Strahl (ibid., 317ff.) conceived of it as shorthand for a set of legal *facts*. On this question, see also Frändberg 2005, 380ff.

[18] Wedberg himself mentioned that the lecture was based on a mimeographed typescript having the same title (Wedberg 1951, 275). I am indebted to Professor Åke Frändberg, of Uppsala University, for kindly providing me with a copy of this mimeograph. The article based on it is included in Wedberg 1968, 1–30.

[19] On Per Olof Ekelöf see Section 17.1 in Tome 2 of this volume.

[20] On the Scandinavian debate on rights, see the comprehensive study by Nils Kr. Sundby (1968).

[21] As has been pointed out by Lindahl and Odelstad (2000, 272–3), there may have been a disadvantage in using intermediate terms in law and ethics by virtue of their indeterminate status, in that they do not lend themselves to any easy classification as being either descriptive or normative.

[22] On Ross see Chapter 16 in Tome 2 of this volume.

[23] "An outside observer may study legal science from many different angles. To psychology

Rationally to reconstruct the doctrine *Dn* is to replace it by another formulation *Dr* which is more exact than *Dn* but still somehow expresses the same set of ideas as *Dn*. (ibid., 250)

Wedberg confines himself to two problems, namely, the distinction between "external" and "internal" sentences and the concept of property (or ownership). In the following, only the first of those two problems will be taken up.

According to Wedberg, we must distinguish between two types of juristic sentences: (*i*) sentences stating the rules themselves and (*ii*) sentences stating that those rules either are or are not in force in a given society at a given time.

To state a rule is to make a statement *internal* to that system, whereas to state that a rule belongs or does not belong to that system is to make a statement *external* to that system. From the perspective of legal science, Wedberg asserts, the statement of a rule *P* "is always, somehow, incomplete unless it is accompanied by an external element to the effect that *P* is (or is not) in force in a society *S* at a time *t*" (ibid., 253).

According to Wedberg (ibid., 254–5), it is a central task for the logical analysis of legal science to clarify the role of external statements and, furthermore, to establish their scientific status. He proceeds by asking two questions: (*i*) What exactly do we mean by saying "*P* is in force in Sweden now?" and (*ii*) How can we arrive at an adequate definition of that sentence, that is, a definition that can be useful *scientifically*?

In answering these two questions, Wedberg takes as his point of departure the jurists' *use* of the sentence "*P* is in force in Sweden now." This is no coincidence. For although he denies that the question can be settled in light of what jurists may think about the sentence (which can be true or false, and may even have a different nature), he notices that the manner in which the sentence is actually *used* seems to be quite stable.[24] Accordingly—and starting from the *use* of the sentence—Wedberg accepts a definition of the sentence as adequate

if and only if the definiens is a "necessary and sufficient condition" for the definiendum: i.e., if the definiens can be truthfully stated of any rule *P* of which the definiendum can be truthfully stated, and conversely; or if definiens and definiendum delimit exactly the same set of rules. (Wedberg 1951, 255)

In studying contemporary Swedish law, Wedberg finds that "its factual basis consists of a set of facts *F* and that the legal interpretation of *F* consists in a certain method of reasoning *M*" (ibid.). This enables him to arrive at the following definition of the sentence in question:

and sociology the legal phenomena offer a rich and varied field of investigation. However, there is also another, perhaps more artificial but still legitimate and important point of view [...] which perhaps may be called that of *logical analysis* or *rational reconstruction*" (Wedberg 1951, 250).

[24] "Concerning a very large body of rules *P* most contemporary Swedish jurists agree when it comes to deciding whether [the sentence "*P* is in force in Sweden now"] can be *truthfully* stated or not" (Wedberg 1951, 255; italics added).

P is in force in Sweden now $=_{\text{def}}$ *P* is obtainable by applying *M* to *F*. (ibid.)

As far as the roles of *internal* and *external* sentences are concerned, Wedberg points out that there is a characteristic difference between the practical jurist (the judge or lawyer) and the legal scholar (the law professor) as regards their respective attitude to these sentences. While the interests of the former are mainly directed at finding the legal rule that applies to the case at hand (and are consequently focusing on the contents of the rule, not on whether the rule is part of the law), the interests of the latter are directed at ascertaining what rules actually belong to the law. Accordingly, the practical jurist is mainly interested in the *internal* sentences (i.e., those that state the legal rules themselves), whereas the legal scholar's (theoretical) interest is focused on *external* sentences (ibid., 258–9).

But what about the *scientific* status of external and internal sentences? As Wedberg had previously shown, the *external* sentence "*P* is in force in Sweden now" can adequately be defined, among other ways, by proceeding from the factual basis of legal science and the method of legal interpretation. "If such a definition is adopted, the external sentences become sociological, in a wide sense of the term" (ibid., 260). By combining logical and empirical methods, then, we can decide "whether a given rule is in force in *S* at *t*. In this sense, the external sentences of legal science undoubtedly possess a scientific quality" (ibid.).

It is a different situation that we are looking at, however, when the legal scholar asserts *internal* sentences as well, that is, sentences stating legal rules: The assertion of internal sentences cannot be claimed to be part of any scientific activity.[25] Therefore, the assertions of a rationally reconstructed legal science "should mainly be assertions of external sentences" (ibid., 261).

In conclusion, in Wedberg's view, the assertions of a rationally reconstructed legal science should mainly be assertions of *external* sentences; *internal* sentences (those that express legal rules) should, by contrast, be asserted only when they are factual and when their truth can be ascertained empirically.

And this view, as Wedberg (1951, 261 n. 13) hastens to add in a footnote, is not invalidated by the observations that Ingemar Hedenius had made ten years earlier, namely, that a legal scholar uttering a sentence expressing a legal rule *P* is frequently using an "elliptical" mode of speech: Although the scholar's sen-

[25] The assertion of internal sentences is, as Wedberg puts it, "no more a genuine science than is an intellectual activity which proceeds on the assumption of the Axiom of Naive Biblical Theology" (Wedberg 1951, 261). Wedberg's meaning here is far from clear. What he *seems* to have had in mind is the propensity of "naive" jurists to jump from the (descriptive) statement (*i*) "*P* is valid law" to the (normative) conclusion (*ii*) "*P* shall be obeyed"—a propensity similar to that of a "naive" theologian to jump from (*i*) "*P* is a biblical assertion" to (*ii*) "*P* shall be a moral standard."

tence literally expresses rule *P*, the point of the sentence is often not to state *P* as such but merely to state that *P* is in force, here and now, or, in other words, that *P* is valid.

Apart from Wedberg, two other philosophers ought to be mentioned who were also initially drawn to some of the main tenets of the philosophy done at Uppsala, but who subsequently became strongly influenced by Cambridge philosophy. These two philosophers, who also concerned themselves with *legal* philosophy, are Konrad Marc-Wogau and Manfred Moritz.

21.2.1.2. Konrad Marc-Wogau (1902–1991)

In Sweden, Konrad Marc-Wogau is known as the nestor of Swedish analytical philosophy.[26] Unlike Hedenius and Wedberg, he belonged to the "old" school of philosophers who preferred to write in German (his main work, for example, is *Die Theorie der Sinnesdaten*, Theory of the objects of perception, of 1945).

Marc-Wogau was professor of theoretical philosophy at Uppsala University. A disciple of Adolf Phalén (1884–1931), he was influenced by logical empiricism (see Section 21.2.2; cf. Nordin 1984, 157) as well as by the analytical philosophy coming from Cambridge (Moore, Russell, and C. D. Broad).[27] Marc-Wogau's tendency to stress the similarities between the national philosophy done at Uppsala and international philosophical trends comes through even in the title of his 1947 inaugural lecture: "Uppsalafilosofin och den logiska empirismen" (Uppsala Philosophy and Logical Empiricism: cf. Nordin 1984, 157).

Apart from investigating the work of Kant and Hägerström (see Marc-Wogau 1968), Marc-Wogau published books on modern logic. Also, he edited a well-known four-volume anthology titled *Filosofin genom tiderna* (Philosophy over time: Marc-Wogau 1976). In his *Preface* to Volume 1, he emphasizes that the main purpose of this monumental work is to outline the evolution of "scientific" philosophy.

Furthermore, there is Marc-Wogau's (1961) popular textbook on how to study philosophy as an academic discipline. Having criticized or dismissed a whole series of philosophical schools, Marc-Wogau presents what he understands to be the correct—i.e., scientific—philosophy, namely, analytical philosophy. Taking as his point of departure the term *explication* (coined by Rudolf Carnap), he describes the analytical method as consisting in the analysis of a sentence by "translating" it into a formal (constructed) language. This is not so much about offering an equivalent translation as it is about *improving* a sentence and making its content more precise (cf. Nordin 1984, 175).

[26] On Konrad Marc-Wogau, see Nordin 1984, 173–7; see also Halldén 1992.

[27] It is noteworthy that Marc-Wogau disliked Oxford Philosophy (i.e., the later Wittgenstein), finding its method of analyzing everyday language "inexact" (see Nordin 1984, 176).

In the philosophy of law, Marc-Wogau made two important contributions in the form of two early articles published in the journal *Theoria*:[28] *Über die Begriffe "bindende Kraft des Rechts," "Rechtspflicht" und "subjektives Recht"* (On the concepts of the binding force of law, legal obligation, and rights: Marc-Wogau 1940) and *Zum Begriff des subjektiven Rechts* (On the concept of rights: Marc-Wogau 1941).

21.2.1.3. Manfred Moritz (1909–1990)

Moritz was a German philosopher who came to Sweden in 1934.[29] In due course (in 1959), he would become professor of practical philosophy at Lund University, where he taught until 1975.

Moritz's research covers Kant's moral philosophy, 18th-century British moral philosophy (which he investigated applying the tools of analytical philosophy), meta-ethics, and the problem of freedom of the will. He also made important philosophical contributions outside practical philosophy, especially in the general theory of norms and, in later years, the philosophy of law.[30]

Moritz had a considerable role in helping to keep the Uppsala school to some extent alive at a time when its influence had been rapidly dwindling, after the death of Hägerström and his immediate followers (see Frändberg 2005, 392). He embraced Hägerström's value nihilism in ethics and in legal philosophy and would therefore come to repudiate deontic logic. The possibility of a logic of norms had already been dismissed by Hedenius, and Moritz emphasized this point even more. According to Hägerström himself, his emotive theory implied the impossibility of a logic of value statements and normative statements. Moritz was vigorous in arguing for this impossibility, and his criticism was directed specifically at modern versions of deontic logic.[31]

Apart from an article on the practical syllogism and on juristic thinking (Moritz 1954), Moritz's two most important contributions in legal philosophy are his monograph on the concept of a juristic person (Moritz 1971) and his work *Über Hohfelds System der juridischen Grundbegriffe* (On Hohfeld's system of fundamental legal concepts: Moritz 1960). In the latter work, he takes up the issue of how best to understand the set of four fundamental legal con-

[28] In 1936, Marc-Wogau became editor-in-chief of *Theoria.* This journal had been founded the year before, in 1935, with Åke Petzäll as editor-in-chief and Marc-Wogau and Gunnar Aspelin as co-editors (see Nordin 1984, 21).

[29] Additional biographical details can be found in the obituary for Moritz written by Göran Hermerén (1992).

[30] See Hermerén 1992, 1. In the 1960s, Moritz published a series of articles in and on the philosophy of law. In 1973, he was awarded the title of *doctor honoris causa* by the law faculty of Lund University (ibid., 2).

[31] But Moritz is in the minority here: Kanger and Åqvist were by contrast very interested in deontic logic.

ceptions of a right expounded by the American jurist W. N. Hohfeld. This question would subsequently also be addressed by Stig Kanger and Lars Lindahl (see Section 21.4.1.1.1 below).

21.2.2. Transitory Influences: Logical Empiricism

Logical empiricism, also referred to as logical positivism, or neopositivism,[32] originated in Vienna in the late 1920s and reached its heyday in the mid-1930s. The "embryo" of this movement was the so-called Vienna Circle, which formed around Moritz Schlick, professor of philosophy.[33] Although the movement developed out of Vienna, its centre, it also had epicentres in Cambridge, with its analytical school, and Oxford. At an early stage, the impulses from Vienna reached Scandinavia as well: The "messengers" were Jörgen Jörgensen (1894–1969) in Denmark, Eino Kaila (1890–1958) in Finland, Arne Naess (1912–2009) in Norway, and Åke Petzäll (1901–1957) in Sweden (cf. von Wright 1972, 6ff.; 1978, 188).

The term *logical empiricism* indicates the two sources from which the movement initially drew its inspiration, namely, mathematical logic (as developed by Russell) and the empirical theory of knowledge (cf. Wedberg 1966, 211).

The members of the Vienna Circle enthusiastically embraced many of the ideas the early Wittgenstein expressed in the *Tractatus*, such as the idea that metaphysics is meaningless; that any meaningful philosophy must be some sort of language criticism; and that analytical propositions are *a priori* but empty, while synthetic ones must be empirically verified.

At an early stage, logical empiricism put forward a series of theses—among which the thesis of the emptiness of metaphysics, coupled with the verification principle—that, not unlike slogans, expressed a vague view about the "conditions for thinking" and served as a unifying theme for the various members of the movement, all of whom rejected "metaphysics" and "traditional philosophy" (ibid., 212; my translation).

Among the Swedish philosophers who embraced logical empiricism (even if they did not devote their entire careers to it) are the previously considered Anders Wedberg and Konrad Marc-Wogau. But also worthy of mention is Björn Ahlander, and since he has not yet come up, the discussion that follows will be entirely devoted to his work.

[32] On this current, see Wedberg 1966, 210ff.

[33] Other members were Rudolf Carnap, Otto Neurath, and Felix Kaufmann. The publication announcing the formation of the Vienna Circle in 1929 was the manifesto *Wissenschaftliche Weltauffassung* (The scientific conception of the world).

21.2.2.1. Björn Ahlander (1920–1982)

Björn Ahlander is credited with having introduced logical empiricism to Swedish legal philosophy.[34] This was in 1950. Strictly speaking, however, and considering philosophy in general, it was Åke Petzäll (1901–1957) who, as early as 1931, had introduced the salient features of this school in Sweden, with his publication *Logistischer Positivismus* (Logical positivism: Petzäll 1931).[35]

Although Ahlander's scholarly production is not extensive, it is highly original. Two years before submitting his doctoral dissertation, he published the work he would become famous for: a monograph intriguingly titled *Är juridiken en vetenskap?* (Is law a genuine science?: Ahlander 1950).[36] Ahlander's point was that legal rules can be understood, as both theoretical and practical sentences, on the basis of the function they serve in actual juristic argumentation. It is not Ahlander's intention to confer any new meaning on the term *legal rule*: His theory is concerned with the *use* of such terms, addressing their claim to correctness. A theory, he argues,

> can be accepted as correct if legal rules in theoretical juristic argumentation are employed in the same way that laws, theories, and assumptions are employed in natural science in general. Otherwise, the theory is incorrect. (Ahlander 1950, 131; my translation)

Legal rules (*rättsregler*) are general assumptions about the *meaning* of the terms and expressions contained in legal statements (*rättssatser*) (ibid., 160). Ahlander now sets out to scientifically verify what are called legal rules. It is at this point that logical empiricism comes into play.

According to Ahlander, from every theoretical legal sentence consequences can be deduced "that can be tested by means of empirical study of the legal statements [*rättssatser*] that exist in a given society" (ibid., 79; my translation). Thus, Ahlander is seen to embrace the logical empiricist view that sentences "from which no such consequences can be deduced are [...] without scientific interest" (ibid., 34; my translation): If a sentence is to have any theoretical meaning, it must accurately state "the conditions under which the sentence can be verified or falsified" (ibid., my translation; cf. Frändberg 2005, 384).

As a theoretical discipline, legal philosophy is tasked only with analyzing and defining the *meaning* of fundamental legal concepts, and this must be done on the basis of the way in which these concepts are used by legal participants (Ahlander 1950, 44). Or, in other words:

[34] Ahlander was awarded a doctor of laws degree from Uppsala in 1952 and was a journalist. He worked as a press attaché in Washington, D.C., from 1955 to 1959, and then as a correspondent for Sveriges Radio, first in Washington (1959–1968) and then in Moscow (1969–1971). In 1971 and 1972, he served as editor-in-chief of *Göteborgs Handels- och Sjöfarts-Tidning*, and after 1972 he worked for *Svenska Dagbladet.* He wrote several books on the United States.

[35] Nordin (1984, 146) suggests that it may have been Petzäll who arranged the visits Carnap made in the 1930s to the philosophical societies in Lund, Gothenburg, Stockholm, and Uppsala.

[36] See the review by Wedberg 1952.

> If research in legal philosophy is intent on addressing its problems in a fruitful way, it must be careful not to endow its concepts—and consequently also the concept "legal rule"—with *more* meaning than is necessary for the use the law [*juridiken*] makes of them. (Ibid., 74; my translation)

And with a "swipe" at strictly behaviouristic legal theories, Ahlander proceeds to comment thus:

> Anyone claiming that the term *legal rule* denotes factual regularities has neglected the study of how legal rules are actually used in the law [*juridiken*]. For such a study will show, and in a way not to be doubted, that the concept has been loaded with much more than is warranted in the actual technique of legal argumentation. (Ibid.; my translation)

Ahlander's terminology is unusual and—it must be admitted—not easy to render in English. Alongside his inquiries into the nature of what are commonly called "legal rules," he distinguishes between *rättssatser* and *juridiska satser*.

Rättssatser are linguistic expressions, normally found in statutes, regulations, and judicial decisions. They are characterized by an important quality, their "being official"; that is, *rättssatser* are uttered or written by officials in their capacity as officials (Ahlander 1950, 78).

Juridiska satser, on the other hand, are of a different nature. Their distinguishing feature is that they are *about* the former: They are either about *rättssatser* or can be transformed into sentences about them.

> Some of them [i.e., some *juridiska satser*] express assumptions or assertions, while others express evaluations. The former can be called theoretical juristic sentences, or juridico-scientific sentences; the latter can be called juristic value judgments, or juristic value sentences. (ibid.; my translation)

Thus, *juridiska satser* can be conceived as both theoretical sentences and practical (evaluative) sentences: "This is the case even with those [*juridiska satser*] that express legal rules [*rättsregler*]" (ibid., 130; my translation). In Ahlander's view, then, we can speak of a specific "juristic argumentation technique" (an expression he coined): It is a technique that is part scientific, part grounded in evaluation.[37]

21.3. Setting the Stage: Jurisprudence as an Independent Academic Discipline at Swedish Law Faculties

In the late 1950s in Sweden, legal education was overhauled, and in the process there were established three special chairs in jurisprudence (*Allmän rättslära* in Swedish). The discipline was introduced in the 1961–1962 academic

[37] Ahlander distinguishes between "valid legal rules" (*gällande rättsregler*) and "plausible legal rules" (*plausibla rättsregler*). If the conclusion of an argument is scientifically tenable, it counts as a "valid" legal rule; on the other hand, a sentence *not* supported by any scientifically tenable argument, but only by arguments permitted within the juristic argumentation technique, is a "plausible" legal rule (Ahlander 1950, 130).

year at the law faculties of three major Swedish universities: At Lund, the chair was assigned to Tore Strömberg, who thus became Sweden's first professor in the discipline; the one at Stockholm was assigned to Ivar Agge; and the one at Uppsala to Lars Hjerner.

Although the *chairs* in jurisprudence were new, the subject was not. In the mid-19th century, before jurisprudence was introduced into the curriculum of Swedish law faculties, the subject was preceded by the *Juridisk encyklopedi* (juristic encyclopaedia).[38] This subject, which did not have specially designated professors of its own, was concerned with the fundamental features of the philosophy of law and the historic development of legal theories, as well as with the formation of juristic concepts and with general legal doctrines.[39]

In the decades preceding the 1958 reform, legal theory and methodology had received a significant impetus as subjects of academic study: This, it may be supposed, was due to an increased interest in theoretical and methodological issues in law, an interest that had been encouraged by the philosophers of the Uppsala school and the representatives of Scandinavian legal realism (Strömholm 1976, 190). At the same time, it was claimed that the future generation of Swedish lawyers ought to show a greater awareness of legal method. In short, the older *juristic encyclopaedia* was judged inadequate for a proper law curriculum: It was being taught as a first-year foundational course, but now it came time to give it a broader scope and a role of greater prominence within that curriculum.[40]

The inaugural lectures held by the three new professors are revealing with respect to the question of how to define jurisprudence itself (*Allmän rättslära*), that is, how to characterize its nature and tasks in distinction to those of legal science (i.e., the doctrinal study of law) and the philosophy of law. In other words: What exactly are the contents and tasks specific to *Allmän rättslära*, justifying its having graduated to the status of an independent academic discipline?

In the following, I will sketch out the three inaugural lectures just mentioned, using them as a yardstick by which to judge the extent to which jurisprudence has been following the outline that was drawn for it around 1960.

[38] On the history behind the *juristic encyclopaedia* and its roots in Germany, see Sundberg 2005, 434–5.

[39] As Strömholm (1976, 190) points out, this was true of the 1935 curriculum (*1935 års studieordning*).

[40] It may be interesting to note that in 2010, Lund University made jurisprudence once again an introductory course, moving it back to term 1 in the curriculum after many years of teaching it in terms 6 and 7. It also deserves mention that the new discipline was initially taught in connection with comparative law, which subsequently was replaced at different intervals with the history of law, with legal informatics, and with Law and Economics. At the law faculties of Uppsala University and Stockholm University, by contrast, the course in jurisprudence has always been placed toward the end of the law curriculum.

21.3.1. Tore Strömberg (1912–1993)

In his inaugural lecture,[41] Tore Strömberg (1962a, 273) conceived of the new discipline as being "the result of a division of labour" within the doctrinal study of law. He expressed the view that, as much as jurisprudence (*Allmän rättslära*) may not be identical with the philosophy of law, it is nevertheless largely inspired by it. Therefore, one of the foremost functions of the new discipline must consist in bringing legal philosophy to bear on the study of law (ibid., 276). There were two things that jurisprudence had to do to this end: First, it had to proceed from unequivocally legal-philosophical premises; and, second, it had to concern itself exclusively with concrete legal material. By adhering to these two principles, jurisprudence would earn its status as a free-standing discipline—formally separate from the philosophy of law—and in the main it would also be able to claim a scientific status (ibid.).

Strömberg also had a view about the Swedish name for the new discipline, *Allmän rättslära*, which he thought was not enlightening: Speaking for himself, he preferred the term *Rättsteori* (that is, legal theory) which, while not identical to *Allmän rättslära*, seemed to him to be the stricter of the two (ibid., 273).

According to Strömberg (ibid.), there are only three tasks for jurisprudence to fulfil: The first is to work out an approach to the fundamental problems common to all fields of law (*hela juridiken*); the second is to explain, further develop, and possibly revise legal systematics (legisprudence); and the third is to provide a comprehensive survey of the legal order, similarly to what had previously been envisioned for the former *juristic encyclopaedia*.

If we rigorously assign these three tasks to jurisprudence—and Strömberg was specific about there being no other tasks—then jurisprudence will be seen to emerge as a genuine, autonomous academic discipline, coordinated with the special branches of law and, together with them, forming a self-sustaining whole.

Strömberg taught jurisprudence at Lund for many years, from 1961 to 1977. Naturally, his jurisprudential thought would have considerable impact on the discipline. Interestingly, the course material he produced would be retained long after his retirement.[42]

Strömberg belonged to the school of Scandinavian legal realism and was rooted in the tradition of the Uppsala school.[43] However, he did much more than merely follow in Karl Olivecrona's footsteps: In his analysis of the mean-

[41] Tore Strömberg's inaugural lecture, held on March 17, 1962, was published under the title *Uppgifter för den allmänna rättsläran* (Tasks for jurisprudence: Strömberg 1962a).

[42] According to a record dated December 9, 1997, the course readings in jurisprudence at the law faculty of Lund University consisted of Peczenik 1995b, Simmonds 1988, and the most recent editions of Evers 1970 and Strömberg 1962b.

[43] Strömberg has been described as "the last orthodox representative of the Uppsala school" (Frändberg 2005, 383).

ing of the term *legal validity*, Strömberg arrived at valuable psychological insights.

Strömberg's well-known textbook *Inledning till den allmänna rättsläran* (An introduction to jurisprudence: Strömberg 1962b) came out in 1962 in the form of a course compendium. Published in book form in 1964, this work was used as a textbook from 1970 to 1992: It went through eight editions, the last one dating to 1981.

Next to that work, Strömberg also included a slim but weighty booklet as a mandatory reading for his course on jurisprudence. It was titled *Rättsfilosofins historia i huvuddrag* (Main features of the history of legal philosophy: Strömberg 1989), and it, too, first appeared in the form of a course compendium. In book form, it was used as a textbook from 1970 to 1998 (in 1989, the book had gone through four editions).[44]

21.3.2. Ivar Agge (1903–1978)

Views similar to Strömberg's were expressed by Ivar Agge, professor of jurisprudence at Stockholm.[45] Even so, Agge did not hesitate to equate jurisprudence with the philosophy of law, since it is well-nigh impossible, in his view, to draw a clear dividing between them.

Agge (1967, 560–1) emphasized that even though jurisprudence and legal philosophy use different methods, they are concerned with the same types of questions. Indeed, the two disciplines have a common task, namely, to inquire into (*i*) the theoretical problems concerning the nature and functions of the legal order, (*ii*) the ideas and ideologies characteristic of legal science, and (*iii*) the methods employed in adjudication.

In Agge's view, the most important task for jurisprudence is methodological (where he included the doctrine of the sources of law). Another important task consists in co-ordinating the study of law (*juridiken*) with other branches of science (Agge 1955, 3 n. 1). Here too, Agge thought, the matter comes down to a "conventional division of labour" (ibid., 3ff.): Issues concerning legislative technique, the practical application of law, and the interaction between rules pertain to jurisprudence, whereas legal philosophy is concerned with the strictly theoretical discussion about the "nature" of the legal order and with the logical analysis of the conceptual apparatus in the doctrinal study of law (ibid., 4).

In contrast to Strömberg, Agge did not object to the Swedish term *Allmän rättslära.* He used it for

[44] On Strömberg see also Section 17.1 in Tome 2 of this volume.

[45] Ivar Agge's inaugural lecture has unfortunately gone lost, and the following account therefore relies on Agge 1955 and Agge 1967.

that part of legal dogmatics that deals with general juridico-technical and juridico-systematic issues, with the functional connection between different legal rules and legal concepts, with the relation between social ideologies and the legal order in force, and, finally, with the method for the practical application of law. (Agge 1955, 3 n. 1; my translation)

In principle, Agge welcomed the tendency of Swedish legal science to break out of the isolation it had gone into under the all-pervasive influence of the Uppsala school of philosophy. Indeed, he cautioned against an exaggerated "scientific realism" (ibid., 5) which in the long run would lead to the "sterilization" (ibid., 4) of legal science. But at the same time he cautioned against expanding jurisprudence too eagerly into the sociology of law as a strictly empirical discipline.[46] In his view, jurisprudence ought to serve as an "observation post" (ibid., 16), seeing to it that the boundary between the law (*juridiken*) and the (empirical) social sciences remained intact.

When the chair in jurisprudence was established at Stockholm in 1961–1962, its new holder, Professor Ivar Agge, did not have to look far for adequate course literature. He assigned to his students a textbook—*Huvudpunkter av den allmänna rättsläran* (The main features of general jurisprudence)—that had previously been in use for the new discipline's "forebear," the *juristic encyclopaedia.* In book form, the work appeared in 1972 (Agge 1972) and would go through three editions, the last one dating to 1980. It is not an exaggeration to say that for several generations of Swedish jurists, Agge's book was *the* textbook of jurisprudence. As such, it shows the extent to which the Uppsala school was influential, but it should also be noted that Agge did not embrace this movement wholeheartedly, always keeping some distance from it (Frändberg 2005, 379).

Ivar Agge taught jurisprudence at Stockholm University for nearly a decade, from 1961 to 1970. He was succeeded by Professor Jacob W. F. Sundberg, who held this chair for an even longer period, from 1970 to 1993.

During his tenure, Jacob W. F. Sundberg (1927–)[47] contributed importantly to the history of ideas in jurisprudence with his monograph *From the Edda Poem to Ekelöf* (Sundberg 1978).[48] In a broad sweep from ancient times to the present, Sundberg lays out a meticulous investigation into the relative significance of the sources of law in the Scandinavian countries. Emphasizing the close relationship that various sources of law bear to certain classes of per-

[46] Interestingly, Agge would later offer a sociological definition of the sources of law as consisting of factors, or "forces," that lead to changes in the content of legal rules (Agge 1972, 44; cf. Frändberg 2005, 379).

[47] Jacob W. F. Sundberg is director of studies at the Stockholm Institute of Public and International Law (IOIR), founded in 1943.

[48] This was Sundberg's major work, which from 1979 on was an optional reading in the syllabus at both Uppsala and Stockholm. Sundberg published a "continuation" of it in the form of the book *Från Ekelöf till Europa* (From Ekelöf to Europe: Sundberg 2004), where he discusses the significance of the European Convention on Human Rights for Swedish law.

sons (such as lawmakers, judges, and legal scholars), he argues that of all the sources, it is *customary* law—understood as close to "ordinary people"—that must be seen as fundamental relative to the others.[49]

21.3.3. Lars Hjerner (1922–2006)

Lars Hjerner,[50] professor of jurisprudence at Uppsala, also had resolute views on the new discipline, *Allmän rättslära*.[51] In fact, in 1963, in his inaugural lecture, he seized the opportunity to lay out in no uncertain terms what he saw as the current state of Swedish jurisprudence.[52]

Hjerner mentioned the intimate connection between jurisprudence, the philosophy of law, and the sociology of law. To be sure, he did see the need to discuss the "nature" of law, the concepts of valid law and of legal rights, and the function and effect of legal rules. But he did not see those as the only issues that jurisprudence should focus on, nor—in reply to Strömberg (1962a, 276)—should it be the main task of jurisprudence to bring the philosophy of law to bear on positive law: Such a task, Hjerner thought, would be "both too narrow and too exclusive" (Hjerner 1966, 578).

In his lecture, Hjerner opines that the three new chairs in jurisprudence had been created not specifically to address the scientific study of law but as "ordinary" chairs in law: Jurisprudence was meant to offer "deeper insight into legal method as well as into the similarities and differences between the various parts of the legal order" (ibid.; my translation).

The focus of the new discipline ought to be on questions of method common to *all* areas of legal activity, such as legal drafting and statutory interpretation.

As concerns legal education, jurisprudence ought to be concerned above all with legal method. Here, Hjerner was mainly referring not to the various

[49] On Jacob W. F. Sundberg's work, see generally Frändberg 2005, 386–7.

[50] Lars Hjerner was professor of civil law and international law at Stockholm University from 1958 to 1962. He then taught jurisprudence at Uppsala University from 1963 onward. He was succeeded by Professor Stig Strömholm in 1969.

[51] Lars Hjerner's inaugural lecture, held on October 12, 1963, was published under the title *Den allmänna rättsläran—ett nytt ämne och något om dess uppgifter* (Jurisprudence: A new discipline; A few words about its tasks, Hjerner 1966).

[52] Specifically, Hjerner called into doubt P. O. Ekelöf's teleological method of interpretation and A. V. Lundstedt's theory of social welfare (Hjerner 1966, 579–80). In Hjerner's view, the teleological method, "an outgrowth of social welfare and value nihilism," would result in a tendency to thrust into the background, and devaluate, the letter of the law in favour of what is conceived as the legislator's intention or as social welfare (Hjerner 1966, 580; my translation). Hjerner was also critical of American legal realism: Reducing the question of valid law to a prediction about the way the courts will act is, in his view, "not particularly realistic" (ibid., 581; my translation). In brief, Hjerner took the view that things had gone too far and that it was time to react: Legislation should be left to the legislator, while the courts should content themselves with applying the law. The letter of the law should be given a more prominent place, for, after all, "one cannot with impunity endow words with any meaning whatsoever" (ibid.; my translation).

methods of interpretation but to those skills one can expect from "a good lawyer" (ibid.). In the second place, jurisprudence ought to investigate the doctrine of the sources of law. A third task, finally, is to inquire into the rules for dealing with conflict of laws (ibid., 584).

In what concerns jurisprudence as a research discipline, Hjerner mentioned tasks of *immediate* practical significance for modern business life (such as the task of analyzing the current concept of contract) as well as tasks of *future* relevance: Here, he was thinking of "supranationalism" (ibid., 589) and the implications of the 1957 Treaty of Rome, establishing the European Economic Community.

Interestingly, there is an early "coherentist touch" to Hjerner's jurisprudential thinking. He hinted that it was time to recall the values embedded in natural-law theory, examples being the value of coherence in the legal order, the importance of understanding legal rules in relation to the system of rules as a whole, and the need to pay attention to historical development. In brief, Hjerner's "message" was, again, that we ought to recognize *continuity* within the legal order as a value in itself (ibid., 581).[53]

Not surprisingly, Hjerner's most important contribution to jurisprudence was on the question of method. As early as 1961, he published the course lectures titled *Om rättsfallstolkning* (Case interpretation: Hjerner 1961). The book came out in several editions (the last time in 1982) and was a mandatory reading in jurisprudence at both Uppsala University and Stockholm.

Lars Hjerner's successor to the chair in jurisprudence at Uppsala was Professor Stig Strömholm (1931–). During his tenure, from 1969 to 1982,[54] Strömholm wrote both extensively and manifoldly in jurisprudence. His major work in jurisprudence—titled *Om rätt, rättskällor och rättstillämpning* (On law, the sources of law, and the application of law: Strömholm 1981)—is an exhaustive and masterly treatment of the subject: It thus served as a mandatory reading at Uppsala from the autumn term of 1981 until the end of the century, and it went through five editions, the last one dating to 1996.

Strömholm's most significant work, even from an international perspective, is probably his famous contribution to the history of ideas in jurisprudence, namely, *A Short History of Legal Thinking in the West* (Strömholm 1985). As the author points out in the preface, the expression *legal thinking*—in distinction to both the philosophy of law and legal scholarship in general—ought to be understood as attempting to cover two elements, namely,

[53] These evaluative criteria, akin to the values that might be embedded in natural law, form part of the legal method propounded by Hjerner.

[54] In 1982, Strömholm left the chair of jurisprudence to become professor in civil law and international private law, at the same university, from 1982 to 1997. From 1989 to 1997, he was *Rector Magnificus* (vice chancellor) of Uppsala University.

not only theory-building about what the law is, as a body of rules [...] and an element of social organization and social realities, but also thinking about the principal problems raised by the exercise of the lawyer's craft, in particular those related to interpretation of statutes or precedents (Strömholm 1985, 5).

Spanning across Western jurisprudential thought from antiquity to the year 1900, this study in the history of jurisprudence focuses on fundamental ideas and outstanding writers (and consequently ought to be read together with a selection of original texts).[55]

21.4. Influences from 1960 to 2000

21.4.1. Strong and Abiding Influences

21.4.1.1. Anglo-Saxon Philosophy of Language

Modern Anglo-Saxon philosophy of language came to Sweden in two waves: The first one was American—it started in the 1920s, originating from the theory of fundamental legal conceptions developed by the American jurist Wesley Newcomb Hohfeld; the second one was English and started in the 1950s, originating from the ordinary language philosophy done at Oxford, which was then the locus of that sort of investigation.[56]

In what follows, I will first describe the early reception of Hohfeld's theory in Sweden through Manfred Moritz and the theory's further development by Stig Kanger and Lars Lindahl (Section 21.4.1.1.1), and then, having mentioned J. L. Austin's influence on Mats Furberg and Karl Olivecrona, I will look more closely at the way the philosophy of language "broke through" in Sweden with the work of Nils Jareborg (Section 21.4.1.1.2).

21.4.1.1.1. W. N. Hohfeld and His Theory of Basic Types of Rights

The American jurist W. N. Hohfeld (1879–1918) investigated legal language as used by the courts.[57] He became famous for introducing a conceptual framework within which to discuss what he called "changes in legal relations" (cf. L. Lindahl 1977, 193). His analyses were first published as articles from 1913 to 1917 and then, after his death in 1918, in book form under the title *Fundamental Legal Conceptions* (Hohfeld 1919). His aim was to arrive at "the lowest common denominators" of jural relations.

[55] Strömholm's many-sidedness is evidenced as well by his collection of essays (Strömholm 1979). Strömholm is also an accomplished belletristic writer, with over twenty novels to his name.

[56] In contrast to logical empiricism, whose inspiration was the early Wittgenstein's *Tractatus*, the Oxford school was inspired by his later philosophy, and in particular by his posthumous *Philosophical Investigations*, of 1953.

[57] In this section, I will be relying on the account of Hohfeld's theory in Eng 2007, 145–9.

Hohfeld wanted to arrive at a list of all possible relations between two legal persons. His basic thesis was that anything of legal relevance—including rights (*rättigheter* in Swedish)—can be expressed as aspects of this relation. In particular, it can be expressed through four relations he identified (Eng 2007, 145ff.).

His investigation accordingly starts out with a division of jural relations, analyzing on the one hand aspects of duty and on the other aspects of power.

In connection with the aspects of duty,[58] Hohfeld identified the following two main relations:

claim ("right")—duty
non-claim (no-right)—privilege

In connection with the aspects of power, he instead identified the following two main relations:

"power"—liability
disability—immunity

In sum, Hohfeld showed, first, that what we call rights can always be analyzed as claims, privileges, powers, or immunities (or as combinations of these) and, second, that a legal system correlates each of these elements with a certain normative modality in relation to another person: Always correlating with a claim is somebody else's duty; always correlating with a privilege is somebody else's no-claim; always correlating with a power is somebody else's liability; and always correlating with an immunity is somebody else's disability (see Eng 2007, 146; cf. L. Lindahl 1977, 25).

Hohfeld's analyses were greatly influential on legal theorists and lawyers alike. His project as stated—to identify the lowest common denominators in legal language, and specifically in the language of rights—was intriguing. Prominent among the Swedish legal philosophers who built on Hohfeld's theory were Manfred Moritz, Stig Kanger, and Lars Lindahl. Let us briefly consider them in turn.

Manfred Moritz (1909–1990) is responsible for introducing Hohfeld's theory to a Swedish audience: He did so with his book *Über Hohfelds System der juridischen Grundbegriffe* (On Hohfeld's system of fundamental legal concepts: Moritz 1960), where he analyzes Hohfeld's distinctions among different types of rights and explains his account of the relation between a claim and a duty.

Hohfeld's analysis of rights was further developed and refined by one of Sweden's most renowned logicians, Stig Kanger (1924–1988), who in a 1966

[58] The four concepts in this group are closely related to the concepts a right (to a service), obligation, and liberty in Bentham and Austin (cf. L. Lindahl 1977, 25).

article, *Rights and Parliamentarism* (Kanger and Kanger 1966, 86ff.), distinguished and defined eight "simple types of rights" and proceeded to set out the logical relations between them (ibid.). By combining these types of rights and their negations, and by eliminating all redundant or inconsistent combinations, Kanger arrived at twenty-six "atomic" types of rights, representing existing and more-complex legal positions (such as the position we find ourselves in as owners of an estate) (Kanger and Kanger 1966, 93ff.; cf. Frändberg 2005, 384).[59]

As for Lars Lindahl (1936–),[60] he has written in both jurisprudence and theoretical philosophy and is also the author of what has turned out to be one of the most impressive works in Swedish legal theory, namely, his doctoral dissertation, *Position and Change: A Study in Law and Logic* (L. Lindahl 1977).

As stated in the preface (ibid., VII), this work investigates an area of the general theory of law the author calls the "theory of *legal positions*." Lindahl—a disciple of Kanger—further develops here the logical tools made available by Kanger and applies them to *legal* acts (or acts in the law, such as forming a contract or making a will).

The book divides into two main parts. In Part 1 ("Basic Types of Legal Position"), Lindahl offers a survey of the theories of Bentham, Austin, Hohfeld, and Kanger with a view to situating his own theory of legal positions in its proper historical context.[61] With that done, he proceeds to set out his theory of basic types of legal positions (chapters 3–5). He constructs three basic systems of legal positions, namely, (*i*) the system for one-agent types, (*ii*) the system for individual two-agent types, and (*iii*) the system for collective two-agent types.

Lindahl's main interest, however, lies in analyzing not so much legal positions in themselves as their *changes*: A change in an individual's legal position may be brought about by some other agent, and the change is thus an act which in turn can be permitted, forbidden, and so on.

In Part 2 of the book ("Change of Position and Ranges of Legal Action"), Lindahl applies the systematization provided in Part 1 to the problems surrounding Hohfeld's theory of changes in existing legal relations (ibid., chaps. 6–5). The legal situation of one or more individuals can change in a number of ways, by virtue of a contract or a promise, for example. Situations of this sort raise the problem of the "dynamics" of legal positions (ibid., 65). This in turn clearly raises the problem of how to go about analyzing the concept of compe-

[59] On Kanger's theory of rights, see L. Lindahl 1994.

[60] At present, Lars Lindahl is emeritus professor of jurisprudence as well as associate professor of theoretical philosophy. He taught for many years at the law faculty of Lund University. In his active period, the course literature was modified with the addition of Simmonds 1988.

[61] "The theory for basic types of legal positions can be seen as a further development of Kanger's theory for atomic types of right" (L. Lindahl 1977, 85).

tence (or power), an issue that would later be investigated by Torben Spaak.[62] This final part of the theory of legal positions is developed by Lindahl (ibid., chap. 9) in the form of a theory of what he calls "ranges of legal action."[63]

21.4.1.1.2. "How to Do Things with Words"

In the view of the British philosopher of language J. L. Austin (1911–1960), much of what had traditionally been cultivated under the heading of philosophy was destined to be transformed into something he called linguistic phenomenology. As von Wright (1978, 193) has explained, what he had in mind was an empirical investigation into the conceptual—and hence logical—characteristics of our use of language.

Austin's most influential work is *How to Do Things with Words* (Austin 1962). Having introduced several types of sentences that, as he points out, can neither be true nor false, he closes in on one of these types—which he calls *performative utterances*, or simply *performatives*—and proceeds to analyze it.

Performatives have two characteristics: (*i*) although they may have the form of an indicative sentence, they are not used to *describe* things and are therefore neither true nor false, and (*ii*) when, in appropriate circumstances, we utter a performative, we are not just *saying* something but are *performing* a kind of action, one that Austin classifies as a speech act.[64]

One of Austin's most famous examples, which incidentally would make its way into the work of Karl Olivecrona (1971), is the following sentence (occurring in a will): "I give and bequeath my watch to my brother." This sentence is not meant to *describe* what the testator is doing but is rather being used to actually *do* it, that is, to bring something about, and in particular to make it so that the testator's brother will, at some future time, become the rightful owner of the watch.

J. L. Austin's philosophy drew the interest of Karl Olivecrona (1897–1980), who devoted intense study to it in the later stages of his career.[65] This can be appreciated, for example, in his well-known article *Legal Language and Reality* (Olivecrona 1962), where several pages are given over to Austin's (1961) performative utterances. And Austin's philosophy of language is given a promi-

[62] See Section 21.4.1.3.1; cf. Frändberg 2005, 389.

[63] Lindahl subsequently abandoned the assumption of a necessary correlation between one party's rights and a counterparty's duties, proposing a formal theory of rights that could explicate "sentences that cannot be well interpreted [...] in terms of the reconstructed notions of rights against a counterparty" (L. Lindahl 1994, 908). For a critique of the extension of the language of rights to a new domain, see Peczenik 1997, 319.

[64] A performative is an action that Austin would subsequently call an *illocutionary act*.

[65] Olivecrona held the chair in procedural law at Lund University until 1964. He continues to exert much influence in Sweden and abroad. On his life and work, see Chapter 14 in Tome 2 of this volume. In his study of speech act theory, he relied on Austin 1961.

nent place as well in the second edition of Olivecrona's major work, *Law as Fact* (Olivecrona 1971).

In Olivecrona's view, the sense of all performative statements is magical, their purpose being to create something immaterial:

> That which is held to be performed is the creation of a non-physical relationship or property through the pronouncing of some words. Such doings fall under the category of magic [...]. [Hägerström] spoke of magic where others now speak of performative utterances. (Olivecrona 1962, 174)

Also an early close investigator of Austin's philosophy of language in Sweden was Mats Furberg (1933–), who began teaching theoretical philosophy at Gothenburg in 1980. But it was much earlier that he turned to Austin, in his 1963 doctoral dissertation, titled (in translation) "Locutionary and Illocutionary Acts," a study he subsequently augmented and brought out in book form under the title *Saying and Meaning* (Furberg 1971).

In addition to Olivecrona and Furberg, there have been other Swedish thinkers who have closely studied the philosophy done at Oxford.[66] But in a strict sense, it was in 1969—through the work of Nils Jareborg (1938–)—that the philosophy of language first broke through in Swedish legal theory. This was the effect of his doctoral dissertation, which is titled *Handling och uppsåt* (Action and criminal intent: Jareborg 1969), and which incidentally also explains why the philosophy of language was influential in Swedish *criminal* law as well.[67] The overarching aim of his doctoral dissertation was to arrive at a way to form concepts that would be tenable in the sense of being practically applicable. In this work, Jareborg defines the *legal* concept of intent (*uppsåt* in Swedish) through a series of *non-legal* (or pre-legal) concepts—that is, concepts used in everyday language—such as the concepts of act, omission, purpose, insight, knowledge, possibility, and probability. Having done that, he sets out to analyze these (nonlegal) concepts in an investigation that takes up the bulk of the dissertation.

But Jareborg's dissertation was only a beginning. Already in 1974, he published another, perhaps still more important work inspired by the semantics of the Oxford school, namely, *Begrepp och brottsbeskrivning* (Concept and description of crime: Jareborg 1974).[68] Part 1 of this work offers a comprehensive overview of the basic ideas in modern semantics; Part 2 applies these ideas to the concept of crime, and in particular to the controversial principle in Swedish law that where the concept is not statutorily defined, the legislator leaves it

[66] Two examples are P. O. Ekelöf (1966) and Nils Herlitz (1963, 94ff.).

[67] In 1984 and 1985, before teaching criminal law, Jareborg was professor of jurisprudence at Uppsala University.

[68] As Madeleine Löfmarck observes in her review, in this book "there is very little of what traditionally falls under criminal law; the main part of the treatise is of a purely philosophical nature" (Löfmarck 1975, 748; my translation).

to the judge to decide what is to count as a crime in the statute in question, in an evaluation that is necessarily going to be subjective.

Finally, in his book *Värderingar* (Evaluations: Jareborg 1975), Jareborg undertakes an analysis of the "nature" of evaluative sentences (*värdeutsagor*). Clearly distancing himself from non-cognitivist and emotivist theories, he argues for the view that evaluative sentences have truth value.[69]

21.4.1.2. Formal Logic

A special school of analytical philosophy promotes the use of formal logic as an analytical tool (as logical empiricism had previously done). The first work in formal logic in Sweden was a 1950 dissertation by Sören Halldén titled *Några resultat i modal logik* (Some results in modal logic: Halldén 1950). Other prominent Swedish adherents of this school are Stig Kanger (1957), Dag Prawitz, Lars Lindahl, and Lennart Åqvist.

Stig Kanger (previously discussed in Section 21.4.1.1.1) used formal logic as an analytical tool and a model of representation. In a 1972 article titled *Law and Logic* (S. Kanger 1972), he addresses the question of how legal systems can be expressed in a way that is "logically well-written."

Together with Kanger and Åqvist, the philosopher and logician Dag Prawitz (1936–)[70] also belongs to the third generation in Swedish philosophy of law, a generation with a strong interest in formal logic. Prawitz's scholarly work essentially falls under the heading of formal logic, with a focus on the proof theory. Worthy of mention among Prawitz's works is the essay titled *Några filosofiska synpunkter på rationell argumentation i juridiken* (Some philosophical views on rational argumentation in the law: Prawitz 1985), where Prawitz argues that the meaning of what he calls spurious legal sentences (*oäkta rättssatser*) lies in what constitutes a correct argument for them; in doing so, he is drawing an analogy to what in mathematics are known as external statements (cf. Frändberg 2005, 384).

Since Lars Lindahl and his important work *Position and Change* (L. Lindahl 1977) have both been considered already, in connection with Hohfeld's theory (Section 21.4.1.1), we will now turn to Lennart Åqvist.

Lennart Åqvist (1932–)[71] is one of Sweden's most outstanding philosophers and logicians of the present time. His interests are directed not only to-

[69] "If one says that S is good, one is in fact saying that there are adequate reasons for the order 'Choose S!' And if one says that S is better than T, one is in fact saying that there are adequate reasons for the order 'Choose S over T!'" (Jareborg 1978, 132; my translation). In other words, one is describing a *state of affairs* (that there are adequate reasons) in a sentence that accordingly can be true or false.

[70] Prawitz was appointed professor of theoretical philosophy at Stockholm University in 1976.

[71] Åqvist received his Ph.D. in 1960 from Uppsala University, where he subsequently was associate professor of practical philosophy.

ward research in logics and semantics but also toward problems in the philosophy of language (as in Åqvist 1972) and in the philosophy of law.

Åqvist is unique in that much of his scholarly work is given over to the basic problems within specific branches of law, such as torts or the law of evidence. His foremost works include one on the law of torts, namely, *Kausalitet och culpaansvar inom en logiskt rekonstruerad skadeståndsrätt* (Causality and negligence in logically reconstructed tort law: An inquiry into analytic jurisprudence, Åqvist 1973), and another one he co-wrote with Philip Mullock titled *Causing Harm: A Logico-Legal Study* (Åqvist and Mullock 1989). Deserving mention among Åqvist's more recent works is a 2008 article titled *Some Logico-Semantical Themes in Karl Olivecrona's Philosophy of Law: A Non-Exegetical Approach* (Åqvist 2008).

21.4.1.3. Analytical Jurisprudence

By about 1960, logical empiricism had practically disappeared from the philosophical scene in Europe.[72] What remained, were the erstwhile "epicentres" (Cambridge and Oxford) and analytical jurisprudence.

One of Sweden's most prominent representatives of analytical jurisprudence is Åke Frändberg, who describes the main tasks of this school as follows: Analytical jurisprudence is concerned in the first place with the r*econstruction* of fundamental legal concepts, and in the second place with the study of judicial decision-making and legal reasoning (Frändberg 1973, 167). Reconstruction in general jurisprudence is conceived by him as an activity involving two steps: The first step consists in analyzing basic legal concepts, i.e., determining their meaning in actual legal discourse; only in the second step do we turn to the properly constructive part of the endeavour, where the attempt is "to work these concepts into a well-defined, consistent and smooth-running system built by analysis, and in such a way as to answer the needs of the special branches of legal science (civil law, criminal law, etc.)" (ibid.; my translation).

At both Uppsala and Lund, the tradition of analytical jurisprudence has been energetically kept alive by a younger generation, in the past as well as now.

At Uppsala, Torben Spaak made an impression with his doctoral dissertation, devoted to the concept of legal competence; and at Lund, Christian Dahlman and David Reidhav have made a name for themselves by excellent scholarly work, proving that the analytical tradition is alive and well even at Lund, for a long time the last outpost of the Uppsala school of philosophy.

[72] For political reasons, the most important members of the Vienna Circle had dispersed, many of them settling in the United States.

21.4.1.3.1. At Uppsala University: Åke Frändberg and Torben Spaak

Åke Frändberg (1937–) has been professor of jurisprudence at Uppsala since 1994,[73] and with his impressive scholarly output he is often considered the "grand old man" of Swedish jurisprudence.

Frändberg represents the analytical tradition in legal theory and places much emphasis on its (re)constructive endeavour. His scholarly interests have accordingly been directed in the first place at the formal (structural) properties of law, an aspect for which he has coined the term "morphology of law" (*rättsmorfologi*) (Frändberg 2005, 387ff.).

Frändberg wrote his doctoral dissertation in 1973 under the title *Om analog användning av rättsnormer* (On the analogical use of legal norms: Frändberg 1973). This treatise is a study in general analytical jurisprudence, where the author—using the apparatus of modern logic—analyzes some of the "ordinary" relations between legal norms (such as the relations of analogy and *a contrario*). It is the author's purpose to answer the question (essential in discussing the analogical use of legal norms) "What is the meaning of 'analogy' in legal discourse, and what use of the word is the most suitable?" (ibid., 169; my translation).[74]

A decade later, Frändberg published one of his most important works, titled *Rättsregel och rättsval* (The concept of a legal rule and choice of law: Frändberg 1984).

The purpose of this book is twofold: (*i*) to inquire into the concept of a legal rule as such (as concerns its meaning, use, and merits in legal discourse),[75] and (*ii*) to inquire into different kinds of conflicts between legal rules and between systems of legal rules.

Conflicts between legal rules *within* a legal system, are grouped by Frändberg (1984, chap. 3) into two classes, which he calls normative collision (*regelkollision*) and competition (*regelkonkurrens*). In Chapter 5 he deals with "intertemporal" legal problems, that is, problems arising when statutory provisions are changed by the legislator. Special attention is paid to problems concerning retrospective legislation.

According to Frändberg, legal rules are judgments, and so are

> a sort of abstract entity, the products of human thinking and, at the same time, tools for this thinking—not unlike figures in mathematics and cubes, circles, and triangles in geometry. (ibid., 44; my translation)

[73] He was also professor of jurisprudence at Stockholm in 1993 and 1994, when he moved to Uppsala University, also teaching the same subject.

[74] In constructing a general methodology capable of expressing his theory of analogies, Frändberg occasionally makes use of elementary set theory.

[75] Frändberg also analyzed a number of concepts appurtenant to that of legal rule. Examples are the concepts of observance, expedience, effectiveness, and validity of legal rules, the last one designating their being in force, where Frändberg (1984, 202) argues for a realistic concept of validity.

With respect to the complex issue of the validity of legal rules, Frändberg ventures to suggest the following distinction (which has been criticized by some):[76] Only in reference to rules actually applied should jurists use the expression "juridically valid legal rules"; when merely referring to rules supported by the doctrine of the sources of law, they ought to use instead the expression "juridically possible (conceivable, acceptable) legal rules," for on this doctrine "certain rules may, of course, be 'more possible' than others" (Frändberg 1984, 64).[77]

Worthy of mention, next to the aforementioned works by Frändberg, is a series of articles expressing his broad interest not only in concept formation (see, e.g., Frändberg 2009b) but also in the relation between law and the state, the *Rechtsstaat*, and legal certainty (see, e.g., Frändberg 1982, 1986a, 1986b, 1993, 2001). These are themes explored in Frändberg and Strömholm's anthology *Rättsteoretiska klassiker* (Classic works in legal theory: Frändberg and Strömholm's 1988).

Let us turn now to Torben Spaak (1960–). In his doctoral dissertation he sets out to explicate (i.e., reconstruct) the concept of legal competence (the work is accordingly titled *The Concept of Legal Competence*: Spaak 1994). Legal concepts are different from most other concepts, for they are intimately connected with norms and, in certain cases, with values as well (ibid., 46).

Taking as his point of departure what leading jurists and philosophers of law have said about competence, Spaak constructs a concept of competence that identifies "a lowest common denominator for said writers' conceptions" (ibid., 22). This concept of competence is defined in D.1, which also defines a legal consequence.

According to D.1, a person *p* "has the competence to change a legal position, LP, if and only if there is a C-act, *a*, such that *p* has the possibility, by performing *a*, of changing LP" (ibid.).

A person with competence has the possibility of changing legal positions and is himself in a legal position "by the very fact that he has competence" (ibid., 99). Spaak discusses three ways of understanding a competent person's possibility of changing legal positions: This may be construed as (*i*) a permission, (*ii*) a *practical* possibility, or (*iii*) a *hypothetical* possibility (ibid.). But it is only (*iii*) that applies: A competent person has a hypothetical possibility of changing legal positions. This idea can be expressed as follows: "*p* has the competence to change LP if and only if there is an *a* and an S such that *if p* in S performs *a*, and thus goes about it in the right way, *p will*, through *a*, change LP" (ibid., 100).

[76] One example is Aleksander Peczenik (Peczenik 1985) in his review of Frändberg 1984.

[77] Frändberg (2005, 388) explained that he conceived of himself as a normativist with respect to concepts such as legal rule and legal order, but that he nonetheless embraced a "realist" view of the concept of validity. This is a position that invariably recalls Ivar Strahl's (1941, 312) famous comment that even though he embraced normativism, he wished to "remain on realistic ground" (*Det oaktat vill jag stå på realistisk grund*).

In plain language, a person is competent to change another person's legal position if, and only if, there are an act and a situation to which the following applies: If the first person performs this act in this situation, and does so correctly, then he or she will thereby change the other person's legal position. As Spaak points out, this construction has the advantage "that the agent's competence is no longer dependent upon the situation" (ibid.).

But what is it, one might ask, that characterizes a C-act? This essential question is discussed by Spaak in Chapter 5 of the work, where he embraces MacCormick's idea that a C-act "is an act which for its legal effect is dependent on its being performed with a certain (actual or imputed) intention"(ibid., 126). As Spaak observes, one might actually understand this as a description of the old concept of "act in the law."

Spaak's investigations lead him to the conclusion that it is logically possible to reduce competence norms to fragments of duty-imposing norms addressed to legal officials within the legal order, but that we are not warranted in considering competence norms independent norms (ibid., 181).

Worthy of mention among Torben Spaak's other publications is *Guidance and Constraint* (Spaak 2007). He is also the author of several articles on legal positivism (Spaak 2004) and, last but not least, on Karl Olivecrona's philosophy of law.[78]

21.4.1.3.2. At Lund University: Christian Dahlman and David Reidhav

Also at the law faculty of Lund University, a younger generation of legal theorists succeeded in establishing themselves as the preservers of the tradition of analytical jurisprudence.

In 2008, Christian Dahlman (1970–) was appointed to the chair in jurisprudence. His doctoral dissertation (Dahlman 2000), on the issue of competing criteria of negligence,[79] is a treatise not so much in general jurisprudence as in the law of torts. But more significant—tackling an "old" problem with a new method—is a 2002 monograph titled *Objektiv moral—tro det den som vill* (Objective morality—believe it or not: Dahlman 2002), where Dahlman deals with the received (and in Sweden longstanding) opinion that objective morality is decisive for moral and legal philosophy, and in particular for the notion of the validity of law—whether or not there is actually such a thing as objective morality.

[78] See, for example, Spaak's recent article *Karl Olivecrona's Legal Philosophy: A Critical Appraisal* (Spaak 2011).

[79] Three criteria of negligence can be found in Swedish tort law. They are defined in terms of normality, efficiency, and safety and are used side by side despite their apparent incoherence, in that their definitions rest on incompatible moral and political theories. Dahlman shows that the way in which conflicts among the three criteria are solved can be observed to follow a clear pattern.

On the one hand, many embrace Hägerström's value nihilism, claiming that objective morality is an impossibility. On this view, the sentence "Abortion is immoral" lacks truth value and does nothing but express the speaker's feelings. On the other hand, there are those, like Ronald Dworkin, who have tried to show that it is untenable to claim that morality is subjective only.

Dahlman (2002, chap. 4) analyzes the relation between legal validity and the objectivity of morality. Specifically, he first identifies those issues that have to do with the validity of law—i.e., its normativity, legality, and legitimacy—and then proceeds to scrutinize these issues one by one so as to find out whether they are affected by the existence or non-existence of an objective morality and by peoples' belief or disbelief in such a morality. Dahlman's analysis shows that the objectivity of morality is completely irrelevant to the normativity and legality of law; as concerns its legitimacy, a certain connection does exist with objective morality, but it is of no practical importance.

In a concise and lucid way, Dahlman (ibid., 8) scrutinizes the arguments advanced by both parties,[80] arriving at the somewhat surprising conclusion that none of them are actually tenable: Neither the value nihilists nor their opponents have succeeded in proving the tenability of their respective "creed." Dahlman shows that the whole discussion on the objectivity of morality is based on a misunderstanding: Both sides assume that objective morality is essential to the "validity" of law, whether or not such a morality exists. But as Dahlman (ibid., 114ff.) shows, that assumption is mistaken: The existence or non-existence of an objective morality has no practical consequence whatsoever, either for the issue of law's validity nor for any kind of legal statement (ibid., 137).

Worthy of mention among Dahlman's published articles is his 2004 *Adjudicative and Epistemic Recognition* (Dahlman 2004), since it has significantly advanced our understanding of H. L. A. Hart's theory of the rule of recognition.

The article takes on the dilemma that cases like *Riggs v. Palmer* (1889) have raised for Hart (and other legal positivists), a dilemma that has led to the division between "inclusive" and "exclusive" legal positivists. Inclusive positivists deal with the dilemma in the same way as Hart did, that is, by rejecting the "strong" social facts thesis in favour of a "weak" one, while "exclusive" positivists insist that the rule of recognition is merely supervenient on social facts (ibid., 230).[81]

Dahlman wants to show that this purported dilemma is in fact no dilemma at all, since there is no conflict between the strong social facts thesis and the observation that the law "sometimes instructs the judge to recognize a norm as a part of the law because of its moral content" (ibid., 230).

[80] "It is not fashionable at the moment to embrace value nihilism. However, for all that has been levelled against value nihilism, there is nothing that says that a rational human being must absolutely abstain from it" (Dahlman 2002, 8; my translation).

[81] The latter position is exemplified in Himma 2002.

Dahlman's point is that we need to emphasize the crucial difference between *participating* in and *observing* the law, and to show that a norm can accordingly be "recognized" in two different senses: an adjudicative sense and an epistemic one. In the adjudicative sense, a norm is recognized by virtue of a court deciding "that the norm in question is valid according to the norms of adjudication that the court applies" (ibid., 231). Here "recognition" follows from certain norms of adjudication. In the epistemic sense, a norm is recognized by virtue of "the social fact that the norm is being practiced in the legal order can be observed" (ibid.). Here "recognition" is a matter of knowledge, that is, of ascertaining whether a norm is being practised as a matter of fact.

As Dahlman (ibid., 231ff.) argues, although Hart was perfectly aware of the distinction between participating in and observing the law, he failed to apply it when it came to the question of recognition. His theory of the rule of recognition was aimed at providing a *general* account of legal recognition, and so it overlooked the fundamental distinction between adjudicative and epistemic recognition: "The twofold nature of legal recognition cannot be captured in a one-sided theory" (ibid., 232).

Thus, there is no conflict between the strong social fact thesis and the weak one, since the former concerns epistemic recognition and the latter adjudicative recognition, and neither is any "weaker" or "stronger" than the other.

Even before being appointed to the chair in jurisprudence in 2008, Dahlman had published a textbook still in use in legal education at Lund (Dahlman 2010). Also, in co-operation with Marcus Glader and David Reidhav, Dahlman has written a textbook in Law and Economics (Dahlman, Glader, and Reidhav 2005).[82]

This takes us to David Reidhav (1970–). Although his doctoral dissertation was submitted in 2007, which means that he falls outside the period considered in this investigation,[83] he deserves to be mentioned in connection with the tradition of analytical jurisprudence and the present state of Swedish jurisprudential thought.

Reidhav's dissertation, titled *Reasoning by Analogy: A Study on Analogy-Based Arguments in Law* (Reidhav 2007)—a contribution to legal argumentation, or legal methodology—is an outstanding example of the path Swedish jurisprudence has been revisiting over the last few decades.

As stated in the introduction to this dissertation, its overarching purpose is to clarify, or explicate, reasoning by analogy in law, that is, to provide an account of it that is "as precise as possible, and adequate for decision-making in the context of legal systems" (ibid., 15). But reasoning by analogy is not

[82] For some time in the 1980s and 1990s, Law and Economics was taught together with jurisprudence and the history of law at Lund. A written examination could comprise all three subjects.

[83] The same applies even more to Lena Wahlberg, whose doctoral dissertation was submitted in 2010 (Wahlberg 2010).

unique to any particular legal system or area of law. What is more, although Reidhav concentrates on reasoning by analogy in the *law*, much of his work can be used in reasoning *outside* the law, too.

Reidhav's focus is on arguments, and in particular on "how arguments from analogy can be given as justification for judges' decisions" (ibid., 15). Having set out a framework for argument by analogy in law, Reidhav distinguishes several such ways of arguing, identifying a *form* for each of these ways. He thus examines what *reasons* can be given for preferring one way of arguing by analogy to another.

Finally, he proposes a *model* for analyzing and assessing these arguments. On this model (ibid., 176), arguments by analogy "are given a form so that they come out as *deductively valid* under a logical assessment" (ibid., 16). The model also makes it explicit what *principle* it is that underlies each argument and makes the reasoning plausible.

21.4.2. Transitory Influences

Although the programme in Swedish jurisprudence was not "shaken up" in any significant way in the period following the creation of the three chairs in that new discipline—that is, in the 1960s and for part of the 1970s—a few transitory influences did act on Swedish legal thought.

Intent on preserving the chronological order, I will first mention two influences that, while rather forceful in their day, cannot be said to have made any greater impact on Swedish jurisprudence—namely, rule scepticism (Section 21.4.2.1) and neo-Marxist legal theory (Section 21.4.2.2)—and then I will, going into greater detail, take up the transitory but important influence of coherentism (Section 21.4.2.3).

21.4.2.1. Rule Scepticism

The influence of rule scepticism on Swedish jurisprudence was intense but comparatively short-lived. This movement came to Sweden in the late 1960s, and one of its foremost representatives was Per Olof Bolding (1918–1997).[84] His book *Juridik och samhällsdebatt* (The law and open debate: Bolding 1968) appeared in the politically charged year 1968. Although it addressed fundamental issues in connection with the sources of law, it is primarily devoted to the jurist's role in society.

In Bolding's opinion, all jurists—judges, solicitors, law professors—should conceive of themselves as participating in an open societal debate; thus, for example, jurists should co-operate much more with sociologists. But the co-operation he envisions is severely undermined by the juristic way of thinking

[84] Per Olof Bolding was professor in procedural law at Lund University from 1964 to 1983.

as well as by the specifically juristic technique of argumentation, and so he embarks on an endeavour to refashion the legal method radically. Specifically, he urges us to do away with the concept of a legal rule in legal reasoning and replace traditional teleological interpretation with what he describes as "an extremely cautious" mode of interpretation. This is a strictly linguistic interpretation, and it is completed as soon as the judge has established which meanings of the rule in question are consistent with its language.

Obviously, this type of interpretation cannot answer the question, *which* solution ought to be chosen? After all, there may be more than one interpretation that can be defended linguistically. Before making that decision, the judge must consider *other* sources of law (such as legal practice) *and* must take socio-political considerations into account. It is this last point in particular that Bolding is especially sensitive to: *General societal considerations* ought to stand by themselves—they should *not* be encased into statutory interpretation or in the doctrine of precedent.

Bolding takes one more step, however. In his view, an open discussion of societal considerations ought to be the *first* phase in legal reasoning: "Traditional" sources of law can wait—Bolding seems to think—until the judge has settled on a "preliminary" view of how the case in question ought to be decided. This way of proceeding goes under the label of "Bolding's open model" (see Bolding 1968, 85ff.): The judge initially ought to disregard traditional sources of law, instead engaging in an open and unbiased debate in which sociologists, for example, can easily participate. What actually takes place, therefore, is a "weighing" between two types of claims: those that spring from social concerns and those grounded in the traditional sources of law. But as Strömholm (1969, 657) aptly points out in his review of Bolding's book,[85] Bolding appears to disregard that there is a relevant distinction between evaluations *de lege lata* and *de lege ferenda*.

In summary, Bolding seeks to craft a jurisprudence alert to the concerns of his time, a jurisprudence sensitive to a changing society. He thus foregrounds sociology and gives it precedence over the law (*juridiken*), which in his view is at bottom a kind of "applied sociology" (Bolding 1968, 87; cf. Frändberg 2005, 383).

21.4.2.2. Coherentism

Although many legal thinkers in Sweden have taken an interest in the concept of coherence, it was only Aleksander Peczenik (1937–2005) who consistently made use of this concept in working out a theory of the ultimate justification of legal argumentation.[86]

[85] Interestingly, Bolding's book and Strömholm's review figured as optional readings in the syllabus at Uppsala throughout the 1970s.

[86] On Peczenik see also Section 25.6 in Tome 2 of this volume.

The coherentist theory of law developed by Peczenik (1998, 13) is a theory about normative and valuative statements (i.e., statements expressing norms and values, respectively). These are distinguished into (*i*) prima facie and (*ii*) all-things-considered normative and valuative statements, in a theory at once cognitivist, as regards the former, and noncognitivist, as regards the latter: The former are *true* if they correspond to a society's cultural heritage; the latter are *not true* in an ontological sense, but they may be more or less *reasonable* in light of an individual's acceptance and preference system.

Thus, whereas prima facie values can be an object of *knowledge*, a well-argued belief about all-things-considered values merely expresses "something essentially similar to knowledge, not knowledge in the literal sense" (ibid.).[87]

In 1978, Peczenik succeeded to the chair in jurisprudence at Lund University, a position he would hold until his retirement in 2004. During the twenty-six years of his professorship, his views on law found expression in a host of monographs and articles.[88]

From the very beginning of his career in Sweden, his efforts were mainly directed at a coherent reconstruction of legal reasoning and a justification of legal argumentation, appealing to deeper, more speculative philosophy only as a tool by which to better understand how lawyers think.[89]

According to Peczenik, legal argumentation is a special case of moral argumentation. What is special is that an individual engaged in legal argumentation

> enters a particular social role, the role of a lawyer and—within it—a particular role of a judge, attorney, constructive legal researcher (a "dogmatician"), critic of the law, etc. Each role has moral consequences. Within each role, the lawyer must create a pocket of coherence. (Peczenik 1998, 14)[90]

Peczenik devoted many years of his career to investigating how knowledge of a morally justified interpretation of law might be possible, and he arrived at the conclusion that both norm- and value-encapsulating statements in legal argumentation can indeed be well grounded and are consequently not mere expressions of feelings (as the Scandinavian realists had maintained). "Well grounded"—how? What *is* the basis of legal justification?[91]

[87] Peczenik (1998, 13–4) comments that, even though he cannot be sure about the soundness of this theory, it still appears to him to be "more reasonable" than its competitors, namely, foundationalism and scepticism.

[88] For biographical data and the milestones in Peczenik's career, see Alexy 2006b; for a bibliography, see Bindreiter 2006.

[89] As Peczenik comments, "almost all legal thinking is defeasible, outweighable and justifiable by recourse to coherence. Legal doctrine is the most elaborated form of legal thinking" (Peczenik 2005b, 4).

[90] The expression "pockets of coherence" was coined by Joseph Raz in 1994.

[91] This was the title of Peczenik's doctoral dissertation in philosophy (Peczenik 1983).

In developing his coherentist theory of law,[92] Peczenik drew much inspiration from the work of Keith Lehrer (1990, 1997), who argues that whatever is justifiable is justifiable on the basis of one's background system of beliefs, or what Lehrer calls acceptances and preferences (Peczenik 1998, 11; Lehrer 1997, 3). But Peczenik had occupied himself with the concept of coherence long before Lehrer came onto the scene:[93] In one of his last manuscripts, Peczenik (2005b, 4) commented that his theory had been influenced by Jerzy Wróblewski, Aulis Aarnio, Robert Alexy, and Jaap Hage in that order.[94]

With Robert Alexy, Peczenik published an important article in 1990 (Alexy and Peczenik 1990), in which the analytical connections between justification, coherence, rationality, and correctness are identified.[95] In this context, the authors develop a series of coherence criteria, stating the *concept* of coherence as follows: "The more the statements belonging to a given theory approximate a perfect supportive structure, the more coherent the theory" (ibid., 131). Logical consistency is a necessary but not a sufficient condition of coherence. There are some additional interrelated criteria of coherence that Alexy and Peczenik identify by arguing that a theory's degree of coherence depends on such factors as

(*a*) how many supported statements belong to the theory;
(*b*) how complex the webs of supportive reasons are that belong to it;
(*c*) how many universal statements belong to it;
(*d*) how many general concepts belong to it, and how high a degree of generality they exhibit; and
(*e*) how many cases and fields of life the theory covers (Alexy and Peczenik 1990, 132–41; cf. Peczenik 2005a, 146).

Coherence is a matter of degree, and the *degree* of coherence is determined by weighing and balancing these criteria. As Peczenik points out, his use of the idea of weighing is not formal or logical but rather "holistic" (ibid.), and in his weighing and balancing he relies on John Rawls's idea of reflective equilibrium.

[92] Although it would be a stretch to say that Peczenik's coherentist theory comes in different "varieties," there is no doubt that over the course of about two decades, he did modify his views, at least insofar as his focus shifted to different philosophical issues.

[93] The concept of coherence, and the accompanying one of support, had previously been addressed in Peczenik 1983.

[94] On Wroblewski see Section 16.3.3 in this tome. On Aarnio see Section 25.5 in Tome 2 of this volume. On Alexy, see Sections 10.3.2.2 and 10.4.3.1 in this tome, and Sections 1.5.4.1, 10.3, and 25.4 in Tome 2 of this volume.

[95] This relation is expressed by the authors in the following way: "If the norm- or value-system in question is more coherent than any competing system, then it is *prima facie* better justified and more rational than any competing system. If the norm- or value-system in question is more coherent than any competing system, then there exists a *prima facie* reason that it is correct" (Alexy and Peczenik 1990, 144).

Reflective equilibrium in morality is achieved by revising general principles in light of individual moral convictions and vice versa. Principles and individual convictions both wind up being modified to the extent that they support each other: Sometimes a principle will come out in front of an individual conviction; other times it will be the other way around (see Peczenik 1997, 313). According to Peczenik, this procedure is reasonable and increases the coherence of argumentation (ibid., 314): It is reasonable to state that

> the ultimate step of moral reasoning is determined by an individual's personal preferences and feelings, within the flexible and ever changing framework of the cultural heritage [referring to Peczenik 1995a, 439ff., 652ff.]. [...] In other words, the cultural heritage decides what *prima-facie* moral and legal reasons are. (Peczenik 1997, 318)

In *legal* justification, reflective equilibrium takes a specific form: It is at once wide, constrained,[96] and segmented, and it coalesces, not around precise ideas, but around commonly accepted "platitudes," as Peczenik calls them (Peczenik 2005b, 5–6),[97] such as that the law should be just (Peczenik 2005a, 150).[98] All the constraints on reflective equilibrium in the law "are ultimately justifiable by recourse to a total system of acceptances and preferences" (Peczenik 2005b, 6, with reference to Hage 2004).

In Peczenik's view, although the theory of reflective equilibrium in law is complex, its aim is simple, insofar as it recognizes that the reasoning of lawyers must keep within the limits outlined by the political system. On the other hand, the theory also recognizes that lawyers in general, and writers on law in particular, "may and should re-work the law in the most rational manner. Only by following the requirements of rationality, legal reasoning can achieve both harmony and justice" (Peczenik 2005b, 6).

The criticisms that over time have been levelled at Peczenik's coherentist theory can for the most part be grouped into two broad classes: They point out the theory's part descriptive, part normative status (see Frändberg 2000, a review of Peczenik 1995a and 1995b), or they take issue with its circularity. In this latter regard, Peczenik certainly admits the circularity of a coherentist justification (see Peczenik 1997, 316). In his view, the only way out consists in admitting that coherentism

[96] This means that legal scholars are not free to adjust principles and judgments to one another at will: This must be done within the framework of the law (Peczenik 2005b, 6).

[97] The reason for this role accorded to platitudes is that the criteria of coherence need to be *general*, that is, applicable to all coherent theories, and that is possible "only because these criteria are not precise. They are platitudes of a kind similar to that found in moral theory" (Peczenik 2005a, 147).

[98] Platitudes do not just come into play in connection with the law: They also shape our ideas about the objectivity of moral judgments, the relation between the moral and the natural, and substance of morality (in this last respect, they are about the concern and respect we should show for other persons). See Peczenik 2005b, 6, referring to Smith 1994, 39ff.

is based on general, philosophical, and in a sense foundationalist, assumptions [...] at least the following weak assumption is (not proved but) reasonable: If a theory can be made highly coherent, then there exists something in the world, some "truth-makers" which decide about this possibility. A stronger, and thus more controversial assumption may be considered, too: *Ceteris paribus,* the more coherent a theory, the closer it corresponds to what is the case. Needless to say *that such assumptions are* (*and perhaps even must be*) *controversial.* (ibid., 317)

And as concerns the status of the theory, Peczenik points out that, on the one hand, the theory is *descriptive*—not normative—when it states what *is* the case, but at the same time, "it is also normatively recommended by the author as legally correct. In other words, my theory not only describes legal doctrine but, being partly descriptive, partly normative, itself belongs to general legal doctrine" (Peczenik 2005b, 5).

In 2004, after twenty-six years of professorship, Aleksander Peczenik could look back on the following achievements.

In developing a coherentist theory of law, Peczenik moved away from the philosophical heritage of Karl Olivecrona and Tore Strömberg and sought to chart a middle course between natural-law theory and legal positivism, an effort that, in his own words, took him back to the "spirit" of natural-law theory (see Peczenik 1998, 9).

Along the way he wrote a range of monographs, among which four textbooks in jurisprudence, two of which have reached a second edition. The more recent of these textbooks was titled *Juridikens teori och metod: En introduktion till allmän rättslära* (On the theory and method of law: An introduction to jurisprudence, Peczenik 1995b) and was a concise version of his magnum opus of the same year, namely, his comprehensive monograph *Vad är rätt? Om demokrati, rättssäkerhet, etik och juridisk argumentation* (What is law? On democracy, legal certainty, ethics, and legal argumentation: Peczenik 1995a).

Finally, one must not forget that Aleksander Peczenik, as incumbent of the chair in jurisprudence at Lund University, never lost sight of two commitments: The first was to maintain the tradition of sustaining an open intellectual exchange with the Institute of Philosophy at Lund; the second was to stimulate doctoral students in jurisprudence by organizing yearly seminars at the three major law faculties.[99]

21.4.3. Other Influences

Rule scepticism and coherentism were of course not the only influences on Swedish jurisprudence in the period from 1960 to 2000: A more or less transitory influence was exerted as well by other international philosophical trends,

[99] Fortunately, both traditions are being kept up by the present incumbent of the chair in jurisprudence at Lund, the previously discussed Christian Dahlman (Section 21.4.1.3.2).

especially Critical Legal Studies, Law and Economics, various forms of deconstructivist and discourse theory. But most of these movements do not meet the two criteria previously stated at footnote 6 for inclusion in this survey of Swedish jurisprudence.

So, in what follows, I will restrict myself to two international movements that have had or continue to have some influence on Swedish jurisprudence, each in its own way, namely, feminist and neo-Marxist legal theory, both of them part of the broader current of Critical Legal Theory.

Critical Legal Theory encompasses not only Marxism and feminist legal theory but also Critical Legal Studies, since these movements share at least three common denominators: First, they all take as their point of departure the view that in society there obtain some basic incongruities created by society itself through its own organization; second, they all assume that the existing societal order is maintained through societal structures, that is, through invisible principles that define boundaries for social practices;[100] and, third, they are all more or less radical in outlook.

21.4.3.1. Feminist Legal Theory

From the 1980s onward, the writings of Carol Gilligan, Catharine MacKinnon, Judith Butler, and Carol Smart, among others, have been of immense importance to the feminist movement in general. In Sweden, their work gave impetus to what in the 1990s would establish itself as Swedish feminist jurisprudence, spawning a flurry of promising new research projects.

The only work so far done in this line of inquiry in jurisprudence as such in Sweden is Eva-Maria Svensson's[101] doctoral dissertation, *Genus och rätt: En problematisering av föreställningen om rätten* (Gender and law: A problematizing of the concept of law, Svensson 1997), which develops a theory that attempts to combine traditional gender theory with a dynamic conception of gender.

However, there are several doctoral dissertations that apply a feminist perspective within special areas of the law. I will mention five outstanding ones in chronological order: In tax law, there is Åsa Gunnarsson's *Skatterättvisa* (Tax equity: Gunnarsson 1995).[102] Investigating gender equality in EU law is Karin Lundström 1999. In labour law there is Susanne Fransson's (2000) *Lönediskriminering* (Wage discrimination: Fransson 2000). In criminal law, Ulrika Andersson (2004) carried out a gender-theoretical analysis of legal protection

[100] Structures come into view in the way that different societal functions unfold (cf. Hydén 1978, 388).

[101] Eva-Maria Svensson is Professor in Law at the School of Business, Economics and Law, University of Gothenburg.

[102] Åsa Gunnarsson is professor at the *Juridiskt Forum* of the University of Umeå.

against sexual abuse. And, also in criminal law, there is Monica Burman, *Straffrätt och mäns våld mot kvinnor* (Criminal law and men's violence against women: Burman 2007).

21.4.3.2. Neo-Marxist Legal Theory

In retrospect, it is not easy to pin down exactly how or when, or even *whether*, neo-Marxist legal theory has influenced Swedish jurisprudence. According to Frändberg (2005, 390), among others, the influence was minimal.

Even so, neo-Marxism—which flourished in Europe (and Sweden) in the 1960s and 1970s—did exert some influence on a well-known doctoral dissertation in jurisprudence whose merits have been acknowledged in several works (such as Strömberg 1978). Its author is Dag Victor and its title *Rättssystem och vetenskap: Studier kring en analysmodell för ideologiska system* (Legal systems and science: Studies on an analytic model for ideological systems, D. Victor 1977).

The work divides into two main parts. Part 1 deals with the issue of what can be required of an activity if it is to count as "scientific." According to Victor, the most important requirement is that the activity have an object existing in reality. Part 2, on the other hand, deals with the issue of the extent to which legal dogmatics can be said to have such an object, and the claim is that it does have such a real object, which is said to lie in social ideology.

The definition of this object forms the basis of Victor's construction of what he calls "a model for analyzing legal systems." Two essential elements of this model are the concepts of structural agreement and disagreement (*enighet och oenighet*), which go back to Jean Piaget, the originator of structuralism, who is a source of inspiration to Victor, as are many other thinkers, including Aristotle, Karl Popper, and Karl Marx.

In constructing his model for analyzing legal systems, Victor puts forward the thesis of "structural disagreement," in this way anticipating Niklas Luhmann's theory of autopoietic law and the idea of binary codes.[103]

21.5. Closing Remarks

As has emerged from the foregoing discussion in Sections 21.2, 21.3, and 21.4, of all the major philosophical movements at an international level that in various ways have shaped Swedish jurisprudence, those whose influence has been more or less continuous are analytical philosophy, Anglo-Saxon philosophy of language, formal logics, and analytical jurisprudence, resulting in well-known

[103] Another outstanding doctoral dissertation inspired by Marxist thought is (aside from Dag Victor's) Håkan Hydén 1978. The reason why I am not discussing it is that, although it was completed at Lund University, it was submitted not at the law faculty but at the faculty of social sciences at Lund University.

monographs, articles, and doctoral dissertations, some of which are still regarded as milestones in Swedish jurisprudence (this holds in particular for Wedberg 1951, Jareborg 1974, L. Lindahl 1977, Frändberg 1984, and Spaak 1994). Other influences, as we saw, turned out to have less staying power: This is true especially of logical empiricism and rule scepticism, and to some extent of coherentism as well, though this last approach was taught and disseminated for some time.

The comments that follow take their cue from the earlier discussion in Section 21.3, which suggests that the scholars who initially held the three newly created chairs in jurisprudence—professors Strömberg, Agge and Hjerner—were all of one mind. This is true as concerns their view of the "nature" of the new discipline, which they all understood as having been carved out, as it were, from the main body of what in Sweden is called legal science, thus leading to a division of labour. But as far as the functions of the newborn discipline are concerned, there was no unanimity among the three professors.

At Lund University, Tore Strömberg (1962a, 276) did not think this carving out in any way undermined the "scientificity" of the new discipline. In his view, what had been effected was merely a *formal* separation from the philosophy of law: The primary function of jurisprudence must still consist in bringing the philosophy of law to bear on the study of law (*juridiken*). How? Through a scholarly approach to the fundamental problems of law—scholarly in Hägerström's sense—by explaining, further developing, and revising the systematicity of the law, as well as by providing a comprehensive survey of the legal order.

In short, the legal scientist, following Strömberg's guidelines, would be restricted to describing, analyzing, and systematizing the law. Which is exactly what happened.[104]

According to Ivar Agge at Stockholm, the two most important tasks for jurisprudence were legal methodology and the co-ordination of the study of law and other branches of science. With respect to the latter, Agge was outspoken and open-minded. While he cautioned against the dangers of too close a contact with the strictly empirical sociology of law and assigned to jurisprudence the role of an observation post, he was sympathetic to the idea that Swedish jurisprudence should leave her fettered existence behind—fettered, that is, by what Agge called the scientific realism prescribed by the Uppsala school—so as to open up to more-modern and promising philosophical trends.

However, Agge did not anticipate the lingering stubbornness of a once dominant and all-pervasive force in Swedish legal life—the philosophy of the Uppsala school. His fears of a "sterile" Swedish legal science (cf. Agge 1955, 4) were only too justified.

[104] In the 1960s and 1970s, a number of frustrated Swedish law professors began to question the "scientific" nature of their own work and decided to forsake jurisprudence for legal sociology, among other research areas.

A slightly different note was finally struck at Uppsala in the inaugural lecture delivered by Lars Hjerner, who emphasized the *practical* role of jurisprudence: As an academic discipline, he thought, jurisprudence should focus on the teaching of a legal method, while as a research discipline, it should take on issues of more or less immediate practical significance.

In retrospect, Hjerner's vision can be said to have been realized, at least in part. For on the one hand there is no denying that each of the three major law faculties left it to the professors holding the chair in jurisprudence to define the specific contents of the broad (and rather vague) guidelines set out in the course syllabus, but on the other hand the discipline at all three faculties wound up giving great weight to the study of legal method.

What is more, Hjerner was also correct in predicting that jurisprudence would come to play an important role in European integration, and in particular in Sweden's accession to the European Union.

Let us now briefly go back to the philosophical influences that have emerged as strong and abiding, producing a series of well-known publications. A closer look at these influences suggests two questions:

(*i*) Why did these influences, strong as they were, not have a *more direct and immediate* impact?[105] and
(*ii*) Why did analytical philosophy, despite its temporary intermissions, manage to hold sway over Swedish legal thinking throughout the greater part of the 20th century?

At first glance, these two questions do not seem to have much in common. In my view, however, there is a single answer that explains both.

The first question can be answered by pointing out that, as much as Swedish jurisprudence did change course, beginning in the 1940s, by moving away from the Uppsala school and from Scandinavian realism in its initial form, the latter approach has never entirely been defeated. In short, it cannot be denied that at least some of Hägerström's achievements, though not his ontology, have survived to this day (and, one might add, that they continue to attract consid-

[105] This also applies to jurisprudence as an academic discipline. At the law faculty of Lund University, for example, it was at a comparatively late stage that students in jurisprudence were introduced to theories like Hart's and Dworkin's. In 1988, Simmonds 1988 was added to the syllabus at the urging of the then associate professor Lars Lindahl (who had done the Swedish translation). Considering that H. L. A. Hart's major work—*The Concept of Law*—appeared much earlier (in 1961), and that several prominent Swedish authors had found it well worthy of attention, it is astonishing that law students at Lund University were not encouraged to study it more or less immediately. In this respect, the law faculty of Uppsala University was decidedly more up to date, where the work was introduced as a suggested reading in the syllabus from the autumn term of 1970. Also a suggested reading at Uppsala was Ronald Dworkin's article *Is Law a System of Rules?* (Dworkin 1968). As concerns the required literature, students could choose among excerpts from Olivecrona 1966, Ross 1953, Strömberg 1962b (4th ed. 1970), and Hedenius 1963.

erable attention).[106] And in light of this state of affairs, the philosophy done at Uppsala cannot be said to have at any time been entirely "displaced" by any other school of thought, no matter how strong the intervening influence.

But something to the same effect can be said in answer to the *second* question, too: The reason why Swedish analytical philosophy managed to retain its position (in the long run becoming an integral part of this movement on an international level) is *precisely* that there was no radical "breaking away" from the Uppsala school, but only a smooth transitioning based on a common denominator, namely, *conceptual analysis*.

When the nestor of Swedish analytic philosophy, Konrad Marc-Wogau, looked back on his career in 1951, he admitted that he was still holding on to three tenets of the Uppsala school: its anti-metaphysical stance, its critique of idealism, and especially the view that the province of philosophy lay in conceptual analysis.[107] Unwittingly, Marc-Wogau thereby gave expression to the leitmotif that runs through the spiritual development of 20th-century Swedish jurisprudence, namely, tradition and innovation amicably proceeding hand in hand.

[106] A good example is Dahlman 2002.
[107] Marc-Wogau, in Ahlberg 1951, 121ff. (mentioned in Nordin 1984, 156ff.).

Chapter 22

20TH-CENTURY LEGAL PHILOSOPHY IN DENMARK

by Henrik Palmer Olsen

22.1. Introduction: Danish Jurisprudence before the 20th Century

No adequate understanding of Danish legal philosophy in the 20th century can be arrived at, particularly as concerns the first part of that century, without some background knowledge of Danish legal philosophy in the 19th century. This is especially so with the important and influential work of Anders Sandøe Ørsted (1768–1860)[1] and with the two-volume dissertation on legal philosophy by Carl Goos (1835–1917), published at the turn of the century.

As the first truly important legal scientist in Denmark, Ørsted is still very much revered among Danish legal scholars,[2] and since his death in 1860 his work has continued to draw much admiration. His influence is primarily owed to his ability to address legal issues as practical regulatory problems. To contemporary eyes, this may not look like a particularly significant or remarkable feat, but in the context of early 19th-century law and politics it was an innovatively engaged approach to analysis. Indeed, legal scholarship at the time was by and large philosophically oriented and mostly speculative. Inspired mostly by German philosophy and influenced politically by the existing absolutist monarchy,[3] most legal "science" was conducted in the form of abstract considerations on how the law could best be seen as a product of monarchical wisdom and the laws of reason. It was controversial to take an interest in the

[1] Anders Sandøe Ørsted was the brother of the famous Danish physician H. C. Ørsted.

[2] It should be noted, however, that Anders Sandøe Ørsted never held a formal position in any university. As was not unusual at the time, Ørsted held a number of public and private offices, but he did not occupy a position as a law professor. Ørsted's publications was therefore not written from the position of chair at the law faculty, but was a result of his own private undertakings. In spite of that, his contributions to legal science are widely acknowledged as unique and many see Ørsted as the founder of legal science proper in Denmark. Attesting to that fact is a three-volume tribute to Ørsted published only twenty-five years after his death (Goos et al. 1885–1906). In this tribute, he is unanimously characterised as the founder of legal science in Denmark. His influence also extended beyond Denmark, primarily in Norway (Blandhol 2005, 211ff.; Larsen 2006, 247–9). Ørsted's work remains unknown outside Scandinavia, as he only ever published in Danish.

[3] Denmark was ruled as an absolute monarchy until 1849, when the king introduced a constitution, which gave some participation in legislative competence to a democratically elected parliament. The king however retained full control over the government until 1901, and since legislation could not be enacted without the consent of the king, he retained signifcant political power all through the 19th century.

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way legal issues were actually decided in the courts or by other branches of government. Not only was it unorthodox from the point of view of traditional natural law, but it was also contentious from a political point of view, since it challenged the existing one-way communication between the king and his courts.[4] Nevertheless, for Ørsted—who had had a career in the courts and in civil service before turning to academic legal research[5]—an intimate connection existed between legal science and legal practice. Ørsted was concerned to emphasize the role of legal science in providing a firm methodological framework for legal inquiry, thereby providing a bulwark against abstract legal opinions that did not sufficiently take into consideration the actual social practices in which the legal rules and principles is supposed to operate (see further details in Larsen 2006, 23). Legal science, Ørsted maintained, should provide the law with a foundation of certainty, without which there would be no law at all, and he emphasized that such certainty could not be provided by an *a priori* natural law. He explicitly rejected "abstract philosophy" in favour of an approach to legal inquiry that sought a thorough knowledge of statutory instruments and their historical origins, as well as an intimate acquaintance with the practical problems these instruments were meant to solve (ibid.).

In a recent doctoral dissertation, Sverre Blandhol characterizes this approach to legal science as an early forerunner of legal realism and philosophical pragmatism (Blandhol 2005). As Blandhol argues, Ørsted's legal thinking can distinctively be described as resting on three basic elements, namely, (*i*) his anti-formalism (the view that practical legal problems evolve with and are coloured by the social and economic development of the time and cannot be fixed in any set of legal forms), (*ii*) his anti-foundationalism and pluralism (the view that the law cannot be understood as a single, unified, coherent system with a common ground but emerges from a society's actual socioeconomic conditions), and (*iii*) a focus on real, experienced legal problems, with a view to understanding the practical underpinnings of these problems as well as their possible solution. Whether, as Blandhol suggests, Ørsted should properly be considered a forerunner of American realism and pragmatism is debatable.[6] Consistent with that thesis is Ørsted's refusal to adopt or develop a unified

[4] At the time, court decisions were not being published in Denmark. Ørsted has to be credited for having initiated a systematic publication of Danish court decisions, but it was only after his death, in 1867, that publication of court decisions became more institutionalised, with the publication of the law journal *Ugeskrift for Retsvæsen* (Weekly journal of legal affairs).

[5] Ørsted began his legal career as a judge, and in 1810 he made it all the way to the Supreme Court. In 1825, he was appointed chief legal adviser to the royal government (*Generalprokurør*), and in that capacity he was responsible for drafting new legislation. He served as prime minister to the royal government in the early years after the 1849 constitution, which abolished the absolute monarchy in Denmark.

[6] Blandhol traces the pragmatic approach to legal reason all the way back to Cicero (Blandhol 2005).

system, choosing to instead address practical legal problems as they emerge in real-life legal practice—but as mentioned above he published only in Danish, and it is unlikely therefore that his thought travelled beyond Scandinavia (see footnote 2). It is fair to say, however, that within Scandinavia, and particularly in Denmark, his work has been influential and a source of inspiration for later legal science. Ørsted's themes can clearly be detected at the turn of the 19th century in the work of Viggo Bentzon.

22.2. Viggo Bentzon: From Normative Systems to Judicial Discretion

Viggo Bentzon (1861–1937) was a professor of maritime law at the University of Copenhagen, but he taught a wide range of subjects, including the law of persons, family law, the law of succession, and jurisprudence. He took particular interest in how law was taught at the university and was centrally involved in reforming the study of law by steering it in a more practical and problem-oriented direction. As part of this effort he developed a theory of law which placed judicial decision-making at the centre of didactical attention.

When Bentzon was appointed professor of maritime law in 1892, he was at the same time assigned the task of teaching jurisprudence to law students. As was customary at the time, in the first years of his tenure he followed his predecessor's course outline and textbook material. In Bentzon's case, that was the two-volume work *Forelæsninger over den Almindelige Retslære* (Lectures in general jurisprudence: Goos et al. 1885, 1894).[7]

Goos was much admired in his own time both as a lawyer and as a conservative politician. His two-volume work on general jurisprudence is long (almost 1,200 pages) and meticulous. In this work he did not just portray law as a general phenomenon and describe its relation to morality and justice and to problems in the theory of sources of law: He also set out his own view of natural law in a detailed and comprehensive fashion. In the introduction to this work (Goos et al. 1885, 2ff.), Goos commented that one might well choose to develop an account of law mainly concerned with describing the basic elements of the existing positive law as well as its history, but that such an approach would yield merely a "theoretical" understanding of the subject matter. Here Goos took up Kant's distinction between theoretical and practical reason (between knowing what *is* the case and what *ought to* be the case), and no doubt his point was that an approach of the kind he identified would not afford a full and proper understanding of law. He then observed that one could instead pursue a theory of ethical jurisprudence (in effect a theory of natural law); a theory which would set out the practical requirements for something to rank as "Good Law," and which would be aimed at setting standards for

[7] In 1891, Goos was appointed minister for education and the church (*Kultusminister*), and at that point he gave up his position at the faculty.

existing and future positive law (i.e., the law created by an act of will). This latter endeavour, says Goos, would lead to a better both practical and theoretical understanding of law. In this work, Goos mostly follows the latter route and argues that the study of natural law has practical import for positive law when it comes to determining in closer detail the *content* of the law. This impact can be appreciated when the effort is either to systematize existing positive law as it is often done in legal doctrine or when judges have to determine what the law *is* in cases where that question can only be settled by judicial discretion and therefore implies some appeal to "natural justice."[8]

Goos's work can perhaps best be described as a liberal conservative theory of ethics with a focus on how ethics should bear on law.[9] Goos's own view in this regard was that ethics should operate both as a form of what in contemporary jurisprudence has been called *legisprudence* and as a framework for legal interpretation. His intention undoubtedly was that existing positive law should be interpreted in such a way as to bring it as far as possible in line with the theory of ethics he outlined.

Goos stands out as the last major theorist in the old tradition of natural law, a tradition that in the 20th century would die out. Despite the acclaim he received in his own time, his work would soon come to be regarded as exemplifying a mode of thought of merely historical significance.

Goos's successor, it was mentioned earlier, was Viggo Bentzon, and it was also remarked that when he was appointed, in Copenhagen in 1892, he saw himself as having little choice but to rely on Goos's heavy two-volume work as the set text book for law. It could be that he felt here the intimidating popularity of his predecessor, but it was certainly not his enthusiasm about Goos's voluminous work and speculative approach to law that led to this outcome, since Bentzon could not see much practical use in that approach. In his own first work on jurisprudence (Bentzon 1904), a lean 176 pages by comparison with Goos's magnum opus, he criticized Goos for not paying sufficient attention to "the real grounds of law," by which Bentzon meant "that which has generated and which sustains every single rule of law, which in sum lies behind all [positive] law, [and] which forms its purpose" (Bentzon 1904, 15; my translation). In his assessment, the reason for this neglect of "the real grounds of law" was an inadequate concern with the issue of how the aims and purposes of legal

[8] The Danish expression here would be *forholdets natur*—similar to the German *natur der sache*—and *natural justice* is something I have chosen for lack on any more-suitable English rendering of that idea. It should be pointed out that the term "natural justice" in this context is not identical with the same term, used as a technical expression in English administrative law, where it signifies a more specific legal rule against bias in public decision making.

[9] The idea of a "liberal conservative" may seem contradictory, but it means that Goos was a liberal reformist within the conservative party and in the prevailing conservative culture in Denmark at the time. Other commentators have described his political outlook in similar terms (e.g., Tamm 1992, 221ff.).

regulation interact with the way in which specific legal disputes are resolved in concrete cases. Inquiring into these very concrete and detailed dimensions of how the legal system operates in practice, was not an approach favoured by Goos, and Bentzon lamented that Danish legal science had been dominated by a Hegelian approach at the expense of Ørsted's more tangible research methods (regarded by Bentzon as superior). Bentzon attributed this speculative turn to F. C. Bornemann[10] and his intellectual descendants (among whom he included Carl Goos)[11] and argued that the failure to embrace Ørsted's more pragmatic approach to law and legal science was to be ascribed to an overblown belief in what can be achieved through "word and logic" (ibid., my translation).

Bentzon's interest in, and focus on, the interaction between the aims and purposes of regulation and the actual decisions of the courts and administrative agencies undoubtedly stems from his admiration for the German legal philosopher Rudolf von Jhering (1818–1892), whose *Der Zweck im Recht* (Jhering 1877–1883, translated into English under the title *Law as a Means to an End*, Jhering 1913) fathered the so-called *Interessenjurisprudenz* (jurisprudence of interests) prevalent across much of German legal theory at the beginning of the 20th century.

Jhering essentially maintained that purposes in law are the products of underlying interests. In law, then, the purpose of some legal rule reflects the underlying interests promoted or protected by the law. Jhering identified both individual and collective (societal) interests, and he promoted an understanding of law and adjudication as an organized institutional approach whose function it is to negotiate between the various conflicting interests reflected in the law. Bentzon uses this as a springboard for promoting a jurisprudence committed to looking for the sources of law in the contemporary social conditions that people live under and respond to either happily (in that their interests are satisfied) or uneasily, by criticising those conditions. Here Bentzon cautions us that, however careful, precise, and insightful we might be in constructing a general conceptual account of the unifying formal grounds on which legal rules rest, if we *only* rely on these formal grounds, we will inevitably fail to appreciate the life that lies behind what formally present themselves as the impersonal commands of law. The only way we can gain insight into this richness of the life that lies behind the formal letter of the law, says Bentzon, is by constantly tracking the way life itself keeps creating and recreating the rule over the course of its development, and by reflecting on how this rule reflects back on life itself (see Bentzon 1904, 17–8).

[10] F. C. Bornemann (1810–1861) was professor of law and jurisprudence from 1840 to 1861. As the discussion suggests, he was strongly influenced by Hegel.

[11] It should be noted that neither Goos nor others whom Bentzon counted as Hegelian traditionalists were oblivious to the role that aims or purposes play in legal interpretation. But whereas these earlier theories conceived the aims and purposes of law as *a priori* and rooted in ethics, what Bentzon meant by *purpose* was the value beliefs and intentions held by those who had an actual interest in the law by being directly affected by it.

This approach also has a political dimension. Writing in 1904, Bentzon listed a number of legal institutions accepted as legitimate in times past whose fate was to be rejected or severely criticized: slavery, the duty to hold the Christian faith, the subordinate position of women, and so on. Bentzon emphasizes that it is of the utmost importance that criticism or acceptance of legal institutions be based on real insight into forms of individual and social life actually unfolding in contemporary society. His point was that the law will only be effective if it is attuned to the lived life of a society, and that the law must therefore evolve with the interests that shape this life.

Bentzon pursued this approach in what is perhaps his best work, *Skøn og Regel* (Discretion and rules: Bentzon 1914), inconspicuously published in 1914 as an offprint that, as we are told in an introductory footnote on the first page of the book, originated from the notes the author had written (a 102-page manuscript) in preparation for a lecture in the spring of 1904 on "Den positive rets ideale berettigelse" (The ideal justification of the positive law). This work focuses on what Bentzon saw as the deepest and most problematic distinction in law—that between regularity and individualisation, i.e., the problem that arises because legal regulation must be general yet applicable to unique individual situations.

Here Bentzon essentially develops a theory of judgment. He focuses on how behaviour in the most general sense must first be learned through instruction and on how these instructions over time recede into the background, when the behaviour in question is fully ingrained. He uses bicycle riding as an example. When we first learn to ride a bike, we have to listen to and follow instructions about how to get the bike moving, all the while keeping our balance, and then how to make turns and stop. Once we "know" how to ride, we simply follow a mode of behaviour. Over time, the practical art of cycling will become an unconscious skill, and the movements necessary to hold our balance, get up to speed, and control our direction will come naturally, without our having to deliberately repeat to ourselves the rules that govern the activity. This, Bentzon argues, is true of all forms of practical activity. The more familiar we become with the forms of life we participate in, the more we will be able to make immediate and finely tuned judgments about the proper way to behave in any given situation (Bentzon 1914, 24).

Bentzon's theory does not really concern itself with the question of what constitutes the right or correct decision in any of these situations. This, too, is probably because Bentzon drew inspiration from Jhering, while also attempting to mark an intellectual distance from his own predecessor in the chair, Carl Goos and the Hegelian tradition of structural conceptualism. Both in his work in general legal theory and in more specialised legal studies on various legal topics Bentzon emphasised the duality in legal concepts, a duality owed to the two basic yet opposite interests that must be reconciled in the practice of law: On the one hand the need for uniformity and regularity in the applica-

tion of law; on the other, the need to adapt the rules and principles of law to individual cases in a reasonable way. This duality found expression in the relationship between individual discretion and fixed rules. Legal practitioners and theorists alike accordingly have to frame or apply legal rules by taking these opposite interests duly into account, which in turn entails a need to balance individual interests against societal interests: freedom against coercion, individualisation against regularity, and so on. And since Bentzon took the view that the correct way to balance these interests in the decision-making process cannot be determined by recourse to *a priori* principles, he assigned a central role to judicial discretion and the individual circumstances of the case in his legal theory.

So, by reason of the focus Bentzon kept on actual judicial processes, he can be said to have anticipated legal realism in Scandinavia. But Bentzon was not alone in breaking away from the structural conceptualism characteristic of Hegelian approaches to jurisprudence. In Germany, both *Interessenjurisprudenz* (the previously mentioned jurisprudence of interests associated with Jhering) and the *Freirechtsbewegung* (or free law movement)[12] took an increased interest in the role and function of courts in the legal system. These two intellectual currents in German legal theory pursued what now appears to be an apposite acceptance of the insight that courts do not only engage in syllogistic reasoning but also carry out crucial tasks by "gap-filling" and developing the normative structure of law. Situating Bentzon in relation to the German developments in jurisprudence at the time, it would probably be fair to say that he was closer to the approaches developed under the heading of *Interessenjurisprudenz*. While the *Freirechtsschule* seemed to have more in common with the rule scepticism developed in American legal realism—both reacting to what was perceived as an excessive legal formalism, and both emphasising the wide scope of indeterminacy left open by most legal norms and the ensuing normative freedom for courts to use this indeterminacy as a vehicle for political activism—*Interessenjurisprudenz* was more moderate in this regard, in that it circumscribed judicial competence by tying discretion to the real interests that could be identified as reflected in the norms of positive law, primarily in legislation. In keeping with a Danish legal tradition tracing back to Ørsted and originally tied to absolute monarchy, but now to new forms of democratic government, Bentzon undoubtedly found it more correct to see the judge's role as being subordinate to the legislator. Bentzon's new theoretical stance should therefore be understood not as a radical break with the past, but as a

[12] The free law movement is most often associated with Hermann Kantorowicz (see Section 3.1 in this tome), and in particular, perhaps, with his essay, published in 1906 under the pseudonym Gnaeus Flavius, *Der Kampf um die Rechtswissenschaft* (The battle for legal science). This essay has recently drawn renewed attention with its first English translation: see Flavius [Hermann Kantorowicz] 2011.

turn toward a more pragmatic approach to the analysis of conflicting values and interests inevitably woven into the legal system. Bentzon retired in 1930.

22.3. Frederik Vinding Kruse: An Elitist Interplay in Danish Jurisprudence

Bentzon was much admired in his own time, and he was later praised by Alf Ross for his effort to connect general jurisprudence to practical legal thinking. In the foreword to the Danish edition of *On Law and Justice*, Ross wrote:

> It is perhaps only in recent years it has really occurred to me how healthy Bentzon's thoughts on legal philosophy is, how realistic his juridical method, and how many lines that connects my own thinking to Bentzon's. If logical rigour was not his strength, and if he was only little learned in philosophy, he had in return a higher degree of contact with the practical science of law than any of my two other tutors [Hans Kelsen and Axel Hägerström]. (Ross 1953, 4; my translation)

But Bentzon was not Ross' immediate predecessor. The background to Ross' *On Law and Justice* and also to his earlier publications on the general theory of law was the severe criticism from Frederik Vinding Kruse (1880–1963), who strongly opposed to the analytical turn that Ross advocated in jurisprudence.[13]

Vinding Kruse was appointed professor of law at the University of Copenhagen in 1914. After a doctoral dissertation on the legal aspects of the organization of capital and labour (Kruse 1913), he invested his time and energy in a major research effort in property law. This resulted in a 1923 book on the registration and organization of land ownership and other rights over land (Kruse 1923). The Ministry of Justice took notice and commissioned him to write a draft bill with a view to reforming the Danish law on land registration: The draft was accepted by the ministry and passed by Parliament in 1926. To appreciate just how thorough his work on this topic was, one need only consider that the Parliamentary Act on land registration (*Tinglysningsloven*) has been modified only slightly since its enactment more than eighty years ago.

From 1929 to 1933, Vinding Kruse published the massive five-volume *Ejendomsretten* (Property law: Kruse 1929), in which he introduced not only new legal distinctions and new ways of systematising the law, but also the basic jurisprudential ideas he would go on to develop in his later work. On the first page of the first volume he introduced his guiding idea: "As far as I can see, the social sciences must in the future rest on an amalgamation of law, social economics, physiology, psychology, and other academic disciplines that investigate the human condition" (Kruse 1929, 1, vol. 1; my translation). His claim, in other words, was that law in general, and property law in particular, had to be understood by investigating all the functions performed by the law in question and by analysing the impact of such law on all other spheres of life: the economy, ethics, psychology, aesthetics, and so on.

[13] On Ross see Chapter 16 in Tome 2 of this volume.

In this and in some of his earlier works, this holistic approach can be taken to signify an interdisciplinary openness to exploring the social causes of law and its effects on other social and societal phenomena. There are even suggestions that Vinding Kruse espoused a strict empirical approach to legal science. On the same page of *Property Law*, he writes that "if legal science is to become a realistic legal science, it must embrace the experimental evaluative approach to experience familiar to the other sciences" (ibid.; my translation). The key to this passage lies, of course, in the word *evaluative*. As was clear from his early criticism of Alf Ross, and as would become even clearer with the 1943 publication of his two-volume work on general jurisprudence (Kruse 1943), Vinding Kruse did not subscribe to what was then the radical new current in philosophy, logical empiricism. Indeed, as much as he was sympathetic to using empirical inquiry as part of the task of carrying out proper legal research he always held that empirical information was valuable only if coupled with an evaluation of its use and impact. Description for description's sake he considered futile, and in much of Alf Ross's early work he saw a concern with analysis and value neutrality so obsessive that it could not be reconciled with his own ideal of science. In Vinding Kruse's view legal science could be analogized to medical science: Just as medical science looks for ways to maintain *bodily* health, so legal science looks for forms of social organisation and legal regulation that can sustain a healthy *society*. So just like medical research is not simply concerned with observation, but with observation for the purposes of being able to actively interact with the body in order to preserve good health, so too legal research should not simply record information about legal events, but should theorize how the law can be adapted to bring about a good society.

Vinding Kruse was in this respect much more a man of the 19th than of the 20th century, and his sympathies lay much more with Goos's systematic and normative jurisprudence than with the down-to-earth pragmatism advocated by Bentzon, whom he succeeded in 1930, when he was entrusted with organising the jurisprudence curriculum at Copenhagen and teaching the subject to law students there.

In 1930, Vinding Kruse (1930, 135–62) reviewed Alf Ross's *Theorie der Rechtsquellen* (The theory of the sources of law: Ross 1929), strongly criticising the descriptive (pure) approach to law that Ross, much inspired by Kelsen's pure theory, adopts in that work. Since the main objective for Ross, as for Kelsen, was to bring into being a new legal science freed from natural law, politics, ethics, and economics—a science that would meet the standards of objectivity and exactness found in the natural sciences—the sociology of law was separated by Ross from legal politics and from the science of law. Ross also separated the science of law from legal history and ethics. In this early publication, Ross saw the single purpose of a theory of law as that of answering the question of how something can be conceptualized as law. In his quest to answer this question, he fought against the prevailing view, that the objec-

tive of legal science was both to systematically set out what the *existing* law is and to complete this system by identifying basic principles by which to interpret and apply the law. On the traditional approach law was conceived as the basic normative framework for state and society, and legal science therefore inevitably had to have a normative dimension to it. This normative dimension of legal science had historically been addressed by invoking natural law, and even though the language of natural law had been replaced with a more technical and "scientistic" language (as in Vinding Kruse's writings), it was widely accepted in legal science that those who are "learned in the law" are possessed of insights legitimizing them to "complete" the positive law by fleshing out the normative framework that the positive law is embedded in (natural law). Now, this idea that the descriptive and normative dimensions of law had to be merged in legal science was precisely the target of Ross's critique. Legal science had to be cleansed from the political and ethical dimensions that so often befouled the pure descriptions of what the law is. Vinding Kruse did not take kindly to this suggestion. In his review (Kruse 1930), he wrote that Ross in this way dispensed with the entire Danish and Norwegian tradition of legal science since Ørsted (see Section 22.1 above). This, according to Vinding Kruse, was not only unprecedented but also outright foolish, for a purely descriptive science of law will be of no value whatsoever: It will merely replicate the positive law such as it is, reiterating those facts that are already familiar to the judge and the other legal officials. Simply lining up trivial facts about the content of law does not amount to a science of law.[14] Only by offering a normative perspective on the positive law can legal science contribute with original knowledge to the legal community, and to this end legal scholars must engage in some kind of normative completion and guidance about how the positive law can best be made out to be a rational and ethically optimal normative system.

While Vinding Kruse was joined by other leading Danish law professors in his criticism of Ross, his own contribution to jurisprudence in turn drew significant criticism, when it appeared in 1943. This contribution, published under the title *Retslæren* (The general theory of law[15]: Kruse 1943), was a hefty two-volume work, but in fact a compilation of Vinding Kruse's previous writings[16] bundled together and presented as a work in its own right. The main

[14] Ross seems to have later come around to Vinding Kruse's view, publishing in 1936, in the same journal, an article (Ross 1936) that under the pretence of celebrating the pure theory of law actually winds up criticizing Kelsen along those same lines. For an English translation and commentary of this article see Ross 2011, Olsen 2011.

[15] As much as this may be a one-word title, it is actually difficult to translate. While *Retslære* (without the final n) corresponds to the indefinite (or zero article) form of the term jurisprudence, *Retslæren* (with the final n) corresponds to the definite form of the same term—"the jurisprudence"—but such usage would not be idiomatic in English.

[16] These are discussed in Evald 2005. For a sense of just how productive Vinding Kruse had been before publishing his *Retslæren*, and so how much material he could draw on, see ibid., 459ff.

theme running through the book consists in a kind of social Darwinism. In the first pages Vinding Kruse sets out the idea that law emerges naturally as higher forms of life evolve. With the development of the human species—and the ensuing possibility of large-scale social organization, division of labour, and long-term planning—science, philosophy, and the arts commence to flourish as part of an effort to make sense of this higher order of life. Science, philosophy and the arts then express in different ways the logic and rationale by which this higher order of life is held together. In this scenario, Vinding Kruse sees law as an instrument which serves to protect this higher-order form of life against the corrupting beast (evil) that is assumed to naturally live within us all. Law, then, serves to promote and protect the highest and finest forms of life.

In this book Vinding Kruse was also thinking about the way a future government ought to be set up,[17] and on the basis of this same sweeping conception he argued that the best solution would be neither monarchy nor democracy.[18] Both of these forms of government suffered from the same problem, namely, that the right to govern was based simply on the fact of birth. Neither the king in a monarchy nor the common man in a democracy had to demonstrate any special skills or competences to participate in the political process. Vinding Kruse saw this as a weakness in both forms of government, and in their place he advocated a meritocracy, in which government would be put in the hands of the nation's most intelligent and skilled men.

Vinding Kruse's critical attitude to democracy would soon mark the end of his success as a lawyer and an academic. Shortly after the end of the German occupation, Alf Ross wrote a scorching article in the leading Danish newspaper, *Politiken* (see also Evald 2010, 167ff.). Under the heading *Vinding Kruse and Nazism*, Ross pointed out how Vinding Kruse's legal theory supported a dictatorial form of government, not unlike that in place in Germany during the Nazi period. Vinding Kruse replied two days later in the same newspaper, accusing Ross of dishonesty for having mischaracterized his position, but there was abundant evidence in *Retslæren* to support the thesis that Vinding Kruse was in fact highly critical of democratic forms of government, and this, was

[17] At the time when *Retslæren* was published, 1943, Denmark was occupied by German forces and the Danish government had been exiled to London. Since no one knew what the outcome of the war was going to be, there was ample room for speculation about how best to organize Danish politics after the war. It is against this backdrop that Vinding Kruse's reflections on the best form of government ought to be read.

[18] Denmark had had parliamentary democracy since 1901, but the legal basis for this form of government lay in constitutional practice. Under the formal written constitution, dating back to 1849, the Danish king was free to appoint his own cabinet, and only in 1901 did he begin to appoint his cabinet in accordance with the political wishes of the lower chamber (or *Folketinget*). Several attempts to reverse this practice ensued, and as late as 1940, shortly after the commencement of the German occupation, a group of leading industrialists and businessmen approached the king with a proposal for a new constitution. *Folketinget*'s control over the Danish government was codified by a constitutional change in 1953.

enough for Ross's argument to win the day and to isolate Vinding Kruse as an anti-democrat under suspicion of having sympathy for Nazism. Ross henceforth positioned himself as the undisputed leading law professor in Denmark, with expertise not only in jurisprudence but also in constitutional law, while simultaneously running a private business writing legal briefs both for the government and for a number of private associations and businesses in Denmark.

22.4. Danish Legal Philosophy after Alf Ross

Alf Ross, and in particular his book *On Law and Justice* (Ross 1953), dominated Danish jurisprudence for two decades after its publication in 1953.[19] Indeed, the intellectual climate that developed in the post-war period was much more congenial to Ross's descriptive approach to law and legal science, and with the developing welfare state and a growing legislation and administrative apparatus, the legal system in Denmark gradually expanded to such a degree that no single person could possibly aspire to master its full breadth and complexity. Increased specialisation proved necessary, and in this light the idea of a general normative jurisprudence (be it Kantian, Hegelian, or Darwinian) seemed more and more distant and irrelevant. At the same time—with the increasing emphasis in the 1960s on new and more critical approaches to the social sciences (mainly that of the Frankfurt School, and of Habermas in particular, and that of contemporary hermeneutics, e.g. as developed by Gadamer)—it became apparent that legal science needed to revise its epistemological foundations, in order to address these new currents in social science.[20] As someone with a positivist background—and mainly inspired by Hans Kelsen, Axel Hägerström, and the philosophical movement of logical positivism—Alf Ross became an obvious target of criticism for those who were propounding these emergent new approaches to social science.[21] In the late 1960s and in the 1970s, criticism of Alf Ross's dominant approach to legal science emerged. Some of these first stabs at Ross' realism were single articles published in Nordic journals, but the emerging critique soon gelled into more comprehensive criticism. Looking back on this development, two strands of criticism can be singled out: They were articulated separately by two different authors who, through their criticism of Ross, and subsequently by attempting to theorize alternative foundations for legal science, have both contributed substantially to Danish jurisprudence, albeit in quite different ways. The first of these authors

[19] Ross's legal philosophy is treated in details in Chapter 16, Tome 2 of this volume.

[20] On Habermas see Sections 10.3.5 and 10.4.3.2 in this tome, and Sections 10.4 and 25.3 in Tome 2 of this volume. On Gadamer and legal hermeneutics see Section 10.3.5 in this tome and Section 23.4 in Tome 2 of this volume.

[21] On Kelsen see Section 2.3 in this tome and Section 8.3 and 8.4 in Tome 2 of this volume. On Hägerström see Chapter 13 in Tome 2 of this volume.

was Stig Jørgensen, one of the first professors in what was then new Danish law school situated in Aarhus, and the second was Alf Ross's predecessor as professor of jurisprudence in Copenhagen, Preben Stuer Lauridsen.

22.4.1. Stig Jørgensen: The Critique from Hermeneutics—the Rationality of Legal Judgment

Stig Jørgensen (1927–) started his career at the University of Aarhus by writing a doctoral dissertation on damages for personal injury in tort law (Jørgensen 1957), and in 1958, at just thirty-one years of age, he was appointed professor of tort law at the Aarhus University Institute of Legal Science.[22] In the 1960s, Jørgensen's growing interest in more general problems in legal science resulted in two minor publications (Jørgensen 1966, 1967), and then in a collection of articles published in German under the title *Vertrag und Recht* (Contracts and law: Jørgensen 1968). From 1972 and onwards, Jørgensen taught jurisprudence, and from 1974, his title was professor of jurisprudence and sociology of law. He retired in 1997.

Unlike Alf Ross and Frederik Vinding Kruse, Stig Jørgensen was a prolific writer, and yet he never published an opus magnum. Nor can any of his works in jurisprudence be said to offer something like a comprehensive theory of law. Instead, he published many articles and small books, often setting out good reasons for supporting certain already existing theories. One of Jørgensen's colleagues has explained this circumstance by pointing out a preference for what he called an "organic authorship" over that of a systematic and analytical authorship, which continuously builds on the same stringent system (Larsen 2006, 134). Applying Isaiah Berlin's famous paradigms for approaches to inquiry, that of the "hedgehog and the fox" (Berlin 1998, 436–98), Jørgensen would have to be categorized as a fox (who knows many small things, as opposed to the hedgehog, who knows one big thing).

Among Stig Jørgensen's many publications we find an article entitled *Argumentation and Decision*, published in 1969 in a *Festschrift* marking seventy years since Alf Ross's birthday (Jørgensen 1969a, 261–84). In this article, Jørgensen criticises Ross for not paying enough attention to the way legal argumentation and legal decision-making is structured. Jørgensen suggests that Ross's inadequate attention to the structure of legal argumentation and decision-making can be explained by reason of his scepticism about everything metaphysical, and by his espousal of logical positivism. Jørgensen sees this as

[22] The Juridisk Institut at Aarhus Universitet was inaugurated in 1936, but it was not until 1950 that the institute could offer a full master's degree in law. Its main purpose was originally to serve as a platform for educating legal practitioners for legal work, mainly in Jylland. Only in 1974 was a chair in jurisprudence endowed at the institute in Aarhus: It was called the chair in Jurisprudence and Sociology of Law.

a flaw in Ross's work, and in his article he underscores this point precisely by arguing that argumentation and decision-making can be construed as a rational activity, and hence that it is possible to have a science of argumentation and decision-making. In making the case that the study of argumentation can be set on a scientific foundation, Jørgensen looks to Theodor Viewehg's *Topik und Jurisprudenz* (Viehweg 1953, translated into English as *Topics and Law*: Viewehg 1993)—on the relation between general topicality and juristic argumentation—as well as to two works by Chaïm Perelman, namely, *Traité de l'argumentation: la nouvelle rhétorique*, cowritten with Lucie Olbrechts-Tyteca (Perelman and Olbrechts-Tyteca 1958, translated into English as *The New Rhetoric: A Treatise on Argumentation*, Perelman and Olbrechts-Tyteca 1969), and *Justice et Raison* (Perelman 1963a, translated into English as *The Idea of Justice and the Problem of Argument*: Perelman 1963b).[23] The point, as concerns Alf Ross, is that while neither Viehweg nor Perelman accept the premises from which logical positivism proceeds in laying out what counts as scientific inquiry and whether our knowledge of some object can be attained, they both have a method by which to understand how legal reasoning works. In other words, they both seek to show how legal argumentation can be understood as a rational activity even though it is neither deterministic nor amenable to empirical investigation. In the same year, Jørgensen (1969b) published an article in another *Festschrift*, this time in honour of the Norwegian professor of legal science Carl Jacob Arnholm. In this latter article Jørgensen further elaborates on Viehweg's work and attempts to show that topical concepts are central to legal reasoning. Jørgensen argues that topical concepts are closely linked to evaluative reasoning and that intensity plays a significant role in this form of reasoning, in that the various elements of a topic can be present with greater or lesser intensity. Intensity in the various elements of a topic is much more important to an understanding of legal reasoning than are the analytic distinctions among various legal concepts. As is also pointed out in *Argumentation and Decision,* it follows from this conception that syllogism does not play as important a role in decision-making as is often assumed in analytical jurisprudence (Jørgensen 1969a). Of course, Jørgensen does acknowledge that syllogism is a legitimate and important means of ascertaining whether the conclusion of a legal judgment follows from the premises set out in the case (that is, syllogism may be used as a rationality check on the final decision), but he adds that it may be "dangerous" to use syllogism as a model for describing the decision-making process itself, since this may lead to what Jørgensen sees as an erroneous view of what characterizes a legal judgment. More to the point, Jørgensen (1969a, 270) argues that a legal judgment should not be regarded *solely* as a logical conclusion derived

[23] On Viehweg and Perelman see respectively Sections 23.3.1 and 23.2 in Tome 2 of this volume.

from given premises: It should instead be understood as a decision based on an underlying value system that (*a*) is framed by basic legal principles inherent in the legal system, and (*b*) supports the rationality of the decision itself (ibid., 279ff.).[24]

Stig Jørgensen was among the first Danish lawyers to pay attention to the intellectual revival of hermeneutics. In 1973, he published *Hermeneutik og fortolkning* (Hermeneutics and interpretation: Jørgensen 1973), an article in which he attempts to apply hermeneutics to some basic patterns in juristic thought. With this article, Jørgensen comes somewhat close to identifying his own position within a hermeneutic approach to legal science. He makes it clear that a purely analytic definition of law narrows our perspective and leads to an impoverished understanding of the phenomenon. He argues that law should instead be understood as a societal and cultural phenomenon that has developed over time. Law is never only contemporary, here and now, but is always located in a historical context that shapes its content. Also in line with hermeneutics, Jørgensen rejects the way Ross construes the study of law, as an empirical science where propositions can be verified or falsified. Legal science is predominantly interpretive and mainly concerned with ascertaining the validity and import of evaluative statements (statements about the weight of different values and principles in legal argumentation). Legal science is better understood and carried out as a science preoccupied with understanding the nature and rationality of such evaluative statements.

Like Ross, but unlike Frederik Vinding Kruse, Viggo Bentzon, and Preben Stuer Lauridsen (see immediately below), Stig Jørgensen published widely in both English and German, and his work might therefore not be wholly unknown outside the Nordic countries. However, since his oeuvre cannot be clearly associated with any single current in jurisprudence, he is unlikely to have been counted as a leading theorist in any of the main "schools" of jurisprudence. And one can speculate that this outcome was precisely what he wanted, as is attested by one of his last publications, *Faces of Truth* (Jørgensen 2000): The cover illustration is a Janus-faced head, and the title only reinforces that metaphor (probably deliberately), signifying either a commitment to pluralism or an inability of the author to commit to any single coherent theory (here, too, the fox analogy suggests itself in an attempt to characterize Jørgensen's approach to jurisprudence). The content of the book's 114 pages is diverse and covers jurisprudence from ancient Greece to postmodernity. It

[24] Jørgensen likewise points out that "a choice is not irrational simply because it is a choice or cannot be the conclusion of a logical inference"; and, he continues, "the choice is guided by the legal ideas which control the legal system, and may 'etre justifies d'une facon raisonable grace à une argumentation don't on reconnait la force et la pertinence [justified in a reasonable way by virtue of an argument whose force and pertinence is recognized]'" (Jørgensen 1969a, 279). The French quote within the quote is referenced by Jørgensen as Perelman 1964 (see Engel 1964, 226ff.).

shows the breadth of Jørgensen's interest and his extensive knowledge not only of Nordic, English, and American but also of German and French legal philosophy. Perhaps it is precisely because he was so widely read, and because he could appreciate the ubiquitousness of ideas, that he remained reluctant, or otherwise found it imprudent, to embrace any mono-theoretical approach to legal science.

22.4.2. Preben Stuer Lauridsen: Iconoclasm or a New Paradigm?

The second substantial criticism of *On Law and Justice* had an even more epistemological twist to it and was mostly directed at Ross's so-called prognosis (or prediction) theory of law—the theory that if doctrinal propositions about law are to be viewed as having scientific content, they must be understood as predictions about the normative ideology judges will feel bound to apply in cases where that doctrinal content is relevant. This theory was frontally attacked by Preben Stuer Lauridsen (1940–2013) in a manuscript that was published as part of a doctoral dissertation on legal-political argumentation (Stuer Lauridsen 1974).

Ross's prognosis (or prediction) theory, as Stuer Lauridsen understood it, seems to entail a view of legal science as an empirical forensic science—and that, Stuer Lauridsen argued, is not the proper way to go about construing legal science. More to the point, Stuer Lauridsen identifies the problem as a misguided attempt to apply Russell's and Moore's correspondence theory of truth to the legal sciences. For the same reason, he considers it absurd to interpret legal doctrinal statements as predictions of future judicial behaviour (Stuer Lauridsen 1992, 66). What makes a particular statement about valid law true is not that it corresponds to some legal ideology that (in principle) can be shown to be shared by some group (say the group of Danish judges), but rather that the statement can be seen to be coherent with the overall assumptions made about the world in the linguistic community of lawyers.

A basic assumption of Ross's prognosis theory of law is that legal statements can be compared against legal reality. This assumption is closely tied to the correspondence theory of truth, under which statements are true if their meaning somehow contains a linguistic representation of empirical reality and can thus be said to correspond to that reality. On Ross's theory, the statement "X is valid law" is true only if it corresponds to a judicial ideology, where X is actually applied and perceived as a binding norm. Doctrinal statements can therefore be verified or falsified by holding them up to the existing judicial ideology and seeing how the two compare. Now, Stuer Lauridsen's argument is that no such comparison can make sense. The so-called legal reality (judicial ideology) can only be accessed through a similarly structured legal language, and that means that the distinction between reality and description collapses: There simply is no language-independent reality against which to measure

doctrinal statements. Any such reality is necessarily going to be itself captured through a description expressed through doctrinal propositions, and there is therefore no way to distinguish description from reality.[25]

Stuer Lauridsen uses a concrete example to illustrate the problem of applying the correspondence theory of truth to the legal sciences. On the correspondence theory of truth, a statement, e.g. "Theft is illegal," is true only if theft is in fact illegal. On Ross's theory of law, whether that is actually the case is something to be determined by empirically investigating the judges' behaviour and convictions, that is, by investigating the prevailing judicial ideology. But such an inquiry into empirical reality would itself yield a *description* of that reality, a description whose truth would in turn have to be determined by looking at how closely it matches the reality it claims to explain, and so on ad infinitum. Hence, there is no ultimate way to verify or falsify the statement "Theft is illegal." Ultimately, all one can do is check to see whether the statement is coherent with other statements about the legal system.

This criticism of the correspondence theory of truth is not unique. Nor was it new when Stuer Lauridsen used it as a basis for criticising Ross. Although Stuer Lauridsen makes no clear reference to the leading international works in epistemology, it seems likely that he was inspired by W. V. O Quine (1953, 20–43), and in particular by the criticism of logical empiricism he first set out in his famous article *Two Dogmas of Empiricism* (Quine 1951) and later, more comprehensively, in *Word and Object* (Quine 1960).[26] According to Quine, all knowledge is generated out of an interaction between language and experience. Human cognition should be analogized to a spider web (a web of beliefs): At its centre lie the most basic components of our language and forms of reasoning, that is, the basic *logical* components; from here there is a gradual transition towards the web's outer rim, where language that points to concrete physical objects meets sensory experience (our experience of the perceived world). Quine's point is that even the most exact sciences (like physics and chemistry) cannot create any certain knowledge on the basis of empirical verification

[25] As one might expect, Ross came out with a trenchant response to this criticism: In a Danish weekly law journal, he reviewed Stuer Lauridsen's dissertation under the title *En Traditionstro Billedsstormer* (A traditionalist iconoclast: Ross 1975), in what might be qualified as an empirical rebuttal of Stuer Lauridsen's argument. In a bid to defend the scientific validity his own prognosis theory, Ross wrote: "This is how scientists proceed all over the world—they test their hypothetical assumptions about some universal law by deducing predictions about specific observations that one should be able to make under certain conditions" (Ross 1975, 231; my translation). But he does not seem to really address Stuer Lauridsen's point, which is that the "specific observations" by which those "hypothetical assumptions" would be verified or falsified are themselves descriptions (of what has been observed), and as Quine has pointed out, there may be more than one way to describe any observed phenomenon, nor is it always clear which description best captures the observation.

[26] Stuer Lauridsen refers mainly to the Danish philosopher Arne Thing Mortensen, whose *Perception og sprog* (Perception and language: Mortensen 1972) does include references to Quine.

alone, because any empirical inquiry will always have an interface with nonempirical factors, such as the structure of language, logic, and various theoretical assumptions. The overall web of belief, in other words, is underpinned not only by experience but also by our theoretical, logical, and linguistic conventions: This existing web is something we must always reckon with, and with it we must accordingly align whatever results an experiment might yield. This is done by making sure that the descriptions of the experiment and its results can be made to cohere with the web. The decisive criterion of truth, then, is not correspondence but consistency: Whether a thesis or theory is true depends not on whether its language corresponds with reality but on whether the new web of beliefs (inclusive of that theory or thesis) turns out to be more or less consistent.

In keeping with Quine's theory, Stuer Lauridsen claims that there can be no legal reality independent of language, and that the truth of a legal statement therefore cannot be determined just by subjecting that statement to an empirical examination. He therefore rejects the correspondence theory of truth in favour of a theory according to which legal propositions are true if they cohere with the overall legal system as set out in other propositions about the law generally accepted as true. The truth of a legal proposition, then, is something primarily to be investigated by considering that proposition together with all the other relevant propositions to see if they make a coherent whole. So for Stuer Lauridsen, judging the legal validity of a proposition is ultimately a matter of taking in the overall network (or web) of propositions at issue and working out the consequences of these propositions—and a statement is valid insofar as the resulting web and consequences can be accepted altogether. Stuer Lauridsen asserts therefore that legal validity depends on the extent to which the language user can vouch for all the linguistic and legal consequences arising from his once made choices of description (Stuer Lauridsen 1974, 201). In a more recent publication that was issued shortly before Stuer Lauridsen's retirement as a professor of jurisprudence at the University of Copenhagen, he restated this as follows: "Decisive of whether a description is correct, therefore, first and foremost depends on whether the choices of description are properly made. The linguistic consequences of the choices of description represent the meaning of the chosen description. If the language user can vouch for these consequences, he has chosen correctly" (Stuer Lauridsen 1992, 70; my translation).

On this view, the decisive criterion in determining legal validity (i.e., in determining whether or not doctrinal statements are correct) becomes whether or not the language user can "vouch for," that is, endorse, his or her own description. This seems inadequate for two reasons. Firstly it seems intuitively odd that the criterion by which to determine the validity, or correctness,[27] of a legal proposition should be whether or not the speaker is willing to accept the

[27] In replacing the correspondence theory of truth with a coherence theory, Stuer Lauridsen also chose to replace the notion of truth with that of correctness.

linguistic consequences deriving from the proposition in question: Why should the person who is formulating the proposition also be the one entrusted with assessing its correctness? You would be a quirky lawyer indeed if, having described the law applicable to some area, you were to claim that the description you just offered is incorrect, since you cannot bring yourself to accept the linguistic consequences which follow from that description. Secondly it seems an implicit background assumption that when we engage in making claims about the law (indeed making any kind of claims), we will be ready to vouch for them and will believe them to be correct. But that does not make those claims correct, for it would surely be absurd if we could make claims about the law and reject the possibility of their being false. Why shouldn't someone's description of what the law is be amenable to falsification by some standard other than the describing person's own rejection of that description? If correctness depends only on what the describing person is willing to accept, any discussion about what the law really is will prove meaningless.

Stuer Lauridsen (1974, 22) is well aware of this problem, and he therefore attempts to further qualify the correctness requirement. He does so by acknowledging that statements about valid law cannot be made completely independent of any constraints other than our intrapersonal acceptance of the consequences those statements will have on our larger web of legal beliefs. More to the point, statements about valid law must be made in accordance with the generally accepted legal method, that is, by looking at the sources of law and observing the general principles of legal interpretation. Correctness is in this way grounded in an interpersonal acceptance of a shared basic web of legal beliefs. In this way Stuer Lauridsen holds to his criticism of the correspondence theory of truth, thereby also continuing to support the view that there is no ultimate truth to be reached outside the legal language itself. But, as was just hinted at, he introduces a correction by which to keep in check the extreme subjectivism suggested in the foregoing account of his theory: He posits the requirement that statements about valid law can be accepted as true only if grounded in the generally shared principles for generating such statements; these are the generally accepted principles for generating correct statements about valid law, or, for short, the method of legal inquiry (ibid., 185). On this view legal inquiry—or law finding at large—is best described as the product of a self-sustaining epistemological community.

On this revised view, statements about the law—whether they are made by law professors at universities or by lawyers arguing a case or by a judge deciding a case—are correct only if they cohere with the broadly accepted sources of law and the principles of legal interpretation, that is, with the generally accepted method for producing statements about valid law. Statements about the law, then, will stand or fall depending on whether or not they comply with the rules for describing the law. Stuer Lauridsen emphasizes that this is what gives the finding and description of law its methodological basis:

> Legal method is scientific; its correctness depends not on our emotional response to it but on its ability to function as an analytically satisfactory and harmonious foundation for describing the law and its theory. This is likely to ultimately depend on its intersubjective acceptance among competent legal professionals [that is, among good lawyers]. (Stuer Lauridsen 1992, 111–2; my translation)

This position is entirely in line with the move from the correspondence theory of truth to the coherence theory. According to Stuer Lauridsen, the question of which principles of method and which principles for identifying sources of law can lead to the greatest harmony is a question for competent lawyers to decide. The epistemological buck stops here! Consensus among legal professionals (or, as Stuer Lauridsen says elsewhere, among competent peers) stands out as the irrevocably final criterion of correctness and hence of legal validity.

22.5. Conclusion: Connecting Danish Legal Philosophy after Alf Ross to Broader Jurisprudential Movements

Danish legal philosophy is most widely known for the contribution of Alf Ross. There is still an interest in his legal philosophy in international jurisprudential circles, even if his work is somewhat removed from contemporary trends in general jurisprudence. The criticism H. L. A. Hart devoted to Ross's *On Law and Justice* (Hart 1959) was undoubtedly the single most important influence on the reception of Ross's work in the English-speaking world, but there recently seems to be greater recognition that Hart proceeded on a somewhat superficial reading of that book. It has also been credibly suggested that the book suffers from a poor translation, and that this makes it difficult to appreciate the real depth of Ross's theory.[28]

It is, however, Preben Stuer Lauridsen's epistemological move from the correspondence theory of truth to the coherence theory, and the ensuing focus on the autonomous status of the epistemic community of lawyers that steers a path closer to some of the more dominant trends in contemporary general jurisprudence. Perhaps the best-known theory in this area is Robert Alexy's, in which coherence plays a central role in ultimately determining legal validity (Alexy 1978).[29] Similarly, the Polish-born legal philosopher Aleksander Peczenik, who taught as professor of jurisprudence in Lund, Sweden, until his death in 2005, has theorised a view of legal argumentation as an exercise in constructing coherence in practical reason (a view he developed in part with Robert Alexy).[30]

[28] In order to mend that, a new translation of *On Law and Justice* is currently underway. This new edition, to be published by Oxford University Press, will be translated by Uta Bindtreiter (Lund University) and edited by Jacob v. H. Holtermann and Henrik Palmer Olsen (both University of Copenhagen).

[29] On Alexy see Sections 10.3.2.2 and 10.4.3.1 in this tome, and Sections 1.5.4.1, 10.3, and 25.4 in Tome 2 of this volume.

[30] Aleksander Peczenik has published extensively in Swedish. Among the writings he pub-

Also relevant in this respect is the turn to contemporary hermeneutics and the focus on the rational reconstruction of legal argumentation: This can be appreciated in the work of Neil MacCormick, which in the spirit of Stig Jørgensen's attempt to "undo" Ross's anti-metaphysical deconstruction, as it were, by constructing legal argumentation and decision-making as an enterprise that proceeds from the legal system's inherent values (MacCormick 1990).[31]

In Norway, the late David Doublet[32] argued that legal argumentation is situated in a specialised epistemic community, and that the validity of legal arguments stand and fall with their acceptance in this community (Doublet 1995). Albeit relying on an epistemological foundation different from that of Stuer Lauridsen (Doublet seem to have been predominantly inspired by Niklas Luhmann) and without an explicit commitment to coherence theory in the style of Robert Alexy and/or Aleksander Peczenik, this is quite close to—if not identical with—Stuer Lauridsen assertion in the quote above, that validity "ultimately depend on its intersubjective acceptance among competent legal professionals" (Stuer Lauridsen 1992, 112; my translation). In Finnish legal theory, Kaarlo Tuori (2002a) has developed a theory he has termed critical legal positivism, arguing that the legal system is a coherent normative structure and that at the core of this system we find non-positivized principles of law capable of functioning as critical hermeneutics aimed at determining and assessing the content of positive law.[33] Like Stig Jørgensen, Tuori envisages law as consisting of layers, with positivised law at the upper level (or surface) and the more general values situated at deeper levels within the law. For Tuori, this layered structure makes for a gravitational force in legal reasoning, a force that serves as a kind of common reference point enabling us to stabilize law's normativity and ground the legitimacy of public policy as expressed through positive legislation. Coherence ensures a connection with the basic principles of law (the values that underlie positive law), which play an important role in rationalizing legal decision-making, as they do for Jørgensen, too.

Coherence and hermeneutics also seem to play an essential role in Ronald Dworkin's theory of adjudication (Dworkin 1986), even though Dworkin prefers the term *integrity*. Although some aspects of Dworkin's theory go well beyond what can be found in Danish legal theory after Ross (witness his one-right-answer thesis and his rights-as-trumps thesis: Dworkin 1977), many similarities can be found at the level of theoretical orientation, especially in connection with conceptual strategies such as interpretivism (hermeneutics), coherence (integrity), and context-based argumentation (Dworkin 1986).

lished in English with Alexy see Alexy and Peczenik 1990, Aarnio et al. 1998. On Peczenik see Sections 21.4.2.2 in this tome and Section 25.6 in Tome 2 of this volume.

[31] On MacCormick's theory of legal reasoning see Section 25.2 in Tome 2 of this volume.

[32] On Doublet see Section 23.4.2 in this tome.

[33] On Tuori see Section 24.4 in Tome 2 of this volume.

But if one should wish to identify in Danish jurisprudence an undercurrent running all through the 20th century, it would have to be its unwillingness to subscribe to any grand theory. Danish jurisprudence and legal theory is, if anything, pragmatic—not in the sense of adapting to pragmatist theory but in the sense of rejecting the idea that a theory can somehow define what law is. It would, of course, be a contradiction in terms to characterize Danish jurisprudence as anti-theoretical, but there is at least a sense in which neither sophistication nor conciseness for its own sake can be said to be highly valued in Danish legal theory. There is instead a prevailing sense that theory must yield to practice and that a theory of law should be measured by its ability to produce insights that are of use to practicing lawyers.

Chapter 23

LEGAL PHILOSOPHY IN NORWAY IN THE 20TH CENTURY

by Svein Eng[*]

23.1. Introduction

Legal philosophy is inescapably interwoven into the issue of the relationship between law, morals, and the possibility of practical knowledge. In this respect, legal philosophy in Norway in the 20th century took a path different from the corresponding fields in the neighbouring Scandinavian countries, Denmark and Sweden. In the first three quarters of the century, the discussions were more fragmentary and low-key, and in the period of Hägerström, Olivecrona, Lundstedt, Hedenius, and Ross, one would seek in vain corresponding research and discussion among Norwegian academics.[1]

A presentation of the developments in Norway is therefore at times dependent upon extrapolation from texts not intended as contributions to legal philosophy proper or written by authors who dedicated their main research efforts to other fields. In what follows, we have systematised our presentation around two main sets of issues, selected partly with an eye to the history of legal philosophy in general and its recurrent core issues, partly with an eye to the actual developments in Norway in the period under consideration.

First, there is what we may term the "ontology of normativity": What is the basis of normativity in reality? Included here is the question of the possibility of natural law based on reason: Are we invested with practical reason, that is, is there such a thing as practical knowledge related to law?

Secondly, there is a cluster of discussions centered on which concepts have the strongest claim on our attention and interest if we choose to give an account of the idea of a positive legal system.

Placing the developments in Norway in perspective requires that both sets of issues be a part of our map. The fact that an area was left unexplored for some time is significant in itself.

23.2. The Origins: Experience and Interests

In 1834–1835 the Norwegian jurist Anton Martin Schweigaard (1808–1870) published a critique of German philosophy in general and of its legal and politi-

[*] The author should like to thank Stanley L. Paulson for help and advice on matters of English style.

[1] On Hägerström, Olivecrona, Lundstedt, Hedenius, and Ross, see respectively Chapters 13, 14, 15, Section 17.3 and Chapter 16 in Tome 2 of this volume.

E. Pattaro, C. Roversi (eds.), *A Treatise of Legal Philosophy and General Jurisprudence*,
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cal relevance in particular (Schweigaard 1834, 1835). He passed harsh judgments on what he took to be empty metaphysics—"empty," that is, given his own framework of what exists, what we can cognize, and what we can rationally discuss.

On these philosophical points, Schweigaard's own reasoning was rudimentary or nonexistent. His conclusions, however, epitomized and strengthened prevailing views. Schweigaard soon established himself as a leading figure on the public scene of the recently established constitutional democracy in Norway. As a professor of law from 1840, and as the leading member of the Norwegian parliament, first elected in 1842 and serving until his retirement in 1869, he incrementally built what was to become the ruling view of the relations between economic life, civil society, and state power. From a political point of view the key concept is pragmatic coexistence. From a philosophical point of view the key concepts are experience and interests: The only possible basis of cognition is experience, and practical argument acquires its justificatory force from interests and utility, be it the interests of individuals, groups of individuals, or of society at large.[2]

From a broader point of view, the upshot was a *sui generis* blend of economic liberalism, utilitarianism, and state intervention. In the perspective of legal philosophy, those parts of the framework referring to experience and interests contributed significantly to constituting the form of legal positivism that was to become a permanent part of legal philosophy in Norway, and, as we shall see, at times also the dominant part. The key idea was that the bounds of practical reason coincided with the bounds of arguments from interests and utility.[3]

23.3. From 1900 to 1945

23.3.1. The Ontology of Normativity

Francis Hagerup (1853–1921) argued for a species of what we may term the psychological concept of norm.[4] In a brief paper entitled *Det psykologiske*

[2] See Seip 1959 and 1968, 22–71, for analyses of species of Schweigaard's arguments in public debates; see further Seip 1974, 98–115, and 1988, 67–125. For a collection of essays on various aspects of Schweigaard's work, with further references, see Mestad 2009. Contested issues of interpretation relating to Schweigaard and his heritage are discussed in Sørensen 1988 and Slagstad 2001, especially 62–98, 223–7, 232–6.

[3] In stating that "the basis and source of all law" cannot but be the criterion of "least imperfection," Schweigaard indicates a version of negative utilitarianism (Schweigaard 1834, 307; my translation). This particular aspect of his position does not seem to have found much resonance in later theory, however.

[4] Francis Hagerup was a professor of law at the University of Christiania from 1887 (in 1925 the city was renamed Oslo). Representing the conservative party in national politics, he served as minister of justice, 1893–1895, and as prime minister, 1895–1898 and 1903–1905. He wrote in a wide range of fields: the law of obligations and property, procedural law, criminal law, legal method, and public international law.

grunnlag for retten (The psychological basis of the law: Hagerup 1907), he formulated his view thus:

> [That a norm, including a legal norm] "is valid" means in general that it can motivate human beings in their acts and omissions. If a legal norm has lost this capacity, it is no longer valid, regardless of the extent to which it happens to be part of our consciousness in other respects. (Ibid., 2–3; my translation)

> Altogether we will not speak of "law" where the only motivating element is the physical force sanctioning the directives in question. True, there is force behind the laws, too, and, true, directives that were initially *solely* orders backed by threats [...] may become legal norms. A genuine legal norm, however, is present only if it evokes the idea of a *duty* to obey the directive [...]. (Ibid., 3; my translation)

In Hagerup we see the idea of a psychological concept of norm in embryonic form. The idea has been developed and refined by many authors; in Norway, this is especially true of Torstein Eckhoff and Nils Kristian Sundby. We shall return to a more detailed discussion in the context of these two authors' work (Section 23.4.1.1 below).

In the first three-quarters of the 20th century, Frede Castberg (1893–1977) was one of the very few among professional legal academics in Norway who argued for a natural law position (Castberg 1939, 1957, 1965).[5] He rejected seeing the nature of normativity and norms as exhausted through analyses in terms of internalisation or other psychological factors.

The positive content of Castberg's position, and what he took to be the grounds justifying it, was, on the other hand, less clear. From several passages we may gather a certain influence from Kantian and Kelsenian ways of thinking, but also, in contrast to these two authors, a marked hesitation to enter into more detailed argument.

On the issue of the nature of the binding force of norms, Castberg's final justificatory step seems to be an appeal to the fact that most people do not accept that their idea of the binding force of norms is illusionary (see, e.g., Castberg 1939, 153, 155; 1957, 111, 112; 1965, 37; 1971, 204). On the issue of the content of natural law, he points to justice, logical coherence, and the effectiveness of the laws as means to the ideal and ultimate goals—while refraining from attempting to specify what these goals are (see, e.g., Castberg 1939, 154; 1957, 111; 1965, 128–33, cf. 106–15). While, with respect to the issue of the binding force of norms, he is content to refer to what people do or do not accept, he is precluded from invoking this kind of argument at the level of the more specific norms, since a basic tenet of his is that the difference between

[5] Frede Castberg was a professor of law at the University of Oslo from 1927. His main fields were international public law, constitutional law, and administrative law. Serving as an expert for the Ministry of Foreign Affairs, he acquired firsthand knowledge of the relations between law and force. Throughout his life he was dedicated to the issue of what makes good law.

right and wrong does not coincide with the difference between majority and minority opinion (Castberg 1965, 118; 1971, 318–20).

In his earlier writings he kept natural law at a certain distance, and although he would later term himself a natural law theorist (Castberg 1965, 131), he hedged his position in several important respects. Thus, according to Castberg (ibid., 128–9), there is no set of laws that are valid independently of time and place, and there is no set of correct solutions to each and every human conflict. Instead, the substance of natural law consists in imposing certain limits to what can justifiably be argued for in light of the ultimate ideals, and the most that is corroborated by this is a natural law with a changing content (Castberg 1939, 155; 1957, 111; 1965, 138, cf. 121–35). He denied (Castberg 1965, 133–5), however, that his position could be adequately characterised as exclusively formal.

In some places, Castberg (ibid., 125–6, 133) relies on beliefs and emotions, in contrast to cognition, in such a way that the distinction between his own position and the emotivist stance of the Scandinavian legal realists becomes a very fine one.

Castberg's main research fields were international law, constitutional law, and administrative law. His acquaintance with the issues and arguments of legal philosophy not infrequently seems to be second-hand only, and his arguments are often rudimentary. He deploys a psychologically tinged nomenclature, quite often referring to our mental acts and their feature of being "more or less conscious" (see, e.g., Castberg 1939, 131; 1957, 94), and he takes little part in the substantive issues of philosophical justification. In brief, he was more of a presenter of standpoints than a participant in the ongoing debates of legal philosophy. His important contribution was his keen sense of the inescapability of normativity in human existence, and, consequently, his consistent questioning of the arguments of the Scandinavian legal realists to the effect that this aspect of human existence is illusionary through and through.[6]

23.3.2. The Foundations of Legal Method

Doing justice to the Norwegian discussion on legal method at the end of the 19th and beginning of the 20th century requires both that we see the links to

[6] An aspect of Castberg's contribution was his ability to see, already in his first writings, the importance of what must be a critical issue in any argument for intersubjectively valid normativity, namely, the mediation between the normative structure taken to be valid and the changing empirical circumstances in which, and to which, this normative structure is to be applied: see Castberg 1920, 539; 1922a, 150. Since most authors in the Norwegian literature rejected, or kept at a safe distance from, the premise of the problem—the existence of an intersubjectively valid normative structure—the problem of mediation was not given the attention it deserves. In the recent literature, the issue has been reformulated and discussed in detail by Svein Eng: see Eng 2007, 247–487, esp. 377, 394–436, 453–9.

the corresponding German discussion and that we see how the German concepts of conceptual jurisprudence (*Begriffsjurisprudenz*) and constructive method (*konstruktive Methode, juristische Konstruktion*) were transformed into heuristic tools.

We may characterise the heuristic turn by pointing to the way in which the constructive method was justified by reference to the goals of making certain information easier to comprehend, recall, and apply; such considerations we shall call "heuristic considerations" (Eng 2003, 397, 412).

To pinpoint the pertinent contrasts, we shall quote from Hagerup and Castberg.

> Through such subsumption of the legal material under a system of relatively few and simple concepts [i.e., via such legal construction], the *acquisition of it and the mastery of it* is greatly facilitated. […] Through the constructive tracing of general legal norms back to simple concepts, and through the cognition of these concepts' systematic connection with one another, the understanding is gained, first, that here it is in reality a matter of relatively few elements, and, second, that it is important to penetrate these in order thereby to be able to master a wide range of individual precepts and *with relative ease and speed to be able* to find one's bearings when confronted with new or unfamiliar legal rules. [...] With respect to the simplification of the legal material and the facilitation of the acquisition thereof, which the formation of legal concepts brings about, an apt comparison has been made between the formation of legal concepts and the *formation of the alphabet*. (Hagerup 1931, 29–30; my translation, italics added)[7]

> The constructive method is what one calls that method in legal science according to which one seeks to *summarise* the norms of positive law in more general propositions, with the intention of *cognising the logical coherence* of the legal order, *sparing memory* the labour of retaining an infinity of detailed norms, and—in the view of many people—acquiring, in the generalisations set up, *the means for the resolution of newly arising questions* of law. (Castberg 1922b, 294; my translation italics added, italics in the original omitted)[8]

These quotations illustrate the emphasis that was placed upon heuristic considerations in justifications of the constructive method. In addition, however, we see a tension between a version of constructivism that is *only* so based and a version that accepts the use of generalisations as a "means for the resolution of newly arising questions" (see the end of the quotation from Castberg). We may speak of a "law-producing" as opposed to a "heuristic" view of concepts and principles generated by the constructive method (Eng 1998, 409–10, 474–6; in part also in Eng 2003, 412–3).

The constructive method generated opposition on two fronts.

First, it understood itself to have superseded the sceptical attitude towards abstract concept formation that was instantiated in Schweigaard's "analytical-

[7] The reference to the comparison with the alphabet is almost certainly made with Jhering in mind (see Jhering 1858, esp. pp. 339ff., 363, 372ff.).

[8] See also Castberg 1922b, 304 ("facilitates the intellectual mastery of the legal material") and 316 ("urge for logical cognition").

descriptive method" as well as in the casuistic approach he deployed in his writings on the law.[9]

Schweigaard's may seem to be a moderate version of scepticism towards our ability to form and apply concepts. This impression owes more, however, to the fact that his investigations were brief than to any clearly delineated doctrine on his part. The 20th-century version by Gunnar Astrup Hoel (1896–1968) was, by contrast, more systematic and clearly intended to be radical. In his book *Den moderne retsmetode* (The modern legal method: Hoel 1925), Astrup Hoel argued that in any determination of what the law is, the crucial element is a *decision* on the part of the law applier (ibid., 62–6, and further, e.g., 124–5, 147, 179).[10] The key term *decision* is here to be understood "in the widest sense possible, as a general term for the actively personal element in legal reasoning" (ibid., 62 in note; my translation). Such decisions are based on an immediate and intuitive act of grasping the singularity of each case, with its infinite particularities. They are not, we may infer, in any way mediated by intersubjectively shared conceptual criteria.

While having the form of a critique of what he took to be the prevailing view of the role of concepts in legal reasoning, namely, the law-producing view (ibid., 101–5, 203), Astrup Hoel's argument has wider implications. Indeed, his decisionism represents a radically sceptic view of our ability to share in *any* practice of forming and applying concepts, and as such the argument has to be defended at the level of basic philosophical positions. Astrup Hoel's discussion, however, moves within the limits set by the discussions of legal methodology, and he does not seem to recognise the general philosophical implications of his own statements (ibid., e.g., 19–20 and 104 n. 2; cf. 203–5).[11]

While the first front—against scepticism vis-à-vis our ability to form and apply concepts—was part of the genesis of constructivism as a position in Norwegian legal theory (Hagerup 1888), the second front came later. Although not a necessary implication of the position as it was presented in the works of Hagerup, its leading proponent and practitioner in the Scandinavian literature,

[9] In the paper by Hagerup in which he argued that constructivism was the superior method, he says: "In order to fulfill its task, legal science must take the path against which Schweigaard warned, and view the legal norms in their conceptual and systemic interconnections" (Hagerup 1888, 19; my translation). Schweigaard did not offer any explicit definition of what he termed the "analytical-descriptive" method, but left it to the reader to gather its meaning from the context, i.e., from its implied contrast with the constructivist methods he criticised: see Schweigaard 1834, 307, 332–3.

[10] For reasons of internal consistency, this thesis must be claimed to hold good whether the determination be formulated in general or singular terms, whether it be a determination found in legal textbooks, in the premises or conclusion of a judgment, or in other contexts. In his actual argument, however, Astrup Hoel focuses primarily on the perspective of the decision-maker in an individual case.

[11] Surprisingly, Astrup Hoel has very little to say about the Uppsala school: see Hoel 1925, 66 n. 1.

constructivism tended to go together with conservative political views, promoted by way of considerations of certainty and foreseeability with regard to the legal consequences of actions (Hagerup 1888, 42–3; 1915, 24–5).[12] In this respect, opposition to constructivism was raised by those claiming the methodological relevance of considerations referring to social policy and general political ideals.

The sociopolitical view found telling expression in the works of Ragnar Knoph (1894–1938). In line with newer trends at the time, he argued that Section 97 in the Norwegian Constitution, stating that the legislative assembly lacks competence to enact statutes with retroactive effect, was to be read as a legal standard (Knoph 1939). By *legal standards* he meant norms instructing the law-applier to weigh and balance arguments and to let this weighing-and-balancing act be informed by the normative attitudes that in fact exist in society.

Knoph's arguments are of interest to us in that they touch upon two themes that were to be elaborated in more systematic and precise ways later in the century. First, his concept of legal standards and that of their rationalisation anticipated later theories of weighing and balancing and their companion guidelines and type instances. Secondly, his reflections in the area where constitutional law intersects partly with the doctrine of the sources of law, partly with politics, serve aptly to illustrate the later discussion of the basis of the doctrine of the sources of law. For both themes, see Section 23.4 below.

These, then, are three important lines of thought in jurisprudential debates on method in Norway: varieties of a *sceptical* attitude, quite often combined with an analytical-descriptive view; the *constructive* view; and the *sociopolitical* view. This tripartite division seems true to the way in which the interlocutors themselves looked upon their methodological debates, and it seems representative of the main currents in the methodological debates of the century.[13]

[12] Although Hagerup built upon the seminal German discussions, and although he was a leading figure in the Norwegian conservative political party, he did not emulate the link between the doctrine of legal method and conservative political views that was seen in Germany (Wilhelm 1958, 125–7). On Hagerup's constructivism in its historical context, see Björne 2002, 216–28, with further references to lines of discussion and interpretation.

[13] Considerations of space do not allow us to refine the meanings of the three key terms or to investigate whether, and, if so, to what extent, the three lines of thought are incompatible in argumentative terms; the latter obviously depends on how we choose to define the key terms in various directions in which we may be interested in arriving at clarity.

23.4. After 1945[14]

23.4.1. The Ontology of Normativity

23.4.1.1. Torstein Eckhoff and Nils Kristian Sundby

On the model put forward by Torstein Eckhoff (1916–1993)[15] and Nils Kristian Sundby's (1942–1978),[16] a norm is a normative proposition that has been internalised.[17]

Eckhoff and Sundby distinguish between direct and indirect internalisation.[18] An individual stands in a relationship of *direct* internalisation to a normative proposition when the individual has a positive attitude towards it. An individual stands in a relationship of *indirect* internalisation to a normative proposition when it may be justified through other normative propositions that the individual has internalised directly. These other norms, then, may be termed *meta-norms*.

In legal systems there are two sets of such meta-norms that are particularly important.

First, there are *the norms in the constitution that empower the legislative assembly to enact statutes*. Few people stand in a relationship of direct internalisation to more than a fraction of the statutes applicable to them. Most people, however, have directly internalised the norms in the constitution em-

[14] World War II meant an end to the predominance of German authors and discussions as parameters in Norwegian law and legal philosophy, making it a basic criterion of periodisation in any general presentation.

[15] Torstein Eckhoff was a professor of law at the University of Oslo from 1957. His first writings were in procedural law, but over the years he moved into public law, the doctrine of the sources of law, and analyses of types of norm and their interaction in law and legal science. Eckhoff acted as a catalyst between law and other academic disciplines, especially social science, in which he kept a lifelong interest.

[16] After having studied philosophy and law, Nils Kristian Sundby was an associate professor of law at the University of Oslo from 1972. His main research field was legal philosophy. He also wrote papers in criminal law, tort law, and on psychiatry, and he took an active part in critical legal studies and in the politics of his day.

[17] We use the term *proposition* in a neutral sense in relation to the distinction between the normative modality and the descriptive modality. More precisely, a proposition may be normative or descriptive, or it may have a fused descriptive and normative modality: on the third alternative, see Section 23.4.6 below.

[18] The term *internalisation* may designate a wide variety of mental states or processes: In one dimension there is a range that runs all the way from accepting the content of a norm to simply not rejecting it; in another dimension there is a range that runs from deliberately performing these mental acts to simply growing into traditions and habits; in a still further dimension there is a range that runs from deeply held convictions to ephemeral opinions; and so on. Here, we shall use the term as shorthand, denoting these dimensions and degrees collectively. This is true to the subject matter, since Eckhoff and Sundby do say quite a lot about internalisation, but do not offer a systematic theory of the psychological aspect of norms.

powering the national assembly *qua* legislative body. As a consequence (by definition according to Eckhoff and Sundby's model), they have indirectly internalised the statutes passed by that body, the regulations issued in pursuance of those statutes, and so on. This is so for non-lawyers and lawyers alike.

Secondly, legal systems contain a set of meta-norms addressed to lawyers in particular, namely, *the norms making up the subject of the doctrine of the sources of law, including the norms on interpretation and application*. No lawyer can stand in a relationship of direct internalisation to more than a small part of existent law. Most lawyers, however, have directly internalised the norms examined in the doctrine of the sources of law concerning how one is to proceed in order to identify the norms of the system. As a consequence (by definition according to Eckhoff and Sundby's model), they have indirectly internalised the norms that are justifiable according to the doctrine of the sources of law.[19]

In light of this, Eckhoff and Sundby argue, the internalisation perspective is suited to capturing those aspects of reality that are of interest where the topic is the way in which norms actually work, be it norms in general or legal norms. It is internalisation, direct or indirect, that turns a normative proposition into a norm. Internalisation is thus among the truth conditions for propositions about the existence of norms.

After Sundby's death, Eckhoff published a second and revised edition of their cooperative work, *Rettssystemer* (Legal systems: Eckhoff and Sundby 1991). One of Eckhoff's revisions was to supplement internalisation, as one way in which normative propositions can acquire a basis in reality, with what he termed *systembasis* (system basis), as another way in which normative propositions can acquire a basis in reality. Still, in Eckhoff's revised version, too, internalisation is the central way in which normative propositions change their existence mode from that of being solely abstract objects to that of being treated as reasons for action as well.

From a philosophical point of view, then, a pressing question is: What is the *relationship* between Eckhoff and Sundby's position and the position of the Scandinavian legal realists (Hägerström, Olivecrona, Lundstedt, Hedenius, and Ross)?[20]

By way of introduction, we indicated that legal philosophy in Norway in the first part of the 20th century differed from the corresponding fields in Sweden and Denmark in being less philosophically inclined. Here we see an example of this. To answer the question just posed, we shall have to draw a

[19] We should note that, while pointing out the role of meta-norms, Eckhoff and Sundby reject the general applicability of theories that represent the legal system as a hierarchical structure with a single ultimate basic norm at its apex. See Section 23.4.2 below.

[20] On Scandinavian legal realism, see Chapters 13 through 17 in Tome 2 of this volume.

distinction between *two senses of the term* "Scandinavian legal realism": a philosophical one, which is the one usually intended, and a wider and philosophically agnostic one, which, we submit, is an analytical tool necessary if we are to reach sufficient clarity in discussions involving the term (Eng 2007, 290–3).[21]

Psychological concepts of norm are not of philosophical interest in themselves, and so they ought not to be philosophically contested. They acquire philosophical substance, and, thus, interest, only if they are *sharpened* by the addition of internalisation as the *only* possible form of reality for normative propositions, not just *one* possible form of reality. Then—and only then—do we see the contrast with non-psychological concepts of norm.

Such a sharpening is characteristic of Scandinavian legal realism in the philosophical sense. A common feature is the analysis of our idea of normative bindingness, or normativity, as an illusion. This idea, in other words, does not correspond to anything real. The only possible reality-basis of norms and normativity are phenomena in space and time, including the psychological facts of internalisation. That psychological concepts of norm cannot account for our idea of the binding force of norms is no objection to psychological concepts of norm. Instead, it is our idea of the binding force of norms that creates the problem. It is not possible to identify any aspect of reality that may serve as the basis for our idea of norms as *also* binding on those who have not internalised the norms. This idea is metaphysical in a bad sense; it may be causally explained, within the framework of psychoanalysis, for example, but it cannot be justified in argumentative terms.[22]

Scandinavian legal realism in this philosophical sense contrasts with Scandinavian legal realism in the wider and philosophically agnostic sense of being interested in the psychological aspects of norms as *one* basis in reality for norms, but not necessarily the only basis in reality. Whether there are *other* bases in reality, indeed other *forms* of reality, where norms have a mode of existence different from the psychological one, remains an open question on this approach. It is thus left open whether we have at our disposal the argumentative means necessary to establish that certain normative propositions are inescapably binding on us in our capacity as beings invested with reason. The empirical, or spatiotemporal, basis in reality is not rendered absolute as the only possible basis in reality, as is done in Scandinavian legal realism in the philosophical sense.

How Sundby would have dealt with the distinction between Scandinavian legal realism in the philosophical sense and the wider sense is left as an open question. Neither in *Om normer* nor in the first edition of *Rettssystemer*, which

[21] On the meaning of "legal realism," see also Chapter 12 in Tome 2 of this volume.

[22] For a paradigmatic version of the argument, see Olivecrona 1939, 9–27, esp. 9–17, and for a reconstruction of Olivecrona's text, see Eng 2007, 277–90.

he wrote together with Eckhoff, did he address the issue of the ontology of normativity in a direct and clear manner.[23]

Eckhoff, on the other hand, did address the issue and took a clear stand. In the 1960s, in a paper on one of the Nuremberg Trials, he rejected the possibility of natural law, be it based on religion or on reason, and declared his adherence to an emotivist position (Eckhoff 1962, 118). Thirty years later, he confirmed his position in the second edition of *Rettssystemer* (Eckhoff and Sundby 1991, 59).

Two things should be noted here. First, Eckhoff's express adherence to a Scandinavian realist position in the philosophical sense, found in the second edition of *Rettssystemer*, was new. This edition was published after Sundby's death, and responsibility for it rested entirely with Eckhoff.

The second thing to be noted is that Eckhoff's express adherence to a Scandinavian realist position in the philosophical sense is *not necessary* in relation to the issues addressed in *Rettssystemer*. Eckhoff's declaration of his view appears as an aside, a piece of information not specifically aimed at supporting the points made in the book. *Rettssystemer* is a book on the fundamental concept of norm and on the various types of norm, particularly with a view to mapping those argumentative structures that we find in the language and argumentation of lawyers. The book is subtitled "system-theoretical introduction to the philosophy of law," but it does not address philosophical (ontological and epistemological) issues concerning normativity and practical reason. The book does not ask: Do norms partake of a specific level of reality beyond the physical and psychological levels, and, if so, what level of reality is this, and how can we cognise (decide upon) the existence or nonexistence of such a level of reality? This family of issues is touched upon in a few places, but only in passing and only as issues against which they demarcate their discussions (Eckhoff and Sundby 1976, 68, 243; 1988, 62, 181; 1991, 69, 206).

The same demarcation is made in Eckhoff's book entitled *Rettferdighet* (or *Justice*, in English: Eckhoff 1971, 1974). This work does not discuss justice as a normative concept or ideal; it investigates the ways in which arguments from justice are in fact employed in various local contexts. The subtitle to the English edition is indicative: "Justice—its determinants in social interaction." What is here a subtitle points to two facts of general import: Eckhoff leaned towards the perspective of the social sciences, and he did not see legal philosophy as altogether separate from these sciences.[24]

[23] He did voice impatience with the perspective of natural law on a couple of occasions: see, e.g., Eckhoff and Sundby 1975, 150. However, to an even greater extent than in Eckhoff's case (see the main text), this attitude is not an integral part of his main contributions.

[24] The contrast between the richness of his treatise on American law and jurisprudence (Eckhoff 1953) and his reserve in engaging with the problems of philosophy is telling.

In sum, the work of Sundby and Eckhoff bears witness to the importance of making the distinction that served as our starting point: Sundby's *Om normer* and Eckhoff and Sundby's *Rettssystemer* claim that there are *also* in existence certain psychological facts that are of importance for our understanding of normativity and norms, namely, the forms and degrees of internalisation; Scandinavian legal realism in a philosophical sense, and Eckhoff in the few express remarks he makes on the issue, claims that these psychological realities are the *only* realities there are, in the sense that they exhaust the possible bases of norms in reality.

This distinction—between Scandinavian legal realism in a philosophical sense and in a wider, philosophically agnostic sense—seems to be overlooked by Alf Ross when he states in a letter to Nils Kristian Sundby:

> It is indeed clear, and a point which you make with exemplary emphasis, that, for you as well, the concept of norm is not a purely semantic affair, but requires that the meaning content be linked to an individual (or a group) in a particular way (internalisation). The norm is always a norm *for* someone: It *is valid* [orig: *gælder*] for someone. This element, the internalisation, is a psychological-sociological fact. [...] There is, then, an essential similarity between our views. (Ross 1977, 2; my translation)

The last two sentences in the quotation are unclear. On one reading that is tempting, they express a fallacious inference. Thus, contrary to what the quotation may suggest, deeming Sundby's use of internalisation in his modelling of norms to be a fruitful move does *not* imply adherence to Ross's philosophical view of normativity, i.e., to Ross's absolutisation of the empirical world of science as the only possible basis for normativity in reality and to his corresponding rejection of a specifically practical reason.

Given this clarification, we are in a position not only to appreciate the true content of the quotation from Ross, but also to characterise Ross's influence. His analyses of norms, rights, legal method, and the legal system represented the single most influential strand of work in legal philosophy—as well as in theoretical reflections on law more generally—in Norway after 1945. The perceived possibility of deploying Ross's analyses in abstraction from his arguments for noncognitivism and for the unity of science made Norwegian lawyers value those analyses as important additions to their analytical toolbox, regardless of any philosophical criticism directed at them. Further, Ross's works encouraged scholars in various fields of the law, as well as philosophers, to engage in the problems of legal philosophy (see, for instance, Ofstad 1949, 1952 and Aubert 1954).[25]

[25] Harald Ofstad (1920–1994) studied philosophy and began his career with critical studies of Kelsen and Ross; in addition to the works mentioned in the main text, see Ofstad 1950. He went on to practical philosophy in general and held a chair at Stockholm university in that field, 1955–1987. Vilhelm Aubert (1922–1988) studied law and philosophy, and already as a student he

While Eckhoff and Sundby's model of law is similar to H. L. A. Hart's model in some respects, there are also important differences (see Section 23.4.2 below). To end with a bird's-eye view in closing our main discussion of their joint work, we submit that the main directions of influence were from Ross to Eckhoff and Sundby and from Ross to Hart (cf. Eng 2011); the similarities between Eckhoff and Sundby's work, on the one hand, and Hart's work, on the other, are more coincidental.

23.4.1.2. Svein Eng[26]

The Norwegian discussion of natural law was sparse, written from the non-committed stance of the history of ideas (Foss 1934), or limited in terms of argumentative rigour, as in Castberg's mixture of argument and appeals to our moral emotions (see Section 23.3.1 above).

Svein Eng argues that the philosophy of law qua engagement of reason has to see itself as similar to the professional fields and the sciences in one respect, namely, in the obligation laid down by reason itself to establish and follow modes of justification that can themselves be justified. Only in that way can it be decided whether our propositions, and consequently our agreements and disagreements, are tenable. What the relevant modes of reasoning are can only be determined by reflection upon the logic of reasoning in the fields under consideration, here the fields of law and legal philosophy.

Eng discusses his philosophy in two books that complement each other. Roughly speaking, the first lays down the analytical framework (Eng 1998, 2003); the second partly expands on this and partly extends the discussion to the ontology and epistemology of normativity (Eng 2007).

With respect to the nature of normativity, Eng argues for the ontological and methodological primacy of a first-person perspective, and from here for a reason-based normative requirement of inviolability and generalisability with respect to beings invested with our perspective on the world, most basically, with our capacity for acting under the idea of freedom.

Eng takes as his point of departure what he terms "a critically reflexive mode of questioning." The mode is reflexive in that thought turns back on it-

wrote a noteworthy paper in which he attempted to apply recent theories of science to legal dogmatics (Aubert 1943). He went on to the sociology of law and, finally, general sociology. He kept, however, a lifelong interest in the basic issues of law, and his wide-ranging work often straddled traditional borders between the disciplines in an innovative way (Aubert 1965).

[26] After having studied philosophy and law, Svein Eng (1955–) held positions as a legal advisor in the Norwegian Ministry of Justice and as a deputy judge before returning to the University of Oslo in 1985. Eng was appointed professor of philosophy of law in 1997, marking the first appointment of an individual to a professorship in this field in the history of the University of Oslo. In addition to his work in legal philosophy, his writings include comparative studies in legal method and studies of basic concepts in contract law and public law.

self, and it is critical in that thought asks for the criteria and facts (in the widest possible sense of this term) that are relevant in assessing the tenability of its own propositions. First, we cannot but distinguish between, on the one hand, propositions that contribute to determining the meanings of words (or concepts), and, on the other, propositions that presuppose this topic and thematise other topics: "definitions" and "characterisations," respectively, in Eng's nomenclature. Different *facts* are relevant in assessing the tenability of these two kinds of propositions. Secondly, we cannot but distinguish between descriptive propositions and normative propositions. Here, different *criteria* are relevant in an assessment of tenability.

This critically reflexive form, Eng contends, leads a shadow existence in theoretical terms: The literature has not captured the wealth of nuances, the internal coherence (the systemic character and dynamics), the independence, and the factual significance that all characterise the fundamental proposition types. He goes on to analyse the fundamental proposition types in detail and to argue for their significance in *all* fields formulated in everyday language, in particular philosophy and law, where the latter term designates both the field (*Rechtsdogmatik*) and its object (*Recht*).[27] Three analyses will be mentioned below: definitions, reconstructions and redefinitions, and fused modality.

The critically reflexive form outlined here can only be cognised from within a basic first-person perspective, that is, it exists in and through interaction between language users, and its existence and content cannot be grasped unless the reader qua reader at least to a certain extent exercises the critically reflexive form herself, i.e., does not only think *about* the critically reflexive form, but also *through* it (Eng 1998, 10–1, 579–80; 2003, 10–1, 551–2).[28]

Having thus argued for the methodological and ontological primacy of the first-person perspective within the analytical framework of the fundamental types of proposition (Eng 1998, 2003), Eng (2007) turns to the realm of normativity in particular—the analytical forms of normativity as well as the possibility of grounding normativity in a specifically practical reason. Specifying the first-person perspective into what he calls "the perspective of justification" (ibid., 7; my translation), his discussion proceeds by way of a progres-

[27] Eng uses the term *everyday language* in contrast to *artificial languages* (like logic and mathematics) but not in contrast to *academic*, *scientific*, or *philosophical* forms of language and argumentation. Many academic subjects, many sciences, and much philosophy are wholly or mainly formulated in forms of language and argumentation which by degrees, and sometimes only to a small degree, differ from those we use in everyday life. This applies, for example, to law and to large areas of legal philosophy.

[28] Eng emphasises that if one leaves language users and their decisions out of the analysis, i.e., if one relates to language as an *abstractum*, then the identity criteria for the fundamental proposition types are necessarily lost, i.e., one will not be able to capture the acts that are mapped in his work. This abstraction, Eng proceeds, is at the root of Quine's criticism of the ontology of meaning entities and his mistaken disavowal of definitions as a separate and important type of proposition (Eng 1998, 353–65; 2003, 354–66).

sion through various positions that have been held on normativity: scepticism, represented by Scandinavian legal realism; utilitarianism, represented by Bentham, Mill, and certain strands in economics; and the idea of a normativity integral to our capacity for reasoning itself, represented by an argument built on Kant's practical philosophy. These positions, Eng (ibid., 443–87) argues, are representative in both historical and argumentative terms, in that our thinking is constantly drawn towards and between them. Proceeding from these analyses, he goes on to explicate the positions of Hart, Rawls, and Habermas within the perspective of justification.

The argument is transcendental in the Kantian sense: It proceeds by demonstrating the performative inconsistency in any refusal to accept that we act under the idea of the freedom of the will. On this basis, Eng argues for a reason-based principle of right (a *rettsprinsipp* in Norwegian, or *Rechtsprinzip* in German) that enjoins the political powers to promote and safeguard a legal space in which each and every person is independent of the will of others under laws that are general and that respect the inviolability of the person.

Taking the perspective of justification to its logical conclusion, Eng emphasises that the choice of a method of justification must itself be justified. On this basis, he proceeds to a critique of various modes of justification, such as Rawls's method of reflective equilibrium, as well as pragmatism and deconstruction. He submits that a transcendental form of argument, like the one evaluated in his discussion of freedom of the will, is the only available alternative when it comes to satisfying the reflexive requirements of the perspective of justification (ibid., 7–71, 443–87; Eng 2014a, 2014b, 2014c).

23.4.2. Basic Norms and the Foundations of Legal Method

Eckhoff and Sundby (1975) criticise the view that it is necessary to assume that legal systems have one or more basic norms. They argue that there is no need for this idea in order to understand the features of law under discussion in the literature. A case in point is legal justification and the idea of legal validity, as discussed, for example, by Kelsen and Hart.[29] The derivation of a norm from another norm that is one level higher in the norm hierarchy is just one form of normative reasoning. Another form is justification from a norm at a lower level, as in the practical case of justifying a competence norm at the constitutional level by pointing to the fact that the norms issued on the basis of the asserted competence have been accepted and followed, by courts, other legal officials, or citizens. In this case, a vicious circle is avoided, for the factors justifying the higher-level norm—acceptance and rule-following with respect to the issued norms—come into existence subsequent to the higher-level norm. Eckhoff and

[29] On Kelsen's conception of legal validity, see Section 2.3.2 in this tome and Section 8.5 in Tome 2 of this volume.

Sundby (1975, 140–1, cf. 145–6; 1976, 225–6, cf. 220; 1988, 150–1, cf. 138; 1991, 178–9, cf. 165–6) argue that a vicious circle can also be avoided when the justification refers to factors present at the same point in time, since the mutual justificatory force of the competence norm and the issued norm may refer to different aspects of their relationship; it is a matter of *partial* justification, not a matter of total justification, as in the derivation model. Having analysed some arguments assumed to justify the introduction of the idea of basic norms, they reject Kelsen's and Hart's models in particular.

Eng (1997, 2000b) has approached basic-norm issues from several perspectives, including specific issues within the perspective of the basis of the doctrine of the sources of law. Lawyers are regularly confronted with questions concerning the limits of permissible legal argumentation. While recognising that such questions may turn out to be resolvable within the doctrine of the sources of law, Eng takes as his point of departure the fact that the logic of irresolvable conflicts points beyond this field to the issue of the basis of the doctrine of the sources of law itself. Within this issue he takes up one topic that has been little discussed, if at all: Does the doctrine of precedent apply to judicial arguments concerning the doctrine of the sources of law?

Eng's conclusion is negative. The doctrine of precedent attained its content and justification through practices addressing the level of ordinary legal rules. Applying the doctrine of precedent at the level of the doctrine of the sources of law would represent a category mistake, removing the doctrine of precedent from its context and transferring it to a level whose problems it does not address. Any binding force given to judicial arguments concerning the doctrine of the sources of law must seek its justification in quarters other than the doctrine of precedent.

Criticism of descriptive methodologies has been a recurrent theme in theoretical debates after Eckhoff and Sundby. It lies beyond the scope of the present work to discuss the tenability of the various interpretations of Eckhoff's and Sundby's theories put forward in the literature. As an introduction to the following, we shall point to an important crossroad in the discussions. Sundby characterises legal dogmatics as "moral reasoning with a bounded mandate," and he proceeds to argue that prediction analyses, including the seminal version in Ross (1953, 1958), invert the relationship between the philosophically interesting relata: The basic element in theoretical terms is not prediction and its subject matter but rather the necessarily presupposed and normatively regulated form of argumentation that makes predictions possible (Sundby 1974, 265). This "inversion view" of the relationship between predictions and norms has been taken up and developed by several other authors, albeit with different claims regarding the lessons to be learned, as we shall see in what follows.

Like Eckhoff and Sundby, David Doublet (1954–2000) built upon theoretical elements from systems theory. However, in what he takes to be a sig-

nificant departure from their work, he seeks to go beyond a purely descriptive model of law (Doublet 1989, 1995). In his attempt to explicate the normativity of legal methodology, Doublet (1995, 31–62) blends system-theoretic elements with ideas from hermeneutics, viewing what he terms "the legal communicative community" (*det juridiske kommunikasjonsfellesskap*) as the embodiment of the criteria of legal rationality. He rejects natural law, legal positivism, and legal realism and turns instead to the idea of a system in its self-evolving totality as the final arbiter: In the last instance, it is only the legal system itself that can decide upon issues of correctness, be it issues that relate to ways of arguing, to particular decisions, or to other parts of what we take to be the particular legal rationality.

Doublet cooperated closely with Jan Fridthjof Bernt (1943–), and together they wrote several works criticising theories that represent legal dogmatics as a purely descriptive enterprise (Doublet and Bernt 1993, 1998).

Seeking inspiration in Derrida's genealogical approaches, the work of Knut Bergo (1967–) diagnoses a decline in the literature on legal method—a decline he links to a lack of reflection as regards the basis of the doctrine of the sources of law, with a correspondingly increasing lack of relevance of one's theoretical apparatus (Bergo 2002). Bergo rejects many of the empirical assumptions about norms in the literature, particularly assumptions related to the concept of internalisation in the works of Sundby and Eckhoff. On Bergo's reading, this concept, innocent as it may seem on the surface, implies determinism and solipsism. Further, Bergo is critical of widespread ideas about the nature of weighing and balancing in law, including ideas about so-called *reelle hensyn*, i.e., arguments from considerations of policy, of the reasonable, and the like. Today, the steps in legal decision-making where such considerations are said to enter are not on the other side of the spectrum from formal factors. Instead, Bergo argues, they have come to function as placeholders for a new formalism, namely, state-sanctioned views of what is to count as the best policies, as reasonable, and so on. On the basis of a comprehensive study of the role of arguments from preparatory works (*travaux préparatoires*) in the judgments of the Norwegian Supreme Court, he submits that the weighing-and-balancing model is not the most adequate one; he instead suggests a model giving prominence to several more specific and formal argument patterns, like arguments from the intention of the legislator, from systemic coherence, and from similarity (Bergo 2000, 288ff., 945ff.).

Morten Kinander (1972–) criticises theories that understand the law as the effective decisions of legal officials, theories he collectively refers to as "legal realism" (Kinander 2004). Common to these theories, Kinander argues, is that they leave little or no room for abstraction and broader principles; only viewpoints already established, functioning and seen as rewarding in one respect or another are taken into consideration. While theories of law should indeed thus refer to the self-understanding of the participants, it

is crucial that they proceed beyond this level and establish a critical perspective.

Arguing for and from these premises, Kinander criticises various aspects of what he takes to be the dominant approach in Norwegian doctrinal law and its methodological doctrines.[30] Particularly unfortunate, he argues (ibid., 13, 240ff., 287ff.), has been the lack of a clear distinction between the methods applied in legal practice, especially the practice of the courts, and the methods adequate to doctrinal law. Seeking inspiration in Dworkin's analyses, he argues that a normative hermeneutics—one that includes but is not exhausted by Hagerup's constructivism (see Section 23.3 above)—is a more adequate point of departure for doctrinal law than are descriptive methodologies (ibid., 161, cf. 288). The sphere of normative theory and discussion excluded by the latter is necessary to law's claim to legitimacy and should be made part of doctrinal law (ibid., 287–8, 319ff.).

23.4.3. Guidelines

Sundby (1974, chaps. 7–12) singled out norms that govern weighing-and-balancing processes for particular treatment, and this topic was also to remain central in his work together with Eckhoff (Eckhoff and Sundby 1976, chap. 7; 1988, chap. 6; 1991, chap. 7; see also Eckhoff 1976, 1980). Sundby designated these norms *retningslinjer*, a term translated by him and Eckhoff as *guidelines* in English and *Richtlinien* in German (Eckhoff and Sundby 1975, 128 in note).

In his final discussion of the concept, Eckhoff laid down the concept in this way:

> [T]he feature common to guidelines that we [i.e., Sundby and Eckhoff] use as a conceptual feature is [...] that they specify (or presuppose) what are to be reckoned as relevant (or irrelevant) factors in a weighing and balancing. [...] Some guidelines also say something about the direction in which a factor pulls, what weight it has, and whether it is necessary to take it into account or whether one has a free hand in this respect. (Eckhoff and Sundby 1991, 109; my translation)[31]

Sundby distinguished between norms in the form of guidelines and norms indicating that a weighing and balancing must take place. Guidelines accompany the latter, putting argumentative strictures on the discretion of the decision-maker. Having structured the field in this way, Sundby maps a wide variety of weighing-and-balancing norms, their accompanying guidelines, and forms of reciprocal relations. As a part of this mapping, he introduces a distinction between those guidelines that are specific to a particular weighing-and-balancing

[30] Kinander opts for the term *doctrinal law* as his translation of the Norwegian term *rettsdogmatikk* (cf. the German *Rechtsdogmatik*) (ibid., 24).

[31] We have reversed the order of the two sentences in the quotation.

norm and those that are not, arguing that the norms relating to the sources of law and their intepretation may be seen as guidelines of the latter kind. In this way, he highlights how law is structured at several levels around weighing and balancing (Sundby 1974, 254–68).

Sundby's and Eckhoff's analyses were rich in material and stimulated much discussion. However, as Sundby (1978) experienced, and as Eckhoff (1980, 154) acknowledged, it was no easy matter to reach a satisfactory determination of the conceptual distinction between guidelines and other norms. The definition by Eckhoff quoted above is essentially co-extensional with Svein Eng's conclusion. Eng's conceptual construction of the distinction is different, however, in that he does not see it as a matter of the content of the norms, but as a matter of which normative consequence is in question. Norms stating what arguments are relevant to a weighing and balancing, and, possibly, what weight they are to be given—in shorthand, "relevance-and-weight norms"—are just as determinative as other norms *if* our normative question is precisely one of relevance or weight. Their non-determinative character is seen only when the context is expanded to include the question of whether or not the normative consequence of the weighing-and-balancing norm, i.e., the norm to which the relevance-and-weight norms attach, ought to obtain. In relation to *this* question, relevance-and-weight norms are never determinative. Thus, the distinction sought for is not contentual, but contextual (Eng 1990b; 2007, 163–77).[32]

The concept of relevance-and-weight norms thus conceived is Janus-faced. It speaks in part against deductive views, in part against the view that the language and argumentation of lawyers is window-dressing for outcomes reached from other arguments or motives; it claims to illuminate how guidelines lend to the language and argumentation of lawyers a rationality of a peculiarly bounded kind.

23.4.4. Competence Norms

Competence norms were part of the analytical inventory of Norwegian lawyers from an early point. In the works of Alf Ross (1953, 45–6, 74, 94–7; 1958, 32–3, 59, 79), the nature and role of this type of norm were analysed further. Sundby and Eckhoff both contributed to this discussion (Sundby 1974, part 3; Eckhoff and Sundby 1976, 93–107; 1988, chap. 5; 1991, chap. 5).[33]

[32] It falls outside the scope of this contribution to explore the relations between the conceptualisation outlined and the idea of norms that can be realised to varying degrees (principles, standards, etc.), an idea common to the works of Ronald Dworkin (1987, 14–45) and Robert Alexy (1986, 71–157). The discussions referred to in the main text relate to this idea as well, but the topic awaits fuller exploration. On Alexy, see Sections 10.3.2.2 and 10.4.3.1 in this tome and Sections 1.5.4.1, 10.3, and 25.4 in Tome 2 of this volume.

[33] Sundby, as well as Eckhoff and Sundby in their joint work, viewed competence norms as a species of qualification norms (see Section 23.4.5 below on the latter type of norm). In the revised

Building on these contributions, Eng (1990a; 2007, 79–127) has presented a general model for the logic of lawyers' discussions of the binding force of issued norms.[34] Contrary to earlier theory, he argues that competence should be seen as neither necessary nor sufficient for an issued norm to be deemed valid, i.e., deemed to have effect according to its content. He emphasises that competence is a capacity, constituted and circumscribed by norms relating to what he calls personal, situational, and contentual criteria (the who, when, and what of norm issuance). Arguing for the theoretical and practical importance of treating capacity as such as a separate step in legal reasoning, Eng restricts the concept of competence to the union of these three types of criteria, and, correspondingly, he restricts the concept of competence norms to norms laying down these criteria. In addition to these three sets of criteria referring to competence qua capacity, the categorisation of an issued norm as valid or invalid is the result of an argument where various features of the exercise of the capacity and of developments subsequent to this exercise are taken into consideration.

Eng (1990a, 649–69; 2007, 101–3, 110–27) argues that legal logic marks a separation between, on the one hand, norms relating to competence, its exercise, and subsequent developments and, on the other, norms qualifying issued norms as valid or invalid, in that there is a variety of relationships between the satisfaction or non-satisfaction of norms in the first three groups and the assessment of the issued norm as valid or invalid.

23.4.5. Definitions, Reconstructions and Redefinitions, and Law as a Definitional Activity

Eckhoff and Sundby divided the field of norms into two main groups: norms of obligation and norms of qualification (Sundby 1974, chaps. 3–4; Eckhoff and Sundby 1976, chaps. 4–5; see also footnote 33 above). Qualification norms provide criteria for what belongs to a category; in that respect they are a species of definitions.

In a comprehensive theory of definitions, Eng (1998, 55–266, cf. 28–41; 2003, 56–269, cf. 28–41) presents a model for representing the modalities, functions, and means of definitions formulated in nonformal language and argumentation. Being a paradigm example of a discipline working from and through everyday language, law figures prominently at the level of evidence for the adequacy of the model. Indeed, as an outcome of the analysis, law is

editions of their joint work, published after Sundby's death, Eckhoff moved the discussion of competence norms to a separate chapter, thereby placing this type of norm on the same footing as norms of obligation and norms of qualification (see Eckhoff and Sundby 1988, 46–7, 88; 1991, 50, 106).

[34] *General* here refers to the fact that the model applies to norm issuance in all realms of the law (international law and municipal law, public law and private law, etc.) and regardless of whether the issued norm is general or referring to named parties, and, in the latter case, whether it is bilateral or unilateral.

shown to be a definitional activity; in the argumentative practice of lawyers, the various forms of definition set forth in the general analysis are put to work as means of expounding the general meaning of, and particular subsumption under, terms in norm formulations.

Building upon his analyses of the fundamental proposition types—i.e., definitions and characterisations, be they normative, descriptive, or fused—Eng (1998, 519–76; 2003, 489–547) further presents a model for a widespread way of combining them, a combination he terms "reconstructions and redefinitions." Here, a set of phenomena is kept *more or less* constant across a range of competing analyses (representing a point of agreement), and the differences that exist between and among the analyses refer to the issue of what criteria to use to generate this set (representing the point of disagreement). Eng compares and contrasts this model with related conceptualisations in Carnap, Goodman, and Rawls, and demonstrates that many controversies in philosophy, legal philosophy, and law have the logical structure the model represents. Law provides a *paradigm case* of the model in the doctrine of precedent: The pairwise constellations of facts and outcomes in previous court cases have to be taken as given, and any disagreement there is regarding the precedential value of previous cases must relate to the issue of what criteria to use in generating the given set of pairwise facts and outcomes (Eng 1998, 532–8; 2003, 502–9; 2007, 537–40).

23.4.6. The Fused Modality of Lawyers' Propositions de Lege Lata

Eng (1998, 310–50; 2003, 312–51; see also 2000a) argues that lawyers' propositions *de lege lata* have a fused descriptive and normative modality, thus calling for a representation of descriptive and normative propositions as extreme points on a graduated scale, not as members of a dichotomous pair.

He presents the concept of fusion by taking as his point of departure the reaction criterion of the distinction between descriptive and normative propositions: If the language user corrects *the proposition*, this is a criterion of his intending to advance a descriptive proposition. If the language user tries to correct *reality*, this is a criterion of his intending to advance a normative proposition.

In lawyers' argumentation *de lege lata*, the source of the descriptive component is the relevance, in many situations, of thematising what norms motivate those who enforce the law. This tangible source Eng sees as a special case of a *general* feature of lawyers' argumentation *de lege lata*, namely, that it is always considered relevant to ask "What will the other lawyers say about my proposition *de lege lata*?"; that is, it is always relevant to make tentative predictions in this respect.[35]

[35] Two features of Eng's analysis regarding the descriptive component may be noted. First,

The normative component in lawyers' propositions *de lege lata* stems from the fact that lawyers more or less directly solve conflicts; the parties and the public expect, and the lawyers themselves wish to achieve, what one considers to be reasonable and just results, both in the case of general interpretation (i.e., on the level of rules) and in the case of subsumption (i.e., in the individual case).

Eng proceeds to argue that lawyers' propositions *de lege lata* are often neither purely descriptive nor purely normative. At the time of giving expression to his or her proposition *de lege lata*, the lawyer takes the standpoint that he or she will not take any standpoint on what is to be adjusted in the event of any subsequent discrepancy between the proposition and the practice of the authorities that enforce the law; and this "third standpoint" is institutionalised through the legal community's customarily practised norms for good legal argumentation. The phenomenon of fusion is *not* constituted through lack of insight or lack of decision on the part of the individual lawyer, but through the fact that the individual lawyer's choice does not fall at either of the extreme points on the graduated scale between the descriptive and the normative.

The general descriptive component in lawyers' propositions *de lege lata* corresponds to a fundamental consciousness perspective on the part of the individual lawyer, the perspective of "the generalised lawyer." It seems necessary to assume the existence of such a consciousness perspective according to Eng's argument. For if this perspective is hypothetically eliminated, the possibility of the general descriptive component in lawyers' propositions *de lege lata* also seems to disappear, and with it the possibility of the fusion modality in these propositions; according to Eng's argument, however, the fusion modality is a fact.

23.5. Some Final Remarks

There is no conventional agreement on sharp boundaries for the field called *rettsfilosofi* in Norwegian—cf. the German *Rechtsphilosophie*—and the same goes for the field called "legal philosophy," or the "philosophy of law." We have given priority to discussions of the ontology and epistemology of normativity and to discussions of some basic concepts. While we have included discussions of the basis of legal method, we have excluded discussions of the

his analysis of this component does not exhaust his analysis of lawyers' propositions *de lege lata*; this is in contrast to the analyses by Holmes and Ross, for example, in which lawyers' propositions *de lege lata* are subordinated to prediction (Eng 1998, 317; 2000a, 242; 2003, 319). Second, Eng claims that the predictive element is part of the propositions *de lege lata* coming from all lawyers (Eng 1998, 317–18; 2000a, 242–3; 2003, 319–20)—not just those coming from legal writers (which is the starting point in Ross 1953, 1958), and also those coming from judges and other lawyers enforcing the law (something which is claimed to be logically impossible by many authors, e.g., Hart 1961, 1994).

method itself. In the 20th century, the Norwegian discussion for long periods did not go beyond the bounds of the doctrine of the sources of law (*rettskildelære* in Norwegian; cf. the German *Rechtsquellenlehre*). From this perspective, the work of Nils Kristian Sundby was a significant event: He was the first academic in Norway to make legal philosophy his main research field, and during the relatively brief time allotted to him for creative work, he produced a corpus setting new standards in its combination of law and philosophy at a highly sophisticated level (Section 23.4.1.1 above).

While legal philosophy may make use of bits and pieces of knowledge from empirical disciplines like psychology, sociology, economy, linguistics, rhetoric, history, and so on, legal philosophy itself is usually not considered an empirical discipline. In Norway, the sociology of law has been an especially strong field. A prominent example of a border case is the wide-ranging work of Vilhelm Aubert (see footnote 25 above, Section 23.4.1.1).

At various times, some parts of the law more than others engender problems that call for theoretical reflection; in Norway, at present, many discussions in fields like constitutional law, human rights law, and international law lead us to legal philosophy. In 1946 the Norwegian Supreme Court, in plenary session, meted out a death sentence to an employee of the Gestapo for acts against members of the Norwegian resistance (Norwegian Law Reports 1946, p. 198). Some of these acts may be hard to distinguish from the "enhanced interrogation techniques" of today. This may serve to illustrate and represent the issues that divide our present society. They confront us not only with the problem of what the current law is, but also with the issue of how we ought to approach situations in which the purported bindingness of the law strikes us as problematic. The most important change that took place in legal philosophy in Norway in the 20th century was the development of a richer assortment of theoretical tools with which to approach this seemingly eternal riddle of legal philosophy: How to represent intentionality with respect to the normativity of law?

Chapter 24

LEGAL THEORY AND PHILOSOPHY OF LAW IN FINLAND IN THE 20TH CENTURY

by Susanna Lindroos-Hovinheimo

24.1. The Beginning of the Century

At the beginning of the 20th century, Finnish legal philosophy was influenced by conceptualist legal dogmatics (*Begriffsjurisprudenz*). This is generally considered to be the dominant theory of law in Finland up to the 1940s or 1950s (see Aarnio 1983, 11–2; cf. Pihlajamäki 2000). There were, of course, some theorists whose work belonged to other schools as well, such as the jurisprudence of interests (*Interessenjurisprudenz*) developed by Rudolph von Jhering. It is noteworthy that Scandinavian legal realism (the Uppsala School) never became a very important school of thought in Finland, even though there were some encounters between that school and Finnish legal scholars.[1] At the beginning of the century, neo-Kantian legal philosophy was represented by Bror Clas Carlson (1890–1966), who wrote a number of theoretical essays and a book proceeding from that approach. He was active from the 1920s to the 1950s (see Minkkinen 2003). But the first modern legal theorist in Finland is generally thought to be Elieser Kaila (1885–1938). His inspiration came mostly from German legal thought. His dissertation, of 1924, is strictly speaking the first in legal theory and contains an analysis and classification of the logical forms of legal sentences, with a focus on their normativity (Kaila 1924; see also Tolonen 2008, 167–210; Björne 2007, 232).

The most important legal theorist in Finland at the beginning of the century was no doubt Otto Brusiin (1906–1973), whose career began in the 1930s. His influence on the development of the discipline is significant, as he played a very prominent role in the legal-philosophical debate after the war. He also participated in international theoretical debates in forums such as the IVR.[2] The intellectuals in his circle would go on to lay the groundwork for legal philosophy in Finland, even though he cannot really be said to have wanted to be the fountainhead of a school of thought. He influenced Finnish legal philosophy because, in addition to conducting his own research, he supported the ac-

[1] According to Helin (1988), the influence of Scandinavian legal realism can be appreciated in research on civil law. That was facilitated by Swedish-speaking Finnish researchers who introduced Scandinavian ideas to Finland. On Scandinavian legal realism see Chapters 13 through 17 in Tome 2 of this volume.

[2] This is the *Internationale Vereinigung für Rechts- und Sozialphilosophie* (International Association for Philosophy of Law and Social Philosophy), founded in 1909, of which Brusiin served as vice president from 1957 to 1963.

E. Pattaro, C. Roversi (eds.), *A Treatise of Legal Philosophy and General Jurisprudence*,
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tivity of others and created conditions conducive to discussion in legal theory. He was a critic of Hegelian thought and neo-Kantianism, both of which were topics of discussion in legal philosophy at the time (see Aarnio 1983, 17–22; Tolonen 2008, 167–210). Brusiin was a realist and sought to refute all kinds of metaphysical explanations. His work was to some extent influenced by logical positivism and the Uppsala School. Brusiin paid much attention in his research to sociological and anthropological studies. His thinking clearly issues from the conviction that law is a social construct and is manmade (Kangas 1976, 37–42; 1990). He underlined the importance of legal science in approaching the law from the perspective of society and its members. Law is always the expression of a certain historically determined social reality, and it reflects the values that are shared in society. It follows that legal science has to look at law as a social phenomenon. The most important task of legal science is to study the relationships between legal norms and the behaviour of people, both citizens and authorities, such as judges (Brusiin 1990, 1977).

In his dissertation Brusiin (1938) discusses the (judicial) deliberation of judges. His idea is that any legal order includes a set of presupposed goals, and that these are influenced by the underlying social goals. Legal norms cannot be understood in a genuine sense if the goals behind the norms and the legal system as a whole are not known. Especially when deliberating on matters where the law has gaps, the judge has to take the entire legal order into account, an order always connected to a certain historical society. Indeed, there is no way to understand law without a grasp of society: The way to gain knowledge of this complex phenomenon is by studying social reality, social structures, and their historical development. Brusiin argues that judges should have a living knowledge of the society in which they act, and it is not enough for him to rely exclusively on sociological, historical, or economic research (see also Lindroos-Hovinheimo 2011, 289–93). In addition, Brusiin (1938, 1990) draws a distinction between the interpretation and systematization done in legal science, on the one hand, and the concrete decision-making of judges, on the other. In his theory on legal deliberation his focus is on the actual situations in which judges find themselves, and it is from this perspective that he develops his theory of legal argumentation (see Tolonen 2008, 167–210; Aarnio 1983, 18–9).

24.2. Analytical Legal Theory

Analytical philosophy became the dominant tradition in philosophical research in Finland in the second half of the 20th century. Continental philosophical thought was much less familiar, as the prominent Finnish philosophers of the time, most importantly Georg Henrik von Wright (1916–2003) and Jaakko Hintikka (1929–), focused on analytical philosophy. Especially visible in Finland in the latter half of the 20th century was the influence of Ludwig Wittgenstein's work. This naturally had an impact on legal philosophy as well, since

this discipline was in many ways influenced by trends in general philosophy. Continental philosophy was for some time almost absent from work in legal theory. Also affecting the development of legal thought were the developments of society. Finnish society underwent substantial changes after World War II, both structurally and economically: The legal order had to respond to the new types of problems brought on by industrialization and urbanization (see Aarnio and Tolonen 1998, 172). These factors in turn contributed to the development of analytical legal theory, which came to hold a dominant position in legal philosophy for some time, emerging as a critique of the legal dogmatics of the day.

Two objectives of analytical legal theory can be described. First, the analytical theorists thought that the language of legal dogmatics must be improved by eliminating superfluous elements that obstruct legal thinking. Second, legal theory must be developed so that it can provide legal dogmatics with concepts exact enough to solve practical legal problems (Aarnio 1983, 25). It is therefore understandable that analytical legal theorists should have focused on the analysis of legal concepts. The most important difference from the earlier conceptualist legal dogmatics is that analytical legal theorists did not see conceptual deduction as capable of solving practical legal problems: The definition of legal concepts was not a normative argument on which a legal decision could be based. Analytical theorists saw that the function of concepts was primarily heuristic. Normative arguments on which basis to justify legal decisions should be sought in the sources of law, especially in statutes, not in the definition of concepts (see Tuori 2002b, 903).

One of the pioneers of analytical legal theory was Osvi Lahtinen (1912–1967), who also sat as a judge on the Finnish Supreme Court. His theoretical work shows a clear connection to logical positivism, and he concentrated on the semantic analysis of legal language (see, e.g., Lahtinen 1951, 1958). Perhaps the most important scholar of early analytical legal theory was Simo Zitting (1915–2012), whose research was mostly concerned civil law, and especially with property rights. His understanding of legal theory included the idea that law, and especially the definition of legal concepts, should be purified or kept free of foreign elements, such as social facts or moral propositions. Zitting's work laid the groundwork for a general theory of the law of property (see Aarnio and Tolonen 1998, 173). In his dissertation, of 1951, he discussed change in ownership in a new, ground-breaking way, arguing that ownership should be understood as a dynamic concept, a concept that takes in different aspects in different legal situations (see, e.g., Paasto 2004; Karhu 2003, 149; Zitting 1977).

24.3. Later Developments in Analytical Legal Theory

In the 1970s, analytical legal theory in Finland began to develop toward a version that has been called analytical hermeneutics. This happened in part in response to the criticism faced by the analytical school, especially from those

scholars who underlined the connections of law to social reality (Aarnio 1983, 35–6; Backman 1977). Kaarle Makkonen (1923–2000) played an important role in developing analytical legal theory and distancing it from strict logical positivism. He is doubtless a scholar who had a significant influence on legal philosophy from the early 1960s onward. In a way, he continued the work begun by Brusiin.[3] His research is concerned above all with the judicial decision-making situation, and he discusses theoretical problems connected to legal interpretation and argumentation. The novelty of his thinking, drawing inspiration from the later philosophy of Wittgenstein, lies in his focus not on the logical structure of language but on its functional role and on its manifold connection to reality and practices. Makkonen presents a detailed analysis of three different types of legal decision-making situations: the isomorphic situation (*isomorfia*), the interpretation situation (*tulkintatilanne*), and the gap situation (*säätelemätön tilanne*). He concludes that a judge's decision is relatively free, dismissing as an illusion the idea of a decision bound by logic, and criticizing the one right answer thesis on the ground that there are no universally applicable criteria for correct legal decisions (Makkonen 1977, 1981; see also Tuori 2003, Lindroos-Hovinheimo 2011, 294–97).

The most prominent legal theorist in the analytical hermeneutic school has undoubtedly been Aulis Aarnio (1937–), whose work has exerted great influence on legal philosophy in Finland, especially in the last decades of the 20th century.[4] Another theorist, whose work can be situated within analytical hermeneutics, is Hannu Tapani Klami (1945–2002), who developed what he calls a "finalistic" theory of law. According to him, the interpretation of law is essentially a goal-oriented activity in which teleological arguments are important and where legal rules will at times have no more than an ancillary role (Klami 1983; 1986, 154–243, 503–7; Aarnio 1983, 37–8). Klami was a very productive scholar whose research interests range from general legal philosophy to Roman law and different branches of law.

The panorama of Finnish legal philosophy started to change from the 1960s onward, as more and more researchers contributed to the discussion and as the theoretical approaches began to branch out. Much discussed in Finnish legal philosophy beginning in the 1970s was hermeneutics, especially in the form developed by Hans-Georg Gadamer. Kauko Wikström (1943–), whose dissertation concerned the interpretation of legal practice, combines the idea of the hermeneutic circle with practical reasoning as developed by von Wright, and he presents some counterarguments to Aarnio's theory (Wikström 1979). By the 1980s, at the latest, Finnish legal philosophy had gradually begun to take on an international dimension, as an increasing number of schol-

[3] Brusiin acted as discussant when Makkonen defended dissertation in 1965, and is said to have held Makkonen's work in high regard. See Brusiin 1965, Tolonen 2008, 171–72.

[4] Aarnio's work is discussed in details in Section 25.5, Tome 2 of this volume.

ars took part in international discussions and increasingly published in international journals. The language of research also started to change toward the end of the century, a shift that can be appreciated in the growing number of doctoral theses written in English.

The dominant theoretical school almost to the end of the century was, in different forms, analytical legal theory. Eerik Lagerspetz (1956–) is a Finnish philosopher who has done research in political and social philosophy, focusing on legal institutions, among other issues, and investigating the ways in which their existence is dependent on conventions (Lagerspetz 1995). In 1996, Matti Ilmari Niemi (1958–) defended his doctoral thesis, in which he studies the preconditions of knowledge as well as the foundations of legal orders. What he puts forward is a conventionalist theory of knowledge in legal dogmatics, following in the footsteps of Hintikka and von Wright in his analysis of legal language as a normative language, and taking his cue from Wittgenstein's ideas of language shared in a community. He also discusses the social contract in the Rawlsian sense as a precondition for a legal order (Niemi 1996).

In his doctoral thesis, of 1998, Raimo Siltala (1960–) developed analytical legal theory into what he calls a post-analytical philosophy of law, studying legal precedents and developing a theory based on analytical jurisprudence as expounded by Jerzy Wróblewski, Alf Ross, and H. L. A. Hart, but which also draws inspiration from Jacques Derrida and Michel Foucault (Siltala 2000).[5] Siltala has subsequently written extensively on theoretical questions of legal interpretation and on theoretical issues in jurisprudence (Siltala 2003, 2004). He sees law as a deliberative practice, practice that even extends to the concept of law itself as an object of debate. He rejects the idea of a definite truth about law, an idea contradicted by the fact that different schools of legal thought define the concept of law in their own ways. His own theory of law is perhaps most clearly connected to institutional legal positivism, and he sees valid law as an institutional and social fact, the content of which enjoys institutional support and societal approval. The institutional and societal principles on which basis law is justified form a meta-context of legal interpretation and provide various models of legal reasoning. Legal science comprises several ways of doing research, and it can be divided into five areas depending on the kind of knowledge pursued and on the method for attaining that knowledge: We thus have an interpretive science, a human science, a cultural science, a social science, and legal philosophy.

24.4. Law and Society

In the 1960s and 1970s analytical legal theory began to be criticized from different directions. According to Aarnio (1983, 32–3), what lay behind the criti-

[5] On Wróblewski and Ross see respectively Section 16.3.3 in this tome and Chapter 16 in Tome 2 of this volume.

cism was a general dissatisfaction with legal positivist research. Some scholars underscored the need for legal research to focus on ways of *changing* society rather than only on explaining the prevailing systems. Analytical legal theory was faulted for having detached law from society and its problems (see also Aarnio and Tolonen 1998, 174). These critical voices took their inspiration especially from Marxist thought.

Marxist legal theory emerged in Finland in the 1960s. The most important theorist in this school is Lars D. Eriksson (1938–), who started his work in legal philosophy on the topic of legal argumentation. He gradually became interested in the Frankfurt school of critical theory and in Marxist theory. He did not, however, lock his research into any dogmatic viewpoints, but gave wide scope to his research interests and managed to keep it that way (see Aarnio 1983, 40). Eriksson argues that legal philosophy should take social reality into account instead of concentrating on isolated and technical problems pertaining to legal dogmatics. Many of his texts deal with issues broader than those traditionally treated in legal theory, since his interests range from political questions to the classics of political theory (see Eriksson 1992). He criticizes hermeneutic theory, among other things, for its inability to see and take account of structural conditions, especially those connected with power relations. Eriksson (1978) also underlines that hermeneutic research is unsuitable for any critique other than the kind strictly immanent in the object of study. Eriksson's work has been influential in the development of later theoretical expositions. His ideas on an alternative legal dogmatics have been further developed by many theorists, a case in point being Thomas Wilhelmsson (1949–). Alternative legal dogmatics sees law as a system that includes inconsistencies and tries to uncover and criticize tensions between the law and social reality (see, e.g., Tuori 1990).

Although Wilhelmsson's research is mostly focused on issues in private law, he has also written on general problems in legal theory. Later in his career he has also worked on European law. Wilhelmsson (1987, 1997, 2001, 2002) seeks to develop the general doctrine of private law in connection with certain values. He introduces the idea of social civil law, which connects law to morality and social responsibility. He underlines values such as solidarity and altruism over against freedom and individualism. These ideas coincide with the reassessment of the welfare state in Finland from the 1980s onward. Wilhelmsson's understanding of law is in many ways postmodern,[6] as he believes in the importance of "small narratives" instead of grand, all-encompassing theories of law. He rejects the idea that society and law could, or even should, be deliberately reshaped in accordance with a general ideology. Indeed, a characteristic of contemporary law, in his view, is fragmentation, a phenomenon bound up with the nature of late modern society. Thus legal philosophy should give up

[6] Wilhelmsson mostly uses the term *late modern*.

ideas of law as a coherent system and pay more attention to particular legal situations. System-oriented thinking can even have harmful effects if it prevents a sensible analysis of law. Fragmentation is a tendency especially visible in European law. Discrepancies are internal to the European legal system, and there are many points of collision between EU law and national law. Wilhelmsson explains the nature of EU law using the Jack-in-the-box analogy: EU law can pop up anywhere in national legal systems and can contradict traditional ways of understanding the law.

Another theorist whose work has been especially influential on the theory of civil law is Juha Karhu (1953– ; born Juha Pöyhönen), who defended his doctoral thesis in 1988. His research is on contract law, and he addresses the antinomy of form and substance, viewed by him as one of the central questions in Western systems of contract law. Form and substance are two dichotomous concepts that cannot be made to cohere. Karhu (1988) argues this antinomy to be an example of an unsolvable tension in law. He draws on the distinction between rules and principles as discussed by Ronald Dworkin and Robert Alexy.[7] In his later work, Karhu has broadened his scope to general issues in civil law and jurisprudence. His ideas are similar to Wilhelmsson's, since he develops a more dynamic way of understanding the law of property and underlines the need for law to be flexible, in the sense that there is room for a situation-centred analysis not constrained by any imperative to follow rigid and unyielding practices. His proposal for a new law of property connects the basic principles of property law with basic constitutional rights (Karhu 1999, 2003).

Among the most influential Finnish legal philosophers at the turn of the century is Kaarlo Tuori (1948–), whose work has ranged from administrative law to social law and legal philosophy. He has developed his own way of seeing the interconnectedness of law and society, in a theory he calls critical legal positivism, where he engages in a dialogue with the theories expounded by Jürgen Habermas, Max Weber, and Michel Foucault, among others, with the aim of describing modern law. Law is seen by Tuori (1983, 2002a) as a multi-layered system, and he distinguishes three layers: the surface level (*pintataso*: i.e., statutory and case law), the level of legal culture (*oikeuskulttuuri*: i.e., general legal theory and basic legal concepts), and the deep structure of law (*syvärakenne*: i.e., fundamental principles, such as civil rights, and the prevailing rationality of the particular legal system in question). The different levels change and affect one another in different ways and at different paces: The pace is rapid at the surface level, slower at the deeper ones. There is an important place for critical legal reflection in this picture, and that explains why his theory is called critical legal positivism. The layered system makes immanent critique possible, as the yardstick can be derived from the object itself. For instance, a court de-

[7] On Alexy, see Sections 10.3.2.2 and 10.4.3.1 in this tome, and Sections 1.5.4.1, 10.3, and 25.4 in Tome 2 of this volume.

cision can be criticized for being contradictory with some elements in the legal culture. The theory's positivism derives from a firm belief in manmade law, always tied to a particular society and historical situation. Law is both a legal system and a social phenomenon.

Later in his work, Tuori (1999, 2007) has developed a pair of notions—the *ratio* and the *voluntas* of law—whose tension is another way of conceptualizing modern law. Law is an instrument both for exercising power (*voluntas*) and for restraining it (*ratio*). *Ratio* controls and holds back the *voluntas* of law and provides systematization, whereas *voluntas* is the legislator's political will. The legal landscape has been transformed with the reduced importance of the nation-state as the only sovereign legislator, and with the variety of legal sources and concepts that derive from international and EU law. This has led to pluralism and even fragmentation, but in Tuori's view there is still a possibility of local coherence in different legal fields. The growing importance of human rights can be seen as an element that also increases coherence on the international level. The *ratio* of law, which in Tuori's system belongs to the level of legal culture, can still provide systematization and uniformity in the current situation, in which the nation-state has lost some of its importance.

In the 1990s, the discourse on rights broke through in Finnish legal philosophy, and it has since remained a much-discussed theme. One of the first scholars to focus on this topic was Martin Scheinin (1954–), whose dissertation concerns international human rights and their applicability in Finland. He studies the role of the judiciary as a safeguard for constitutional and human rights, as well as the general questions relating to the division of power (Scheinin 1991). He later worked with different issues relating to human rights and comparative constitutional law.

24.5. Theoretical Approaches at the End of the 20th Century

Legal philosophy became increasingly diverse in Finland in the 1990s. Perhaps the greatest change in comparison with earlier developments was that the continental philosophical tradition became an important and widespread theoretical framework for Finnish legal philosophers. Hannu Tolonen (1945–2005) is among the first legal theorists to have studied law from what could broadly be described as a postmodern perspective. He, too, was influenced by hermeneutics, but his main interest was in the ontology of law.[8] Tolonen (1997) was a theorist who continuously sought for new ways in which to understand the legal system and its features. His conception of law does not postulate a single principle by which to explain the legal system but develops a pluralistic view of law. Law is a kaleidoscope and can be understood in countless different

[8] In his dissertation, defended in 1984, Tolonen discusses natural law theory and especially Thomas Aquinas's thought: See Tolonen 1984.

ways. In addition, law is not a coherent system but always contains conflicts and contradictions (Tuori 2008).

The research tradition in which law and society are seen as interconnected, and in which legal theorists develop critical perspectives for the study of law, continued and developed new forms at the end of the 19th century. The late modern perspective on law has been developed by many legal philosophers. Their work is closely connected to international debates in legal philosophy, both European and American, and especially to critical schools of thought. One of the internationally best-known Finnish legal theorists is Martti Koskenniemi (1953–), whose field of speciality is public international law. His research includes elements of social and political theory, underlining the political nature of international law, a feature that can be observed in its practices, institutions, and conceptual frameworks. International law is not independent of international politics, nor can it be seen as objective in distinction to the subjectivity of politics (Koskenniemi 2005; see also Koskenniemi 2002). In the 1990s there also emerged in Finnish legal philosophy an interest in gender studies and the development of feminist perspectives. In 1993, Kevät Nousiainen (1950–) defended a dissertation that addresses the special characteristics of modern trials and the power relations at work in legal proceedings (Nousiainen 1993). She has since been focusing especially on gender and equality issues.

The legal philosophers who have been active around the turn of the century have made legal philosophy interdisciplinary by establishing very close connections with general philosophy and the social sciences. Panu Minkkinen (1957–) defended his doctoral thesis in 1998. His philosophical frame of reference is continental philosophy, and he discusses classic theories such as those of Plato, Aristotle, and Kant, as well as postmodern ones. His thesis attempts a deconstruction of legal philosophy, and he focuses on metaphysics and the nature of law. Minkkinen argues that justice can be understood as a striving for metaphysical correctness, something which can never be realized, but which nonetheless plays an important role in steering the law toward correctness itself (Minkkinen 1998). Minkkinen has actively participated in international discussions in legal philosophy, and in his later work he has investigated issues in areas of study ranging from law and literature to social and political philosophy. In 2009, he published a book on sovereignty in which he investigates the topic from three different angles: as a legal question in relation to the state, as a political question in relation to power, and as a metaphysical question in relation to self-knowledge (Minkkinen 2009).

Similarly, the research conducted by Ari Hirvonen (1960–) has focused on a variety of issues, such as the polycentricity of law and questions connected with law and evil (see Hirvonen 1998, 2010). He has also done research in fields beyond legal theory, mostly in general philosophy and psychoanalytic theory. Hirvonen's thesis, of 2000, offers a reading of Sophocles' *Anti-*

gone through which to look at the connections between law and justice and the ontology of law. His approach can be described as phenomenological and poststructuralist, and he discusses theories such as those of Martin Heidegger, Jacques Derrida, and Jacques Lacan. His effort is to find ways to understand law in Greek tragedies so as to avoid the shortcomings of rigid positivism, which excludes questions about justice and the legitimacy of law. He also emphasizes the undecidability inherent in law and the problems associated with the determination of legal meaning (Hirvonen 2000). In both Hirvonen's and Minkkinen's work one can appreciate the influence of Tuori's thinking, as well as of Eriksson's, in that both have developed critical accounts of law, of its purpose, and of it justification. Hirvonen's and Minkkinen's research profile is fairly similar, in that they have both drawn on phenomenology, deconstruction, and psychoanalytical theory, and both started their careers by studying criminal law and abolitionism.

Another legal philosopher whose work is very clearly influenced by continental philosophy is Jarkko Tontti (1971–). In his dissertation (of 2002) he discusses legal decision-making from the point of view of hermeneutical philosophy and deconstruction. According to him, hermeneutical philosophy has two sides: It is a transcendental philosophy—concerned with investigating the conditions for the possibility of understanding its object, namely, law—and it is also a methodological approach, one through which we can clarify what happens in practical interpretive work such as legal decision-making. Tontti studies law from both perspectives. He is interested in the ontology of law, as well as in describing the process of legal decision-making. According to him, law is one example that paradigmatically shows what it means to engage in hermeneutic activity: It is an exercise through which other interpretive activities can be understood. Tontti (2004) develops a theory that emphasizes the need for a critical perspective on law, a perspective provided by hermeneutics, through which hidden structures of pre-understanding can be revealed. The work done by Minkkinen, Hirvonen, and Tontti shows that at the turn of the century there was a strong tendency in legal philosophy to move away from analytical theory. At the same time, Finnish legal thought has become diversified, as more and more scholars have taken part in international theoretical discussions.

Chapter 25

LEGAL PHILOSOPHY IN THE LOW COUNTRIES

by Mark Van Hoecke and Arend Soeteman[*]

25.1. Introduction

In legal philosophy as in other fields, the Low Countries have always been a place where the streams flowing from different neighbouring countries intersect. Until recently, most Dutch and Flemish scholars spoke all the languages of the neighbouring countries: They could read and understand publications in German, French, and English. As a result we find in the Low Countries the influence of German idealism, French structuralism, and English analytical philosophy. Also, one should not neglect the influence of the United States: American pragmatism and American idealism have counterparts in the Low Countries.

This characteristic of Dutch and Belgian legal philosophy—its being a crossroads of different traditions—seems to be at once its main weakness and its main strength: a weakness to the extent that it was difficult to develop an authentic Dutch/Belgian philosophy in the shadow of so many impressive neighbours; a strength in the sense that legal philosophers in the Low Countries, being conversant with a range of traditions, can compare them and enrich their thinking through that knowledge.

It is clear that legal philosophy in the Low Countries has become much more international over the course of the 20th century. Better possibilities for travel and, more importantly, modern communications have prevented a provincial approach to legal philosophy. Although Dutch and Flemish authors knew what was going on in the countries around them, their discussions at the beginning of the century were still mainly internal. That is impossible today, even if many papers and books are still published in Dutch—and it will continue to be that way for as long as Dutch is the language of the law in the Netherlands and in the Flemish part of Belgium.[1]

At the beginning of the 20th century the Association for the Philosophy of Law was founded. Originally it was a strictly Dutch association, but soon its membership came to include Dutch-speaking Belgian legal philosophers. It was only from the 1970s onward that they have also been participating in meetings on a regular basis. The association now meets twice a year to discuss

[*] This contribution is partly based on two earlier papers, namely, Soeteman 1993 and Ost and Van Hoecke 1995.

[1] In this contribution we will be focusing on the Flemish part of Belgium because the French-speaking authors are discussed in Chapter 12 in this tome, while Perelman's theory of legal reasoning is treated in Section 23.2 in Tome 2 of this volume.

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papers written by members or by invited guests from other countries, to give young scholars an opportunity to present their ideas to a broad audience of legal philosophers, and to discuss current social problems from the perspective of legal philosophy. The association has grown into the most important forum for discussion on legal philosophy in the Low Countries (apart from all the many informal meetings that take place every day). The papers presented at the meetings, as well as the contributions of different participants in the discussion, were originally published in the *Handelingen van de Vereeniging voor Wijsbegeerte des Rechts* (Proceedings of the Association for the Philosophy of Law). Since 1972, the association's journal has been the *Nederlands Tijdschrift voor Rechtsfilosofie & Rechtstheorie* (Netherlandish journal for legal philosophy and jurisprudence, since 2012 titled *Netherlands Journal of Legal Philosophy*),[2] which publishes not only papers presented at the association's meetings but also papers by Dutch, Belgian, and occasionally other authors.

In this short contribution we can only provide a partial picture of the work on legal philosophy that has been done in the Low Countries in the 20th century. We will first introduce some of the themes elaborated in Dutch-language legal philosophy today and then provide a short survey of the most important work done before World War II. Second, we will mention some of the work done in the first decades after the war. Thereafter we will continue along some more-thematic lines, discussing, third, natural law and the relation between law and morals; fourth, the question of what justification, if any, there can be for morality—assuming it is important—in the pluralist world of modernity; fifth, some legal moral ideas (justice, democracy, fundamental rights, and euthanasia); and sixth, the Dutch and Belgian contribution to the question of judicial decision-making. In the more thematic parts we will occasionally also refer to work done before 1950. The last section mentions some further areas and topics.

Dutch and Flemish legal philosophers often make a distinction, as others do, between legal philosophy and legal theory. The demarcation between these two fields is, however, rather vague.[3] There seems to be agreement that substantive questions—such as justice and human rights—belong to legal philosophy. The study of legal reasoning and the analysis of legal concepts (such as the concept of law, of a legal person, of rights, of duty, of an act, and of liability), on the other hand, belong to legal theory. Paradigmatic conceptions in legal theory in the Netherlands have been developed by Marc A. Loth (1956) and Popke W. Brouwer (1952–2006). In 1988, Loth, now a member of the Dutch

[2] In the interests of full disclosure, it should be noted that the authors of this contribution both have sat for many years on the journal's editorial board: Soeteman was a member from the very first issue (November 1972) and van Hoecke from the second one (March 1973), in which he was erroneously identified as a doctor of law ("Dr."), a title he would obtain only six years later.

[3] A discussion can be found in Gijssels and Van Hoecke 1982 and Van Hoecke 1985.

High Court, wrote a most penetrating analysis of acts, causality, and liability making use of analytical philosophical tools (Loth 1988). Two years later, Brouwer, professor at the University of Amsterdam from 1991 until his untimely death in 2006, published what is perhaps the most theoretical book ever written in Dutch about coherence in the law (Brouwer 1990). A particularly interesting aspect of his conception is that Brouwer regarded legal principles as only marginally relevant in creating coherence, considering that different principles point in different directions, thereby undermining (rather than sustaining) coherence.

In the 1970s and 1980s, a good deal of work was done in (analytical) legal theory, but today legal theory and legal philosophy are more in balance. Political and demographic developments in our countries (today about 10 percent of the population is Islamic) require that we reevaluate some fundamental principles of our legal system and our democratic order. In the courtroom, we are confronted with cases involving ritual slaughter, honour killing, and, less dramatically, the custom of wearing headscarves. A strictly majoritarian understanding of democracy proves quite undemocratic in a multicultural society. Freedom of speech is endangered when tolerance diminishes. On the other hand, freedom of religion is endangered when used by religious leaders (and imams in particular, even if only a small minority of them) to argue for the inferiority of other communities (Jewish and Christian, and non-Muslim generally) and claim that husbands are allowed to beat their wives. And can we afford to maintain the traditional principles of our criminal procedure when confronted with modern criminal outfits and large-scale terrorist threats? Questions of this sort—lying at the heart of the contemporary debate across the world—also figure centrally in the Low Countries. Legal philosophy may contribute to finding some answers.

25.2. Before World War II

In the first half of the century, a dominant influence in the Netherlands was exerted by Germany. We will mention four authors, all of whom mark points of high achievement in legal philosophy in the Low Countries. They all illustrate that Dutch legal philosophy looked to the East.

The first work in legal theory of any importance in the 20th century is the doctoral thesis written in 1903 by a civil lawyer, Eduard M. Meijers (1880–1954), later professor of civil law in Leiden and the first author of the new Dutch Civil Code. The discussion is limited to Dutch and German authors (Meijers 1903) and addresses a range of topics usually understood to fall within the scope of legal theory: legal concepts, legal interpretation, induction, and deduction. More than forty years later, the same author wrote a book (Meijers 1947) that can be considered a supplement to the earlier work, and in which he develops a method of "definition by normal types," essentially proceeding

along the same lines that Ludwig Wittgenstein (1953) suggests in his *Philosophical Investigations* when he speaks about family resemblances between the different uses of some word.

A second author worthy of mention is the constitutional lawyer Hugo Krabbe (1857–1936). Law, Krabbe (1906, 1915) argued, is determined by the people's sense of justice. In a parliamentary democracy, legislation is authoritative as the voice of the people. It fills something like the role Rousseau envisioned for the *volonté générale*, entailing the same dangers for the protection of minorities.[4]

A third important author was a criminal lawyer, Leo Polak (1880–1941). Polak (L. Polak 1921) wrote a thesis of more than 650 pages on punishment. Punishment, he argues, cannot be justified by its putative effect (specific or general deterrence), but only by reestablishing in society the ethical balance that was upset by the criminal act itself. Here we can clearly see a Kantian influence.

The last person to be mentioned—he wrote important work before World War II and was still active in the 1950s—is Herman Dooyeweerd (1894–1977). According to G. E. Langemeijer, then president of the Royal Dutch Academy of Arts and Sciences, Dooyeweerd is the most original Dutch philosopher in history, even more so than Spinoza. Dooyeweerd was an orthodox Calvinist thinker who developed a Christian philosophy he called philosophy of the Cosmonomic Idea, where *nomic* refers to the cosmic world order created by God.[5] He offers a transcendental criticism (the reference is to Kant) arguing that every science necessarily presupposes a religious commitment. The cosmic order is held together by time. If you abstract from time, the cosmic order breaks up into fourteen or fifteen different aspects, or modes of being: One of these is the legal aspect, next to which are the physical, the historical, and the moral, among the others, and they all form part of a coherent structure, but it is beyond the scope of this discussion to enter into this conception or explain the other parts of Dooyeweerd's philosophy, which also includes a philosophical analysis of the state and other social communities, such as the family and the church, considered to be "sovereign in their own sphere." Although Dooyeweerd was a lawyer by training, he did not publish much on the legal consequences of his philosophy. But he did write about them in unpublished materials for students. His disciple and successor as professor at the Free University at Amsterdam, H. J. van Eikema Hommes (1930–1984), worked this out in a number of books (van Eikema Hommes 1972, 1976, 1986). What seems to be the obvious Kantian influence on Dooyeweerd's work has always been denied by him.

[4] On Krabbe see also Section 2.2 in this tome.

[5] The fullest statement of his philosophy is contained in Dooyeweerd 1935–1936, a work in three volumes of more than 500 pages each. There is also an English version (Dooyeweerd 1953–1957), which in translating the Dutch original also offers a further development of his views (it contains an additional fourth volume, but this is essentially a very elaborate index).

In Flanders, the situation was quite different. After Belgium separated from the Netherlands in 1830, French took hold as the dominant language in education and most notably in higher education. It was only starting from 1930 that it became possible to attend university lectures in Dutch in Belgium, notably at Ghent University. At the University of Leuven this process started later and more slowly. Until the 1960s, these were the only two Flemish universities. This explains why hardly anything was published in Dutch in jurisprudence (and in fact in most disciplines) before World War II. Three legal philosophers of note active in the first half of the 20th century who only published in French are Jean Dabin (1889–1971), who taught at Leuven (his classes, too, were in French only) and is to be counted as a legal philosopher and natural lawyer; Georges Cornil (1863–1944), who took a sociological approach to private law; and Henri De Page (1894–1969), who taught legal interpretation in Brussels and figures among doctrinal legal writers who have also written at least one book in legal theory.

In the same period, in Flanders, only two professors at Ghent University published in jurisprudence, namely, René Victor (1897–1984) and Jean Haesaert (1892–1976).

René Victor was a part-time lecturer in legal theory at the Free University of Brussels (1931–1941) and later at Ghent University (1955–1967). He was very good at describing other people's work,[6] but his own scholarly production was limited.[7] He was mainly a legal practitioner who did a lot to promote a Flemish legal science, including by founding, in 1931, the weekly law journal *Rechtskundig Weekblad*, for which he served as editor-in-chief for more than fifty years.

Jean Haesaert was a professor at Ghent University from 1925 to 1962. He worked mainly in sociology and legal theory. His approach to legal theory was rather sociological. In 1935, he published a general introduction to legal theory (Haesaert 1935)[8] in which most of the attention goes to German authors, while also discussing some English and Dutch authors and, with somewhat more emphasis, French ones, too. Haesaert did not develop a full theory of his own but was quite productive, mostly with articles and books published in French, and he had original ideas on many points. He was markedly antimetaphysical and considered natural law (and its revival) to be no more than a "temporary disease" (Haesaert 1933, 20).

[6] For instance, he wrote a very complete overview of the work of J. P. Haesaert (R. Victor 1963) and an essay, published as a monograph, on the importance of Dutch scholarship in legal theory (R. Victor 1933).

[7] R. Victor (1935) mainly explained Adolf Reinach's "Platonic" theory of law. This was also the first contribution by a Flemish scholar at a meeting of the (Dutch) Association of Legal Philosophers. On Reinach see Section 4.2 in this tome.

[8] Later, in 1948, he came out with a more developed general book on legal theory in French (Haesaert 1948).

25.3. The Early Post-war Period

The German influence did not wane after World War II, to be sure. But in the Netherlands a French influence began to take hold, mainly in the work of a number of Roman Catholic authors influenced by French existentialism (and German existentialism, too, with Werner Maihofer) and sometimes also by the work of Emmanuel Levinas. Perhaps no work is more representative of these scholars' investigations than a short book that J. J. M van der Ven (1907–1988) published in 1966 (Van der Ven 1966). As Langemeijer (1978) summarized it: "The primal conviction underlying his theory is the proposition that man's 'being with others' is a datum from which it follows as a matter of course that he can only reach authentic existence if he accepts the consequences of this datum." Also in this group of scholars was W. Luijpen (1922–1980), who argued that in a perfect society, where love reigns, there is no place for law and justice. According to Luijpen (1966, 261–2), law is for an imperfect society, where it is needed to secure the realization of at least a minimum degree of love. With that caveat in the background, Luijpen (1969 and 1975) defends a natural law responsive to changing circumstances, and hence a natural law that can itself change over time: The requirements of the minimum content of love cannot be determined once and for all. Love also figures centrally in the work of Jan Jozef Loeff (1903–1979).

Another approach to legal philosophy can be found in the work of R. A. V. Van Haersolte (1919–2002), who was professor at Rotterdam and Leiden. In Van Haersolte 1946, he offers a conception of the state modelled on Hegel's philosophy of the state, though not as authoritarian as the kind more common among authors who look to Hegel. In his later work, he freed himself from Hegel and embraced a conception of legal philosophy as a branch of philosophical anthropology (Van Haersolte 1984, 147). We are the one animal that speaks with itself, an evolutionary development of our speaking with others. In moral and legal conversation there is a certain tension between my own interests and those of the generalized other, between ego and alter ego. The alter ego represents the individual conscience. In law, however, conscience is the *legal* conscience, by which is meant an institutionalized positive morality, such as it actually exists in society. Law is founded in the existing expectations of existing others. This anthropological construct is extended by van Haersolte (1971) to the state, on the reasoning that the state can itself be considered a kind of person.

Another post-war author was J. F. Glastra van Loon (1920–2001), who rejected metaphysical ideas or ideal standards as important for an understanding of law, thereby clearly moving away from van der Ven, Luijpen, and Loeff. Although the conception developed by Glastra van Loon (1957) is perhaps best described as one of general philosophy than of legal philosophy, it laid the groundwork for many legal philosophers in the generation (at least in the

Netherlands). It presents an independent elaboration of both phenomenology (Helmuth Plessner) and Anglo-Saxon analytical philosophy, using both to challenge a traditional Cartesian dualism.

Glastra van Loon was one of the two intellectual fathers of *functionele rechtsleer*, or functional legal theory. The other intellectual father was J. ter Heide (1923–1988), especially in Ter Heide 1965 and 1970. Both authors reject an essentialist analysis of law: Law is not founded on any transcendental, moral, or instrumental value singled out as the putative essence of law. As Glastra van Loon puts it in one of his later works (Glastra van Loon 1989, 7), law derives its binding force only from itself. The law is constituted by a legal community. Legal rules are not imperatives: They originate in social interaction among human beings. The concept of law does not point to the existence of any special entity out there in the world, but rather singles out an aspect of social life (in its ongoing development), identifying in particular an institutionalized method for preventing people from taking the law into their own hands if their legitimate expectations are frustrated.

Also worthy of mention is G. E. Langemeijer (1903–1990), whose work can be argued to bear a stronger relation to either van Haersolte or van der Ven, but which (regardless of that question) offers an independent conception. This conception builds on the idea that anyone who invokes a rule of positive law as being just, insofar as it is prevalent, is doing so proceeding from a basic presupposition, namely, that we all want to coexist on the basis of mutual convictions, at least with respect to the issue or matter at hand. It follows from this premise that all interests should be recognized as having equal weight. This does not result in any incontestable proof that we are asserting a legitimate claim on the basis of those interests, but it does give us an opportunity to be apprised of what is surely unjust. No more than that level of proof or conviction is needed for the practical working of law (Langemeijer 1973).[9]

In Flanders, Carlos Gits worked out a phenomenological approach to law based on the work of Georges Gurvitch. However, upon earning a Ph.D. from Leuven University in 1949 (Gits 1949), he went into law without further pursuing his scholarly activity.[10] At Ghent University, Willy Callewaert was appointed to the chair in legal philosophy after Haesaert's retirement. In the 1960s, he regularly attended the meetings of the Association for the Philosophy of Law, even though he mainly devoted himself to his activity as a criminal lawyer, a trial lawyer and a politician (a member of parliament and a minister). So, in this case, too, there was no real follow-up at Ghent University in the area of jurisprudence. In the 1970s, jurisprudence went through a revival at Ghent Univer-

[9] This summary is based on Langemeijer's own summary in Fokkema et al. 1978, 591.

[10] The only exception is a book on natural law he wrote with Jan Delva, president of the Constitutional Court of Belgium (Gits and Delva 2000). This book was still largely influenced by theories developed in the first half of the 20th century.

sity under the leadership of Marcel Storme (1930–), a procedural lawyer with a wide range of interests: This he did, most notably, by paying attention to the changing role of the judge, in collaboration with Dutch colleagues such as ter Heide and Langemeijer (Storme 1973 and 1976). The same happened in Leuven, and indeed throughout the whole of Flanders, following the publication of a very influential book on judicial decision-making, *Het beleid van de rechter* (The policy of the judge: van Gerven 1973), marking the start of a period when jurisprudence became institutionalized in Flanders, through research centres, journals,[11] congresses, seminars, and inter-university cooperation.[12] None of these centres or initiatives has lasted to this day, to be sure, but there has been an overall continuity even so.

25.4. Law and Morals

By the end of the 20th century, natural law was no longer very popular. D. H. M. Meuwissen (1939–), now a retired professor at the University of Groningen, was still making a case for natural law, but he reduced its content to Radbruch's formula: A law or set of laws can be so egregiously unjust and harmful that its validity, and even its nature as law, must be denied (Radbruch 1963, 336).[13] His legal philosophy is inspired by Hegel (see Meuwissen 1982). Another scholar who worked in the natural-law tradition from its ethical side is Fernand Van Neste (1931–), who taught legal philosophy at the University of Antwerp from 1965 to 1995 and developed the idea of a minimal content of natural law based on a foundation of human liberty, self-fulfilment, mutual recognition among individuals, and a degree of organization through law (see Van Neste 1975, 12; 1991).

Frank Van Dun (1947–)—he taught at Ghent University after many years of teaching at Maastricht University—worked out a comprehensive libertarian system of natural law. This system is based on two complementary principles: the absolute freedom of all individuals, coupled with an unconditional prohibition for any other person or any social body from interfering in the individual's life or

[11] Chief among these was the previously mentioned *Netherland Journal for Legal Philosophy and Jurisprudence*, but in time other journals emerged, such as the Dutch-Flemish *Recht en Kritiek* (1975–1997)*, Tegenspraak* (1982–1984, now a series), and the *Marxistisch Juridisch Tijdschrift* (1976–1978). These journals are mainly aimed at providing critical commentary on the law and on legal developments from an external perspective (be it ideological, political, philosophical, or otherwise).

[12] Apart from ad hoc cooperation for research, there has been the *Interuniversitaire Kontaktgroep Rechtstheorie* founded in 1982 with representatives from all Flemish law faculties, and which has been active until the mid-nineties. Also, many Flemish scholars have been involved in the activities of the European Academy of Legal Theory, most notably in the period during which the Master Course in Legal Theory was organized in Brussels (1992–2009).

[13] On Radbruch's Formula see Section 10.2.2 in this tome, and Sections 1.1.3.2, 9.1, and Chapter 2 in Tome 2 of this volume.

property, unless the individual has previously willingly become a member of the social body and thus has accepted its power over him or her. Law so conceived is, in Van Dun's view, logically incompatible with the state (Van Dun 1983).

Meuwissen's successor in Groningen is Pauline Westerman (1957–), who in her dissertation—*The Disintegration of Natural Law Theory* (P. Westerman 1997)—lays out three main reasons why natural law is not attractive as a research programme: It is difficult to find an acceptable foundation for it today; it is perhaps even more difficult to justify its obligatoriness; and, third, what is left of natural law today is so general that it loses its critical potential. Maybe not everyone will find her uncompromising analysis convincing, but no one who is still intent on defending natural law can ignore her arguments.

This general rejection of traditional natural law does not mean that most Dutch legal philosophers are legal positivists. Legal positivism, moreover, is considered a container concept. In the final chapter of her thesis on moral ideals in legal theory—a chapter characteristically subtitled "Beyond Legal Positivism and Natural Law Theory"—Sanne Taekema (1970–), professor of legal theory at the University of Rotterdam since 2009, offers interpretations of a number of legal positivist tenets, including the so-called separation thesis (the thesis that law is separate from morality). An important distinction is between exclusive legal positivism—under which law can be identified exclusively by reference to social facts, without resorting to moral argument—and inclusive legal positivism, which holds that morality plays an important role when it comes to identifying law, but that this is nonetheless a contingent role (Taekema 2000, 176ff.).[14] Legal positivism and natural law are similarly not considered to be an oppositional pair in the conception put forward by Luc Wintgens (1959–), who in Wintgens 1991 draws a distinction between legal and "juridical" positivism: The latter is described by him as "moderate legal positivism," a theory that seeks to explain the validity of law in positivist terms but in a way that is compatible with moral criticism.

The role of morality in the identification of law is often discussed along with the role of legal principles. A central question in this latter regard is the difference between rules and principles, a topic that Dutch and Flemish legal philosophers have discussed,[15] and there is general agreement among them that legal principles do exist. But do they or do they not invalidate legal positivism? P. W. Brouwer believes they do not, while A. Soeteman (1944–) believes they do.[16] The answer to this question partly depends on the type of pos-

[14] A slightly revised version of this thesis came out a year later, in 2001, with Kluwer Academic Publishers.

[15] See, for example, the October 1991 special issue of the law journal *Ars Aequi*, an issue titled *Rechtsbeginselen* (Legal principles) and, in the same year, Van Hoecke 1991.

[16] See Soeteman's contributions to the special issue of *Ars Aequi* mentioned in the previous footnote.

itivism one refers to. Brouwer and Soeteman both refer to what Taekema has called inclusive positivism. The question, then, is whether inclusive positivism is a consistent position.[17]

Principles are related to ideals. There is wide acceptance in the Netherlands of Robert Alexy's (1985a, 19) definition of principles as *Optimierungsgebote* (optimization commands), that is, norms requiring that something (such as an ideal) be realized to the highest degree possible.[18] But this raises questions about the concept of ideals and their role in law, morality, and politics. Wibren Van der Burg (1959–), currently a professor at the University of Rotterdam, has written an important paper on the importance of ideals (Van der Burg 1997).

Principles and ideals are used to construct a third way between natural law and legal positivism. This third way goes by the name of culture law or interactionist law or functional legal theory, but the overarching idea is that, on the one hand, law and morality cannot be separated—or at least that this separation is not as strict as staunch positivists are inclined to think—while, on the other hand, the morality relevant to the law cannot be based in some eternal natural law. This approach can be found in many modern Dutch introductions to law.[19] Some authors, such as Witteveen and Van der Burg (1999), make this argument relying on the work of Lon Fuller.

Another author concerned with the relation between law and morals is Thomas Mertens (1955–), who holds the chair of legal philosophy at Nijmegen. His approach is based on Kant and neo-Kantian legal philosophy, especially Gustav Radbruch, but also Hans Kelsen. He is thinking not so much about morals *in* the law as about the consequences of possible discrepancies between the two normative systems: What should we do with the officials of the German Democratic Republic who shot citizens who tried to escape to Western Germany?[20] But he is also concerned to set positive law on a Kantian or neo-Kantian foundation. In his inaugural address he discusses two debates that took place in interbellum Germany. The question in both debates was the legacy of Kant and the liberal democratic order: The first was a debate between the neo-Kantian Ernst Cassirer and Martin Heidegger and the second between Hans Kelsen and Carl Schmitt.[21] It is clear that Mertens (2000) is sympathetic to the neo-Kantians.

[17] Taekema (2000, 188–9) argues (convincingly in our view) that it is not.

[18] On Alexy, see Sections 10.3.2.2 and 10.4.3.1 in this tome, and Sections 1.5.4.1, 10.3, and 25.4 in Tome 2 of this volume.

[19] Examples are Soeteman 1990, Witteveen 1996, Franken et al. 2001, and Loth and Gaakeer 2002.

[20] On this question, see Mertens 1998 and Mertens and Lensing 1998. See also Soeteman 1990, 54ff.; Brouwer 2000, 92ff.

[21] On the debate between Kelsen and Schmitt see Section 2.6 in Tome 2 of this volume.

25.5. A Justification of Morality?

If the morality of law cannot be grounded in natural law, and if neo-Kantianism develops into value relativism—which, contra Kelsen, cannot provide the foundation of liberal democracy—what, then, can that morality be made to rest on? It may be argued that this basis is positive law itself, in that the entire body of concrete legal prescriptions will provide the material from which to extract or infer the principles and ideals absent which law itself (even on a positivist conception) cannot function. Arend Soeteman (1991) has argued that a principle can be a *legal* principle only if it fits with positive law. But there is also another condition: The principle should be attractive from a *moral* standpoint, too. So legal philosophy winds up drawing on moral philosophy: Can it be argued that the moral foundations of our law are morally sound?

The question of the foundation of our political morality is made all the more pressing by the multicultural makeup of our modern society. C. W. Maris (1947–), until 2012 professor of legal philosophy at the University of Amsterdam, argues that in the end we modern Western liberals cannot prove the superiority of our political philosophy: When engaging with persons with cultural and religious backgrounds far removed from our own, we lack the common ground with which to start our argument. Liberals may follow Ronald Dworkin, saying that what is unproven may nonetheless still be true. But Maris (1992), using an example by Alasdair MacIntyre, points out the same could be said of unicorns and witches.

Scepticism, however, is not a feasible position. Soeteman (2000) has argued that it is a necessary condition for a liberal society to be able to uphold the truth of its basic assumptions (such as equal dignity for every human individual, the recognition of fundamental human rights, and material democracy). It may be conceded that truth in general, and moral truth in particular, is essentially open to question. One scholar who hase developed this theme is Serge Gutwirth (1960–), professor of legal theory in Brussels (Vrije Universiteit), who in his Ph.D. thesis (Gutwirth 1993) made a case for a "pluralism of truth," arguing that since facts are not entirely objective data, but are partly constructed by norms, they cannot be described in a neutral way. What holds for claims to the truth in law and science basically also holds for claims to the truth in philosophy and so in the philosophy of law. Still, even with these relativistic conclusions, there are serious arguments to be made for the liberal position. There is no better way to arrive at conclusions than by careful argumentation and with an open mind. Even when other persons do not agree—regardless of whether they are outliers, and even if they have arguments not to agree—that fact is not in itself relevant to determining the truth of our own views. As soon as compelling arguments for the existence of unicorns and witches are put forward, we might rationally believe in their existence. But to the best of our knowledge, no such serious arguments exist. As soon as com-

pelling arguments for the existence of liberal rights are put forward, we will have a rational basis for believing in these rights. And in this latter case serious arguments *are* available (Soeteman 2000).

Wibren Van der Burg offered a broad pluralist framework for the law-and-morality debate and put forward a theory he called legal interactionism, rooted in pragmatism and conceived as a synthesis between natural law theory and legal positivism (Van der Burg 2014).

What about the economic analysis of law? Could the economic approach provide a foundation for our political morality? According to Dutch and Flemish scholars who have investigated law from an economic-analysis standpoint, the answer to this question is no.[22] Economic analysis may be able to explain some parts of positive law, but efficiency or even wealth cannot be values in themselves, so they cannot be a basis to *justify* law. Most economic analysis, moreover, is concerned with contract law, torts, competition law, environmental law, and other areas where cost efficiency plays an important role, but it cannot say anything about fundamental rights or about the principles of a liberal democracy: It seems difficult to form views about euthanasia, for example, on the basis of economic analysis alone.

25.6. Law and Ideology

A line of investigation pursued in the 1960s, quite apart from the interest taken in the moral aspects or foundations of law, was that in which the effort is to uncover the hidden underlying ideological assumptions behind law or the hidden analyses informing different accounts of law. Scholars such as Fernand Tanghe (1948–), professor at University of Antwerp, and Koen Raes (1954–2011), professor of legal philosophy at Ghent University, started out from a Marxist approach but then embraced a broader critical approach. In his doctoral thesis, Tanghe (1982) tried to reconstruct a Marxist theory of law, but by his own admission (in the introduction) he did not succeed in this endeavour. He had to conclude that a credible socialism needs positive liberalism, legal certainty, and freedom. Raes also started out from a Marxist approach, but having written his doctoral thesis on John Rawls's theory of justice, the stronger influences on his work are Rawls himself and Habermas.[23] He criticizes Marxism and other communitarian theories for laying too much emphasis on the community, while neglecting that a community is essentially made up of individuals. Raes can be considered a representative of the Critical Legal Stud-

[22] See Hol 1993, Holzhauer and Teijl 1989, and de Geest (1993), pointing out the advantages but also the limits of law and economics, and Raes (1988, 20), who is more critical of the approach, taking issue with what he views as the "economization" of law.

[23] On Habermas see Sections 10.3.5 and 10.4.3.2 in this tome, and Sections 10.4 and 25.3 in Tome 2 of this volume.

ies movement, though not in a narrow sense, as he has always criticized the nihilist approach taken by European critical scholars influenced by postmodern French philosophy (Raes and de Lange 1991).

Jan Broekman—born in 1933, and until 1998 professor of legal philosophy at the University of Leuven—proceeded from structuralism and the philosophy of language to "deconstruct" the language of law by exposing the unexpressed and thus hidden views it carries in regard to man and society, thereby shaping the way lawyers and legal scholars talk about and work with the law, and ultimately endowing lawyers with power over society (Broekman 1979a, 1993). At the University of Leuven, Broekman supervised a Ph.D. thesis defended by Frank Fleerackers (1964–), now professor of law in Brussels. His work follows the research lines pursued by his supervisor (Fleerackers 2000, 2002), but neither one nor the other makes for an easy read.

25.7. Justice

Justice is studied by moral, legal, and political philosophers, among others. Many of them—such as Raes (1983)—work within the Rawlsian paradigm. The concept of reflective equilibrium has been analysed in a *Festschrift* (Van der Burg and van Willigenburg 1998) marking the 60th birthday of Robert Heeger (1938–). A liberal political philosophy has been worked out by Frans Jacobs (1943– ; retired from the University of Amsterdam),[24] who in his doctoral dissertation (Jacobs 1985) studied the universalizability of ethics. Also a professor who has in 2008 retired from the University of Amsterdam is Govert den Hartogh (1943–): He has developed a conventionalist theory of law based on mutual expectations (den Hartogh 1998, 2001a), and in a later article (den Hartogh 2001b) he made a case for humanitarian intervention against large-scale violations of fundamental human rights.

Democracy is an important aspect of any theory of justice. Willem Witteveen (1952–2014) was professor of law at Tilburg University, and in his inaugural address he discussed the *trias politica*, arguing that the important point is not a *separation* of powers but a *balance* among them (Witteveen 1991). In the second part of his introduction to law, Witteveen (1996) also discusses some other aspects of the *Rechtsstaat*, including the principle of legality, representative democracy, majority rule, and fundamental rights.[25] Also working on issues such as representation, authority, and sovereignty in legal philosophy is a colleague of his at Tilburg, Bert van Roermund (1948–), who finds inspiration in Rousseau and Hans Kelsen. Together with Stanley Paulson he edited a special issue of *Law and Philosophy* on Kelsen, titled *Authority and Competence*

[24] See, e.g., his contributions to Musschenga and Jacobs 1992.

[25] In the other parts of his introduction he addresses the language of law and law as practiced in in activities such as lawmaking, judicial decision-making, and legal argumentation.

(van Roermund and Paulson, 2000, van Roermund 2000). A discussion of formal and material democracy can be found in the work of G. A. van der Wal (1934–), emeritus professor in Rotterdam, who in van der Wal 1992 explained that every plausible justification of a formal democracy also justifies material democracy, as every plausible justification entails respect for individuals and minorities. It is not obvious, he says, that all new minorities endorse this ideal of material democracy: No one who rejects the principle of respect for individuals or fails to appreciate their important role can really be said to have absorbed the democratic ideal.

An interesting thesis about freedom of expression has been advanced by Theo E. Rosier (1956–). In Rosier 1997, he investigates the limits of freedom of expression in the United States and the Netherlands. Discriminatory statements are morally wrong, to be sure—the more so the more they are outrageous—but should they be forbidden by criminal law? His answer is *sometimes*—more than the Americans are willing to accept, but much less than the Dutch are inclined to think. He argues that it is essential for the Netherlands to have an open conversation on these matters in the face of increasing immigration: This is a discussion that should not be hindered by criminal law. In view of recent political developments in the Netherlands, this turned out to be a prescient insight. But there are good reasons for prohibiting language that is abusive and racist.

Another important but specific point is euthanasia. The Netherlands is the first country in the world to have enacted a law allowing euthanasia under certain conditions. But the issue is not yet completely settled, as the law allows for some interpretation even under the conditions it sets forth. In the *Brongersma* case, judges had to decide about an old man who found himself alone and thought that "death had forgotten him": He was assisted by his doctor in ending his life even though he was not ill. On December 24, 2002, the Supreme Court of the Netherlands decided that in this case the doctor acted in violation of the law in assisting his patient.[26]

25.8. Judicial Decision-Making

Judicial decision-making has always drawn much attention in the Netherlands and in Belgium. We know that judges apply the law, but in doing so they are *interpreting* the law as well.

In Belgium, two important works bear mention, both written in French in the first half of the 20th century, namely, *Méthode positive de l'interprétation juridique* (The positive method of legal interpretation: Van der Eycken 1907), by Van der Eycken, and *De l'interprétation des lois* (On the interpretation of laws: De Page 1925), by Henri De Page (1894–1969). Both authors carried forward the French reaction that François Gény (1899) launched in 1899 against

[26] *Nederlandse Jurisprudentie* 2003, 167.

the strict textual approach to statutory interpretation that had been dominant in the 19th century, and it was especially Van der Eycken who in doing so argued in favour of a more flexible approach.[27] After that, it took almost half a century before this discussion would be taken up again, with the critical and protest movements that swept through society in the 1960s and beyond (reaching a peak in the "Mai 68" events in France). Almost all jurisprudential writings returned to some form of plea for greater flexibility in statutory interpretation.[28] In recent decades, there has been a shift in focus on (unwritten) legal principles (see above) and on human-rights law and its impact on legal interpretation in all areas of law, most notably through the case law of the European Court of Human Rights (ECHR). With the increasing role of international courts, such as the ECHR and the European Court of Justice, and of the Constitutional Court of Belgium, established in 1983, the national legislatures gradually lost some of their authoritative hold on the law, and it became more acceptable for judges to have law-creating powers. So the focus is now more on the content and scope of principles and of human rights than on the separation of powers between judges and legislators.

In Dutch jurisprudence, the authoritative classic on judicial decision-making is by an author who was active the first half of the 20th century, Paul Scholten (1875–1946). His view can be said to anticipate Dworkin's law-as-integrity thesis, put out half a century later, despite some considerable terminological differences between the two authors. Scholten (1934) believes that in every judicial decision there is at work a view about the principles behind the law. At its most basic, this is a view about the justice of law, which every judicial decision must try to realize, and to this end judges must make their decisions in keeping with what their conscience dictates. Every Dutch work on judicial decision-making has since had to define its position in relation to that of Scholten.

As much as this view would seem to suggest that judges can exercise a good deal of discretion in their adjudication, Scholten actually denies that they should have any such discretionary power (something that can be gleaned from Scholten's work even though he does not use that term).[29] The question whether judges have discretionary power is important for a number of reasons (it carries implications for the authority of the judge's decision and for the possibility of legal criticism, among other things), but on the more pragmatic approach that seems dominant in the Netherlands, it is clear that no matter how

[27] On Gény see Section 12.5 in this tome.

[28] See Van Gerven 1973, Storme et al. 1979, Van Hoecke 1979, and Bouckaert 1981, and there are in addition many articles by a variety of authors.

[29] Dworkin, for his part, defines the term as follows: Judges have discretionary power to the extent that they can choose between alternatives without being bound by any higher human authority.

the theoretical issue is settled, judges have to make decisions which are open to challenge (other judges could render different decisions) and which lie beyond the letter of the law or fall outside the scope of the legislator's intent. Popke (Bob) W. Brouwer (2001) argued that there is a limit to legal rationality. When we are faced with quantitative problems (e.g., to what extent is a loss or injury the victim's own fault) or with incommensurable principles applicable to the case at hand, then some of the decisions rendered can be clearly wrong, but many times there will also be more than one sound decision. We can choose between them through a method of weighing and balancing, but in the end it is impossible to conclusively argue that one of those sound decisions is the right one.

Sometimes judges clearly make "new law" (which for a Dworkinian "noble dreamer" might be hidden in existing law, but in that case it will be very deeply hidden). There are many examples in Dutch law. Rules about the legality of strikes and the liberalization of euthanasia were formulated by the courts before the legislature (more or less) codified this judge-made law.

One of the questions that come up in connection with these facts is that of legitimacy: The legislator is elected; the judge is not. It would seem to follow that the judge's decisions lack the democratic legitimacy of the legislator's statutes. This question is dealt with by Peter Rijpkema (1962–), who in Rijpkema 2001 analyzes the division of tasks between legislator and judge, investigating the legitimacy of different types of legal rules in statutory and judge-made law. Sometimes, for one reason or another, a legislature cannot make new law, or it will choose to rely on the insight afforded by prior judicial decisions. The judge, Rijpkema (ibid.) argues, plays a modest but important role in making new law. Possible undesired consequences of judge-made law can be mitigated by "the art of tempering." The judge may, for example, give a strong case-dependent description of applicable law. Another tempering technique is prospective overruling. The question of legitimacy is addressed as well by Mark Van Hoecke (2002) in a theory he calls law as communication, and in which he seeks to transcend the apparent opposition between the (elected) lawmaker and the (unelected) judge, on the reasoning that the two do not act independently of each other but make their decisions by constantly interacting (communicating) with each other, with the community, and with society at large. The typical 19th-century one-directional, hierarchical model is no longer suited to current society and needs to be replaced by concepts such as network and communication if it is to offer a realistic theoretical framework of current reality, in which a considerably increased role is played by constitutional courts (at the national level) and supranational courts (at different levels of European jurisdiction).

Other questions concern the defeasibility of legal rules: There always is an open class of exceptions, at least in principle. Moreover, legal rules may contradict one another in concrete cases, but this does not mean, as traditional logic seems to imply, that the legal system collapses. These types of consid-

erations have stimulated the study of non-monotonic logic for the law. Some extraordinarily important work in this field has been done by Henry Prakken (1960– ; see Prakken 1997) and Jaap Hage (1956– ; see Hage 1997, 2005). Prakken (1997), for example, has formalized principles for dealing with conflict of rules, such as the principle *Lex specialis derogat legi generali*. Attention has been paid as well to legal reasoning and informatics, most notably by using legal expert systems. Generally, a critical attitude to the possible use of informatics is taken (see Raes 1993, 87–122, and Gutwirth 1993, 123–48).

A Dworkinian approach to legal reasoning is taken by Klaas Rozemond (1960–), who in *Strafvorderlijke rechtsvinding* (Interpretation in criminal procedural law: Rozemond 1998) develops a constructivist interpretation and applies it to criminal procedure. The code of criminal procedure in the Netherlands was enacted in 1926, but it subsequently went through deep changes, not only by way of new legislation but also through judgments rendered by criminal judges. Moreover, the Constitution of the Netherlands has changed and the European Convention on Human Rights came into force. Constructive interpretation tries to construct a normative unity in this diversity of rules and decisions. As Rozemond argues, the purpose of criminal procedural law is to provide a framework for fighting crime while protecting citizens against any arbitrary exercise of power by the authorities. He investigates the applicability of constructivism to almost all the problems of criminal procedural law (such as the admissibility of anonymous witnesses and of investigative methods like police surveillance of suspects).

Legal positivists, such as Brouwer (2000), disagree. They argue that judges who rule according to what they believe to be the right answer, reasoning from the morality of the law as encapsulated in legal principles or in natural law, are making new law when traditional sources of law are silent or ambiguous, and also when ruling retroactively. If these judges claim that they are only enforcing existing law, then they are hiding that fact and avoiding responsibility for the new law they have made.

The debate between constructivists and positivists is as unsettled in the Dutch-speaking area as it is in the rest of the world. This again illustrates that Dutch and Flemish legal philosophy is an offshoot of world legal philosophy, however much a minor one. It also illustrates that legal philosophy has not come to an end just yet.

25.9. Other Areas and Topics

In the late 20th and early 21st centuries, a variety of problems relating to the state and democracy have received a lot of attention. In these investigations, the boundaries between legal philosophy, legal theory, and positive law have partly been fading, as changes in positive law and its context have placed traditional theories in a difficult spot.

In the theory of the state, strong liberal ideologies have argued for a minimal state, if not for its abolition (Van Dun 1979, 9). Conspiring with that influence are the developments in Europe that came with the creation of parliaments and courts at a regional and a supranational level: This has reinforced the need to investigate law from more-pluralist approaches where national state law is but one element and no longer the starting point for all law. Moreover, it has been argued by Jan Gijssels (1929–2010, professor of public law at the University of Antwerp from 1974 to 1993) that legal relations mainly have a contractual basis and are prior to state law (Gijssels 1991). Jef Van Bellingen (1948– ; now a retired professor of legal philosophy at the Vrije Universiteit Brussel) has discussed the philosophical aspects of federalism (Van Bellingen 1991, 20). One of the changes in legal practice that scholars have increasingly been faced with is the blurring of the strong 19th-century division between public and private law, at least in continental Europe. Interesting writings on this topic have been published by René Foqué (1946– ; professor of legal philosophy at Leuven University from 1998 to 2011; see Foqué and Weyembergh 1997) and Josse Mertens de Wilmars (1912–2002), former president of the European Court of Justice and professor at the University of Leuven (see Mertens de Wilmars 1983). The tension between the public and private spheres also lies at the core of theoretical and philosophical reflections on democracy. Here, Maurice Adams (1964–), professor of law at the Universities of Antwerp and Tilburg, has contributed to the discussion with several writings, mainly addressing the question how we can construct a framework of rules enabling us to live together in a pluralist society (Adams 2006; see also Gutwirth 1998, 137–93). Theories of democracy are closely linked to human-rights theories. Scholars who have contributed to this discussion include Serge Gutwirth (Vrije Universiteit Brussel), who has written, with others, on the measures taken against antidemocratic political parties (Backs et al. 2001), and Paul De Hert (Vrije Universiteit Brussel and Tilburg University), who has regularly been working with Gutwirth. In his doctoral dissertation, De Hert framed human rights from the larger perspective of rights and investigated the process toward the constitutionalization of rights and values, focusing on its consequences for nonconstitutionalized freedoms, including in the context of the new information and communication technologies (De Hert 2002). One who has also worked in the area of human rights is Stephan Parmentier (1994), professor of legal sociology at the University of Leuven. The theory of legislation has been a new focus in research since the last decade of the 20th century (see, e.g., Wintgens et al. 2001 and Thion 2010).

Also a recent topic that has attracted some attention in legal philosophy is globalization. Hans Lindahl, successor to Bert van Roermund in the legal philosophy chair at Tilburg University, published an important book titled *Fault Lines of Globalisation: Legal Order and a Politics of A-Legality* (H. Lindahl 2013), arguing that a host of novel legal orders can no longer be accom-

modated in a concept of law that takes the spatially bounded state to be the paradigm for the legal order. Lindahl criticizes a variety of theories that have sought to articulate a general concept of the legal order without having to rely on the inside/outside distinction as an essential feature. With concrete examples, he shows that this inside/outside distinction has to be maintained. There is no universal conception or language of law.

Furthermore, some research has been carried out in the theory of criminal law, covering topics such as the boundary between criminal law and civil law (Gutwirth and De Hert 2002), the relationship between punishment and morality (Claes et al. 2005), and legality and interpretation in criminal law (Claes 2003).

A branch of law that in the Netherlands has developed in the last decades of the 20th century, challenging traditional legal thinking, is environmental law. Work in this area has been done by Serge Gutwirth, Gerrit van Maanen (see Gutwirth and van Maanen 1995), Jean-Marc Piret, Koen Raes, and Mark Van Hoecke (1995, 2002).

Finally, and mainly in this last decade, much attention has been paid to the epistemology and methodology of legal scholarship—a discussion in which roughly all possible positions have been taken by a wide variety of scholars.[30] Obviously, legal scholarship is looking for a new identity, different from traditional, mainly descriptive "legal dogmatics," by pursuing a more contextual and empirical approach.

[30] Eg: Van Klink and Taekema 2011. Most of the discussion is in Dutch-language publications, including a long list of articles published in the journal *Nederlands Juristenblad.* Some of these authors have contributed to Van Hoecke 2011. See also Jan Smits 2009.

Part Five

Latin America

Chapter 26

20TH-CENTURY PHILOSOPHY OF LAW IN ARGENTINA

by Manuel Atienza

26.1. Introduction. Some Remarks on Argentinian Legal Philosophy in the First Half of the 20th Century

The marked development of philosophy of law in Argentina, particularly since the end of the World War II, can at first sight seem surprising.[1] There is no doubt that during the 20th century, Latin America occupied a peripheral position on the world stage, from both an economic and a cultural perspective. Thus, it is difficult to talk about a genuinely "Latin American" philosophy (or philosophy of law). What can be presented under this label is, except for some rare exceptions, more a copy or a reflection of the "authentic" philosophical culture elaborated in the advanced Western countries. And what distinguishes Argentinian philosophy of law—something that can with qualifications be applied to other spheres of this country's culture—lies in having achieved an important place in philosophy of law (even while retaining a degree of cultural dependence) as a result of a series of rather exceptional circumstances that to a great extent are related to the country's peculiarities within the Latin American context.

Indeed, although the recent history of Argentina has in many ways been a failure, there are various features that make Argentina a relatively advanced country, closer to Europe than to Latin America, at least from a cultural point of view. For many decades Argentina has been a secular country, with a high literacy rate, a "European" demographic growth (its population is also largely of European origin), and a large urban and middle-class population (about a third of Argentina's population lives in the capital city, *el gran Buenos Aires*). Throughout the 20th century, the country's *per capita* income was well over the Latin American average. In the history of the country there has been a significant tradition of liberal (but not democratic) regimes, which gave it considerable political stability from 1852 to 1930. It was in this latter year that the "coups" began which from then on, until democracy was restored in 1983, characterized Argentinian political life. Moreover, the existence should be

[1] Sections 26.1, 26.2, and 26.2.1 of this contribution essentially constitute a condensed version of my book *La filosofía del derecho argentina actual* (Current legal philosophy in Argentina: Atienza 1984), where the reader can find a complete bibliography of the period. For an overview of legal philosophy in Latin America until the 1950s and 1960s, see also J. L. Kunz 1951 and Recaséns Siches 1963.

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pointed out of a working class, which from a very early point (about 1883) was organized into free trade unions, and of an autonomous and progressive university since the radical reform of 1918.[2] However, a constant factor has been the situation of economic dependence (first on Great Britain and then on the United States), even in the country's greatest moments. It should not be forgotten that around 1930 Argentina was one of the richest countries in the world, thanks in part to the exploitation of its great wealth in agriculture and livestock.

From the mid-19th century until World War I, the prevailing philosophy in Argentina (as in other Latin American countries) was positivism. This is not surprising, given that the positivist ideas of progress and development seemed well suited for a country which was at that point growing dramatically. What is more, this philosophy, with representatives of great stature such as José Ingenieros (1877–1925), contributed markedly to the education and modernization of Argentina. The most important author of that time in philosophy of law was Carlos Octavio Bunge (1875–1918), who represented an extreme type of sociological positivism and who was greatly influenced by Comte, Spencer, and Darwin.

The anti-positivist reaction came mainly from the philosophy of Alejandro Korn (1860–1936), who introduced German idealism and based on Kant a criticism of positivism rooted in liberalism. Until World War II, all or nearly all the philosophies then prevailing in Europe were represented in Argentina. Francisco Romero (1891–1962), one of the most original and important Latin American philosophers, was responsible for introducing phenomenological philosophy. Carlos Astrada (1894–1970) disseminated existentialism and later evolved towards Marxism. Traditional metaphysics had a great number of representatives, such as Coriolano Alberini (1886–1960) and Alberto Rougés (1880–1945).

In philosophy of law, the distancing from positivism was introduced through neo-Kantianism. In this sense, the influence of Rudolf Stammler (a neo-Kantian from Marburg) was decisive in the work of Enrique Martínez Paz (1882–1952) and in that of Alberto J. Rodríguez, and it is also present in the work of Enrique R. Aftalión (in his pre-egological stage), in that of Segundo V. Linares Quintana (1909–2013), and in that of Mario Sáenz. Aníbal Sánchez Reulet (1910–1998), Ramón Alsina, and Martín T. Ruiz Moreno were also neo-Kantians.[3] In fact, although the neo-Kantian influence went into a slow decline, it lasted until the 1940s, when Carlos Cossio introduced his egological theory (shortly to be discussed, in Section 26.2.1.2).

Whereas neo-Kantian philosophy is associated with ideologies of a liberal or liberal-conservative nature, neoscholastic natural law theory, which was

[2] The *Unión Cívica Radical* was founded in 1891 by Leandro N. Alem and is roughly equivalent to the European liberal parties of the time.

[3] On Stammler see Section 1.3 in this tome and Section 2.2 in Tome 2 of this volume.

widespread, was instead associated with positions of a markedly conservative, rarely liberal nature. Neoscholastic writers who published works of this type between the two world wars were Tomás Casares, Ismael Quiles, Adolfo Korn Villafañe, Eduardo Lustosa, Faustino Legón, Alfredo Fragueiro, and Manuel del Río.

26.2. Argentinian Legal Philosophy in the Second Half of the 20th Century

In Argentina, the end of World War II coincided with Perón's first government. Peronism (a populist interclass movement, which was politically authoritarian and ideologically vague) is a key factor in understanding the recent history of Argentina and is not at all easy to explain. Perón's first government lasted until the so-called *Revolución libertadora* (Liberating revolution) in 1955, but Peronism returned to power in 1973, until the 1976 coup d'état, which, until democracy was restored in 1983, established "a repressive system never before seen in Argentina" (Luna 2009, 242; my translation). The experience of the dictatorship has undoubtedly been a determining factor in recent Argentinian history, and so in what follows I will use this date to divide in two parts my presentation of Argentinian philosophy of law.

26.2.1. Main Trends until 1976

From the end of the World War II until the military coup in 1976, the following four currents can be distinguished in Argentinian philosophy of law: a more traditional one, coinciding with natural law theory; a phenomenological and/or existential one; analytical legal philosophy; and a strand of legal philosophy which finds its inspiration in Marxism. The diversity of these orientations and their unequal development cannot be ascribed to intra-cultural reasons alone: It was also due to socioeconomic and political circumstances, to be sure, but these will only be briefly dealt with here.

26.2.1.1. Natural Law

Natural law was comparatively less influential in post-war Argentina than it was, for example, in Spain. This can be explained not only by reference to cultural and political factors but also by the appearance, from the 1940s on, of what is known as the egological theory of law (see Section 26.2.1.2 below), which decidedly clashed with natural law theory. In any event, natural law attracted a considerable number of philosophers of law who taught not only at national universities but, above all, at private Catholic universities. Such was the case with Tomas Casares, Juan Casaubón, Manuel Seoaje, Bernardino Montejano, Edgardo Fernández Sabaté, Manuel M. del Río, Federico Torres Lacroze, José M. Díaz Cosuelo, and Oscar Viola. None of these scholars produced work of

great theoretical interest, but a highly conservative political orientation can be observed in nearly all of them (Manuel del Río being an exception).

Werner Goldschmidt's trialist theory of the legal world (W. Goldschmidt 1973), which could also be qualified in a way as a theory of natural law, may be considered more original. This theory, which had a certain resonance among Argentinian philosophers of law and jurists of the time, was based on the distinction among three levels, namely, that of norms, that of facts, and that of values. Taking this as a starting point, Goldschmidt defended a "realist" formula *integrating* the three levels, a move that distinguished his theory from other tridimensionalisms, especially from the one put forward by the Brazilian-born Miguel Reale, who was considered by Goldschmidt to be an idealist and a relativist.[4] Indeed, in Goldschmidt's opinion, it is Christianity, as a doctrine incorporating monotheist genetic realism, which provides a firm basis for tridimensionalism.

26.2.1.2. Phenomenology and Existentialism

Goldschmidt's theory notwithstanding, the prevailing trend in philosophy of law in Argentina in the 1940s and 1950s was, as was earlier pointed out, Carlos Cossio's egological theory of law, which as he himself indicates was inspired by Kant, Husserl, and Kelsen, among other authors.[5] Cossio started out teaching at the University of La Plata but during the first Peronist government (1945–1955) he went on to occupy the position of professor of philosophy of law at the University of Buenos Aires. It is with Cossio, one could say, that a period of marked development of Argentinian philosophy of law began, a period that has continued to this day.

The main thesis of egology lies in the claim that law is a mode of conduct lying within the sphere of intersubjective interference, while norms are judgments (not imperatives) through which such conduct is known. With this, Cossio seeks to make legal science a science of experience (a science specifically, and most importantly, concerned with *judicial* experience, since the judicial decision is for him the legal phenomenon par excellence), in such a way as to surpass normativist conceptions (such as Kelsen's), which he regards as going along with formalism and legal liberalism. Cossio distinguishes the following themes in philosophy of law: legal ontology, formal legal logic, transcendental legal logic, pure legal axiology, and the gnosiology of error.

Egology seeks, above all, to be an ontological approach to law. He takes Husserl's "regional ontologies" as a starting point and classifies objects as ide-

[4] On Reale see Section 27.5 in this tome.

[5] On Kelsen see Section 2.3 in this tome and Section 8.3 and 8.4 in Tome 2 of this volume. On Husserl's phenomenology as applied to law see Chapter 4, and in particular Section 4.1, in this tome.

al, natural, cultural, or metaphysical. Cultural objects can in their own turn be subclassified either as things of the world, where the substratum is objectified human life, or as egological, whose substratum is living human life, namely, conduct. Cossio further distinguishes three themes in his legal ontology: the ontic being, the ontological being, and legal time. Formal legal logic can be seen as representing the pole opposite to legal ontology: While "in legal ontology what is given are acts, or conduct, in logic in general what is given are concepts, or logos, but the concept as such can be studied from two angles: as thought or as knowledge. [...] Formal logic deals with the first, and transcendental logic with the second" (Cossio 1964, 329; my translation). Formal legal logic is not a logic of *is* but of *ought*; as has been pointed out, however, the legal norm is not an imperative but a judgment, specifically a disjunctive judgment having two parts as follows: "Given A, B ought to be the case [stating what Cossio calls an endonorm]; or, given no-B, S ought be the case," stating what he calls the perinorm (Cossio 1964, 453; my translation). In any case, since formal legal logic is the study of legal norms (this is why the pure theory is limited to formal logic), Cossio introduces into his theory a transcendental legal logic that basically addresses what he takes to be the object of law, namely, conduct. Here, in turn, he distinguishes three themes, these being the three antinomies raised by dogmatic science: the antinomy of personality, that of freedom, and that of validity. Yet there is more to transcendental logic than this, since on the ontological level (the antinomies refer to the ontic level) this logic implies values. As Cossio repeats over and again, law is conduct, and conduct without value is not ontologically possible. He thus finds that legal science is none other than an *axiological* dogmatics. Values are immanent in law (law is a valuable object), which in turn does not prevent the possibility of evaluating them, whether positively or negatively. On this point, Cossio differs clearly from Kelsen (and from Gioja), that is, from those who consider the norm a neutral element, thus (in their opinion) making the relationship between law (the norm) and values purely extrinsic. Cossio introduces in his legal axiology the metaphor of the sphere of values, capturing the idea that there is no rigid hierarchical relationship between values: In the "sphere," values place themselves in such a way that at any given moment their weight rests on one of them, which then becomes the supreme value. It should also be pointed out that conduct (i.e., law) is for Cossio "phenomenalized metaphysical freedom," leading him to argue for what he calls the "ontological axiom of freedom," which he expresses in the formula "Everything which is not prohibited is permitted" (Cossio 1964, 405; my translation). This formula implies considering law as a seamless, gapless system wherein all conducts are determined "*a priori*." In any case, the question of the "gnosiology of error" is no doubt what enabled Cossio to evolve towards theses close to Marxism (perhaps not in a completely coherent way, as he did so without modifying the basic elements of his theory). In Cossio's opinion, a theory in decline—in the social sciences, and

so also in law—is not only an error but an obstacle that must be overcome. In other words, ideology is not just tantamount to error but also includes a positive aspect that cannot be ignored. This is why he calls for investigating the social function of error: "When the critical history of legal conceptions looks at these as errors, it finds in them a functional truth that Karl Marx typified as ideology. Accordingly, we are led to consider scientific ideologies through a gnosiology of error" (Cossio 1964, 649; my translation).

It is not easy to do an overall assessment of Cossio's work. For on the one hand, it contains elements of unquestionable originality, and one clearly has to give Cossio credit for promoting an extraordinary interest in philosophy of law in Argentina, and interest that, as I have already mentioned, still exists today. But on the other hand, the egological theory is in many ways obscure and arbitrary, combining an amalgam of elements which are difficult, if not impossible, to reconcile, and which in certain respects brought it close to the Peronist ideology. Thus, personalism, rhetoric, and ideological confusion led to a situation where both egology and Peronism gained acceptance up to a certain point among sectors of the antiliberal right and the Marxist left, while both met stiff resistance from reformists and liberals; another element (in addition to personalism and rhetoric) was nationalism, considering that the egological theory sought to be the Argentinian synthesis of English, German, and French jurisprudence; there was, too, the pretence that Peronism would supersede liberal democracy, and that egology would do the same with respect to the pure theory; or, again, there was the antagonism to the Catholic Church, a stance which was typical of the first Peronist period, and which in Cossio's work took the form of an opposition to natural law theory.

It was Ambrosio Gioja (1912–1971) who substituted Cossio as professor of philosophy of law at the University of Buenos Aires after *la Revolución libertadora* and held this post until his untimely death, in 1971. The period of democratic rule—lasting from 1955 to 1966, though I am referring here to a "limited" democracy, since Peronism was proscribed—had a positive effect on the university, which at that point regained its autonomy and, in a climate of freedom and tolerance, brought about significant cultural development. This period, however, came to an abrupt end with General Onganía's 1966 coup d'état and the military's violent crackdown at the University of Buenos Aires. This sparked a protest movement which took the form of mass resignations among university professors. Gioja and his colleagues, however, did not take part (nor, in general, did the law school's faculty), choosing to instead stay at the university in an attitude of "passive resistance" to the established power. Cossio identified with Peronism, and the same could be said of Gioja with respect to radicalism.

Gioja's written work is less important than his teaching, for Gioja was essentially a Socratic teacher. Carrió described him in the following way: "There was little work that Gioja set to paper and bequeathed to us, this by contrast to his incessant theorizing. For him, philosophy was mainly an oral activity. We

could hear him philosophising almost until the end of his days, and it was from him that we learnt to do so, according to our vocations and individual abilities" (quoted in Nino 1990, 345; my translation).

Gioja's philosophy of law can be seen as a synthesis of Husserl's phenomenology and Kelsen's pure theory. Gioja's early training was under Cossio, and like Cossio he considered philosophy to be essentially ontology or metaphysics. There are, however, notable differences between the two. According to Gioja, Kelsen's pure theory is an ontological one, since it is based on the separation between the normative and the natural world (through imputation) and that between law and morality (through coercion). Whereas for Cossio law (which he equated with conduct) is evaluation, for Gioja (and Kelsen) law is based on imputation, that is, on what ought to be, understood as an axiologically abstract and neutral category. In addition, an important role is played in Gioja's work by the separation between prescientific and scientific law, a separation corresponding to that drawn by Kelsen between legal norms and legal rules. His conception of values, then, is relativist, as in Kelsen's case: The objectivity of values can have no other ground than intersubjectivity, and while, on the one hand, this leads Gioja to support democracy, it also leads him to reject the view that the enemies of this form of government should be recognized as having political rights.

Cossio and Gioja were the great masters of Argentinian philosophy of law in the second half of the 20th century, but of course they were not the only philosophers of law of phenomenological and/or existentialist inspiration. In addition to them, one should mention a series of authors, like Enrique Aftalión, Esteban Ymaz, and Julio Cueto Rúa (1920–2006), representing the egological theory of law; Juan Carlos Smith, who advocated a phenomenology influenced by Kant; Abel Arístegui, who supported a typically Heideggerian existentialism; Sebastían Soler, author of an important work in the field of criminal law and the general theory of law, in which the influence of Nicolai Hartmann is evident; and José Manuel Vilanova (1924–1999), who always considered himself to be an egological author, despite some rather significant differences setting his work apart from that of Cossio (1903–1987).

26.2.1.3. Analytical Legal Philosophy

Gioja's greatest significance was probably that of opening the path to an analytical philosophy of law. Although he was not, strictly speaking, an analytical philosopher, most of his disciples and colleagues adopted this kind of philosophy, which since the 1960s has been the predominant trend in Argentina. It is important to point out that even before that time, in the 1950s, analytical philosophy had already been taken up, as a general philosophical trend, by authors as notable as Mario Bunge (1919–), Gregorio Klimowski (1922–2009), Rolando García (1919–2012), and Tomás Moro Simpson (1929–), who had

founded the *Association of Río de la Plata for Logic and Philosophy of Science*, which preceded the *Argentinean Society of Philosophic Analysis* (SADAF). This association played a very important role after the 1960s, since it somehow filled the vacuum brought about by the dismantling of the universities. A more or less traditional classification should be made within the group of analytically inspired philosophers of law, distinguishing those in favour of using formal-logical techniques from those who advocated a kind of natural language analysis.

As far as the logical analysis of law is concerned, the most important work of the period, an emblematic work of Argentinian legal philosophy and one of the landmarks of philosophy of law in the second half of the 20th century, is Carlos Alchourrón and Eugenio Bulygin's *Normative Systems*, originally published in English (Alchourrón and Bulygin 1971) and later translated into Spanish (Alchourrón and Bulygin 1974). As von Wright remarked writing twenty years on, "this work is still today the most complete monographic study on basic questions in theory of law carried out using the instruments of modern logic and conceptual analysis" (quoted in Alchourrón and Bulygin 1991, XI; my translation).

Carlos Alchourrón (1931–1996) and Eugenio Bulygin (1931–) take as a starting point Tarski's notion of deductive system, understood as a set of statements containing all their consequences. A normative set, then, is a set of statements that contains norms (but also definitions, among other things). By *normative system* they mean a normative set containing norms that set forth a sanction. By *legal system* they mean a normative system containing norms that set forth a sanction in such a way that the sanction does not characterize *every* component of the law but the legal system as a whole. In a slightly later work, Alchourrón and Bulygin (1976) complement the notion of system with that of order, understood as a succession of systems over time. Thus, proceeding from the notion of system, they define norms as those statements that correlate cases with solutions.[6] Solutions are elements consisting of an act (normative content) preceded by a normative marker, namely, a deontic operator, whereas cases are defined through a series of determinable properties starting from a Universe of Properties. Among the requirements a system must meet are those of completeness, coherence, and independence. A system failing to exhibit these properties is said to be gappy, contradictory, or redundant, respectively. Alchourrón and Bulygin pay special attention to the concept of a gap, drawing clearly defined distinctions between normative gaps, on the one hand, and axiological ones, on the other (the former arising when the system does not provide a solution to a case, and the latter when a solution does exist but proves

[6] Norms are so defined on the *syntactic* level. In an important later work, Alchourrón and Bulygin (in *La concepción expresiva de las normas*, The expressive conception of norms, 1976; now in Alchourrón and Bulygin 1991) described this as a "hiletic" or abstract conception of norms, setting it in contrast to what they called the "expressive" conception.

unsatisfactory). Apart from that, systems can be either closed or complete (if they contain a closure principle), but this is not necessarily so in all systems. In contrast to what has been stated from different angles by authors like Cossio and Kelsen, Alchourrón and Bulygin believe that law can contain gaps, and not only axiological gaps but also normative ones. In *Normative Systems*, emphasis is also laid on the importance of systematization in legal science. In this operation we should distinguish among three phases, in the first of which we determine the system's base (consisting in the Universe of Cases and the Universe of Solutions), in the second we use the rules of inference to derive consequences from the base, and in the third we substitute the primitive base with a new one (thus reformulating the system). Alchourrón and Bulygin underline that even though legal science is a deductive activity, at least in part, this does not make it to that extent uncreative, as is often held by jurists who object to the application of logical analysis in law.

As I noted before, *Normative Systems* constituted a landmark in Argentinian law. Carlos Alchourrón (whose training was essentially that of a logician) and Eugenio Bulygin (whose knowledge of logic is combined with a command of the theory of contemporary law) offered an impressive model of intellectual symbiosis and rigorous analysis of the problems inherent in the theory of law, whose influence has been of great relevance in Argentina and in many countries of the Latin world, including such European countries as France, Italy, Spain, and Portugal. Not only did the work introduce a new research method but it also set the agenda to be followed, the problems which philosophers of law had to deal with.

It was Genaro Carrió (1922–1997) who took on the role of intellectual leadership in this respect, studying law from the perspective of natural or ordinary language analysis. He did this from positions akin to that of the "second" Wittgenstein, of the philosophers in the Oxford group, and, in law, of H. L. A. Hart. Carrió translated a number of Hart's works and introduced in Argentina a vision of philosophy of law very much like Hart's. However, Carrió did not write any general work on philosophy of law. He focused more on analyzing a series of basic problems in philosophy of law (that with extraordinary rigour, originality, stylistic purity, and wit). To use Bobbio's terminology, his is a clear example of a *jurist*'s philosophy of law (which the Italian thinker set in contrast to the *philosophers*' philosophy of law), and in fact, Carrió was from a professional point of view essentially a lawyer (who would one day sit on Argentina's Supreme Court, when democracy would be restored after the military juntas). He started out as a follower of Cossio's egology, but in 1946 abandoned his teaching post in protest against the totalitarian politics of Peronism. He returned to the university in 1958 but then resigned once more, in 1966, after General Onganía's coup d'état.

In 1965, Carrió published a book, *Notas sobre derecho y lenguaje* (Remarks on law and language: Carrió 1965), in which he very clearly pointed out the

need to distinguish the various uses and functions of language (descriptive, prescriptive, performative, etc.) and the various "congenital defects" that can affect natural language: ambiguity, vagueness, open texture or potential vagueness, and emotional charge. Taking these basic notions as his starting point, he argues that an attempt can be made to solve some of the problems which have traditionally engaged legal science, and which in some cases are simply pseudo-problems arising from the jurists' lack of sensibility to the language in which law is expressed. Many of these mistakes, it is argued, stem from an essentialist conception of language, that is, from the belief that language directly reflects some type of natural, essential, or substantial reality. This has led jurists to seek "essences" or "legal natures" in expressions that denote nothing at all, since they are only used for economy of language. In a series of works, always brief but impeccably written, Carrió relied on these and other linguistic tools to contribute decisively to clarifying such fundamental notions as that of judicial lawmaking, the interpretation of law (in a famous debate with Soler), arbitrary ruling, legal obligation, original constituting power, legal principles, and legal positivism.

In 1970, Carrió devoted to these two concepts a brief work (Carrió 1970), in which he defended Hart's positivist model against Dworkin's attacks. To this end, Carrió distinguished various notions of the term *legal principle*, reaching the conclusion that Hart's model (which, in his view, is misleadingly characterized by Dworkin as "a model of rules") makes it possible to include both rules of conduct and principles (including principles as characterized by Dworkin), so long as this is authorized under the system's rule of recognition. So, Carrió was at that point already prefiguring what many years later would be called "inclusive legal positivism."

Other important authors who were engaged in Argentinian analytical philosophy of law in the years before the military juntas and who belong to the same generation as Carrió are Roberto Vernengo (1926–), Ernesto Garzón Valdés (1927–), and Eduardo Rabossi (1930–2005).

Roberto Vernengo is probably the philosopher of law with the widest intellectual range. He evolved from egology and phenomenological philosophy to analytical philosophy, but he also took an interest in Marxism and Chomsky's linguistic theory (which he applied to legal interpretation), as well as in game theory, cybernetics, and programmed instruction.

Although Vernengo's work reveals Gioja's influence during this period, it was especially as a direct disciple of Kelsen that Vernengo worked. One of his main concerns appears to have been that of removing all traces of metaphysics from pure theory; in this, he showed an attitude contrary to any kind of ontological approach in law, and above all contrary to egological ontology. Vernengo shows a full awareness of the effect that axiological, political, and ideological factors, among others, have on the conceptualization of legal science. This explains his determination, following in Kelsen's footsteps, to remove all ideo-

logical elements from legal knowledge (this in an attempt to make such knowledge rational) by categorically separating the world of is from that of ought. All told, Vernengo must be classified among the analysts of ordinary language, since he takes natural language to be at once the means of expression in law and the central object of theoretico-legal analysis. At the same time, though, he draws widely on formal logic in formulating the general theory of law, using formalization to approach legal concepts in a rigorous manner.

Ernesto Garzón Valdés wrote in 1970 what is considered to be his most important work from this period (Garzón Valdés 1970), criticizing the German authors with regard to the nature of things. Garzón Valdés sees in this new "renaissance of natural law" a vain attempt to overcome the traditional opposition between natural law doctrines and legal positivism. He shows that this process was facilitated by the "emotive" content of language, that is, by the merely persuasive use of terms like *law* and *nature*. In criticizing these authors, he gives evidence of an axiological relativism that he would later categorically move away from, at a second intellectual stage to which I will refer in Section 26.2.2.1.

The work of Eduardo Rabossi belongs more to moral philosophy than to philosophy of law strictly so called. However, a number of his works greatly influenced the Argentinian analytical philosophers of law from that period. Relevant in this respect are his characterization of analytical philosophy (he was essentially an analytical philosopher of an "Oxonian" type), his classification of ethical theories, and his study on the moral justification of punishment.

The most representative legal analytic authors of the subsequent generation are Antonio Martino, to whom we owe an interesting study on legislative definitions (Martino et al. 1975); Luis Warat, who was interested in legal semiotics and the way legal science conceals its prescriptive character, by turning to (ideological) techniques such as redefining terms and using semantically anaemic expressions and axiological variables (like the abuse of law and legal gaps); Carlos Santiago Nino (1943–1993), who wrote significant works in the *first* half of the 1970s—especially his "Notes" of introduction to law (Nino 1973–1975) and his criticism of traditional legal dogmatics (Nino 1974)—but whose most significant work was developed later; Ricardo Guibourg, who in the early 1970s began to show an interest in legal logic and legal informatics; and Martín Farrell, who in the 1970s advocated a rather extreme legal realism and went on to be essentially a moral philosopher, putting forward his own version of utilitarianism. Some other authors that should be noted are Jorge Bacqué (1945–2011), Norberto Griffa, Eduardo Russo, and Maria Isabel Azaretto.

26.2.1.4. Materialist Philosophy

The appearance of materialist philosophy of law in Argentina dates back to the years after the 1966 coup d'état. This current's theoretical development in this

period was markedly inferior to that of analytical philosophy of law, a circumstance that to at least some extent may be due to the political and institutional difficulties the representatives of this conception were faced with. For only a very brief period (coinciding with Héctor J. Campora's accession to the presidency of the republic in 1973, before Perón's second government), the Argentinian university (particularly the National University of Buenos Aires) was in the hands of the left (Peronist and non-Peronist alike), and it was this brief period that contributed to the development of these studies.

Here a distinction should be drawn between the members of what could be called the Buenos Aires group—with authors like Jorge Rébori, Enrique Marí, Eduardo Barcesat, Carlos Cárcova, Ricardo Entelman, and Alicia Ruiz—and other authors inspired by Marxism, such as Juan Carlos Gardella and Alberto Kohen. The most important among those in the former group is Enrique Marí (1928–2001), author of an influential book on neopositivism and ideology (Marí 1974). Under the rubric of neopositivism Marí includes logical empiricism, philosophy of language, and the Popperian school. The authors in these schools are criticized by him for either avoiding the question of ideology or boxing the question into an intra-propositional matter. This latter approach is deemed insufficient in any case, since what prove to be deformed are not only the propositions of science but also its very object. The distinction drawn by the neopositivists between scientific judgments and value judgments was in Marí's opinion superseded by materialist epistemology (that of Bachelard and Althusser), which showed how what is scientific can only be determined by taking ideology as a starting point.

In reality, what the materialist philosophers of law do is not in a strict sense to develop their own philosophy of law but to criticize the analytical legal philosophers, whom they accuse of both neglecting to study ideology and not taking into account the socioeconomic circumstances that condition law. Althusser's influence on the authors in the Buenos Aires group is very marked (Gardella combined Marxism with a nonpositivist empiricist philosophy inspired by Aristotle; Cohen approached the question of law and the state from an orthodox Marxist-Leninist position), and so they all accepted the thesis of the relative independence of the superstructure in relation to the socioeconomic base, the existence of an "epistemological rupture" between ideology and science, and the twofold (positive and negative) character of ideology.

26.2.2. Argentinian Legal Philosophy after 1976

The period of the military juntas lasted from March 1976 until the end of 1983. It was a time of terrible repression (the famous *Nunca Más* report set the number of *desaparecidos* in this period at approximately 9,000), which led to the exile of many intellectuals and professors. However, in addition to this, the restoration of democracy was not fully satisfactory, which is why the period

has been termed "an incomplete democracy" (Luna 2009, 245). There were some significant achievements, such as the trial and sentencing of the members of the three juntas for their human rights violations, when Alfonsín was in power. However, this was followed by the *Ley de Obediencia Debida* (Law of due obedience), under which lower-ranking members of the military were relieved of responsibility; and shortly afterwards (during Menem's first term as president) came a series of pardons for the convicted members of the military, who were thus set free and cleared of all charges. Moreover, the economic and social situation has not helped the country at all in recent times. The juntas had piled up an enormous foreign debt, and various measures taken during the democracy in an attempt to improve the situation were either unsuccessful or even deleterious, actually *worsening* the situation. In this way, the country went through moments when inflation was so high that prices needed to be revised up various times during the day; "neoliberal" experiments wound up deindustrializing Argentina and led to deep inequalities, which meant poverty for many of its inhabitants; or, again, there was the so-called *corralito*, the economic measures freezing the bank accounts of Argentinian citizens. This situation of extreme instability on both a political and a socioeconomic level, a situation that characterized the last decades of the 20th century in Argentina, is reflected in a rather absurd way in two events that took place in 2001: the succession of no fewer than five presidents of the republic in a single month and the protest of wide sectors of the population under the slogan "They must all go!"

Logically, all of this affected philosophy of law and even explains why, to a certain extent, it is not exactly clear what one means when speaking of "Argentinian philosophy of law," for the expression could refer to that which is produced *in* Argentina or to that produced *by* Argentinians. Consider, for example, Ernesto Garzón Valdés, who has lived in Germany since the 1970s, and most of his work has been produced there. The same goes, in later generations, for many other philosophers of law who are from Argentina (or were born there) but have permanent posts as professors at universities outside Argentina: Witness Jorge Malem, Rodolfo Vázquez, Óscar Correas, Cristina Redondo, Pablo Bonorino, Carlos Herrera, Gustavo Fondevila, Maria Inés Pazos, and Silvina Alvarez. The number of philosophers of law whose academic life in large part takes place (or has taken place) outside Argentina is impressive. In other respects, the legal philosophical landscape has become more complex, for at least these two further reasons. The first is that in addition to the authors of the previous period, many of whom continued to publish prolifically after 1976, many others should be counted who have been active since that date. (According to Ortega y Gasset's criterion, these of philosophers of law make up two new generations.) The second reason is that the lines of demarcation between various conceptions of philosophy of law are less clear today than in the previous period. Certainly, the most relevant classification is that

which distinguishes philosophers of law according as they follow natural law or an analytical orientation or, again, a critical one (phenomenology and existentialism no longer being in fashion).[7] However, natural law has been renovated, and today's neo-natural law theorists are considered in many ways close to other authors from other traditions, authors like Nino and Alexy. Not all analytical philosophers of law are still positivist and sceptical in ethics. There are authors, like Russo, who have moved from analytical philosophy to postmodernism. As for "analytical Marxism," it ceased to be an oxymoron some decades ago.

For these reasons, my presentation of the most recent stage of Argentinian philosophy of law will be divided into two sections. In the first of these, I will deal with the work of those philosophers of law who were active before 1976, showing how they have since evolved. In the second, I will outline a general characterization of this period and will also include the work of the newer generations.

26.2.2.1. New Developments of Previous Trends

It is a considerable amount of work that Carlos Alchourrón and Eugenio Bulygin produced (both together and separately) after *Normative Systems* (Alchourrón and Bulygin 1971). A good part of this subsequent production can be found collected (along with some earlier works) in an extensive volume published in 1991 under the title *Análisis lógico y derecho* (Logical analysis and law: Alchourrón and Bulygin 1991), with a foreword by Georg H. von Wright, which is divided into three parts, under the headings "Logic and norms," "Issues in the general theory of law," and "Some philosophical problems." Many of these works have been very influential, and in the Spanish-speaking community they have caused a great deal of controversy about conceptions of norms, about permission and permissive norms, about definitions, and about derogation. Alchourrón (he died in 1996) was not only a jurist but also, and perhaps above all, a philosopher and a logician, and his work on change in theories and beliefs is of great importance. Also of great importance was his research on the logic appropriate for law, a subject that, as Vernengo (1996) pointed out, he chose to concentrate on in his later years. Eugenio Bulygin advocated in various works a legal positivism that could be qualified as "radical": The legal positivism we are dealing with here is exclusive (though quite different from that of authors like Raz), based on the thesis of the separation between law and morality and on scepticism in normative ethics, a framework that has greatly influenced the younger generations.

Genaro Carrió, by contrast, did not write any work of relevance after the 1970s. Notable, however, during the military period, was the stand he took in

[7] On this classification, see Botero Bernal 2008.

a number of court cases where he came out in defence of victims of human rights abuses. He later became the first president of the Argentinian Supreme Court during the restoration of democracy. He died in 1997.

The case of Roberto Vernengo is quite different. He took exile in Mexico during the years of the military juntas, returned to Argentina when democracy was reinstated, and in this second period he also wrote copiously on a range of subjects. His most relevant research is on the problems involved in applying and interpreting the law, as well as on the relation between law and morality and on logic. In this last field, Vernengo cowrote with the Brazilian logician Newton da Costa (see Vernengo and Da Costa 1996) various articles devoted to exploring the ability of divergent logics to explain legal reasoning. As he himself explains (see Guibourg 1996, 446), his central concern as a philosopher of law, and as philosopher tout court, has been the question of rationality and its traditional nucleus, namely, reason, which he interprets in quite a strict sense. Reason is bounded by the formal and the empirical sciences, in such a way that he is also a convinced noncognitivist in matters of morality and an enemy of theories like Dworkin's and Nino's, which he considers to be forms of natural law "qui n'ose pas dire son nom" (ibid., 455).

Ernesto Garzón Valdés changed direction in his work in the mid-1970s or thereabouts. At the outset, he was essentially concerned with moral philosophy, producing in this field extensive work characterized by his steadfast support of moral objectivism. Garzón Valdés was a diplomat in Germany when the 1976 coup d'état took place. He was removed from service and stayed in Germany. He has played a fundamental role in recent decades in the development of philosophy of law in Latin America as well as in Europe and the United States. His moral philosophy can be found in numerous works (many of them collected under the title *Derecho, ética y política* [Law, ethics, and politics: Garzón Valdés 1993]), where he deals with questions such as the relation between law and morality, as well as tolerance, civil disobedience, positive duties, and paternalism. One of his most influential ideas is encapsulated in what he calls the off-limits area principle, reinforcing the nucleus of fundamental rights and setting a limit on the reach of majority rule; it is formulated thus: "Questions concerning the full validity of primary or basic goods cannot be left to procedures of discussion in which a role is played by the community members' will or desires" (quoted in Garzón Valdés 1993, 26; my translation).

Enrique Marí also produced most of his work in the 1980s and 1990s (he died in 2001). Although he was a lawyer by profession, his intellectual interests went beyond law and included many fields in philosophy and the social sciences. The work he has done in a more legal-philosophical vein is accordingly concerned with the question of the boundaries of law. He thus investigated the relation between law and power, between law and ideology, between knowledge and power (it was he who introduced Foucault's work on legal culture into the Spanish-speaking world), between law and literature, and between law

and psychoanalysis (see Courtis 2001). Marí was doubtless the main reference point for critical legal theory in Argentina at the turn of the 20th century.

As for the authors of the following generation, their careers have also ranged widely in different directions. Antonio Martino moved to Italy at the end of the 1970s, and it was there that he pursued a career as a teacher interested especially in questions of logic and legal informatics. He and Carlos Alchourrón wrote an influential article about logic without truth. Luis Alberto Warat also left Argentina in the same period to settle in Brazil, where he has been a charismatic professor, criticizing "scientific reason" and advocating a "hedonist justice." He is the kind of iconoclastic jurist determined to bring law closer to artistic expression. Of those who stayed in Argentina, Martín Diego Farrell did significant work in moral theory and is the main representative of utilitarianism in the community of Spanish-speaking philosophers. He has written on practical questions (such as abortion, euthanasia, and education) as well as on the grounds of ethics. His support of utilitarianism goes along with his support of the liberalism of neutrality, which in contrast to the liberalism of autonomy does not postulate the existence of any objective value. In Farrell's opinion, no plan of life is objectively better than any other, for which reason the state should always be neutral with respect to all plans, so long as they satisfy John Stuart Mill's harm principle (see Farrell 2000). Ricardo Guibourg has followed a path similar to that of Alchourrón and Bulygin; has written on methodology, logic, and legal informatics; and has defended a "classic" version of methodological legal positivism. He presents under two headings—system and method—what he considers to be his most important contributions (he has written extensively and with an impeccable style):

> Where questions of system are concerned, my contribution lies in an imperfect, albeit probably useful, proposal for formalizing competence rules; in the area of method, my contribution lies in a proposal for reconstructing the concept of truth, this being an aspect of general philosophy that, when applied to law, can help us dispel certain structures of the traditional debate (so much with us even today) and, more simply, it can also help us organize our ideas and preferences about what still stands true. (Quoted in Atienza 2003, 914; my translation)

The main representative of critical legal theory Argentina after Marí was Carlos Cárcova. It was precisely while carrying forward Marí's work, as well as Cossio's, that Cárcova became interested in the nontransparent aspect of ideology and law (their opacity), pointing out the existence of a "paradoxical function of law," in that law "reproduces the conditions for the existence of a social system and, at the same time, helps it towards its positive transformation" (Cárcova 1998, 162; my translation). Apart from that, he holds quite sceptical conceptions in epistemology—like Rorty, he thinks that "in a democratic and tolerant society, truth is not discovered but is rather made within language games" (quoted in Botero Bernal 2008, 71; my translation)—and these are conceptions that could be extended to the realm of morality.

The most important philosopher of law in this period—and indeed in the history of Latin America—is rightly considered to be Carlos Santiago Nino (on which see also Section 26.2.1.3 above), who was born in 1943 but died rather young (in 1993, before turning fifty) and so belonged to this same generation.[8] Nino started out as an analytical philosopher very much in the same line of thought as Carrió, but later (still using the analytical method) he constructed a complete and original philosophy of law aimed at articulating law with morality and politics under the concept of the unity of practical reason. Nino also actively participated in the restoration and consolidation of democracy in Argentina and played an important role in many a young researcher's scholarly training.

He defended a theory of ethics close to that of authors such as Rawls and Habermas, and called it "epistemological constructivism."[9] *Constructivism* describes the role he ascribes to rational discourse in determining correctness and moral truth. *Epistemological* specifies that the result of this discourse is not *constitutive* of truth or moral correctness but simply the most reliable path to achieving it. Discourse makes it possible to justify three basic principles from which human rights derive, and which Nino qualifies as "one of the greatest inventions in our civilization" (Nino 1984, 1; my translation). These three principles are (*a*) the inviolability of the person, under which no individual can be asked to bear burdens and sacrifices for the greater good of others or of the majority (*b*) the principle of autonomy, prescribing that the state should remain neutral with respect to individual plans of life and the ideals of human excellence, and should simply facilitate the carrying out of these plans and prevent mutual interference in this process; and (*c*) the principle of dignity, according to which we should judge and treat people on the basis of their voluntary acts rather than on the basis of other properties or circumstances, such as their race, sex, and beliefs.

In political philosophy, Nino developed a theory of democracy in which this type of government is justified as a regulated substitute for moral discourse. Which is to say that democracy (understood as *deliberative* democracy) is a procedure of collective decision that preserves as far as possible the characteristics of moral discourse, all the while managing to overcome the operative limitations of such discourse, this by extending the scope of moral discourse beyond what morality would allow. Nino consequently supports a moralization of democracy, but only if this is counterbalanced with a politicization of morality, given that morality is for him a deliberative intersubjective praxis and not an activity or the result of any individual's activity (see Roca 2005, 23).

[8] On Nino see also Sections 1.4.5.2 and 10.2 in Tome 2 of this volume.

[9] On Habermas see Sections 10.3.5 and 10.4.3.2 in this tome and Sections 10.4 and 25.3 in Tome 2 of this volume.

And with reference to philosophy of law, Nino made essential contributions to each of the three fields into which by convention this discipline is broken down, namely, the theory of law, the theory of legal science, and the theory of justice. As he saw it, law should be understood as a broad social practice that takes place over time and cannot be separated from either politics or morality. As he stated on many occasions, law is not an insular phenomenon but is inherently connected in several respects with political practice and morality. What he considered to be the central problem of philosophy of law was that of explaining that legal reasons are not autonomous reasons for justifying decisions; which is to say that practical reasoning is unitary in nature (this prevents its breakup) and it is structured in such a way that legal or political reasons are subject to moral ones.

All things considered, Nino is one of the half-dozen most notable philosophers of law in the second half of the 20th century. Together with Dworkin and Alexy, he is the most prominent representative of what has come to be called legal constitutionalism.[10]

26.2.2.2. Salient Features of Argentinian Philosophy of Law in Recent Decades (Post-1976)

I now discuss what I consider to be the most salient features of Argentinian philosophy of law in recent decades. In what follows I present nine such features, which in combination give us a kind of x-ray of the current situation.

(1) The *most* relevant of these features is without a doubt the extraordinary wealth that Argentinian philosophy of law presents today. Many are the philosophers who dedicate themselves to the discipline. And their output is extensive (published both in Argentina and abroad, in Spanish and in other languages, such as English). A considerable amount of what is published is of a high or extremely high level, and the thematic variety could not be greater, ranging from specialized work in deontic logic to law and literature and covering, among other areas, the theory of human rights, the theory of norms and normative systems, legal informatics, legal ethics, the philosophy of criminal law, and international law. However, not everything has received equal attention, and two areas I would point out as needing greater development (though they have not been completely neglected) are the sociology of law and the history of legal thought.

(2) Moral and political philosophy have played a significantly more important role in shaping Argentinian philosophy of law. Until 1976, the only work in moral philosophy that played such a role was that of Rabossi, but now one would have to also recognize the influence of some additional moral philosophers. Apart from Garzón Valdés, there are Martín Farrell, Osvaldo Guari-

[10] On neoconstitutionalism see also Chapter 10 in Tome 2 of this volume.

glia, and Eduardo Rivera López. And to this list one would have to add those scholars who have explored in particular the way moral and political philosophy intersect with other legal disciplines. That is the case with Horacio Spector, whose most significant work is perhaps *Autonomy and rights: The moral foundations of liberalism* (Spector 1992); other examples are Guido Pincione, Fernando Tesón, and other younger professors at the University of Torcuato di Tella (such as Marcelo Ferrante, Martín Hevia, and Ezequiel Spector), as well as Roberto Gargarella, who has especially concerned himself with political philosophy and constitutional law. Important in this respect—I would say even essential—has been the influence of Nino, this for his role in leading many Argentinian philosophers of law to arrive at a "noninsular" conception of law today, or otherwise to believe that legal theorists may form a view about problems of normative ethics.

(3) Although Argentinian philosophy of law is to this day mostly concentrated in Buenos Aires, it has also been developed to a certain extent (more now than at earlier times) at influential centres in Córdoba, Rosario, Santa Fe, and Mar del Plata, among other places. And even in Buenos Aires, philosophy of law has developed at centres other than the University of Buenos Aires itself: At least two other universities—Torcuato di Tella and Palermo—have formed significant groups of philosophers of law. All these centres maintain close institutional as well as personal connections with universities in the United States, Latin America, and Europe, with the result that many Argentinian philosophers of law have taught or now teach at foreign universities, and as I previously mentioned they have also *published* abroad. It would be fair to say, then, that philosophy of law in present-day Argentina has become a highly internationalized discipline.

(4) There are two orientations in Argentinian analytical philosophy of law, its two reference points—indeed its two points of attraction—being Bulygin's and Nino's conceptions of philosophy of law. Bulygin takes a strictly positivist stance in the theory of law and a sceptical one in moral philosophy. Nino lays emphasis on the unity of practical reason and advocates moral objectivism. Adherence to one camp or the other is not a matter of steadfast and uncompromising loyalty, and neither group's attitude is even remotely dogmatic. In the first group we can include Hugo Zuleta, even if this has not prevented him from criticizing the deductivist thesis and Alchourrón and Bulygin's "bridge conception" of the norm. Jorge Rodríguez proposed a distinction with respect to one of the central concepts expounded in *Normative Systems* (Alchourrón and Bulygin 1971): His distinction may appear subtle, to be sure, but it can lead to changes of some substance (J. Rodríguez 2002). As concerns the second group, we have to consider that Carlos Nino's influence is to a greater or lesser extent present in all Argentinian philosophers of law, although this is especially true of Carlos Rosenkratz, Roberto Gargarella, Martín Böhmer, Marcelo Alegre, and Roberto Saba, who have all basically proceeded along the same line.

(5) Human rights, virtually an unknown question until 1976, has in recent years become very important. Clearly, the experience of the military juntas has had a role in shaping this phenomenon, but it was Nino's work that provided the initial impetus among Argentinian philosophers, and one would be hard put to it to find even a single philosopher of law in Argentina who has not in one way or another dealt with this question. This widespread interest has given rise to various interesting discussions—between Nino and Rabossi, for example, in which Guariglia also took part—about how to understand human rights (or how to frame the theoretical paradigm from which to approach them), as well as about the question of social rights, in which regard one should point out the important book by Abramovich and Courtis (2002), which revisits the traditional idea of human rights as programmatic rather than as claimable rights.

(6) In any event, the most striking feature of contemporary Argentinian philosophy of law is probably the enduring strength of legal positivism, especially that brand of it which bears the imprint of Kelsen's work, and especially as concerns his thesis of the strict separation between law and morality, as well as his moral scepticism. It is fair to say that these two features—the separation thesis and the moral scepticism—are what most characteristically distinguishes the mainstream of Argentinian philosophy of law. As we have seen, they are present in the work of Bulygin and Vernengo, and also in the work of Guibourg, who can be said to have gone through a stage where he brought systems theory to bear on legal positivism (Ernesto Grün has likewise supported a systemic and cybernetic vision of law not far from that of Guibourg). Guibourg is extremely critical of the "openly antipositivist" conception that he sees as something of a current vogue in legal culture. The same two features are also present in the work of Ricardo Guarinoni and in that of Hugo Zuleta, and with some clarifications in that of Farrell, too, who combines moral utilitarianism with the liberalism of neutrality, the former being a *nonsceptical* conception of morality and the latter instead a sceptical one, at least in his understanding of it. Strict positivist theses have been supported as well by others from the Buenos Aires school, like Eduardo Barbarosch and Juan Pablo Alonso.

(7) The same could be said of a considerable number of those who belong to what may be called *la escuela cordobesa* (the Córdoba school), in which at least two generations can be distinguished. In the first of these we find various disciples of Garzón Valdés, such as Jorge Malem (who has worked in particular on questions of legal ethics, such as civil disobedience and judicial corruption), Carlos Ernst (the author of an interesting book on implicit rights), Ernesto Abril, and Ricardo Caracciolo. Caracciolo can be described as the guiding light of the later generations and wrote very rigorous works, the most important of which is on normative systems. In the next generation, important work has been produced by Pablo Navarro and Cristina Redondo, who can

definitely be considered as belonging to what I have elsewhere called "the central line." Apart from what they have written together, the former is the author of works that have had much influence in shaping the legal concepts of efficacy and applicability (the law's applicability is the subject of works that Navarro has written together with Jorge Rodríguez, Germán Súcar, and Claudina Orunesu). Cristina Redondo, for her part, has worked on the theory of the reasons for action, among other subjects she has investigated. Other members in this school are Hugo Seleme (whose specific interest is Rawls), Guillermo Lariguet (who has worked on ethical dilemmas), and Alberto Bovino.

(8) There is also a natural law strain that runs through Argentinian legal philosophy after 1976. I will not count legal trialism as part of this current, however, for even though its founder, Goldschmidt, cast it as a theory of natural law, that is no longer the case with Ciuro Caldani. The most influential natural law theorists in Argentina appear to be Carlos Massini and Rodolfo Vigo. Both belong to a classical realist line of natural law theory closely linked to the work of John Finnis. Massini and Vigo thus support very similar conceptions, but the latter is more open than the former to dialogue with other trends in legal philosophy. In fact, Vigo has shown a great deal of interest in the work of Nino and other authors (like Dworkin and Alexy) who work in what is usually called the constitutionalist (or neoconstitutionalist) paradigm.

Both Massini and Vigo criticize the attempt to construct a purely descriptive theory of law, to reduce law to the normative level, and to draw a conceptual separation between law and morality, and they also criticize moral scepticism and relativism. What they instead advocate is the centrality of the notion of praxis; the analogical nature of the concept of law, which leads them to consider the normative dimension as deriving from what they take to be the authentic meaning of law, namely, law as human conduct that is objectively required; the unity of practical reason, in such a way as to find a continuity between law and morality; and the existence of some principles of justice that are valid in an objective sense, independently of whether they have been established by political authority or whether a consensus exists in the community. It should be pointed out that the two belong to *classical* natural law, the kind inspired by St. Thomas Aquinas, and are critical of Enlightenment natural law theory.

(9) Finally, a considerable amount of work in Argentina has been devoted to critical legal theory, with authors who have carried forward Marí's legacy in what concerns epistemology and its application to law. Prominent among these authors are Carlos Cárcova, Ricardo Entelman, Alicia Ruiz, Claudio Martyniuk, and Christian Courtis. We should also include Óscar Correas in Argentinian critical legal theory (even though he is based in Mexico), as well as Enrique Zuleta Puceiro, who has written an influential book (Zuleta Puceiro 1981) applying Kuhnian ideas about science to legal dogmatics. The main representative of critical legal theory in Argentina is Cárcova, and it is significant

that he sees it "as an unfinished project in progress" and further believes that "it would not be desirable for critical legal theory to take the form of a theory" (quoted in Botero Bernal 2008, 71; my translation).

26.3. Closing Remarks

The foregoing discussion is not in any way meant to offer a complete panorama of Argentinian philosophy of law in the 20th century, for that would no doubt take up books of considerable length. What has been attempted here is simply a rough outline intended to help readers do further study on any of the authors and ideas discussed here. If I were asked to for general opinion, I would say that Argentina, and Buenos Aires in particular, stands as one of the most important centres of philosophy of law in the second half of the 20th century and will probably continue to do so in future decades. It is unfortunate, in my opinion, that this extraordinary technical development has not been guided—and continues not to be guided, apart from some significant exceptions—by a more pragmatic brand of legal philosophy more concerned with improving law and social institutions.

Chapter 27

PHILOSOPHY OF LAW IN BRAZIL IN THE 20TH CENTURY

by Ronaldo Porto Macedo junior and Carla Henriete Bevilacqua Piccolo

27.1. Introduction

It is commonly noted that the problem of philosophy begins with its own definition. Brazilian philosophical thought in the 20th century is confronted with the same preliminary question, namely, what is to count as philosophy in Brazil, and in particular what is to count as *legal* philosophy? Moreover, the philosophy of law investigates philosophical problems arising in connection with the *practice* of law and is somehow parasitic on the philosophy of ethics, mind, and action.

As in other Western countries, law schools in Brazil have played a key role in disseminating and expanding what can be broadly referred to as humanistic culture, thus transcending the limits of law itself as a discipline. For this reason, the developments covered in this exposition are divided into four phases. The first one starts with the establishment of higher education in Brazil and runs through the end of the 19th century. This first development will be introduced very briefly just to make the rest of the discussion on the 20th century more intelligible. The second phase sees the emergence and development of a type of legal philosophy that lasts almost through the entire 20th century. This second phase can be characterized by the presence of humanism and rhetoric in legal thinking, often without clear boundaries between sociology, history, general philosophy, and legal philosophy. The third phase is marked by the emergence of professional, technical, academic philosophy in Brazil at the universities (especially as an outcome of the establishment of the first schools of philosophy) and its coexistence with the philosophy of law produced in the law schools. This third phase began with the establishment of the University of São Paulo in 1934 and follows a "parallel history" of philosophy in Brazil that is still with us. Its distinguishing features are an obsession with method and conceptual accuracy and an emphasis on the history of philosophy, especially among classical authors, as there is little concern with the philosophy of law in a strict sense. In the fourth stage, which begins in the first decade of the 21st century, the discussion closes in around a reduced number of topics that became the subject of theoretical work done for the most part by professional philosophers and in cases by the law schools.

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27.2. Law Courses in Brazil and the Building of a National Elite: The Legal Legacy before the 20th Century

27.2.1. Overview

The history of legal philosophy in Brazil traces back to colonial times, which makes it unconceivable to separate that history from the history of legal philosophy in Portugal. The first law graduates in Brazil were educated in Europe, especially in Portugal, where they absorbed the culture and tradition of Lusitanian legal studies and where they came from in playing various roles among the cultural, political, and economic elites in Brazil (see Lima Lopes 2000, Venâncio Filho 1977, and Adorno 1988). A similar situation is found in most Latin American countries of that time.

One of the earliest philosophical manifestations of this influence in Brazil was seen during Brazilian independence in 1822, before the first two law schools were founded in 1827. Influenced by the French Enlightenment, Father Diogo Antônio Feijó (1784–1843) and Martim Francisco (1775–1844) taught the first courses on some of the main philosophers of the French Revolution. Martim Francisco even taught a course on Kant in Brazil from 1805 to 1810, which certainly was remarkable, given that Kantianism would take longer to get to European countries such as France. It is worth noting, however, that Kant and the Enlightenment were "received" more as expressions of liberalism than as an outcome of the philosophical revolution they would bring about, especially in epistemology (see Ferraz Jr. 2000, 12–30).

Not until 1827 did the newly independent Brazil, through a decree of its emperor, institute the first law courses, one in Olinda (in northeastern Brazil), though it was later moved to Recife, and the other in São Paulo, in the southeast. That was the foundational moment not only for legal studies in Brazil, but also for higher education in the humanities. However, although it was only several decades later that Brazilian intellectual life would begin to move away from the Portuguese, the creation of law courses stems directly from a new political institutional design for the country and brought new intellectual influences like Romanticism in literature and liberal ideas in politics.

Hence, the rise of the national state and of liberalism emerge as two central issues in the first Brazilian reflection on the philosophy of law (see Lima Lopes 2000). Interestingly, however, a liberal legal-philosophical consciousness coexisted ambivalently with the maintenance of slavery, abolished in Brazil as late as 1888. As José Reinaldo Lima Lopes has pointed out,

> a liberal and enlightened revolutionary perspective capable of large demonstrations in defence of individual freedom coexisted uneasily—from a theoretical point of view—with slavery. But it invoked a number of arguments to rationalize this restricted universalization of civil rights. Even the American and French Revolutions had to live with this kind of contradiction [...]. And the revolutionary and civilizing France, having abolished slavery in its territory and colonies by or-

der of the Convention of February 4, 1794, had second thoughts in 1802, when it allowed both slavery and the slave trade in the colonies, thus putting an end to equal rights. (Lima Lopes 2000, 351; my translation)

Such nonrepublican thought, however, remained alive during this period. One of its representatives was José Maria Corrêa de Sá e Benevides (1833–1901), of the Faculdade de São Paulo, who stood apart as a follower of theological natural law, relying especially on the doctrine of the Catholic Church. He rejected Auguste Comte's positivism on two grounds: in the first place because it is not based on a belief in God and the immortality of the soul, and in the second place because it asserts that morality should be subordinate to sociology (see Nader 2000, 255).

The law schools, however, were not only venues for the teaching of law. Generalist education tended to have a strong humanistic component. More often than not, students would engage in discussions on the arts, politics, literary criticism, and science, as well as on the law. Some examples of this dominant type of education can be found in some classic writers of Brazilian literature, including Álvares de Azevedo, Castro Alves, and José de Alencar. The impact of the law schools was also strongly felt in the development of the social sciences in Brazil. Virtually all classical social thinkers in Brazil were trained in the law schools.

This generalist and interdisciplinary scenario fostered the first efforts aimed at a philosophical investigation of law. This philosophy of law was born as a *philosophy of jurists* trained in a rhetorical tradition commonly known as *bacharelismo* (lawyership), characterized by classical and general humanism, generalism, and erudition; influenced by the belle époque; and lacking academic and methodological accuracy in treating authors and ideas. The national elite echoed the European debate in legal philosophy—especially in Paris and Lisbon—without necessarily digesting it with the rigor with which it was conceived and developed. The legal philosophical production of that time can be said to have been much more interested in disseminating mainstream *European* thought than Brazilian philosophical thought (cf. Reale 1976, 9). Brazilian social thought evolved differently, as it focused on Brazilian facts and realities, thus forging an identity of its own long before general philosophy, and legal philosophy in particular. Such an eclectic academic environment, a lawyerly one (see Venâncio Filho 1977), is still alive and well in most Brazilian law schools of the 21st century. Even so, these legal philosophers did produce some works of intellectual value.

In the end, it is still in an original way that European ideas travelled across Brazil, even if for the most part these ideas were imported and reworked not so much for their inherent philosophical merit as for the political and ideological function they could play Brazil's political and legal landscape (cf. Reale 1976, 137).

27.2.2. The Main Point of Reference in the Colonial Period

Even during the colonial period there was some effervescence, a case in point being Tomás Antônio Gonzaga (1744–1809), author of the *Tratado de Direito Natural* (Treatise on natural law). Gonzaga developed some libertarian political ideas and was sent to exile for having allegedly participated in the affair known as the Minas conspiracy (*Inconfidência Mineira*), a famous chapter in Brazilian history in which the Portuguese authority was challenged by the settlers. Although his natural law tempered with theological nuances did not bring major innovations, he did set out a systematic and clear outline of the thinking of some authors, including Johann Gottlieb Heineccius, Samuel Pufendorf, and Hugo Grotius, the last of these criticized for designing a natural law independent of God's existence.

In the 19th century, several names were associated with the philosophy of law, usually professors in São Paulo. One of these was José Maria de Avelar Brotero (1798–1878), who at the newly established São Paulo School of Law was the first professor of natural law (a course that would subsequently be replaced by the philosophy and general theory of law). In 1829, he published for his course a handbook offering an introduction to natural law. His teaching was informed by the work of authors like Gabriel Bonnot de Mably, Baron d'Holbach, Claude Adrien Helvétius, Bruno Perreau, and Pierre Jean Georges Cabanis and introduced avant-garde opinions clearly at odds with the prevailing doctrine in Portugal. So, for example, he argued that marriage was an agreement based on mutual consent, that divorce was the only possible moral solution in the absence of such a mutual agreement, and that spouses should have equal rights.

The establishment of the São Paulo School of Law in 1827 came at a time when European philosophical influences were somehow already present (especially as concerns Grotius, Pufendorf, Heineccius, Filangieri, Beccaria, Bentham and Smith). However, it is only with the institution of the law course that this influence was consolidated (cf. Lima Lopes 2000, 338).

As we saw earlier, Kant was already familiar. However, late in the 1830s, Kantianism began to wield a more powerful influence, particularly through the work of a lesser Kantian named Karl Christian Krause (1791–1832), brought to Brazil by a German immigrant, Julius Frank (1808–1841), who taught at preparatory schools for admission to law school. This Kantian presence, though somewhat ambiguous, is felt on the thought of Tobias Barreto (1839–1889), one of the jurist philosophers who stands out in this period. Barreto, who taught in Recife, was significant for his effort to disengage Brazilian legal thought from traditional Portuguese legal thought, still deeply rooted in ordinary legal praxis and in Scholasticism. It was precisely against praxis-oriented thinking and the Scholastic style that he charged, looking instead to natural science as a methodological model to be followed in legal science, too. Distancing himself from the French exegetical school and the German Pan-

dectists, whose influence peaked in the first half of the 19th century, Barreto was one of the authors who did most to bring sociological and anthropological inquiry to jurists. In a syncretic and quite inconsistent fashion, Barreto combined Krause's Kantianism with the evolutionism of Ernst Haeckel—an author who drew a cult following in Brazil—and with the work of Rudolf von Jhering and Herman Post. He forged a kind of sociology of natural law. Another professor of natural law in São Paulo was João Theodoro Xavier (1828–1878), also responsible for disseminating Karl Krause's and Heinrich Ahrens's ideas. These theoretical reference points were remarkable in the education of another important 19th century Brazilian jurist and thinker who projected his influence on the 20th century, Clovis Bevilacqua (1859–1944).[1]

It is important to remember that, as was previously highlighted, this generation of jurists also bears the strong influence of the "practical approach" espoused by Portuguese philosophy, completely averse to pure metaphysics (cf. Costa 1956, 438). Perhaps this can explain why Brazil had not had a philosopher of law per se, but did, for example, have great theorists of private law who built their works relying on their eclectic knowledge of philosophy. According to Clovis Bevilacqua, responsible for drafting the Civil Code of 1916, "if some day we will produce further works of philosophy, they will not emerge from the heights of metaphysics" (see Costa 1956, 442; my translation). In fact, the "practical approach" that dominated in the law schools foreclosed any other avenue, at least in the near future. The practical approach, however, was not tantamount to a lack of theories or reflection on law. Bevilacqua was influenced by the evolutionism of Tobias Barreto, whose conception he combined with the idea that the law would evolve by way of struggles (the obvious reference here was to Jhering).

Also noteworthy is that around 1854, João Chrispiniano Soares (1809–1876), professor of Roman law at the São Paulo School of Law, was influenced by Pandectism and the ideas propounded by Friedrich Carl von Savigny. This influence would be remarkable in shaping the exegetical and systematizing model followed by several prominent jurists and codifiers, such as Bevilacqua, Teixeira de Freitas, and Conselheiro Ribas. In the latter's civil law course, we can also see noteworthy German influences and many quotations by German writers, including Ludwig Arndts von Arnesberg, Johann Burchard Freystein, Johann Ulrich von Cramer, Christian Friedrich von Gluck, and Georg Friedrich Puchta (cf. Ribas 1915).

Teixeira de Freitas (1816–1883) drafted a general code intended to stand above all other civil, criminal, and procedural laws, containing standards for the application, interpretation, validity, and duration of laws, as well as criteria for resolving conflicts of laws across time and space. Although his work and ef-

[1] His most important works are *Teoria general do direito civil* (General theory of private law: Bevilacqua 1908) and *Código Civil dos Estados Unidos do Brasil Comentado* (The Civil Code of the United States of Brazil: Bevilacqua 1916).

forts were not accepted in Brazil, its logical structure served as a model for the civil code enacted in 1898 in the Empire of Japan, the 1929 Vatican laws and general rules and sources of law, the Italian Civil Code of 1942, and the revision of the French Civil Code in the 1930s. In Latin America, his works served as a basis for the civil codes of Argentina, Paraguay, and Uruguay. Teixeira de Freitas is a further example of an intellectual man of legal science, versed in philosophy, but whose intellectual potential brought him fame for his role in practical matters such as the creation of a code of laws. His work is marked by the traits of the Brazilian legal thought of this time, with little concern for purely metaphysical questions and much emphasis on practical questions. Even so, he did also put his great skill to work in brilliantly tackling the philosophical dimensions of private law, an interest rarely seen among his peers.[2]

Another prominent author in this turn of the century was Silvio Romero (1851–1914), responsible for disseminating in Brazil an eclectic concept of Spencerian evolutionism and a positivist scientific approach to law under the strong influence of the English evolutionist Thomas Huxley.[3] Also advancing a "positivist" philosophy of law, in São Paulo, was Pedro Lessa (1859–1921), who adopted the principles and methods of Auguste Comte, Herbert Spencer, and John Stuart Mill, among others (see Lessa 1909 and 1912). Despite strong resistance from those who propounded Scholasticism in Brazil—especially Soriano Sousa (1833–1895) in the north and João Mendes Junior (1856–1923) in the south—this positivist scientific approach to law, also espoused by Clovis Bevilacqua and Pontes de Miranda, prevailed until the late 1930s. Since then, new doctrinal currents have been embraced by Brazilian legal thought: Prominent examples are Edmund Husserl's phenomenology, existential philosophy, and Marxism.

In short, the inception of Brazilian legal thought bears the mark of two parallel forces: the emphasis on legal practice, coupled with the influence of positivism and its scientistic ambition, evolutionism, and classical Scholasticism as theoretical frameworks. In the words of Lima Lopes,

> the theoretical discussion in the second half of the century (the generation born in 1870, the so-called Brazilian Enlightenment) shows the need to overcome the traditionalist natural law that prevailed. The alternative that emerges is *science*: Here, as almost everywhere, what is pursued in various forms is *naturalism.* (Lima Lopes 2000, 341; my translation)

As we discuss below, these features go beyond the 19th century, crossing over into the 20th. This new approach in legal thought dealt with an often mentioned "dilemma between the real country and the country of laws," the "living law and the doctrinally constructed law," and the solution offered was

[2] His most important works are *Consolidação das Leis Civis* (The consolidation of civil laws: Teixeira de Freitas 1857) and *Código Civil: Esboço* (The civil code: A draft, Teixeira de Freitas 1864).

[3] On the philosophy of law, Romero wrote Romero 1878 and 1885.

clear: The science of law should focus on the real law and abandon the metaphysics of idealistic legal philosophy.

27.3. Legal Philosophical Thought in the Early 20th Century

The late 19th century marks the beginning of republican decentralization in Brazil, a process that ultimately consolidated the state of São Paulo as the new crucible of the Brazilian economy, with its strong reliance on the production of coffee. This fact would have an impact from both a cultural and a philosophical standpoint. These changes underpin the emergence, early in the 20th century, of a new emphasis on reflection wedded to dogmatic practice, away from the previous concern with the dilemma between the living law and doctrinally constructed law. Some influential works set the new methodological requirements that would resonate in legal philosophy. João Mendes Junior, for example, outlined a role for the philosophy of law as a kind of basic doctrine of legal science. Francisco Campos assigned to the doctrinal study of law the task of devising general principles of law and determining how to explain the legal phenomenon. Pedro Lessa and João Arruda focused on the methodological issues involved in a scientific investigation of law. A scientific approach to law was taken as well by Pontes de Miranda, but in his view it was sociology that offered the model for such an investigation (see Ferraz 2000).

From a cultural standpoint, the last decades of the 19th century generated what Barros (R. Barros 1927) termed the Brazilian Enlightenment, which stemmed from a direct contact with European culture and particularly with France. From this development sprang a focus on the ideas of evolution, biological and social Darwinism, positivism, and materialism. These ideas were embraced by the Brazilian local elites, who developed themes and aspects closer to them. Although positivism had great influence in the military and scientific arena, it did not hold much sway with the law schools, the main site of philosophical conjecture at the time. As João Cruz Costa has pointed out, "positivism was incorporated into Portuguese and Brazilian culture for its inherent philosophical worth, but because it served the interests of a politico-historical movement" (Reale 1976, 137; my translation).

The 1920s and 1930s brought changes that profoundly influenced legal thought throughout the European legal tradition. In Brazil, the situation was not different. Political changes were profound and extreme. Huge ideological conflicts between socialism, liberalism, fascism, and corporativism would leave their footprint in both public and private law. In the private arena, reforms to the Code of Obligations and Family were planned. Although such reforms were not carried out, they set liberal ideas against fascist corporativism (particularly influential in Brazilian labour-relations law and social-security policies: cf. Lima Lopes 2000, 382). A case in point—in the Vargas era, the period when Brazil was governed by President Getulio Vargas (1930–1945)—was the

theoretical debate between two competing views about the role of jurists and the role of private law. The main characters in this debate were Waldemar Ferreira (1865–1964), professor at the São Paulo School of Law, and Oliveira Vianna (1883–1951), a legal adviser at the Ministry of Labour and also a sociologist and jurist who taught in Rio de Janeiro. The former made a classic defence of liberal thought (see Ferreira 1938), arguing that liberalism is inconsistent with Brazilian labour courts, fashioned after the corporatist model, and hence completely at odds with the standards of private law. Oliveira Vianna (1938) defended the need for strong state intervention to implement a national development project. Vianna's corporative model, successful in the Vargas era, has considerably influenced the political and legal debate that continued in the following decades.

In public law, a comprehensive administrative reform was undertaken under the powerful influence of some social thinkers, such as the same Oliveira Vianna, and legal philosophers proper, such as Francisco Campos (1891–1968), who wrote the Authoritarian Constitutional Charter of 1937 and the reform that created the curriculum that went by the name of "introduction to the science of law" (mostly focused on the main concepts of legal dogmatics). One of the high points of this reform was the creation of a system of appointment to public office by examination, gradually replacing the system of appointment by simple designation and enabling the establishment of a professional bureaucratic corps recruited from the urban middle class independently of traditional patrimonial relations or family ties (cf. Lima Lopes 2000, 383). However, even late in the 1930s, influential Catholic sectors coalesced around Alceu Amoroso Lima (1893–1983) and Father Leonel Franca (1893–1948) to come up with an alternative to the system of vocational schools modelled after the medieval university corporations: These reformers put science and technique under the umbrella of philosophy and theology, and in this way they laid the foundations for a movement that eventually resulted in the *Pontifícia Universidade Católica do Rio de Janeiro* (Catholic University of Rio de Janeiro). This environment was shaped under the continuing influence of Saint Thomas Aquinas's religious thought, which remained present in the natural-law thinking at the law schools (see Schwartzman 1979, 189).[4]

This strongly eclectic positivist, evolutionist, and naturalist frame of mind—coexisting with a strong presence of Catholic thought and an inflow of the nonliberal ideas that informed authoritarian fascist and communist thinking (see Lamounier 1989)—defined the dominant intellectual landscape in Brazil from 1930 to 1940. In 1940, Miguel Reale (1910–2006), published *Fundamentos do Direito* (Fundamentals of law: Reale 1940), bringing about a shift in the legal and philosophical scenario of the post-war period. Before we ana-

[4] Social thought inspired by Catholicism has influenced the São Paulo Catholic University (PUC), especially through the teaching practices adopted by Montoro (2009).

lyze this work and its influence, we should describe a new philosophical intellectual force that came into being in Brazil with the creation of the University of São Paulo. To this subject we thus devote the next section.

27.4. The Creation of the School of Philosophy: Professional Philosophers

27.4.1. The Foundation of the University of São Paulo (USP) and the "French Mission"

It is worth noting that in the early 20th century, social theory and philosophy was generally done by Brazilian jurists specialized in other branches of legal dogmatics. This is still a salient feature of the theoretical and philosophical work of contemporary "legal philosophers," whose writing is chiefly concerned with the production of handbooks, précis, and disseminative works designed for the legal publishing market, but these materials are scarcely used in academic circles outside the law schools. They thus constitute a theoretical production intended "for consumption by law students and jurists," not engaging in intellectual debates with other university departments. This phenomenon is evidently linked in part to the framework of Brazilian theory of law, still predominantly carried out by lawyers or legal professionals who hold a professorship on the side, usually showing little concern for academic research proper.

A turning point in this timeline was the founding of the University of São Paulo (USP) and its School of Philosophy in 1934. This event provided a bold model that would deeply shape the university in Brazil. The USP has since been the most influential and reputable institution of higher education in Brazil. Although it was not the first Brazilian university, it was born out of the reform designed by Francisco Campos (Minister of Education and Public Health under Getulio Vargas). This reform was concerned with creating "an administrative and educational unit aimed at technically equipping the Brazilian professional elites and making for an environment conducive to speculative and disinterested vocations—an environment essential to the formation of a national culture and devoted to research and pure science" (Schwartzman 1979, 172; my translation). The USP preceded most other universities in embracing this new phase of modernization.

For the foundation of the USP, and in particular for the formation of the School of Philosophy, Sciences, and Literature, many foreign professors were hired representing almost all areas of knowledge. In the humanities, the first full professors included the sociologist Roger Bastide (1898–1974), the political scientist Paul Arbousse-Bastide (1899–1985), the anthropologist Claude Lévi-Strauss (1908–2009), the geographer Pierre Monbeig (1908–1987), the philosopher and psychologist Jean Maugüé (1904–1985), and the historian Fernand Braudel (1902–1985), all of whom came from France at a young age

as recent graduates invited by the mathematician Theodoro Ramos (1895–1936), sent to Europe to seek out a teaching and research cadre. This group of intellectuals thus began to teach at the new university: For them we have chosen the term *Missão Francesa* (French mission), for on the one hand they all came from France, and on the other the word *mission* can designate a group of people entrusted with advancing some vision, usually in another place or country. And at the same time the term also carried the connotation that, as Novais (1994, 161), has observed, "we were seen as a land of indigenous people to be indoctrinated" (my translation).

Brazilian philosophical production had just begun and so was not much developed, and in this context the French mission represented a foundational moment, introducing Brazil to a unique way of philosophizing—more scholarly, methodologically strict, and distant from the *lawyerly* style of the past. The concern with a close and structural reading of classical texts was such that the curriculum was gradually veering toward the *history* of philosophy and away from philosophy itself. This became glaringly conspicuous with the arrival of the first professors of history of philosophy, such as Gilles Gaston Granger (1920–), and with the strong influence of the structuralism of Martial Guéroult (1891–1976) and Victor Goldschmidt (1914–1981). From 1960 to 1990, the French professors Gérard Lebrun (1930–1999), Michel Debrun (1921–1997), and Francis Wolff (1950–) would also be very influential (cf. Arantes 1994). A few years earlier, in 1936, Émile Bréhier (1876–1952) had also been hired to teach philosophy at the University of the Federal District of Rio de Janeiro, and he too left a lasting mark on future generations.

The French mission brought a new academic style and a rigorous method to the study of philosophy. This new intellectual moment in philosophy in Brazil immediately gave rise to a sort of rivalry (especially in São Paulo) with the philosophy done by jurists, hitherto prevalent in major Brazilian cities like São Paulo itself, as well as Rio de Janeiro and Recife. The differences in method, approach, and aims was such that the two models of philosophical investigation in Brazil would each go their separate ways, with hardly any contact. This insularity of legal philosophy at the law schools would not dissipate until the end of the 20th century. And only recently have academic philosophers become interested in contemporary philosophy of law and jurisprudence.

27.4.2. The Main Reference Points

The professor of philosophy assigned to initiate the philosophical civilizing mission was Jean Maugüé, who taught from 1935 to 1944. He was later succeeded by his first assistant, João Cruz Costa (1904–1978), who along with Lívio Teixeira (1902–1975) would ensure that the previously instituted radical reform project would continue (Arantes 1994, 1988). The French mission also included the aesthetics professor Gilda de Mello e Souza (1919–2005)

and the second generation of university graduates, a group of Brazilian philosophers who deeply influenced future generations: In this group were José Arthur Giannotti (1930–), Bento Prado, Jr. (1937–2007), Oswaldo Porchat (1933–), and Ruy Fausto (1935–). Contemporary with this first wave of technical philosophers were the French professors Michel Debrun (1921–1997) and Gérard Lebrun (1930–1999). This generation was succeeded by other major figures in Brazilian philosophy—such as Marilena Chauí (1941–), Rubens Rodrigues Torres (1942–), and Luis Roberto Salinas Fortes (1937–1987)—as well as in the philosophy of law, such as Tércio Sampaio Ferraz Jr. (1941–), who opened a small chapter of methodological dialogue between the jurists' philosophy and the technical philosophy taught in the USP School of Philosophy. This first generation did its methodological homework by incorporating the strict academic spirit handed down by the founders and by other missionaries who had been part of the department of philosophy, such as Gilles Gastón Granger (1920–) and Victor Goldschmidt (1914–1981).[5] These were responsible for encouraging the push to internationalize philosophical education, which essentially required an internship abroad, preferably in France.

The first results of this technical-philosophical education lay in a number of structuralist studies devoted to reading several thinkers who made up this generation's intellectual universe (this line of inquiry was taken up in a more or less orthodox manner and was always part of the curriculum, at least as a preliminary step in a study of the history of philosophy). The thinkers the new Brazilian philosophers studied on this close-reading philosophical method included Descartes (L. Teixeira 1990), Marx (Giannotti 2000 and Fausto 1997), Spinoza (Chauí 1999), Schopenhauer (Cacciola 2004), Rousseau (Prado Jr. 1976, Fortes 1976), Fichte (Torres Filho 1975), Aristotle (Pereira 2001), Mill (Giannotti 1953), Hume (Monteiro 2009), and Hegel (Arantes 2000), and later Husserl (Moura 2007), Frege (L. H. L. Santos 2008), and Kant (Terra 2003). Subsequent generations would continue in the same tradition, undertaking a structuralist study of a thinker according to Gueroult's "order of reasons" (i.e., according to the internal logic of the argument: see Guéroult 1953), at least as a starting point for philosophical interpretation. Noteworthy in this body of work was the lack of interest in the philosophy of law. An exception to this rule was Tércio Sampaio Ferraz, Jr., who earned his Ph.D. in Mainz, Germany, with a dissertation devoted to a structural reading of Emil Lask's thought (see his interview in Nobre and Rego 2000, 277).[6]

The model created at the USP shaped the development of philosophy in Brazil. So, as much as other states were home to highly accomplished philosophers and historians of philosophy—such as Henrique de Lima Vaz (1921–

[5] On this development, see Macedo Jr. 2008; V. Goldschmidt 1982, 130; and Moura 2001, 13.
[6] On Lask see Section 1.4 in this tome and Section 1.1.3.2 in Tome 2 of this volume.

2002), Raul Landim (1939–), and Guido Antônio de Almeida (1939–) in the state of Rio de Janeiro, and Gerd Bornheim (1929–2002), Ernildo Stein (1934–), and Balthazar Barbosa Filho (1947–2007) in the state of Rio Grande do Sul[7]—they were often looking at the USP School of Philosophy as a model. In that way the school's influence spread to other parts of Brazil. The dissemination of the new technical standard of philosophical or historico-philosophical production gained momentum with the creation of the Centre for Logic and Epistemology (CLE), based at the department of philosophy of the University of Campinas (UNICAMP).[8] The CLE was conceived and organized in 1976 and was officially introduced at UNICAMP in 1977 by Prof. Oswaldo Porchat Pereira (1933–). By organizing seminars on epistemology and several philosophical topics—including political philosophy, moral philosophy, metaphysics, the philosophy of language, and logic—this centre brought together philosophers from several Brazilian cities who had hitherto been scattered and without much interaction. In lieu of a classic congress, with keynote speakers and few participants, these seminars introduced an interactive and philosophical debate that has since become fairly established in Brazil (see Balthazar Barbosa's interview in Nobre and Rego 2000, 406). This experience consisted of an important moment of self-criticism addressing the exaggerations of the structuralist method, which in a way constrained the USP's initiatives in producing an independent philosophy (see Oswaldo Porchat Pereira's and Paulo Arantes's interviews in Nobre and Rego 2000, 119–44, 337–72). Even today, the centre plays an important and key role in Brazilian philosophy, although it has not produced relevant works in the philosophy of law.

Later on, in 1983, the Brazilian Association of Graduate Programmes in Philosophy (ANPOF) was founded, bringing together all master's and doctoral degrees in philosophy in Brazil: This new association—accredited by CAPES, an agency of the Ministry of Education responsible for higher education—has made it possible to organize national meetings, in such a way as to unify and standardize a philosophical style brought forward by the USP's School of Philosophy.

27.5. The Tradition of Legal Philosophers and the Brazilian Institute of Philosophy (IBF)—Miguel Reale: A New Chapter in the Philosophy of Jurists

As we turn now to legal philosophy specifically, we should first note that the tradition of the "jurists' philosophical thought" did not come to an end with the beginning of the 20th century. In fact, it remained alive and hegemonic un-

[7] The works of the authors just mentioned include Lima Vaz 1986, Landim 1998, Bornheim 2001, and Stein 2005.

[8] The CLE publishes three major philosophy journals: *Cadernos de História da Filosofia da Ciência*, *Revista Manuscrito*, and *Coleção CLE*.

til the 1930s, when it was essentially replaced by the philosophy taught at the universities. The key figure in this new tradition, the most influential philosopher of law in Brazil in the second half of the 20th century, is surely Miguel Reale (1910–2006). In this period, Reale became the most renowned Brazilian philosopher worldwide, and his works were translated into Italian and Spanish. A typical example of a cross-disciplinary man of letters, he synthesized various characteristics of the mode of thought he represents. He was a philosopher, a jurist, an educator, a lawyer, a journalist, a poet, a member of the Brazilian Academy of Letters, a politician, an ideologue, and a legislator (he drafted the Brazilian Civil Code of 2002).

In 1932, Miguel Reale started an early intellectual movement: With Plínio Salgado (1895–1975) he became one of the main ideologues and founders of *Ação Integralista Brasileira* (Brazilian *Integralismo*), a Brazilian version of fascist thought that reached its heyday in the 1930s. *Integralismo* also attracted other important intellectual philosophers, among whom Goffredo da Silva Telles Júnior (1915–2009), a jurist philosopher at the USP Law School (cf. Telles Jr. 2003, 2008); Roland Corbisier (1914–2005), a jurist and a philosopher (see Corbisier 1978); and Álvaro Vieira Pinto (1909–1987), a physician, physicist, and mathematician (see Pinto 1960). It is at this time that Reale produced some of his earliest works, permeated by an authoritarian and critical attitude to liberalism. Over the years, his political engagement moved away from fascist thought, but it did remain authoritarian and conservative in outlook. In 1969, President Artur da Costa e Silva appointed him to the so-called High Level Commission, entrusted with revising the 1967 Constitution. This work led to the wording of the First Amendment to the Constitution: The amendment was enacted on October 17, 1969, and the revised constitution of which it was part consolidated the military regime in Brazil by restricting many civil and political rights. It was de facto a new constitution written by the military regime.

There is a whole collection of educational and disseminative works that gave Reale fame (and are still in circulation),[9] but apart from that he can be seen as a "freethinker" in the philosophy of law by comparison with authors who valued the rigor of a more "technical," more academic philosophy, and his more open approach has had an undeniable influence on Brazilian legal and philosophical thinking and style. According to Reale's culturalist approach (often called *Culturalismo*), law is not a natural fact, but a *cultural product* essentially marked by its connection to social values. Accordingly, the science of law should not follow the method of the natural sciences but that of the social sciences. His "three-dimensional" theory of law, combining the influences of Radbruch's neo-Kantianism with Husserl notions of *Lebenswelt* and

[9] For example, Reale 1953, 1968a, 1973, some of them translated into Spanish, French and Italian.

intentionality, attempts to overcome the unilateral character of legal positivism (broadly construed) that prevails in the Brazilian academies of law, treating law as a phenomenon that has three dimensions: a factual one, an evaluative one, and a normative one. For him, sociologism (such as Leon Duguit's), normativism (such as Kelsen's), and natural-law theory (such as Jean Maritain's) offer a one-sided view of law.[10] Reale's three-dimensional theory is based on an eclectic merging of these three main sources of modern jurisprudence and sought to overcome them by arguing that facts, values, and norms should be viewed in a dialectical and dynamic way, according to what he called the "dialectics of complementarity" (see Reale 1977, 120; my translation). For Reale (ibid.) values are historical products. However, once created and culturally accepted, they become "axiological invariables" and affect the law of a community. Positive law is for him a fact that should be analyzed from the standpoint of its three dimensions. Thus values become historically concrete in facts, and intersubjective relationships become normatively regulated. Key to that effort is the not-always-clear concept of dialectics, which Reale explains as follows:

> The term *three-dimensional* can be rigorously understood only if taken as though it were translating a dialectical process in which the normative element becomes whole in itself and supersedes the factual-axiological correlation; the norm thus gains an ability to convert into fact at a subsequent moment in the process, but it can do so only with reference to, and as a function of, a new normative integration determined by new axiological demands and new factual circumstances. (Reale 1968b, 77; my translation)

For many years in Brazil, this conception of law informed the courses introducing students to the study of law. Only very recently has it lost its central role in the academic study of legal philosophy. His philosophical syncretism often makes it hard for interpreters to understand his ideas clearly. As Tércio Sampaio Ferraz, Jr., diplomatically argues, the production and courses offered by Reale were profoundly different from those prevailing at the USP School of Philosophy.

> One time I said to Celso [Lafer] that the seminars organized by Professor Miguel Reale had nothing to do with the study of philosophy, and he replied that I was being biased. In fact, the study I was used to at the School of Philosophy was the kind shaped from the point of view of the French structuralists: It was about studying the history of philosophy, studying philosophical systems as strictly as possible, while Miguel Reale's style was completely open-ended. The course he was offering at that time, for example, was on Vico, but there was no concern with rigor in the interpretation of his philosophical system: What really mattered was thinking about the issues raised by Vico. At first, I found it eccentric, but little by little, I realized that he was simply doing something different—and why not? (Nobre and Rego 2000, 274; my translation)

[10] On Duguit see Section 12.3 in this tome. On Maritain see Section 3.2 in Tome 2 of this volume.

Reale's undeniable intellectual brilliance made him the ideal example of a rhetorical philosopher, heir of the old lawyerly style, a high representative of the spirit that at the USP School of Philosophy was pejoratively described as "philosophizing" (*filosofante*). The political, ideological, and methodological contrast marked a distance between different "styles" of doing philosophy, and prompted Reale himself to offer a critical reply, which he so expressed after introducing one of the philosophy congresses he promoted:

> Certain people who adhered to a different line of thought pursued elsewhere were against this initiative, this to the extent that, in their express view, the history of philosophy in Brazil has been nothing other than a sequence of influences received, and its mentors arrogantly denied us the title of philosophers, calling us "philosophizers." (Reale 2002, 02; my translation)

In 1949, Reale founded the *Instituto Brasileiro de Filosofia*, or IBF (Brazilian Institute of Philosophy), which was very influential among Brazilian intellectuals and served as an institutional alternative to the USP School of Philosophy. As Reale put it:

> In 1949, with the support of some thinkers affiliated with the government or with private universities, I found it critically important to create an entity that would enable our promoters of philosophy to interact in a broad national dialogue. This was the origin of the Brazilian Institute of Philosophy, with the creation of the *Brazilian Journal of Philosophy* (*Revista Brasileira de Filosofia*, or RBF), its essential organ of communication, without preference for any doctrine, and open to collaboration with all stakeholders, whether or not they belonged to the university. Last year [2001], that quarterly journal celebrated half a century of existence, with the publication of 206 issues to date, each of about 120 pages. (Reale 2002, 02; my translation)

The IBF organized some national congresses of philosophy,[11] and it brought together intellectuals from various philosophical and ideological backgrounds, especially those working in different "philosophical styles." In a historical account, Reale notes that the

> IBF gathered thinkers of all doctrinal stripes, from Djacir Menezes (1907–1996), with his Hegelian dialectic; to Blondel, with his "intuitionism of action"; to João de Scantimburgo (1915–). As founder of the IBF, I could work with the wonderful team comprising Luis Washington Vita (1921–1968), Vicente Ferreira da Silva (1916–1963), Renato Cirell Czerna (1922–2005), Heraldo Barbuy (1913–1979), Vilém Flusser (1920–1991), Milton Vargas (1914–2011), Teófilo Siqueira Cavalcanti, Roque Spencer Maciel de Barros (1927–1999), Adolpho Crippa (1929–2000), and Lourival Vilanova (1915–). The team was later strengthened by Antonio Paim (1927–2011).[12] Vicente is indisputably the greatest existential metaphysician in the Portuguese language. Luis Washington was the great architect behind the effort to unify Brazilian and Portuguese thinkers, an effort that later culminated in the foundation of the Institute of Portuguese-Brazilian philosophy. (Reale 2005, 01; my translation)

[11] Reale had a direct role in organizing seven Brazilian philosophy congresses (from 1950 to 2002) and the Eighth Inter-American Congress of Philosophy (held on Brasília in 1972).

[12] The main works the scholars in this group wrote on the philosophy of law are Menezes 1980, Vita 1950, and Czerna 1999.

The IBF and the *Brazilian Journal of Philosophy* (RBF) thrived, especially through the 1980s, by bringing together thinkers from diverse backgrounds, especially those disconnected from the tradition inaugurated with the foundation of the USP School of Philosophy. Along with the IBF, the *Instituto Superior de Estudos Brasileiros*, or ISEB (Higher Institute of Brazilian Studies) also played a unifying role in Brazilian social thought. The ISEB was created in 1955 by an eclectic group of nationalist intellectuals affiliated with the Ministry of Education and Culture: It was given administrative autonomy and freedom of research and opinion, and it had its own chair, and its activity revolved around the study, teaching, and dissemination of the social sciences. It worked as a centre of ideas and its main purpose was to discuss theories of development, in principle with the function of validating the action of the state under the administration of Juscelino Kubitschek, president of Brazil from 1956 to 1961.[13] Although many of the thinkers associated with the ISEB came from the USP, some tension remained on the question of methodology, with accusations from the USP that the work done at the ISEB lacked a strict philosophical theoretical framework. The philosophers in the ISEB group were Miguel Reale, Álvaro Vieira Pinto (1909–1987), and Roland Corbisier (1914–2005), a graduate of the São Paulo University School of Law and of the São Bento School of Philosophy. These philosophers distanced themselves from the USP's philosophy and even scorned it, thus working in a direction similar to that of IBF: one of detachment.

Indeed, the dialogue among intellectuals at the IBF and the USP School of Philosophy, Sciences, and Literature has always been scant. On the relationship between these two institutions, Jose Arthur Giannotti (1930–), one of the main voices at school of philosophy, would later comment as follows:

> Although the opposition between the right wing and the left was very polarized, there was much conviviality (perhaps because the participants were all members of the ruling class) among younger groups; grievances had not yet solidified. Owing to our French roots, we developed the tactic of not directly engaging in discussions involving Brazilian matters: We would be different, would do another kind of philosophy, and this other kind would spread like wildfire. Therefore, we simply began to publicly ignore what they did—not so much out of contempt but because of this difference in style, precisely to test and consolidate our way of being. On occasion we would "take a swipe at each other," but that did not produce major consequences on either side. (Nobre and Rego 2000, 99–100; my translation)

Hence, educated or professional philosophers had no interest in the philosophical work of their "philosophizing" colleagues, as the legal philosophers who gathered around the Brazilian Institute of Philosophy (IBF) were contemptuously called. From the point of view of those philosophers graduating

[13] Kubitschek is usually viewed as the father of modern Brazil because he favored long-term planning and set high goals for Brazil's development. He started the construction of a new modernist capital, Brasília.

at the USP School of Philosophy, legal philosophers seemed to be the outcome of the intellectual underdevelopment of a culturally unemancipated country, a victim of pedantic superficiality and of an ideological and methodological syncretism capable of merging elements from conflicting schools of thought without feeling compelled to provide readers with explanations. Legal philosophers linked to the ISEB and the IBF, on the other hand, criticized the philosophers at the USP School of Philosophy for their "alienation" from national problems as well as for their scarce interest in law and its specific problems, often seen as having no philosophical interest or as a mere expression of legal "ideology." They were accused of being excessively driven by a very specific philosophical interpretation of history of philosophy. Some of them later did admit to this excessively technical approach, that is, to a deep concern with accuracy and the methods of philosophical interpretation. Thus, for example, Paulo Arantes (1942–) even stated that "we were technicians, rather than 'philosophers,'" ironically emphasizing the intellectual obsessions of those in his own camp (Arantes 1994, 141; my translation).

This mutual ignorance and indifference, this purposeful lack of dialogue, was further strengthened from the 1960s on. This development was precipitated by a decisive historical event that would call on intellectuals to ideologically position themselves, thus magnifying the differences that were already separating them: the seizure of power by the militaries in 1964.

27.6. The 1960s: Increasingly Divergent Paths

The military regime in Brazil began with a coup d'état carried out by the armed forces on March 31, 1964, and lasted until 1985. In October of 1964, the government passed the so-called Suplicy Act, extinguishing the Brazilian Student Union (UNE) and banning any state-level student associations. The idea that dictatorship sought to convey was the need to defend democracy against its worst enemies, the communists. Some leftist groups responded by armed struggle, and that led to a hardening and expansion of political repression, leaving deep scars in academia and Brazilian intellectuals. Persecution, imprisonment, exile, and compulsory retirement affected the lives of many who engaged in philosophy, and it put the question of democracy at the core of the militancy of many intellectuals who were against the dictatorship.

In São Paulo, leftist thought penetrated the USP School of Philosophy, Sciences, and Literature, while the more conservative line, allied with the military regime, made its home the School of Law of the Mackenzie Presbyterian University. Ideological and political tensions grew more bitter. The Mackenzie, USP, and PUC (*Pontifícia Universidade Católica*) Schools of Law, the three most important in São Paulo at the time, supplied a number of intellectuals who supported and championed the military dictatorship, including some professors of philosophy of law, such as Miguel Reale and Alfredo Buzaid.

In other Brazilian states, an association was also forged between law and the right wing and between the left wing and academic philosophy. In these states the law schools were the privileged locus for the production of conservative thought.

The new political moment aggravated the rift the French mission engendered between "jurist philosophers" and "academic philosophers." The political (and philosophical) thought of the right wing and the left found their natural loci in the schools of law and philosophy, respectively. In São Paulo, this antagonism was exemplary, considering how the most prominent representative of the "jurist philosophers," Miguel Reale, openly supported the military regime. Similar alliances were formed in the other Brazilian states, too, though the bias in these cases was not as strong.

As can be surmised, the divergence between the schools of philosophy and of law was ideological, not based on philosophical arguments, and the military regime only exacerbated that situation. The obvious tension between institutional and ideological positions further nurtured the existing methodological disconnect. But this disconnect was not confined to method, considering how the schools of philosophy felt the strong influence of philosophical currents—like Marxism and phenomenology in the French versions developed by Sartre and Merleau Ponty—that did not have as much sway in the schools of law, which instead were dominated by an eclectic culturalism that drew inspiration from various sources such as Husserl, Stammler, and Emil Lask and the Baden school.[14]

In this landscape, rendered in broad strokes, there emerged some works strongly influenced by a reading of the main works of pre-Hartian legal positivism, especially the conceptions put forward by Hans Kelsen and Norberto Bobbio, and to a lesser degree the Scandinavian realism of Alf Ross, but also the conceptions advanced in dealing with the issues in legal logic.[15] Two scholars who had a role in this development were Tarcisio Burity (1938–2003; see Burity 1988) and Lourival Vilanova (1915–2001; see Vilanova 1997). Especially worthy of comment in this context is the latter's work, since it represents the first systematic effort to build an analytically inspired theory of norms in the Kelsenian fashion. Although these readings of Kelsen may be open to question, they left a deep mark on the theoretical work done in specific areas like administrative law and tax law. In recent years, the latter has surprisingly flourished as a focus of publication in legal theory.[16]

[14] On Stammler, see Section 1.3 in this tome and Section 2.2 in Tome 2 of this volume. On Lask see Section 1.4 in this tome and Section 1.1.3.2 in Tome 2 of this volume.

[15] On Kelsen see Section 2.3 in this tome and Section 8.3 and 8.4 in Tome 2 of this volume. On Bobbio, see also Section 11.4 in this tome and Section 9.3.1 in Tome 2 of this volume. On Ross see Chapter 16 in Tome 2 of this volume.

[16] Examples can be found in the work of Paulo de Barros Carvalho (1938–), Celso Antonio Bandeira de Mello (1934–), and Geraldo Ataliba (1936–1995). See also Sundfeld 2005.

The new political environment has not helped schools of philosophy and of law to produce work based on any mutual engagement. Indeed, if anything, the situation is one of mutual *disinterest*: The philosophers have not been concerned with the investigations carried out at the law school—or with law itself, except in its classic treatment, as in the works of Hegel and Kant—and the jurists likewise ignored what was being produced at the schools of philosophy.

Despite significant differences, both movements were adversely affected by the lack of their own national production, that is, by the absence of a Brazilian philosophy, whether general or legal.[17] Throughout the 20th century, national philosophical production was popularizing and disseminative in nature.[18] The same goes for the philosophy of law, whose fate was no different.

27.7. The Beginning of a Difficult Dialogue and a Venture: Some Overview of the Present Moment

There is a certain point in our outline of 20th-century philosophy of law in Brazil when an interesting fact took place that brought about a change of direction: A large number of European and North American philosophers revived the interest in law. Significant in this regard is Jürgen Habermas's account of the reevaluation of law:

> In Germany the philosophy of law has long ceased to be a matter just for philosophers [...]. Indeed, it is no accident that legal philosophy, in search of contact with social reality, has immigrated into law schools. [...] What could once be coherently embraced in the concepts of Hegelian philosophy now demands a pluralistic approach that combines the perspectives of moral theory, social theory, legal theory, and the sociology and history of law. (Habermas 1996a, X)[19]

The expansion of the importance of modern constitutionalism, and in particular the moral readings of law, has prompted philosophers and jurists to find a renewed interest in common themes. In a sense, the new constitutionalism and the emergent question of the role of principles in the interpretation of constitutional law has been a gateway to a discussion of philosophical issues in the law schools.

On the other hand, the reevaluation of the agenda for discussion in political philosophy (theories of justice) and moral philosophy steered the interest of academic philosophy toward legal issues, opening new horizons for a more

[17] This seems to be a general diagnosis made by a considerable portion of the Brazilian philosophical community. See Nobre and Rego 2000, and especially the reports by Paulo Arantes and Bento Prado.

[18] Bento Prado, Jr., accordingly commented thus: "Here, we also do Marxism, phenomenology, existentialism, positivism, and so on. But what we usually do is dissemination. These works neither coherently follow a tradition nor do they develop their own system: Their cohesion always comes from the outside" (Prado Jr. 1985, 176; my translation).

[19] On Habermas see Sections 10.3.5 and 10.4.3.2 in this tome, and Sections 10.4 and 25.3 in Tome 2 of this volume.

fruitful dialogue between legal and academic philosophers. The remarkable influence of John Rawls's work on the agenda of contemporary political philosophy has also made an impact in Brazil, where the texts of major international philosophers, such as Amartya Sen, Ronald Dworkin, Jürgen Habermas, and Charles Taylor, have already been translated into Portuguese. Moreover, more than ever, certain problems and legal issues under discussion in our courts require both technical and philosophical expertise coupled with an awareness of technical legal problems.

On the other hand, the central themes in the philosophy of language have definitely been incorporated into the themes of moral philosophy and law, especially after the publication of H. L. A Hart's *Concept of Law* and the dominant debate in the philosophy of law in English-speaking countries and continental Europe. This development updated the legal philosophy done "before the linguistic turn," bringing new issues and challenges that now prevail in the schools of philosophy. As a case in point is the extent to which the conceptions expounded by Hart, Neil MacCormick, and Robert Alexy are linked to the core of the contemporary philosophical debate that revolves around the philosophy of language and around the work of authors such as Habermas, Wittgenstein, Heidegger, Gadamer, Searle, Williams, and Rawls. This fact—coupled with the undeniable process toward globalization in legal and philosophical production, and with expanded technological access to discussion on the issues at stake in the countries that lead the way in the production of philosophical knowledge—has made it possible for the national debate to update its agenda so as to stay abreast of the international debate. Note, too, that because Brazil came relatively late to the process of translating works written in English (a process begun many years before in Latin American Spanish-speaking countries, especially Argentina, Colombia, and Mexico), the national debate could put into perspective the theoretical reference points it had traditionally looked to: the Italian production (especially Del Vecchio, Bobbio, and Romano), the French production (Duguit and Hauriou), and to a lesser extent, to the German production, save for the strong influence of criminal and civil law.[20]

What survives—especially when we consider the mass education that currently prevails in almost 1,200 law schools in Brazil—is a lawyerly and outdated form of disseminative philosophical vogues from Europe and the United States, a trend that differs little from the general and superficial practices of the past. However, aside from this large market for educational dissemination

[20] This influence can be traced to the 1960s, which brought a wave of German immigration that made for linguistic familiarity with the prevailing German culture of the time (Welzel and Wieacker). Today, Brazilian criminal law pays much attention to authors like Claus Roxin, Günther Jakobs, and Bernd Schünemman, whereas American criminological schools attract next to no attention. Even so, it is fair so say that English-language legal and philosophical thought is now generally becoming increasingly influential in Brazil.

and simplification, a common agenda is gradually emerging among those jurists who are more concerned with the standards of academic rigor set by the university. This has opened some new avenues for debate, with the promotion of publications, congresses, and authentic discussion in an effort to bridge the historical divide that has traditionally been wedged between the jurists' philosophy and the philosophy practiced at the universities.

Some signs of this change can be noticed in the vivid market for the translation of works of legal philosophy, as well as in the vast production of dissertations on legal philosophy at the schools of law, political science, and philosophy, with an incipient process of institutional dialogue. Little by little, law libraries are replacing books on legal philosophy based on a "philosophical production of jurists for jurists," bringing in works written by philosophers as well as by jurists. Several works have directly been translated into Portuguese, introducing modern classics hitherto unknown, or which have made their way in through translations into Spanish. These changes have popularized books of legal philosophy exhibiting better technical and academic quality and have played a role in renewing the current model of legal education, still clinging to the lawyerly traditions dating back to the beginning of the 20th century.

It should be noted that the Brazilian Association for Graduate Programmes in Philosophy (ANPOF) has recently created thematic groups on theories of justice, philosophy, law, ethics, and political philosophy, bringing together researchers in law and philosophy. This convergence is also beginning to be reflected in some publications. Also from an institutional point of view, it should be noted that the philosophy of law in Brazil is gradually coming out of a state of complete seclusion by comparison to other Latin American countries. With rare exceptions, the most evident one being Miguel Reale, few Latin American authors are read in Brazil, and few Brazilians exert influence in other countries. The academic exchange between Brazil and Latin America is still embryonic and lacks prestige.

The perspective afforded by the present always limits our ability to identify and properly evaluate changes in Brazilian legal philosophy. In the short term, it is not easy to pinpoint the effects that flow from the interweaving of agendas, with the philosophers' philosophy crossing over into the jurists' philosophy, and vice versa. As much as the interchange between Brazilian jurists and European and North American universities has grown stronger, renewing the methodological paradigms of theoretical research on law, there have been few institutionalized channels for dialogue and collaboration between schools of law and philosophy departments in Brazil. The syllabuses are usually isolated from one another, the methodological division is still very strong, and there is even professional dispersion, since very few professors of legal philosophy are entirely devoted to academic work.

This is a circumstance that has weighed heavily in bringing about the superficial kind of educational literature that can be found on bookshelves in

Brazil. This large amount of "textbook-like" or introductory works on the philosophy of law has grown at a startling rate thanks to an important sociological factor, namely, a booming number of law schools in Brazil in recent years: Brazil has gone from 165 schools in 1991 to over 1,200 in 2012. Every year, around 120,000 new law graduates graduate from colleges and universities. The opportunities offered by the publishing market and the small academic community guided by a stricter philosophical style has promoted the survival of the old lawyerly style and its more contemporary forms, both marked by doxographic compilations, linear summaries of ideas, and a "superficial" reading of essential authors. Clearly, the new vogues are different from those of the past, but the mode of appropriation remains at bottom the same.

Among the philosophical trends in this syncretically divided philosophical and sociological-legal world, there is room for a methodologically eclectic production bearing the influence of the French structuralism of Foucault, Derrida, Deleuze; the Frankfurt School (Adorno, Horkheimer, Marcuse); Habermas; systems theory (Luhmann and Teubner); and Marxism. Moreover, even though Critical Legal Studies has had only a limited influence in Brazil, it is worth commenting the conception developed by Roberto Mangabeira Unger (1947–), who was a Brazilian citizen with a degree from the Federal University of Rio de Janeiro, but who pursued an academic career at the Harvard Law School, where he has been teaching for four decades. There, along with Duncan Kennedy, Mark Tushnet, and Morton Horwitz, he has been among the main proponents of Critical Legal Studies, a movement that characterized North American legal thought, mainly in the 1970s and 1980s. Unger has written many books on social theory, legal thought, economic thought, political alternatives, and philosophy, developing the ideals of a radical democratic society open to constant institutional experimentalism.[21] One of his main theoretical concerns is how to plan a transformative politics consistent with new alternative arrangements for economic development. His work in legal theory has focused on criticizing the hegemonic methodological consensus in contemporary thought. Interestingly enough, Mangabeira Unger is a legal thinker who falls outside the Brazilian academic circles. Although he may be the most quoted Brazilian legal theorist (in part because he writes in English), his theoretical influence is greater abroad than in Brazil.

In the context of the 1970s, we should draw attention to the presence and influence of Luis Alberto Warat (1941–2010), an Argentinean jurist based in Brazil and one of the founders of the program in postgraduate studies in law at the Law School of the Federal University of Santa Catarina, where he also teaches. His presence (and in particular his work on law and language, legal education, and legal epistemology), along with a new generation of jurists dedicated to legal theory, turned this program into a new national reference point,

[21] His works include Unger 1976, 1986, 1996, and 1998.

especially for Critical Legal Studies and the *Uso Alternativo do Direito* (Alternative Use of Law). The latter has been more closely linked to legal practice than to formal legal education.

Although we may fall outside the scope of this discussion if we go into legal sociology in Brazil in the 20th century, it is interesting to note that a phenomenon probably similar to the one described with regard to philosophy has made it possible for sociologists, jurists, and sociologists of law to conduct research that crosses disciplinary boundaries. Several protagonists of this movement in Brazil, including José Eduardo Faria (1949–), Joaquim Arruda Falcão (1943–), José Reinaldo de Lima Lopes (1952–), Celso Campilongo (1957–), and Cláudio Souto (1931–), are also intellectuals responsible for teaching and publishing works in the philosophy of law.[22] The study groups include the Law and Society Working Group, affiliated with the *Associação Nacional de Pós-graduação em Ciências Sociais*, or ANPOCS (Brazilian Association for Graduate Studies and Research on the Social Sciences), which up to 1989 held annual meetings with other study groups, professors, and researchers concerned with the critical study of the relationship between law, sociology, politics, and philosophy; the *Instituto de Direito Alternativo* (Alternative Law Institute), which has organized several lectures and conferences, disseminating alternative practices in law; the *Grupo de Magistrados Gaúchos* (Group of Justices from the State of Rio Grande do Sul), a centre set up to discuss alternative law; and the Association of Judges for Democracy, which seeks to increase the judges' awareness of the role they can play in protecting human rights and helping to empower the less affluent social groups.

It is also worth noting that the political struggle against the dictatorship has sparked a heated debate and stimulated the production of Brazilian social and theoretical thought on the topic of legitimacy and democracy. The efforts of intellectuals in the social sciences, history, philosophy, and law thus produced important theoretical works on the Brazilian reality and had repercussions on the national jurisprudential agenda.[23] This is also one of the reasons why the works of Norberto Bobbio, as well as of Antonio Gramsci, would become very popular in Brazil. The other reason lies in the strong influence exerted by Kelsenian positivism, which Bobbio helped disseminate.

Also as part of research in law schools, new institutions emerged reflecting the increasing complexity and diversity of Brazilian legal and philosophical thinking. Examples are the *Associação Brasileira de Filosofia e Sociologia do Direito* or ABRAFI (Brazilian Association for the Philosophy and Sociology of Law), founded in 2001; the Jacques Maritain Institute of Rio Grande do Sul, dedicated to the dissemination of Catholic concepts, and inspired by

[22] Their works include Faria 2010, Faria and Campilongo 1991, Falcão and Souto 1980, Campilongo 2001, and Souto 1997.

[23] Among these works are Cardoso 1975, Weffort 1984, and Coutinho 1984.

the works of the thinker for whom it is named (Jacques Maritain), as well as those of John Finnis; and the reborn Brazilian Institute of Philosophy, headed by Tércio Sampaio Ferraz, Jr., and Celso Lafer. Likewise, the *Instituto Brasileiro de História do Direito*, or IBHD (Brazilian Institute for the History of Law), founded in 2002, has been organizing and promoting courses, conferences, seminars, publications, and research projects to foster discussion on the history of law and related fields. The Research Group on Law and Democracy—created by the *Centro Brasileiro de Análise e Planejamento*, or CEBRAP (Brazilian Centre for Analysis and Planning), a very prestigious research centre founded in 1969 by Fernando Henrique Cardoso (a sociologist and a former Brazilian president) and other influential Brazilian social theorists—has been bringing together scholars from the schools of law and philosophy who are interested in the theory of law, enabling them to converge on a line of research inspired by Habermas's theory of democracy and law.

Finally, it should be noted that alongside these institutional efforts, some works and individual teaching initiatives in the philosophy of law have contributed to expanding Brazilian legal philosophical production and giving it greater sophistication. Some works of applied theory of law also represent the result of advancing discussions of legal philosophy in Brazil, especially in constitutional theory and in particular in the interpretation of law.[24] Many of these authors are influenced by the work of Robert Alexy, Ronald Dworkin, and Joseph Raz, among others.[25] Several authors are engaged in these efforts, and although it may be too early for an assessment, the trend can be observed in several Brazilian states, marking a change from the past, when a select group of developed states virtually monopolized the production and dissemination of legal philosophy. Even so, production is still very uneven in terms of quality and methodological commitment.

It is reasonable, as well as desirable, that these individual efforts should usher in a new stage in the production of legal philosophy in Brazil, institutionalizing it, professionalizing it, making it more technical and less amateurish or dilettantish, directing its discussions toward Brazilian legal themes. As of this writing, however, this scenario is more an optimistic prospect than a consolidated reality. Globalization has posed challenges to the old ambitions of producing a genuinely home-grown philosophy. Perhaps for this reason, the old ambition of some Brazilian legal experts—that a distinctly Brazilian *philosophy of law* may flourish—should be replaced by an ambition to establish a philosophical and legal theory directly engaged and interested in the Brazilian *legal reality*.

[24] These works include L. da Silva 2005, Ávila 2003, Vieira 1999, Dimoulis 2006, Bonavides 1998, and Macedo Jr. and Barbieri 2011.

[25] On Alexy, see Sections 10.3.2.2 and 10.4.3.1 in this tome, and Sections 1.5.4.1, 10.3, and 25.4 in Tome 2 of this volume.

Chapter 28

20TH-CENTURY LEGAL PHILOSOPHY IN OTHER COUNTRIES OF LATIN AMERICA

by Rodolfo Vázquez[*]

The historical and cultural and political Latin American context in which we can speak of a "standardization" of philosophy in general and philosophy of law in particular—borrowing an expression used by the philosopher Francisco Romero—has been none other than that of modernity. What modernity are we talking about? In an effort to summarize this situation, Octavio Paz once said:

> [Latin America] was born as a projection of the universal vision of the Hispanic monarchy; it harboured a plurality of nations that rested on one philosophy: Neo-Thomism. That political construction and the philosophy that justified it have dissipated over the course of history, but the foundation, the basis—the language, culture, and basic beliefs—resisted the changes. After that, we conceived another, no less universal project: a republican and democratic modernity. The realization of this project demanded a radical critique of our past and of our culture. After many vicissitudes we have entered the modern world. We are living a transitional period, and I ignore what the outcome of this great process of change will be. In any case, I can say that our fate will be that of modernity [...] and modernity is in crisis. (Paz 2010, 209–10; my translation)

Paz wrote these words in 1991. During this decade—especially after the terrible military dictatorships and the so-called "lost decade" of the 1980s—great expectations regarding Latin America were prevalent concerning what could be an effective instrumentation for an international system of justice and the long-awaited consolidation of a democratic political system. In a way, it was a decade of transition, full of uncertainties, towards modernity. After all, the weight of the past was not something that could simply be obviated through good intentions. It is because of this that it is now a commonplace to say that Latin America has been laggard compared to the three modern technological-scientific revolutions, for (1) it taught within the counter-reform dogmatism without having known the reform itself; (2) it imported a liberal and illustrated conception of the state without a bourgeoisie that could implement it; and (3) it incorporated the discourse on globalization ignoring the profound ancestral inequalities of its classes. The "Caesarism," the clientelism, and the generalized anomie would continue to be the distinctive characteristics of our collective Latin American mentality. As Marcos Kaplan comments:

[*] I would like to thank René González de la Vega and Mariana Cortina for the English version of this paper.

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> Norms are perceived as invalid or inefficient, the legal as illegitimate, the illegal as reasonable and necessary. The politics of sacrifice, of effort, of work give way to a form of ethics that is based on speculation, the hope of a quick gain, the short-term replenishment of capital, a fictitious consumerism with regard to the actual state of the national economy. Delinquency is thus generated not only by socioeconomic structures but also by certain features of the collective mentality and of the predominant culture, historically created and developed, as well as by the interdependence of all these factors. (Kaplan 2002, 364; my translation)

The last democratization wave led many to believe that the time had come for Latin America to transition from a legislative state to a constitutional state, as had already happened in Europe many years before. Since the decade of the 1990, Latin America witnessed, and Mexico was no exception, a repositioning of the constitutional democracy. As the Chilean constitutionalist Javier Couso (2010, 38) explained, the consensus surrounding democratic constitutionalism was built as much from the right wing as from the left wing. Among the left, the dictatorial wave of the preceding years—translated in terms of torture, disappearances, extrajudicial executions, and other human-rights violations—led to a reappreciation of constitutional institutions such as habeas corpus and due process. Likewise, the fall of socialism confronted the left wing with the need to promote fundamental human rights, and accept their entrenchment within the constitutions, this as a necessary element of any reasonable political regime. Among the right, the economic pragmatism led to the conviction that "without a solid rule of law to establish clear property rights, an independent judicial system, and a well-organized public force, the weaker countries will not achieve economic development." The more conservative sectors began to evaluate the contentions included in the constitutional designs. In this way, whether in a dogmatic fashion or an organic one, constitutional democracy appeared to be the only possible alternative for reaching the necessary governance consensus.

This constitutional wave, typical of representative democracies, began to take shape on the basis of several axes of analysis and social demands: (1) the construction of a rule-of-law model based on the recognition and effectiveness of the most ample spectrum of human rights, including civil and political rights as well as economic, social, cultural, and so-called third-generation rights; (2) the entrenchment of these rights within the supreme constitutional norm, reinforced by the instruments of an international system of human rights; (3) the organization and preparation of a progressive, independent, and impartial judiciary that can guarantee the legal adjudication of those rights, especially social ones, with deference, but not with subordination, to the organs of popular representation; (4) the construction of an inclusive democracy that could open the channels necessary to enable ethnic minorities, vulnerable groups, and the historically excluded majority to gain proper recognition; (5) the empowerment of those groups through the use of legally and judicially recognized procedural mechanisms, such as habeas corpus, tutelage, shelter

and collective actions; and (6) the goal towards which all of the foregoing demands and requisites are geared, namely, the building of a more homogenous and plural society, through the implementation of public policies upholding the principle of equality in order to protect differences and reduce economic and material disparities.

There are reasons to believe that the Latin American project of a constitutional democracy has scarcely fulfilled the promises it made. What has been witnessed from the late 1990s until now is what throughout the region has been called an "epidemic of specific powers." As Eugenio Zaffaroni (2004, 120) has rightly observed, everything indicates that instead of moving from a legalist rule of law towards a constitutional one, we are once again receding towards a "rule by decree" based solely on the state. Far from consolidating a culture of robust legality within the framework of a democratic and social rule of law, we are moving towards a culture of illegality, or, in Guillermo O'Donnell's terms, an *un(rule) of law*, where what prevails is a "low-intensity citizenship":

> What I mean by this is that everyone has, at least in principle, the political rights corresponding to a democratic regime, but that many are denied basic social rights, as is suggested by the extent of poverty and inequality [...]. These people are also denied basic civil rights: They are protected from neither local violence nor different forms of private violence; they are denied an easy and respectful access to government institutions or to the courts; their homes may be arbitrarily searched; and, in general, they are forced to lead a life not only of poverty but also of systematic humiliation and fear of violence [...]. These people, whom I will call the popular sector, are not merely materially dispossessed: They are also legally dispossessed. (O'Donnell 2003, 91; my translation)

The Chilean sociologist Jorge Larraín has expressed this situation through a powerful statement: We are living in a "syndrome of learned despair" (Larraín 2001, 90, my translation). This no longer only applies to the displaced but to an increasing number of people who have lost the illusion of a future and who find it impossible to carry on in a climate of uncontrollable insecurity. It would seem that a considerable portion of our population is living in a dynamic that the Brazilian legal philosopher Óscar Vilhena (2007) has depicted as an "extreme invisibility of the poor," a "demonizing of those who question the system," and an "immunity of the privileged" or of the powers that be. A trilogy that corresponds to another, no less dramatic one: the corruption, ineffectuality, and impunity of our leaders. It is for this reason that I think Ernesto Garzón Valdés is right to criticize a considerable number of Latin American scholars for living under a "veil of illusion" and for attempting to conceal our failures behind euphemisms—such as the one encapsulated by the expression "transitioning democracy"—that only justify the "delay" or the "departure from the proclaimed goal." Or rather, Garzón Valdés criticizes these scholars for living under the illusion of a "rule of law" when what is present is an abysmal distance between the formal rules and the rules that are actually being applied:

> To speak of the validity of the rule of law is, in most Latin American countries, to disfigure the judicial reality and mislead anyone who attempts to take an interest in the norms that regulate the behaviour of the governing and the governed within the broad areas of social life. For those who have a penchant for literary quotations, allow me to remind you of a phrase by one of Alejo Carpentier's characters: "As we say down there, 'Practice always screws up theory' and 'A leader with balls does not need papers to show leadership.'" (Garzón Valdés 2009, 205; my translation)

These signs, which are currently being manifested in a considerable number of countries in the region, certainly do not invite us to be more optimistic: The Fujimori precedent and the acts of corruption and nepotism perpetrated by the subsequent Peruvian governments; the authoritarian populism that can be observed in the governments of Nicaragua, Venezuela, Ecuador, Paraguay, and Bolivia; the abusive use of *decretos de necesidad y urgencia* (emergency decrees); the inefficiency and impunity of the Argentine governments from Menem until now; the widespread violence committed by organized crime and the repressive—yet not preventive—policies that have been enacted in Colombia and Mexico; the endemic poverty experienced in a good part of Central American and Caribbean countries; the humiliating socioeconomic inequality present throughout the region, and even more acute in emerging countries such as Chile and Brazil.[1]

It might be time, as Roberto Gargarella says, to thoroughly consider redesigning the institutional machinery, since the current one is now perceived as having been "exhausted." It is worth quoting *in extenso* a recent text he wrote in honour of the bicentennial of independence that is being celebrated in some Latin American countries:

> After more than two hundred years of modern constitutionalism, as understood by its most basic features—the adoption of a declaration of rights and of a system of "checks and balances"—it cannot be said that its endeavour has been successful, particularly in a vast majority of Latin American countries. This majority of countries continues to be affected by politically unstable and highly unequal economic systems; here, violations of human rights are a recurrent occurrence; the government's decision- and law making bodies tend to function independently of any sort of claim made by the citizens, while showing a propensity to mould norms in accordance with private interests; the courts appear to be organs without easy access, closed off from the public and with a tendency to decide in favour of the powerful, criminalizing those who protest; and public debate (both during election campaigns and, even more so, in the interim periods between elections) is made conspicuous by the poverty of its content. [...] It is my understanding that the severity of the institutional deficiencies at play is forcing us to abandon the idea that

[1] The *first Regional inform about human development for Latin America and the Caribbean* (2010), put out by the United Nations Development Programme (UNDP), has some troubling figures: 10 of out of the 15 countries in the world where inequality is greatest are found in Latin America and the Caribbean. According to the Gini regional coefficient of income distribution—the most widely used indicator—inequality is 65% higher than in high-income countries, 36% higher than in Far Eastern countries, and 18% higher than the average for sub-Saharan Africa. A special mention is reserved for Costa Rica and Uruguay, because they stand as islands amongst a sea of generalized indecency.

we just need to "perfect" and "polish" certain aspects of said scheme. [...] There is an urgency to rethink the causes of what most definitely is an institutional failure with already tragic consequences. (Gargarella 2010, 7–8; my translation)

It is remarkable that even within this bleak picture, some of the countries in the region have managed to develop since mid-century a philosophy of law. Above all, these philosophical developments in Latin America have had the merit of translating the great themes and debates of the most advanced countries; and even more remarkable is that the region has managed to incorporate these ideas into its specific demands and requirements. This has helped us to build an agenda of Latin American problems that have occupied the attention of our main legal philosophers. Included in this range of output is an adequate theory of norms and of legal systems based on classic models, the effort to fortify constitutionalism by forging what is known as neoconstitutionalism, the development of a modern theory of legal argumentation and its application in the courts, and a solid theory of justice in constant dialogue with other practical disciplines, such as politics and economics. As concerns the theory of justice, let us recall, for example, the debate on human rights and, especially, on social rights and their necessary legal adjudication; the reflections on the problems affecting a region characterized by its multiculturalism, and on the place of the indigenous populations within a globalizing environment; and the proposals for building a democratic and social rule of law in societies that are deeply polarized by poverty and inequality; as well as the research done in response to the increasing demand to forge good leaders, officials, and heads of state—with a focus on transparency, accountability, efficiency, and the eradication of impunity—while also addressing the urgent need to build a social and cohesive network of critical and active citizens. Also, these and many other problems have forced us to reconsider the way we teach our discipline in the classroom, highlighting the need to renew the current crop of scholars, researchers and academics. This is an insurmountable task that has been met with innumerable resistances; however, especially in light of the traditional conservatism that characterizes our law schools, it is undoubtedly something that needs to be done.

Attempting, as I have done here, to organize and summarize the developments of legal philosophy in Latin America—from the Rio Bravo all the way down to Patagonia, and in such a way as to accurately depict the variety and complexity of the authors and schools of thought, as well as each country's unique peculiarities—has not been an easy task. A self-imposed restriction for this account has been to leave out two countries: Argentina and Brazil.[2] The rationale for this exclusion lies in the unquestionable relevance of the Argentinean production of legal philosophy and the particular characteristics of Lu-

[2] On legal philosophy in Argentina and Brazil see respectively Chapters 26 and 27 in this tome.

so-American history and culture—which is more than reason enough to warrant a separate and special treatment.

A further restriction has to do with historical temporality. Although the two abidingly recurrent theories in modern legal philosophy, namely, natural law and legal positivism, can be traced back to the independence movements of the 19th century, it is not until the 1940s that we can possibly speak of a "standardization" of legal philosophy. To be sure, this is a notion that Romero applies to the "founders" of Latin American philosophy in general: Antonio Caso, José Vasconcelos, Carlos Vaz Ferreira, José Ingenieros, Alejandro Korn, Enrique Molina, Alejandro Deustúa, and Raimundo de Farías Brito. But the notion can be extended to our own discipline, the philosophy of *law*, for it, too, acquired a presence and a standardization it previously did not have, moving from "facile improvisation" to "methodical and rigorous" research conducted on the basis of direct information regarding the philosophical production of the European countries. Deserving mention among the most prominent legal philosophers of this period are Carlos Cossio, Luis Recaséns Siches, Juan Llambías de Acevedo, Eduardo García Máynez, Rafael Pizani, Miguel Reale, Ambrosio Gioja, Luis Eduardo Nieto Arteta, Jorge Millas, and Francisco Miró Quesada.

Not all the countries in the region have received an equal treatment in this discussion; this, in good measure, is due to two reasons: Either their contribution to our discipline has been limited, or they have devoted themselves to problems and debates which have been sufficiently developed in other latitudes, and by simple transfer at that, reiterating such other debates without the backing of an adequate critical apparatus. Ultimately, what is being offered is a representative collection that allows us to present a fairly objective account of the Latin American school of thought and scholarly production. The order in which each country is presented is strictly alphabetical.[3]

28.1. Colombia

The founding of the *Instituto de Filosofía y Letras de la Facultad de Derecho de la Universidad Nacional de Colombia*, in 1946, is considered the moment when the "standardization" of philosophy was set up in Colombia. Two works have decisively marked the beginning of modern legal-philosophical thinking: *Lógica, fenomenología y formalismo jurídico* (Logic, phenomenology, and legal formalism: Nieto Arteta 1942), by Luis Eduardo Nieto Arteta, considered the first philosopher to disseminate Kelsen's *Pure Theory of Law* in Colombia, and

[3] This contribution concisely incorporates and adapts to the discussion of the ideas and comments I have received in writing from Pablo Ruiz Tagle (Chile), Minor Salas (Costa Rica), Leonardo García Jaramillo (Colombia), David Sobrevilla (Peru), Óscar Sarlo (Uruguay), and Julia Barragán (Venezuela). I wish to thank them all for their invaluable insights.

El ambiente axiológico de la teoría pura del derecho (The axiological context of the pure theory of law: Carrillo 1947), by Rafael Carrillo. Both works have decisively contributed to breaking with the neo-Thomist philosophical line that had prevailed since the ideological project was presented in Núñez and Caro's regenerationist constitution. Other important figures who played a role in the Colombian standardization of legal philosophy were Cayetano Betancur—the founder, in 1951, of what is now considered to be the most important Colombian philosophical journal, *Ideas y Valores* (Ideas and Values)—as well as the jurist Jaime Vélez Sáenz, whose importance in the analytic branch is highly appreciated, and Abel Naranjo Villegas, who studied philosophy with Manuel García Morente and Francisco Romero.

The discussion between natural lawyers and legal positivists, as in the majority of Spanish-speaking countries, occupied a central place in the debates on the nature of law. Legal positivism, particularly in its Kelsenian version, exercised an influence that is still showing its consequences in the design of academic programs throughout the country. In the same way, natural law exercised a determining influence on the subjects and contents of legal-philosophical reflection. Because natural-law theory affirms at its core that certain principles of natural law—immutable and eternal—exist beyond human laws, the theory won favour when it came to articulating a conception of law based on the notion that those principles were the same ones as were defended by the Catholic faith. In Colombia, they had to wait until the promulgation of the secular liberal constitution in 1991, and in particular until the introduction of a court system that would guarantee the rights set forth in the constitution itself, before a decision-making process could get underway on previously censured topics such as abortion, euthanasia, the rights of same-sex couples, and the implementation of affirmative action policies.

With the exception of Alf Ross, North American legal realism has been studied far more than Scandinavian legal realism.[4] Other tendencies include Habermas's political-democratic proposal and his theory of practical discourse, which has become known throughout the country thanks to the work of Guillermo Hoyos Vázquez and his disciple Oscar Mejía Quintana.[5] This last author wrote the first book in Colombia to address the German thinker's legal philosophy. Since then, Mejía Quintana has done extensive research in political philosophy and on the criticism of constitutional jurisprudence, as can be appreciated in his books *Derecho, legitimidad y democracia deliberativa* (Law, legitimacy, and deliberative democracy: Mejía Quintana 1998) and *Teoría política, democracia radical y filosofía del derecho* (Political theory, radical democracy, and legal philosophy: Mejía Quintana 2005). Hoyos, for his part,

[4] On Scandinavian legal realism see Chapters 13 through 17 in Tome 2 of this volume.

[5] On Habermas see Sections 10.3.5 and 10.4.3.2 in this tome, and Sections 10.4 and 25.3 in Tome 2 of this volume.

published with Ángela Uribe the anthology *Convergencia entre ética y política* (The convergence between ethics and politics: Hoyos and Uribe 1998).

The change introduced with Dworkin's legal-interpretation paradigm, his egalitarian critiques of political liberalism, and his thesis about the general principles of law have been highly relevant in Colombian philosophical developments, especially since the enactment of the 1991 constitution. It is the decisive influence of Rodolfo Arango (1999) that explains how Dworkin's theories and their dogmatic developments came to be a part of university curricula. Arango's legal theses on the interpretation of law, as well as his politico-philosophical theses on the nonaggregative conceptions of democracy and on the idea of rights as trump cards, can respectively be appreciated in his books *¿Hay respuestas correctas en el derecho?* (Can there be right answers in law?: Arango 1999) and *Derechos humanos como límites a la democracia* (Human rights as a limit to democracy: Arango 2007).

The feminist theory of law has found fertile ground at the University of the Andes through publications such as *La mirada de los jueces: Género en la jurisprudencia latinoamericana* (The judicial perspective: Gender in Latin America's jurisprudence, Motta and Sáez 2008), a collective work edited by Cristina Motta and Macarena Sáez, and also, to a large extent, through the work of nonprofit organizations advocating equal rights for women. Critical Legal Studies (especially the work of Duncan Kennedy) have been developed by Diego López Medina (2006), who is now among the most influential CLS theorists in Latin America. He started out publishing works on the philosophy of law in the strictest sense, linked to Plato's philosophy; and recently, in his books *El derecho de los jueces* (The law of the judges: López Medina 2006) and *La letra y el espíritu de la ley* (The literal meaning and the spirit of the law: López Medina 2008), he has been working on the theory of judicial precedents, as well as on the issues involved in legal transplants, and has pointed out several directions regarding the discussion that surrounds legal interpretation and its methods.

Legal interpretation, and constitutional interpretation in particular, is one of the cardinal themes in the legal theorist's agenda. The local production, centred on Alexy's theory of legal argumentation, is ample. Alexy's theory has become well known thanks to Rodolfo Arango's teachings and intellectual production—mainly with his book *El concepto de derechos sociales fundamentales* (The concept of social fundamental rights: Arango 2005), which carries a foreword by Alexy himself. This work also contains contributions by Carlos Bernal Pulido (2005) and Gloria Lopera (2005), and the well-known translations of Luis Villar Borda. Neoconstitutionalism has not only been influential; it has also added to the transnational Colombian canon. The works of Bernal Pulido—initially conceived in Alexy's tradition of constitutional law, with *El principio de proporcionalidad y los derechos fundamentals* (The principle of proportionality and fundamental rights: Bernal Pulido 2007), and most recently dealing with the philosophy of language, with *El neoconstitucionalismo y la*

normatividad del derecho (Neoconstitutionalism and the normativity of law: Bernal Pulido 2009), have contributed in the broadest sense to the configuration of the emerging research agenda in constitutional theory and the philosophy of law.[6]

The works of Toulmin, Perelman, MacCormick, Aarnio, Peczenik, and Atienza have also been studied; and since the mid-Nineteenth century hermeneutics has, too, specifically in the technical sense of modernity, and the work of Gadamer in particular, and Theodor Viehweg's legal topics.[7] Rodrigo Uprimny Yepes and Andrés Abel Rodríguez published *Interpretación judicial* (Judicial interpretation: Uprimny Yepes and Abel 2006), in which they tackle the classic problem of the scope of legal interpretation, its practice, and its limits, as well as the main theories of legal interpretation.

Bourdieu's theory of social fields has made it possible to construct some very interesting articulations between judicial and sociological discourse, with studies taking up the question of normative law and social needs from different perpsectives, such as those of legal power, weak democracy, representation deficits and constitutional theory. These topics have received close attention for some years now, particularly from Uprimy, César Rodríguez, and Mauricio García Villegas (2001). The collective work *El caleidoscopio de las justicias en Colombia* (The kaleidoscope of Colombian justice: García Villegas and de Sousa 2001), which García Villegas edited with Boaventura de Sousa, along with *Jueces sin Estado* (Stateless judges: García Villegas 2008) and most recently his *Sociología y crítica del derecho* (Sociology and the criticism of law: García Villegas 2010), constitutes without a doubt one of the most significant and advanced contributions in the field.

The inclination towards moral and political philosophy in Colombia is an early reflection of the developments this branch has shown in other Latin American countries, which developments in turn correspond to the resurgence of global political thought fostered by the work of Rawls. One indication of the importance of Rawls's theory among local scholars lies in the activities that took place when he died, among which is worth noting the monographic work edited by Leonardo García Jaramillo under the title *John B. Rawls: El hombre y su legado intelectual* (John B. Rawls: The man and his intellectual legacy, García Jaramillo 2004). This book gathers the contributions of Rawls's disciple and assistant professor, Thomas Pogge, and his colleague Martha Nussbaum, as well as those of some of the main Colombian experts, such as Oscar Mejía Quintana, Francisco Cortés Rodas, and Delfín Ignacio Grueso. Among the

[6] On Alexy, see Sections 10.3.2.2 and 10.4.3.1 in this tome, and Sections 1.5.4.1, 10.3, and 25.4 in Tome 2 of this volume. On neoconstitutionalism in general see Chapter 10 in Tome 2 of this volume.

[7] On the contemporary theories of legal argumentation see Chapters 23 through 25 in Tome 2 of this volume.

normative conceptions of democracy, we must highlight the analyses on its deliberative conceptions and the importance of civic virtues. We can find several texts on the subject in the collective work edited by Andrés Hernández under the title *Republicanismo contemporáneo: Igualdad, democracia deliberativa y ciudadanía* (Contemporary republicanism: Equality, deliberative democracy, and citizenship: Hernández 2002).

We should notice that the particular reality of the Colombian state has encouraged a wide range of investigations, such as those on the multiethnic and multicultural society, but especially on the constitutional enshrinement of the rights of indigenous people, along with the constitutional court's guaranteeing of such rights. Two works that stand out among those that address the subject of culturally differentiated rights are *La constitución multicultural* (The multicultural constitution: Bonilla 2006) by Daniel Bonilla, and *Petróleo economía y cultura: El caso U'wa* (Oil, the economy and culture: The U'wa case, Uribe 2005) by Ángela Uribe.

28.2. Costa Rica

In a categorically critical tone that is not without realism, Minor Salas maintains that

> in Costa Rica—and I fear in a large part of Central America—philosophy of law does not actually exist [...]. We have reached such an extreme that in many universities the subject itself has already been expunged from curricula; that is to say, it is now either part of the historical bookshelves and the failed curricular projects, or it has completely ceased to exist. (Salas 2007; my translation)

The disenchantment expressed in this statement—a disenchantment made more significant by the fact that it comes from one of the area's most emblematic countries, known for its social and democratic stability—must not dissuade us from highlighting the personal work and academic contributions of figures such as Enrique Pedro Haba and, in the younger generation, the contribution made by Minor Salas himself (Salas 2007) and Gustavo González Solano.

Originally from Uruguay, Haba begins his brilliant career in Europe. Then, in 1978, he becomes a professor of philosophy of law at the University of Costa Rica, where he remains until his retirement in 2006. His thinking is part of what he qualifies as a critical-realistic or negative-heuristic conception of law and of social theory in general. More than by a set of theoretical premises and attitudes (epistemological scepticism, an analytic orientation, and empirical individualism, for example), this conception is characterized by an intellectual stance in the face of the problems of knowledge. A careful reading of his works—among which it bears highlighting *La idea del totalitarismo y la libertad individual* (The concept of totalitarianism and of individual freedom: Haba 1976), *Tratado de derechos humanos* (A treatise on human rights: Haba 1987), *El espejismo de la interpretación literal* (The illusion of literal in-

terpretation: Haba 2003), and *Metodología jurídica irreverente* (Irreverent legal methodology: Haba 2006)—reveals his special inclination towards what he qualifies as "matters of degree." Essentially, his leitmotif emerges from a need to bring into evidence and dismantle the vices of reasoning that one usually incurs when examining all sorts of social, legal, political, and sociological issues. Among the most criticized and discussed vices we find in his book are what Haba calls the "lawyer's normative syndrome," false generalizations (or "fallacy of the whole"), the "missionary conception of the social sciences," and the "false-opposition fallacy."

Minor Salas is a professor at the University of Costa Rica. His body of research ranges across three different fields, all of them interrelated: the philosophy of law, criminal law, and the epistemology of social science. His works grapple, on the one hand, with the idea that some social and legal phenomena can (or must) be subjected to criteria of rationality and argumentation (critical rationalism) and, on the other hand, with the grim realization that those very criteria, however much they might have been properly elaborated by the metatheory of law or by social theory, have little or no chance of being implemented in the vital praxis of social and legal relationships in general (a view called people scepticism). According to Salas, legal institutions, and particularly the legal discourse in which these institutions are versed—regardless of whether their field is legal or judicial or whether it consists of strict academic theory, that is, whether it falls within the legal dogmatism now being nurtured in the faculties of law—basically only play the role of providing symbolic legitimizations for human action.

Gustavo González Solano, also a professor at the University of Costa Rica, describes himself as a cognitive scientist, with a strong influence from what could generically be called analytical philosophy. His philosophical research is currently oriented towards the study of the semiotics and logic (both formal and informal) of legal discourse, a study through which he attempts to describe the interpretive, deductive, adductive, and heuristic processes carried out by lawyers and judges. González Solano estimates that his research situates him within what he calls the post-Morris stage; accordingly, he does not believe in the idea of an inherent nature or essence of law, nor does he believe in paleo-symbolisms or conceptualisms. His main purpose is to make explicit those processes in law whose origin is dubious, all the while clarifying their value, this to implement the ethical and scientific bases for optimizing them, yet without holding out any hope whatsoever that any of them should be either adopted or followed as a matter of practice.

28.3. Chile

In the 1930s, and in line with trends that prevailed beyond the Chilean borders, we saw how legal positivism—in a climate of deep commitment to natu-

ral law—reached the classrooms and other areas of discussion, thus extending its influence amongst Chilean intellectuals, philosophers, and jurists. For example, we can highlight the valuable contribution made by the philosopher Jorge Millas (1917–1982), who in legal philosophy can be made to fall within the tendency of axiological formalism and a school of thought that was closer to democratic socialism. Although he does to some extent show a Kelsenian influence, he claims that the ultimate foundation of law lies in the social power by which it is established. Concerned with the study of norms, and especially with legal values and the nature of law, he comes to identify the certainty of law as the sole value. Perhaps a product of the country's historical context, and of its zeal for ideology and for the politicization of the academy, Millas identifies this value with what is known as the rule of law. In 1960 came the publication of his book *Filosofía del derecho* (The philosophy of law: Millas 1960), which reflects his incessant study of the discipline. Aside from philosophical production, his contributions are also devoted to defending the Chilean university. This is clearly and incisively expressed in a 1981 speech he gave at the conference *Análisis de la universidad actual* (Analysis of the contemporary university: Millas 1981), where he dramatically claimed that the "university [is] under surveillance," referring to the military intervention of which he was a victim under the Pinochet dictatorship (1973–1990).

Well into the mid-20th century we can attest to the arrival of the new and absolutely reforming currents of thought that were part of the prevailing tendencies. It is worth highlighting in this respect the immense legacy left behind in the 1960s and early 1970s by Professor Eduardo Novoa Monreal (1916–2007), who acted as a political advisor to the government of Salvador Allende, and who in parallel to this legacy also produced a body of legal thought in criminal law and legal philosophy. In *Obras escogidas: Una crítica al derecho tradicional* (Selected works: A critique of traditional law, Novoa Monreal 1993), we can recognize the main features of his doctrine, which are closely linked to the influence of Marxism in its relationship with Christianity, and which also stem from the need to justify the deep political changes underway at that particular time in Chile. In effect, Novoa's legal analysis is based on an acknowledgment of the Chilean reality, with respect to which he marks "the subsistence of enormous differences in the distribution of wealth and the existence of an enormous mass of people [...], placed in a position of great disadvantage" (ibid.; my translation). This is how he sets up the relation between social organization and the legal framework: Rather than *determining* the social organization, the law is *determined* by it, or by political and economic factors. The law, understood as a complex of positive norms, is defined—as to both its concept and its ends—as an instrumental relationship with its underlying reality. So then, according to Novoa, law can be harmless or it can be fair: In the former case, we are looking at a law that enables just this type of society to subsist; in the latter case, law will have as its main objective that of modify-

ing and eliminating differences in the distribution of wealth and the people's quality of life.

Subsequently, legal positivism in its Kelsenian version reached its moment of greatest influence through the professorships of Antonio Bascuñán and Agustín Squella, both of whom have extended the influence of this form of thought through an active participation in Chile's academic, intellectual, and professional life. Agustín Squella (2001) has published several books that reflect his work as a teacher and his important contribution to the study of the philosophy of law in Chile. Among his works we can highlight his thesis, published under the title *Derecho y moral: ¿Tenemos obligación moral de obedecer el derecho?* (Law and morality: Are we under a moral obligation to obey the law?, Squella 1989) and his books *Introducción al Derecho* (Introduction to law: Squella 2000), *Estudios sobre derechos humanos* (Studies on human rights: Squella 1991), *Positivismo Jurídico, democracia y derechos humanos* (Legal positivism, democracy, and human rights: Squella 1995), and *Filosofía del Derecho* (Philosophy of law: Squella 2001). In this last book, Squella expounds his methodological legal positivism, which he formulates hand in hand with Norberto Bobbio, and which (on a monistic theory) assumes the unity of law, establishing a distinction—albeit not a separation—between morality and law, considering them both as "different normative orders" (see Squella 2001). It is to Squella that we owe the reception of Norberto Bobbio's thought in Chile, and it is to Bobbio that Squella devoted an entire book, *Norberto Bobbio: Un hombre fiero y justo* (Norberto Bobbio: A feisty and fair-minded man, Squella 2005).[8]

Moving further along in the 20th century we come upon Enrique Barros, who has been influenced by the work of Dworkin, and who in *Reglas y principios en el derecho* (Rules and principles in the law: E. Barros 1984), as well as in his doctoral work, advances a critique of positivism where he points out that "a strictly logical focus carries with it serious limitations that are not always grasped by analytical theoreticians, who are too closely bound to the objective of either formulating a general theory or comprehensively capturing the concept of law" (ibid., 279; my translation).

With the arrival of the 1990s, a period that saw a return to democracy in Chile, innovative currents in the analysis of law appeared. These currents are known for bringing different sciences, disciplines and foreign perspectives into the traditional analysis carried out in legal science. I am referring to the economic analysis of law, the feminist analysis of law, and the literary analysis of law, among others. In the beginning, these new currents were slow to find acceptance in Chilean doctrine, this owing in part to a natural mistrust attendant on the process of integrating into the analysis of law extraneous disciplines that do not share the basic principles of legal science. In time, however, the Chilean academy did bring these currents to bear on its own analysis, as can be

[8] On Bobbio, see also Section 11.4 in this tome and Section 9.3.1 in Tome 2 of this volume.

observed in the increasing number of publications that address these subjects. Their presence within university classrooms has also increased. The most popular of these philosophical currents in Chile has undeniably been the economic analysis of law, which has not only made its way into the philosophy of law but has also permeated the study of the civil law of contracts. In turn, a rigorous critique of legal positivism has been advanced by Fernando Atria (2001), in works such as *Creación y aplicación del derecho* (Creation and application of law: Atria 2001b) and *La ironía del positivismo jurídico* (The irony of legal positivism: Atria 2004). His book *On Law and Legal Reasoning* (Atria 2001a) undoubtedly ranks among the most lucid contributions made to the contemporary theory of law.

In recent years, the works of Joaquín García Huidobro (1993) and Cristóbal Orrego (1997) have attempted to bring natural-law theory up to date and incorporate it into current philosophical discourse. Standing out in this respect is the book *Razón Práctica y Derecho Natural* (Practical reason and natural law: García Huidobro 1993). In it, García Huidobro analyzed the main features of Thomas Aquinas's natural-law philosophy, in the same way that the Oxford professor John Finnis has recently done. Likewise in *H. L. A. Hart: Abogado del positivismo jurídico* (H. L. A. Hart: the advocate of legal positivism, Orrego 1997) Orrego, in continuity with his doctoral thesis, critiques the main tenets of Hart's theory, taken up as the paradigm of legal positivism in the second half of the 20th century. He lays special emphasis on the analysis of what might turn out to be the conceptual separation between law and morality, concluding that reference to ends and values is indispensable for an understanding of positive law, a constitutive element of which is the idea of the common good.

As far as Hart's legacy is concerned, it is important to point out the work done by Carlos Peña (2008), who in his diverse publications has encouraged and revitalized the space occupied by this paradigmatic author of legal positivism in the Chilean legal-philosophical discussion of recent decades. The same goes for his analysis of Ronald Dworkin's and John Rawls's work. His study of the latter has also had a great influence in Chile, and many are those who have dedicated themselves to the study and dissemination of Rawls's work, among whom Pablo Ruiz Tagle (1989), with *La prioridad del derecho sobre el bien en la Teoría de la justicia de John Rawls* (Priority of law over welfare/goodness in John Rawls´s theory of justice: Ruiz Tagle 1989), and Carlos Peña himself in his most recent work, *Rawls: El problema de la realidad y la justificación de la filosofía política* (Rawls: The problem of the reality and justification of political philosophy: Peña 2008). In like manner, political philosophy, particularly its republican version, has also had a decisive impact on Chilean philosophy of law: Among the most recent books is the one written by Renato Cristi and Pablo Ruiz Tagle, *La República en Chile: Teoría y práctica del constitucionalismo en Chile* (Republic in Chile: The theory and practice of constitutionalism in Chile, Cristi and Ruiz Tagle 2008).

28.4. Mexico

Since the mid 1940s, contemporary philosophy of law in Mexico began to revolve around four personalities, two of them internationally recognized, Luis Recaséns Siches (1903–1977) and Eduardo García Máynez (1908–1993), while the other two equally brilliant but only locally recognized: Guillermo Héctor Rodríguez (1910–1988) and Rafael Preciado Hernández (1908–1991). With considerable intellectual force, the influence of this first group lasted all the way into the early 1970s. Nonetheless, it must be acknowledged that this was also the moment when their proposals began to be eclipsed by other philosophical ideas. Analytical philosophy, for example, was bursting onto the scene in Mexico with great vitality.

Recaséns Siches, in exile since 1937, developed his prolific academic activity at the *Universidad Nacional Autónoma de México*. In works such as *Vida humana, sociedad y derecho* (Human life, society and law: Recaséns Siches 1945) *and Tratado general de Filosofía del Derecho* (General treatise of legal philosophy: Recaséns Siches 1965)—and on the basis of the *ratio*-vitalism of his teacher, Ortega y Gasset—Recaséns structures a conception of law understood as a cultural product, as an objectified form of human life, that is to say, as a group of signifiers which constitute the rules of human behaviour. Within this prism, law must be understood as a set of norms that have been worked out to achieve values (legal axiology) existentially integrated into, and revolving around, the principle of human dignity. In a late stage in his philosophical thought, Recaséns took vitalism all the way to the theory of rational discourse, and with a certain amount of originality distinguished between the logic of vital reason (the logic of action) from a formal logic. This can be found in his book *Experiencia jurídica, naturaleza de la cosa y lógica "razonable"* (Juridical experience, the nature of "the thing," and "reasonable" logic: Recaséns Siches 1971). Thus we could rightfully locate his conception among the modern theories of legal argumentation.

Eduardo García Máynez defended, alongside his German teacher Nicolai Hartmann, an objectivist axiology that served as a basis on which to justify the obligatory nature or validity of legal norms. But his objectivism did not bind him to the natural-law thesis. For Máynez, natural law is not, strictly speaking, law. In *La definición del derecho: Ensayo de perspectivismo jurídico* (The definition of law: An essay in legal perspectivism, García Máynez 1948), a book written under the guidance of Ortega y Gasset, he developed his theory of the three circles, claiming that the law can have three different definitions, corresponding to three different perspectives as concerns the notion of validity: a formal perspective, an intrinsic one, and a positive one. The bearing of this division is only theoretical. When these three perspectives are joined in each and every one of the precepts that form part of a legal system, we then have the limit or ideal case for the realization of justice. In a former stage of his thought,

which spans across fifteen years, he devoted himself to elaborating a legal logic from a traditional point of view, an effort that resulted in *Lógica del concepto jurídico* (The logic of the legal concept: García Máynez 1959), *Lógica del juicio jurídico* (The logic of legal judgment: García Máynez 1955), and *Lógica del raciocinio jurídico* (The logic of legal reasoning: García Máynez 1966), a body of work that would eventually be superseded by the parallel research conducted by authors such as Georg Henrik von Wright. His most systematic account, and in a sense a compendium of his legal-philosophical thought, can be found in his book *Filosofía del derecho* (Philosophy of law: García Máynez 1974), in which he takes enough distance from his initial objectivism—values exist not in and of themselves but rather *for* someone—and elaborates a self-referencing theory of legal systems.

The importance of Recaséns Siches's and García Máynez's intellectual production cannot be ignored, however, and it must be said that they did not bother to bring up a group of disciples, nor were they interested in giving any sort of continuity to a school of thought. The same goes for Preciado Hernández. His *Lecciones de Filosofía del Derecho* (Lectures on the philosophy of law: Preciado Hernández 1947), which pioneered the development of natural-law theory in Mexico, continues to be one of the most widely read works in law schools in Mexico, and there are undoubtedly many philosophers who owe Preciado Hernández the best part of their legal-philosophical training, although he, too, did not concern himself with disciples. All in all, the development of natural-law theory can be found in Miguel Villoro, Antonio Gómez Robledo, Héctor González Uribe, and Efraín González Morfín, to mention but a few of its most distinguished representatives.

The situation is quite different for Guillermo Héctor Rodríguez, a neo-Kantian from the Marburg lineage, as well as a student and follower of Stammler and Kelsen.[9] His work has not yet received the necessary transcendence for it to be valued, but the disciples or "travel companions" he left behind are a clear measure of his importance. In the mid-1970s the "neo-Kantian" group included Leandro Azuara, Fausto Vallado Berrón, Ulises Schmill (1971), Agustín Pérez Carrillo, and Rolando Tamayo y Salmorán (1989), among others. One of their distinguishing trademarks is their profound knowledge and understanding of Hans Kelsen's work.

In the late 1970s, and especially with *Kelsen y Ross: formalismo y realismo en la teoría del derecho* (Kelsen and Ross: Formalism and realism in legal theory, Esquivel 1980)—a work by Javier Esquivel (1941–1992) gathering a good part of his intellectual production—we come closer to the analytical philosophy that was being vigorously developed at the *Instituto de Investigaciones Filosóficas de la Universidad Nacional Autónoma de México* (National Autono-

[9] On Stammler see Section 1.3 in this tome and Section 2.2 in Tome 2 of this volume. On Kelsen see Section 2.3 in this tome and Section 8.4 in Tome 2 of this volume.

mous University of Mexico´s Philosophical Investigations Institute) by scholars such as Luis Villoro, Fernando Salmerón, and Alejandro Rossi. It is through their work, as well as through the institute, that we became aware of the Argentinean analytical philosophy of law that was being advanced by people such as Roberto Vernengo, Eugenio Bulygin, Carlos Alchourrón, Ernesto Garzón Valdés, and Carlos Santiago Nino, who in turn introduced Mexico to thinkers such as Alf Ross, H. L. A. Hart, Karl Olivecrona, and Georg Henrik von Wright, among other notable legal philosophers.[10]

The entire decade of the 1970s was characterized by an intense legal-philosophical productivity that regretfully waned from the early 1980s onward. It is not easy to determine the cause of this situation, even though many attribute it to the 1982 economic crisis, which forced the new generation to abandon teaching and research in favour of better financial opportunities in both the public and the private sector. It can be said without exaggeration that Mexico lost an entire generation of legal philosophers, and the consequence of that loss was felt throughout the 1980s and into the early 1990s. Yet, in spite of it all, it is worth highlighting the perseverance of some legal philosophers who expended much effort in charting new courses, even though they unfortunately lacked the necessary critical guidance of a legal-philosophical community. We can see this in Ulises Schmill (1971)—with *El sistema de la Constitución Mexicana* (System of the Mexican Constitution: Schmill 1971), *Lógica y derecho* (Logic and law: Schmill 1993), and *Recostrucción pragmática de la teoría del derecho* (A pragmatic reconstruction of the theory of law: Schmill 1997)—and Rolando Tamayo y Salmorán, with *El derecho y la ciencia del derecho* (Law and the science of law: Tamayo y Salmorán 1986), *Introducción al estudio de la Constitución* (An introduction to the study of the Constitution: Tamayo y Salmorán 1989), and *Elementos para una teoría general del derecho* (Elements for a general theory of law: Tamayo y Salmorán 1992), both of whom I previously mentioned as forming the neo-Kantian group of the mid-1970s, as well as in the work of Óscar Correas (1998) and the journal *Crítica Jurídica*, founded in 1983, both devoted to legal Marxism and critical theory with a revision of Kelsen's thought.

Since the early 1990s, legal philosophy in Mexico has become revitalized in an attempt to make up for the lost time, catching up with the contemporary debate and creating opportunities for teaching, research, and publication at several universities throughout the country. This change also came about in response to certain legal-political conditions that developed in the country, especially with regard to the exercise of judicial power and its perception. One of these conditions is the democratization process and the subsequent reforms of the judicial system. The year 1988 turned out to be a watershed year for Mexico, because there was suspicion of electoral fraud, and at the same time

[10] On Argentinean analytical philosophy see Section 26.2.1.3 in this tome.

the legal conditions were generated for political competency, and also because the reforms of judicial power introduced in 1987 and implemented in 1988 changed its relation to political power by converting the Mexico's Supreme Court into a constitutional tribunal. Another objective condition that developed in Mexico was the downscaling of power itself and the political pluralism consequent upon a deep questioning of the principle of the separation of powers. Mexico went from a hegemonic party system—with the *Partido Revolucionario Institucional* (PRI), which governed uninterruptedly in Mexico from 1929 to 2000—to a government that is now divided into upper and lower chambers. This situation has favoured a greater balance between the powers. And yet, despite these changes, and this is something that must be insisted upon, the greater opening of the political system proved insufficient to cope with the enormous social deficiencies. As José Woldenberg has commented:

> There was a democratic transition that enabled us to move from a system based on a hegemonic party to a balanced system, from noncompetitive to competitive elections, from a world of one-color representation to a plural one, from an exceeded presidency to a limited one, from a subordinated congress to a living and plural one. It was a very important political change. But what seems to remain the same, ever since Humboldt, is that this is an absolutely deformed country, beset by an inequality that, as is sometimes stated by the United Nations Economic Commission for Latin America and the Caribbean (ECLAC) itself, prevents us from thinking of building an inclusive "us," because Mexico is so many Mexicos, marked by such an inequality that the sense of belonging to a national community becomes hindered. (Interview with José Woldenberg. *Milenio*, July 19, 2010; my translation)

The impulse of legal-philosophical studies in Mexico, within the context of the process towards greater democratization, was reflected in each of the different legal-philosophical schools. The influence that analytical-normative legal philosophy came under from what has been called the "rehabilitation of practical reasoning" was driven—with the decisive support of Ernesto Garzón Valdés and Manuel Atienza—by the creation and development of the 1991 seminar *Eduardo García Máynez*, dedicated to the theory and philosophy of law, and some time later, in 1994, by the founding of the journal *Isonomía*. Both initiatives, as well as considerable collections of books, have contributed to the creation of a favourable climate for research and teaching that has had very positive results in the advancement of the discipline, with an output ranging from an analytical and argumentative legal epistemology—with contributions such as the ones by Carla Huerta, Bernardo Bolaños, and Roberto Lara—to a theory of justice and human rights in the context of a constitutional, democratic, and social rule of law, as can be appreciated in the works of Rodolfo Vázquez (2006, 2009), Adrián Rentería, Jaime Cárdenas, Juan Antonio Cruz Parcero (2007), Miguel Carbonell, and Pedro Salazar Ugarte (2006). And the list also includes Pablo Larrañaga (2009), with a pragmatic-constitutional focus and a foundation in market theory, and Imer Flores, with a special interest in Latin American legal philosophy and North American constitutionalism.

Under the guidance of Javier Esquivel (1996), with his rigorous Anglo-Saxon analytic training, legal positivism decisively influenced a generation whose signature work came in the 1980s, without any further development or any critical revision, however well deserved it may be. In this group we find Álvaro Rodríguez Tirado, Juan García Rebolledo, and Alfonso Oñate, among others. The continuity of this current of thought can be appreciated in the works of Javier Ortiz, María Inés Pazos, Juan Vega, and Jorge Cerdio.

As concerns legal realism and the critical theory of law, in constant dialogue with anthropology and the social sciences, we must highlight the works of Antonio Azuela, Arturo Berumen, Martín Díaz y Díaz (2001), Sergio López Ayllón, Héctor Fix Fierro, and Karina Ansolabehere. The economic analysis of law, despite its inability to make its way into the curricula of the law schools, has been developed in the work of Andrés Roemer.

Finally, in the traditional line of Scholastic natural law, with contributions to the field of international law, we find the works of Jaime Ruiz de Santiago. The research done by Mauricio Beuchot and Javier Saldaña stands out for the renewed vision they developed working from an analogical and pragmatic hermeneutics. And from a historicist point of view, with contributions in the philosophy of liberation, we find the works of Jesús de la Torre Rangel.

28.5. Peru

During the first half of the 20th century, the philosophy of law in Peru gave continuity to a traditional legal-philosophical thought gravitating toward natural-law theory, be it in its Scholastic or rationalist version. At the same time there began to develop the broad outlines of legal positivism as conceived from a formal and sociological point of view. For example, at the dawn of the 20th century, Manuel Vicente Villarán (1873–1958) initially worked from the standpoint of natural-law theory, but then he veered towards legal positivism, as can be observed in his 1907 article *Objeto y división de la Jurisprudencia* (The object and division of jurisprudence: Villarán 1907) where he maintains that we must abandon traditional legal philosophy and replace it with a sociological approach to law. This appeal by Manuel Vicente Villarán must have received a warm reception, because the 1911 book by Juan Bautista de Lavalle (1887–1970)—*La crisis contemporánea de la filosofía del derecho* (Contemporary crisis of legal philosophy: Lavalle 1911), a book deeply influenced by the ideas of the Italian legal philosopher Icilio Vanni, whom Lavalle has translated—sparked an immediate reaction against natural law.[11] Lavalle described the contemporary crises in legal philosophy as owed to an uncertainty about its object of study, an uncertainty generated by the pretence, advanced by the sociology of law, that it would displace and replace traditional philosophy of law.

[11] On Vanni see Section 11.1.1 in Tome 2 of this volume.

The author maintained that legal philosophy was still necessary as a synthetic discipline, and that, in keeping with Vanni's ideas, it is shaped by a three-pronged purpose: (*a*) to know the law, (*b*) to know its history and how it is generated, and (*c*) to inquire into the problem of justice.

The great Peruvian civilist José León Barandiarán (1899–1987) began his intellectual production with the 1929 course *Lecciones de filosofía del derecho* (Lectures in legal philosophy: Barandiarán 1929), where he rejected three conceptions of the philosophy of law: one that conceives it as the science of law, one that looks at it from a purely genetic point of view, and one that addresses it from a sociological perspective. For Barandiarán, legal philosophy studies the law for what it *is* (gnosiological point of view) and for what it *should be* (deontological point of view). The law is the norm that regulates human activity. Its constitutive elements are four: the subject, the object, the relationship, and the pretence. Its final cause is justice, whose most ontological and dynamic quality is equity. In later works, the author made a presentation of the law as consisting of such three dimensions: sociological, deontological and ontological.

Mariano Iberico Rodríguez (1892–1974) was an eminent philosopher and a member of the Peruvian judiciary. For him, law—conceived as a discipline concerned with human social conduct—is essentially a mode of existence which to some extent is independent from those who adhere to it, but which still constrains them by making them serve certain intentions or finalities of life. The law is as much a form of legal thought as it is the object of a specific theory that lends itself to a logical study. That is how, in 1944, Rodríguez proceeded in writing his *Principios de lógica jurídica* (Principles of legal logic: M. I. Rodríguez 1944), exploring the ways of organizing legal thought. According to the author, the theory of legal thought does not coincide with the philosophy of law, which is much broader and takes law into account not only as an object of thought but also as a social objectification in its ontological fundament.

But the greatest Peruvian philosopher of law is without a doubt Francisco Miró Quesada Cantuarias. In 1953 he wrote his thesis, "Bases y lineamientos de la lógica jurídica" (Basis and linings of legal logic), which was then published in 1956 under the title *Problemas fundamentales de lógica juridica* (Fundamental problems in legal logic: Miró Quesada 2008a). For him, legal logic is a specific logic that "must determine which structures are applicable to the field of legal knowledge" (ibid., 43; my translation). He believed that legal norms are not descriptive propositions, which is why we cannot at a glance apply any sort of deductive structure to them. However, this difficulty can be overcome by resorting to what Miró Quesada calls the principle of normative-propositional parallelism, under which every norm corresponds to a true (descriptive) proposition, even though not every true descriptive proposition corresponds to a norm. Once this principle is assumed, the derivation can be accomplished through an encirclement: One looks at the norm applicable to

the case at hand, determines on this basis the corresponding legal-descriptive proposition, deductively derives therefrom another legal-descriptive proposition, and finally returns from the latter to the corresponding norm. In later years he abandoned this conception in light of the development of deontic logic. In *Lógica Jurídica Idiomática* (Idiomatic juridical logic: Miró Quesada 2008b), he maintained that norms have an even more complex structure than what is ordinarily assumed, for they are neither descriptive nor prescriptive but rather descriptive-prescriptive, which is why a new hybrid logic must be elaborated so that we can account for typical legal deductions.

Another of Miró Quesada's objects of interest has been the concept of just law which he discusses in an article so titled published in his book *Ensayos de filosofía del derecho* (Essays in legal philosophy: Miró Quesada 2011a); he then takes up the subject again in the later article *Ensayo de una fundamentación racional de la ética* (An essay on the rational foundations of ethics: Miró Quesada 2003), and it is to this last source that we are referring. According to Miró Quesada the principle of symmetry unifies the theoretical and practical worlds. In the case of the practical world, and more concretely the world of law, in order for a norm to be regarded as having a proper basis, it must be symmetrical. Thus, for example, if we hold A obligated to B, then we must also hold B obligated to A. However, this is only one of the necessary conditions for a norm's basis, for we still have to add the condition that the norm must not be arbitrary.

Finally, a third area in the philosophy of law to which Miró Quesada has devoted his interest is legal interpretation, the subject of his book Ratio interpretandi*: Ensayo de hermenéutica jurídica* (*Ratio interpretandi*: An essay in legal hermeneutics, Miró Quesada 2011b). According to the author, there are three main types of interpretation: deductive, which pertains to the problem of the contradictions that come up between norms; analogical and extensive, which is used to deal with the problem that experience always supersedes any conceptual system; and the type he calls *epiphysis*, which is for the syntactic, semantic, and contextual interpretations used to resolve the difficulties generated by conceptual empiricalness and polysemy. For Miró Quesada, all the types of interpretation proposed by legal tradition can be reduced to these three basic types.

Other representative figures of Peruvian philosophy of law are Mario Alzamora Valdez (1909–1993) and Carlos Fernández Sessarego (1990). The former is the author of *Introducción a la ciencia del derecho* (Introduction to legal science: Alzamora Valdez 1987), *La filosofía del derecho en el Perú* (Legal philosophy in Peru: Alzamora Valdez 1968), and *Filosofía del Derecho* (Legal philosophy: Alzamora Valdez 1976). Alzamora makes a distinction between the scientific study of law, which answers the Kantian question *quid juris*—that which has been established as law by a certain legal system—and the philosophical study of the law, which is concerned with the question *quid jus*, or

that which is generally understood by *law*. According to the author the law is based neither on a system of norms, nor on a group of values, nor on human conduct but rather on the essential direction of human beings towards the goals that correspond to them so that they may realize their rational end. As for justice, this rational end is the common good. Fernández Sessarego (2006), a recognized Peruvian civil lawyer, has in his own turn formulated a three-dimensional approach, this in his dissertation thesis, *Bosquejo para una determinación ontológica del derecho* (Tracing for an ontologic determination of law: Fernández Sessarego 1950), where law is conceived as human conduct that is bound by norms and carries out values. In a later work, *Derecho y persona* (Law and the person: Fernández Sessarego 1990) he criticizes the Kelsenian formalism, realistic vision and Marxist law as the same kind of one-dimensional conceptions.

Deserving mention in the current landscape of Peruvian philosophy of law are the works of Fernando de Trazegnies (1993), David Sobrevilla (2008), Domingo García Belaunde (1982), and Luis Manuel Sánchez (2011). Trazegnies has published the books *Posmodernidad y Derecho* (Postmodernity and law: Trazegnies 1993) and *Pensando insolentemente: Tres perspectivas académicas sobre el Derecho, seguidas de otras insolencias jurídicas* (Thinking insolently: Three academic perspectives of law, followed by other legal insolences, Trazegnies 2001). Trazegnies (1993) advocates a postmodernism that can free postmodernity from its narrowness; that recognizes an order within the cultural diversity, as well as it recognizes cultural diversity within the order; and that furthermore conceives the law as a struggle among values, proposals, and interests which can be productively developed only if we establish rules designed to prevent this struggle from turning into a collective suicide. Sobrevilla embraces an inclusive positivism and has done noteworthy work in the historico-critical analysis of contemporary legal ideas, as can be appreciated in his book *La filosofía alemana del derecho actual de orientación racionalista* (The rationalist approach in current German philosophy of law: Sobrevilla 2008), with studies on Alexy, Habermas, and Höffe. García Belaúnde has written the book *Conocimiento y Derecho: Apuntes para una filosofía del derecho* (Knowledge and law: Considerations for a philosophy of law, García Belaúnde 1982), in which he defends a three-dimensional vision of the law akin to the one presented by Miguel Reale.[12] Luis Manuel Sánchez, in his book *Después del positivismo* (After Positivism: Sánchez 2011), offers a radical critique of legal positivism such as we find it in the theories of Alexy, Atienza, and Garzón Valdés, among other authors, and proceeds on that basis to lay out what he calls a "re-substantiation of law." Finally, it is imperative to highlight the academic and professional work of Alfredo Bullard, who introduced the economic analysis of law in Peru.

[12] On Reale see Section 26.2.1.3 in this tome.

28.6. Uruguay

Up until the end of the 19th century, the chair in legal philosophy had settled on two major orientations: a spiritualist but secular natural law, on the one hand, and the Spencerian version of evolutionist positivism, on the other. During this period, the chair assumed a highly polemic stance and took it upon itself to play a leading role in the formation of the national consciousness. Since the consolidation of the democratic state, at the beginning of the 20th century, the philosophy of law has adhered to a series of efforts intended to support the professional training of lawyers and notaries by adopting a series of eclectic, syncretic positions calling on those in the legal profession to commit themselves to this or that ideal.

Carlos Vaz Ferreira (1872–1958) and Antonio M. Grompone (1893–1965)—two eclectic thinkers who combined positivist, natural-law, Marxist, and solidarist influences—devoted themselves to the standardization of philosophy in general and of legal philosophy in particular. When they left their post, the chair in Legal Philosophy and General Theory of Law was awarded to Professors Julio Luis Moreno (1925–1981) and Esther Aguinsky (1925–1999). In his general theory of law courses Moreno was basically guided by Kelsen's pure theory, in its typically Latin American version, that is, through the interpretation of García Máynez and Recaséns Siches, who at that time were the most widely read legal philosophers in Latin America. Likewise, Moreno did as he preached by reiterating an existentialist basis of law that was yet another attempt at a "commitment" wavering between the formal perspective and the realistic perspective. Meanwhile, although Aguinsky's interests appeared to be closer to phenomenology, her teachings were framed within the traditional syncretism of legal philosophy. She also introduced more modern authors, such as Norberto Bobbio, Giovanni Reale, and Fernández Galiano. Thanks to this innocuous spirit, the chair in legal philosophy was not affected during the dictatorship (1973–1985), despite the fact that the post was filled by democrats who had no commitment to the totalitarian thinking of the period.

However, it must be pointed out that the most important Uruguayan philosopher, the only one with international recognition, was Juan Llambías de Azevedo (1907–1972). His main works were published in Buenos Aires and later translated into English, German, and Italian. He was the first to undertake serious and original research on the subject. And his philosophical thought gravitated around phenomenology, with influences from Edmund Husserl, Nicolai Hartmann, and Max Scheler, but without veiling his Catholic inspiration.[13]

It fell to Hugo Malherbe (1927–1999), a disciple of Juan Llambías de Azevedo, to initiate a profound renewal within the chair in legal philosophy, which

[13] On the phenomenology of law see Chapter 4 in this tome.

he took in 1993. His main objective was to criticize the legal dogma that was still predominant in the study of law. To this end he resorted to contemporary hermeneutics, dialectics, and semiotics: It was the first time that Aristotle, Kant, Heidegger, Gadamer, Eckart Viehweg, Perelman, Foucault, and Charles Morris, among others, were presented within a single sweep. This unusual conjunction of thinkers can be explained by a rare rigor that Uruguayan philosophy exhibits, but also by the direct connection that the thinkers so grouped bear to legal problems. Malherbe's teachings strongly influenced the subsequent generation of teachers and scholars, among whom were Alicia Castro, Luis Meliante, Américo Abad, and Óscar Sarlo, in addition to whom came, in the last stage of Malherbe's docent activity, Marcela Vigna, Gianella Bardazano, Gonzalo Calviño, and Marcia Collazo.

In 2001, after Malherbe's death, his chair went to Óscar Sarlo (Caetano and Sarlo 2010), who had been trained in the Kelsenian tradition. Sarlo couples his interests to Gadamer's hermeneutics, the analysis of language, and other collaborative work done in the contemporary theory of critical positivism. His main interests lie in the epistemology of legal science, the methodology of law, the theory of argumentation, and legislative technique.

Some of the most significant contributions in the period in question—from the mid-20th century onward—come from thinkers who are not affiliated with any chair in legal philosophy. Perhaps the main promoter of studies in legal philosophy pursued outside the ambit of the chair was the trial lawyer Eduardo J. Couture, whose writings on legal language and legal logic were the first of their kind in Uruguay and introduced the subject to the country. Other trial lawyers who followed his example were Adolfo Gelsi Bidart, inspired by Max Scheler and Ortega y Gasset; Luis Alberto Viera Ruiz, influenced by Kelsen, Ross, and Marxism; and Dante Barrios de Angelis, with a solid background in German philosophy. And an unusual contribution to the philosophy of law came from the doctoral thesis of the priest José Gabriel Buzzo Sarlo, influenced by Javier Hervada, where he addresses the issue of canonical law and our knowledge of it.

Also worthy of mention are some contributions made by Uruguayans living abroad, mostly political exiles. In the 1940s, Lorenzo Carnelli (1887–1960) gained a certain notoriety for joining, after his political exile (of 1933), the egological school led in Argentina by Carlos Cossio.[14] Other Uruguayan professors who earned a strong academic standing were Eduardo Piacenza Otaegui, Enrique Pedro Haba (see Haba 1987), Javier Sasso, Carlos Pereda, and Daniel Schwartz.

[14] On Cossio see Section 26.2.1.2 in this tome.

28.7. Venezuela

The philosophy of law in Venezuela—currently embracing a politico-philosophical and economic approach—has seen an overall evolution stimulated by initiatives undertaken for the most part at different academic centres, among which are the *Universidad Central de Venezuela*, the *Universidad del Zulia*, the *Universidad de Carabobo*, and the *Universidad Católica Andrés Bello de Caracas*. It is a clear influence that these activities have exerted over the years, making it possible for us to identify and describe an interesting process toward conceptual and methodological maturity.

In 1935, Rafael Pizani (1909–1997) came out with a book—*La Filosofía del Derecho en Venezuela: Exploración crítica para una vocación* (Philosophy of law in Venezuela: Critical exploration for a vocation, Pizani 1935)—that in both its title and content evidences the then-growing interest in the philosophy of law, all the while shaping a conception of that cultural literary form which is the essay, a form at the time was gaining ground. This work was most influential among the intellectuals of his time, a time when Venezuela abandoned the dictatorship of Juan Vicente Gómez, which had spanned across the entire 2oth century: Accordingly, this was also a time of enthusiasm about the prospect of cultural advancement by exploring new subjects and writings that had until then been kept in the dark. Years later, in 1954, Pizani would leave us with another important mark, this time charting a new course, with his *Reparos a la teoría egológica del Derecho* (Faults in the egological theory of Law: Pizani 1954), where he takes up his ongoing polemic with the Argentinean philosopher of law Carlos Cossio. Venezuelan philosophers of law would feel the influence of this book for quite some time, as can be appreciated from the clear legal-positivist orientation they wound up taking.

In parallel, the *Universidad Católica Andrés Bello de Caracas* took in the academic Luis M. Olaso (of the *Societas Jesu*), who in time would place at the centre of the philosophical debate the discussion on human rights, later aggregating a large group of researchers with a strong inclination towards social critique.

Another noteworthy influence is the one that begins to gestate at the Institute of Political Science of the *Universidad Central de Venezuela*, initially with the work of Manuel García Pelayo (1909–1991) and subsequently with that of Juan Carlos Rey. They incorporated political categories into their reasoning, thus enriching their philosophical readings with concepts borrowed from the analysis of power, legitimacy, and the efficiency of norms. An analogous line would be taken up and developed at the University of Zulia's Institute of Philosophy under the direction of José M. Delgado Ocando. For the whole of five decades Delgado Ocando has steered his research activities towards an attempt to deconstruct the institutional framework that constitutes the law, looking at the philosophy of law from a topical perspective. Some of the prob-

lematic issues that have been discussed are the ones that deal with axiological relativity (there are no absolute values), the political character of justice, the negative and formal reach of democracy, and the study of legal semiotics with its social references. These studies have led him to propose a revision of the fundamental concepts of judicial and legal production and of the judges' theory of argumentation.

In turn, the University of Carabobo's important influence on the evolution of legal philosophy in Latin America has become effective in the work of Roque Carrión: Working out of the *Centro Latinoamericano de Investigaciones Jurídicas y Sociales* (Centre for juridical and social investigation of Latin America: CELIJS), he not only stimulated the use of analytical tools but also took it upon himself to carry out the inestimable task of academic-editorial management, thus introducing local philosophers to the work of some of the most outstanding scholars in Latin American philosophy. In informatics and in the semiotics of legal discourse, Carrión has oriented his research towards the semiosis of discursive legislative and discursive judicial signs. And in a secular way, he has managed to incorporate this perspective within the postulates of the logical and analytical semiotics of legal language, with an emphasis on analyzing the way the meaning of discursive legislative and discursive judicial signs is produced within the core of social life, thus highlighting the essential role of pragmatics in constructing the meaning of these two types of discourse.

Jesús Esparza has developed his research at the University of Zulia and the Rafael Urdaneta University, both located in Maracaibo. His line of research has attempted to chart a methodological path (metatheory) based on the formal analysis of normative sentences and their deductive possibilities. His work was originally centred around the logic of action based on deontic modalities, where permission, prohibition, and indifference are defined by way of derivation, assuming the Leibnizian modal tradition developed by Georg von Wright. His research is largely devoted to the attempt to trace clear paths by recourse to legal hermeneutics, but recently he has been trying to trace the bases for a comprehensive deductive system as a model of practical reasoning in the law. In another line of work, he has also brought forth politico-philosophical and existential reflections on the state, society, liberty, and culture.

The prolonged and rigorous academic activity of Rogelio Pérez Perdomo (1990) in several national and international institutions is most certainly worthy of attention. At the *Universidad Central de Venezuela* and the *Universidad Metropolitana* he concentrated on the developments of argumentative theory as well as on analyzing the role of values in legal education and the legal profession and studying the functioning of the administrative justice system. Then, at the *Instituto de Estudios Superiores de Administración* (Superior Administration Studies Institute: IESA), his focus turned to the shared values of the Venezuelan society and to the analysis of corruption. In his capacity as the academic director of the Standford's program in international law, he has worked

on the subject of Latin American legal culture and comparative law. He has also served as academic director for the *Instituto Internacional de Sociología Jurídica* (International Juridical Sociology Institute) in Oñati. In all of these studies he has given the philosophy of law a sociological and socio-historical focus.

Lastly, we must once again point out the *Universidad Central de Venezuela*, this time by reason of its Postdoctoral Program in Normative Studies under the direction of Julia Barragán: Just as the philosophy of law has grown richer with concepts drawn from political science, so this postdoctoral program has incorporated categories of analysis conceived in the theory of rational decision, the theory of games, and economic theory, with the intent of taking into greater account the complexity that characterizes this field of knowledge (cf. Aguiar et al. 2007, Barragán 2009). The program has done very important work in education—with researchers among whom one cannot fail to mention Elega Carolina Jiménez Sandoval and Miguel Ángel Latouche—as well as in its management of academics and publishing in collaboration with the likes of John Harsanyi and James Griffin, among other researchers. The program has served as a reference point in the legal-philosophical debate and has also contributed to broadening relations among academic institutions internationally. In concrete terms, Barragán's driving interest has been in matters of public decision, both in law and the economy as well as in public policy. In this latter field she has analyzed risk and uncertainty using tools drawn from the theory of legislation, institutional economics, the theory of rational decision, and especially the theory of games. Working on this basis, she has taken up social ethics by inquiring into the inherent problems affecting the design and functioning of institutions.

For ease of reference in the indexes that follow, letters belonging to alphabetic systems having a different arrangement than English have been slotted into the place they would occupy in the English alphabet. To this end we have adopted a criterion of similarity (for example, å = a). If an original work has been translated into English and the contributor has deemed it necessary, the title of that translation will appear next to the original title even if the former is not a literal translation of the latter.

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Part One

Natural Law Theory

Chapter 1

INTRODUCTION: NATURAL LAW THEORIES IN THE 20TH CENTURY

by Francesco Viola

If Karl Magnus Bergbohm (1849–1927) had lived later in the 20th century, he would have had an opportunity to use his bloodhound's sense of smell with much greater satisfaction in sniffing out the hidden presence of natural law in the legal doctrines of the time (see Bergbohm 1973). I will try to carry on his work, certainly without his acumen, but also without his preconceived hostility.

We need to preliminarily distinguish natural law from the *doctrines* of natural law. The latter are manifold and often very different from one another, but they are linked by the persistence of an identical problem, that of the existence of a law not produced by man or, more modestly, of the presence in positive law of some strictly legal elements not posited by man. That is natural law as a problem, while a natural law doctrine is any of the possible answers to that problem. The problem is one, the answers many. The problem persists throughout the history of legal thought; the answers appear and fade away and return, at times in a renewed form, but they always depend on the historical evolution of positive law.

Natural law theory can present itself as a deontological conception of law, that is, it can say the way positive law *ought* to be. From this point of view it is distinguished from other deontological conceptions of law by the way it identifies the criteria of the legal ought.

Natural law theory can also present itself as a theory of law, that is, it can describe law as it is. From this point of view it is distinguished from other theories by the way it defines the *concept* of law. It is only in this second sense that natural law theory can properly be situated in the sphere of the knowledge of law and so can be compared with, and can compete with, other theories of law, and in particular with legal positivism.

In the first sense natural law theory belongs to the sphere of ethics or politics or, more precisely, to the sphere of the moral or political criticism of positive law, and in principle it is compatible with legal positivism. Nevertheless, in the history of legal thought it is not at all easy to distinguish the two meanings of natural law theory, in part because a deontological conception of law often presupposes a concept of law already fraught with elements of natural law.

Since the most typical and controversial meaning of natural law theory is the one linked to its claim to be a theory of law, attention will be paid here to this meaning.

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Natural law theory as a theory of law is generally speaking interested in addressing some of the following contentions: (1) that law must be described in light of its practical sense, that is, it must be described as a reason for action; (2) that the contents of law cannot be determined regardless of an attentive look at human nature; (3) that legal theory implies value judgments with a cognitive content; (4) that law and morality are necessarily connected; and (5) that natural law has a legal character.

Obviously, it is very unlikely that a doctrine of natural law should endorse *all* of these contentions, and so there will be stronger and weaker conceptions of natural law. Which of these contentions are strictly indispensable in characterizing a theory of law as a natural law theory? Which of these characteristics is the strictly indispensable one, without which one can no longer speak of a natural law theory? It is impossible to answer this question without moving into the internal point of view of a doctrine of natural law. For this reason, in this historical investigation we will adopt the broadest possible meaning of natural law theory.

For natural law theory to maintain its salience, it cannot just recognize that positive law in its origin and in its practical application is not self-sufficient, having to resort to external elements (of a moral, social, or economic nature). Nor even can it just observe that legal systems, as cultural expressions, are steeped in positive morality. Rather, the stronger claim to be made is that factors not ascribable to human will play a normative role and are already marked by their own legality, even if they still need to be taken through a process of positivization. This also explains why among the distinctive characteristics of natural law theory I have not included the distinction between what is natural and what is artificial. The fact is that not everything that is artificial stands in opposition to nature, and indeed nature, if it is to have any value, always needs to be expressed by human work.

After a century marked by legal positivism, on different occasions the 20th century witnessed a return to natural law. This is not so much due to antipositivism, which grouped a range of philosophical tendencies (see Fassò 2001, 214). Indeed, the reciprocal independence of philosophical and legal positivism has been abundantly demonstrated (see, for instance, Pattaro 1974a). The reason is instead to be sought in the conjunction between social transformation and the triumph of legal-philosophical speculation, which became autonomous both from the philosophers' philosophy of law and from the jurists' philosophy of law.

Three revivals of natural law can be identified: one at the beginning of the 20th century, one provoked by World War II, and one proper to contemporary constitutionalism beginning in the last two decades of the 20th century. All three belong to the so-called short century, but we need to realize that the same label encompasses a broad spectrum of different cultural phenomena and philosophical trends. If there are three rebirths, it means that there have been as many deaths or crises (see Bobbio 1965a, 180) and consequent returns of legal positivism (cf. Lang-Hinrichsen 1954).

(1) The revival of natural law in the early 20th century was in reality brought about by a dissatisfaction with 19th-century legal positivism, which in general had pursued the objective of rigorously separating out the legal sphere, unduly neglecting moral ideals and the social bases of law.
(2) The revival of natural law after World War II was obviously prompted by the fact that evident and serious violations of human dignity had been permitted or at least not prevented by positive law, so it was felt necessary to avoid that from happening again.
(3) The revival of natural law at the end of the 20th century was provoked by the greater role the question of human rights assumed within constitutional regimes, with the consequent transformation of the very way of conceiving positive law. Here the rebirth of natural law is confused, often indistinguishably, with the crisis within legal positivism.

1.1. The First Revival

1.1.1. Natural Law and Legal Science

In 1854, Bernhard Windscheid proclaimed that "the dream of Natural Law is over," but in 1884 he reluctantly admitted that the dream of "a universal, fixed and unchanging law grounded in reason" was still alive (Windscheid 1904, 9, 105; translated in Bjarup 2005a, 292).

In the early 20th century, when post-Kantian natural law theory had long since died out (see, for instance, Ahrens 1838–1840), the revival of natural law was possible because of the wearing out of legal positivism and the renewal of Catholic natural law theory, though the two cultural phenomena developed separately and remained separate.

Within legal positivism there emerged nonpositivist tendencies that confusedly manifested a restlessness and increasing dissatisfaction in legal science. This, however, often did not mean an explicit recourse to natural law, which in the most benevolent cases was seen as a morality external and extraneous to positive law. At the same time, Catholic natural law was developing its own moral theory, freeing itself of eclecticism. In this way it was able to intervene in the theoretical debate about law and legal science, but with results limited to the sphere of jurists of Christian persuasion. This new cultural climate helped to accredit the plausibility of natural law orientations. This is precisely the connotation of the first revival of natural law, meaning that its presence was accepted where it had hitherto been radically denied.[1]

The slow and systematic construction of 19th-century legal science had been possible because it did not presuppose a law at the mercy of a fluctuating

[1] A reconstruction of this reappraisal of the concepts of natural law in Europe and in the United States can be found in Haines 1930.

sovereign will: Rather, on Savigny's conception, law harked back to an objective order existing in society, an order from which it drew all its stability (see Fioravanti 2011). Once the fundamental legal categories had been worked out, positive law had lost contact with its social bases on the assumption that lived a life of its own. In the place of society and the people there now was the state, that is to say, an artificial order. Therefore, the formula of the *Rechtsstaat* is representative of this self-foundation of law in the 19th century.

This state of affairs went through a crisis when the issue of the correctness of judges' decisions could not be fully resolved by an appeal to strict conformity with the legal norms (see Schmitt 1912). Legal claims may be grounded in sources other than the statutory law. The possibility of *contra legem* law is accepted. These other sources can be those of legal praxis or of legal science itself, but also, deeper down, those of social life.

Although in the first decade of the 20th century many works were published on natural law, the first scholar expressly to speak of a rebirth of natural law was Joseph Charmont (1910).[2] He saw it as a form of "legal idealism" that accorded legitimacy to those moral claims which would have been disqualified had law been merely seen as a set of technicalities. More than to natural law, however, Charmont, following in the footsteps of Raymond Saleilles (1902), made reference to natural rights as having their origin in the 17th- and 18th-century classical school of natural law (see Solari 1904) and their full development in the French Declaration of the Rights of Man and of the Citizen and the American Declaration of Independence, as well as in Kant's thought. What Charmont defended was above all the role of the subject of law, sterilized mostly at the hands of utilitarianism and philosophical positivism. He very clearly saw the problem of the conflict between law and individual conscience and reevaluated the thought of Rudolf von Jhering, who unlike Savigny stressed the active role of the struggle for subjective rights and the importance of aims in law.[3] However, Charmont did not appear very consistent with his Christian subjectivism when he traced the causes of the revival of natural law to the organicistic solidarism of Émile Durkheim, to Gény's theory of free scientific research, and even, albeit with some reservations, to the theory of objective law advanced by Léon Duguit, regarded as a crypto–natural lawyer (see also Haines 1930, chap. 10). These references would have required greater consideration of natural law as an objective morality.

Indeed, the renewed attention to natural law in legal science was hindered by the circumstance that natural law was confined to the field of morality and clearly distinguished from positive law. Even if, as Jean Dabin (1928, 431) remarked, the natural law of moralists could be accepted by jurists as a rational

[2] For what can be considered a corresponding text in American culture, see the article by Morris Raphael Cohen (1916).

[3] As we shall see, this reference to Jhering's thought would assist the first rebirth of natural law.

ideal law, it remained external to positive law (see Ripert 1918), while as a subjective right it could give rise to legal claims.

However, a true rebirth of natural law cannot be described solely by reference to Enlightenment natural rights. It is necessary above all that objective moral values be perceived as meaningful for the concept of positive law. We will start by examining the evolution of the relation between natural law and morality, and then we will consider the cultural phenomenon involving legal science taking up ethico-social concerns.

1.1.2. Catholic Natural Law Theory

In the early 20th century, natural law became a candidate for serving a dual function, to use a distinction drawn by Lask (1950, 6–7). From a formal point of view (formal natural law) it presented itself as a criterion for the validity of positive law and as a foundation of its normativity (a metaphysical doctrine of the sources of law); from a material point of view (material natural law) it sought to dictate the necessary contents of positive law. To be sure, recourse to metaphysics was not seen favourably by the dominant philosophy; for its part legal science did not appreciate the lack of any distinction between morality and law, for it was concerned to defend the principle that formal legality should be equidistant from ethical ideals and from mere facticity. Set in opposition to "the idealistic doctrine of natural law," then, was "the realistic doctrine of positive law" (Bergbohm 1973, 144; my translation).

As is well known, the main defence of natural law came from the long tradition of the Catholic Church, which had long been going through a period of internal cultural travail. From the standpoint of natural law, this change of heart did not concern the traditional contents but rather affected the theoretical bases. These were primarily of a theological nature and so not very meaningful to nonbelievers.

There are two ways of considering natural law: as a universal morality founded on a general idea of human nature and on the use of natural reason, and as a specific moral tradition that formed within the Christian faith and in the shadow of the Scriptures (see Porter 2003, MacIntyre 1988). For the medieval Schoolmen, who sought to carry forward the Greek and Roman tradition, both Scripture and reason are expressions of the same divine wisdom and so are isomorphic. Not only was natural law inspired by Scripture, but the latter was also interpreted in light of natural law. In modernity, the two sources of Christian revelation, reason and Scripture, have become independent of one another, even though they are compatible. For Grotius, Hobbes, and Locke, Scripture validates what reason discovers on its own. But when the possibility of a scientific knowledge of morality is affirmed, natural law is conceived as a set of rational rules deduced from first principles and there is no further need for Scripture. Accordingly, the survival of Catholic natural law theory was made to depend on

the possibility of showing that its specific contents were grounded in a rational ethics set in contrast to Enlightenment ethics. But in the early 19th century, Catholic doctrine did not yet have a philosophical compactness of its own and became eclectic, with strong influences coming from Locke's natural law theory and Condillac's sensationalism. Still, in mid-19th century, the signs of a revival of the Catholic philosophical tradition of law became clearly manifest above all in the thought of Antonio Rosmini (1841–1843) and in that of Luigi Taparelli d'Azeglio (1840–1843). At the end of the 19th century, a return to the thought of Thomas Aquinas provided a more rational foundation for the Catholic doctrine of natural law, which was completely reworked. Even today Thomist thought can be said to remain the only organic doctrine of natural law, both inside and outside the Catholic Church. In Protestantism, natural law began to draw philosophical attention only after the tragic experience of the Holocaust.

Throughout the 20th century, the Aquinas's thought showed its remarkable ability to survive its transient interpretations. Consequently, Catholic natural law theory contains a variegated range of approaches to his thought on law and justice. After pointing out what the principal approaches are, I will try to outline the elements they have in common so as to provide a general identification of this current of thought.

The rebirth of Thomism in Catholic thought was supported by Leo XIII's the encyclical letter *Aeterni Patris* (1879), and it started in pontifical universities, and so in an ecclesiastical milieu, owing to the cultural training of the clergy. (For this reason its first organic expression was markedly Scholastic, though it was very different from its medieval expression.) But with the rise of the social question and the exhortations contained in the 1891 *Rerum Novarum*, the social part of Catholic doctrine began to gain wider currency.

The philosophical and theological movement of neo-Scholasticism was promoted above all by the Jesuits at the end of the 19th century, and it quickly spread not only in Italy but also in Belgium, France, and Germany, aspiring to take on the role of the philosophy proper to the Catholic Church. Especially with regard to natural law and morality, the German-speaking countries were the most fertile for this school of thought,[4] both because of the strength of a rationalistic tradition that overstressed the connection between Thomas Aquinas and Christian Wolff and because of the need to give cultural substance to the political presence of the Catholics in Bismarck's Germany. So imposing was this movement that it led some to speak of a "restauratio christiana juris naturalis" (Hollerbach 1974, 114).

In general the attitude of neo-Scholasticism was that of frontal opposition to the philosophical currents dominant at different times: first to positivism,

[4] Here we can point to the works of Theodor Meyer (1885), Georg von Hertling (1893), Johann Haring (1899), Constantin Gutberlet (1901), Joseph Mausbach (1918), and Martin Grabmann (1922).

neo-Kantianism, and neoidealism, and then to Marxism, phenomenology, existentialism, and analytical philosophy—all immanentist philosophies. For this reason, too, neo-Scholasticism took on a rationalistic form very distant from the ancient Christian moral tradition. Not satisfied with so many external enemies, it also provoked lively and at times very heated debates. Neo-Scholasticism persisted until after World War II, though it gradually abandoned its original expository style.

Neo-Scholasticism was a method for studying and expounding Aquinas's thought, a method that inevitably became a way of interpreting it. With this rigorously and rigidly syllogistic method, neo-Scholasticism was dry, confutative, and peremptory. The tendency was to establish philosophical and theological theses distinctive to Catholic thought. Among them there were, obviously, those regarding natural law and the relation between law and morality. For a paradigmatic example of this style of thought, one need look no further than the work of the Jesuit Victor Cathrein (1845–1931). His writings, among which there are some on law (see Cathrein 1891, 1901), spread widely and have been reprinted in numerous editions down to our own day.

The study of Aquinas refused to be imprisoned in Scholastic methods, and after a few decades the need was felt for a direct contact with his writings, that is to say, a contact no longer mediated by traditional commentators and no longer couched in stereotyped formulas. In some measure, this made it possible to recover the old Scholastic tradition founded more on the universality of human capabilities and virtues than on that of moral norms (see Sertillanges 1916). This new tendency, which spread above all in the French-speaking countries, favoured a historical approach over a systematic one, something that had already been prefigured by Martin Grabmann and his school. One of the first works in this direction was concerned precisely with natural law, and it is that of Odon Lottin (1931).

Among the advantages of historiographical research were that it brought out the rich complexity of Aquinas's practical philosophy, and they reignited the issue of his relation to metaphysics. The fact is that the rigorously deductive method by which moral problems were dealt with in neo-Scholasticism were not well-suited for practical reason. The disadvantages, by contrast, were those of any historiographical research, meaning that it cannot present itself as a militant philosophy. Still, the direct approach to Aquinas's texts and its intellectual attitude helped to free Catholic thought from the *hortus clausus* of ecclesiastical universities and sparked the interest of lay intellectuals. This fostered greater freedom compared to other ecclesiastical traditions of thought, as well as greater creativeness in its applications.

The fruits of this second phase would be seen much later, when Thomism became disconnected from political conservatism, with which it had been once identified, even though that connection was not at all obvious (see Maritain 1984, 1988b). Another later consequence was that non-Scholastic theories of

natural law were modelled, as those of Heinrich Rommen and Jacques Maritain, to whom we will return.

The last phase in the interpretation of Aquinas in the 20th century sees a departure from a holistic reconstruction of his thought and the development of largely independent currents, including one that focuses on practical reason, the sphere in which natural law belongs (see Viola 1998). This allows us to bracket off, without wholly forgetting, both the theological drive and the metaphysical foundation of natural law, while at the same time abandoning neo-Scholastic rationalism once and for all. This new orientation tends to equate the problems of natural law with that of ethical cognitivism understood in terms of practical reasonableness, and it is also nurtured by important contributions from Anglo-Saxon culture, both English and American.

We will now try to identify the elements common to the treatises on natural law in the first phase of Thomism by taking Cathrein's conception as paradigmatic, for it is much more clear-cut and rigorous than the others. The other two phases will instead be mentioned in connection with their respective historical periods.

As is well known, natural law theory also serves a political function, one that cannot be fully understood without keeping social context in mind. At the beginning of the 19th century, during the Restoration, the main problem of Catholic political thought was that of the justification of authority. At the end of the 19th century, it instead became more urgent to justify obedience to the commands of this authority, since the throne was moving further and further away from the altar. For this reason the question of law took on an absolutely central role as an intersection of theology, metaphysics, and morality.

According to Catholic doctrine, the obligation to obey positive law is a moral obligation. This means that this obligation is ultimately founded on God, from whom there originates both the order of nature and that of morality. Only God can create obligations for beings who are created free, and God does that through the law. Human law is the last link in a chain that begins with eternal law, and its fulcrum lies in natural law. This scheme is common to Catholic natural law theory throughout time. But within the scheme, variants are possible that may even differ widely from one another.

According to Cathrein (1893, 146, n. 199), moral obligation derives from a theoretical truth that indicates what actions are intrinsically good or bad. This truth concerns human nature as shaped by a rule of reason drawn from natural inclinations. Here we should note the strict derivation of the practical norm of human action from creationist metaphysics.

As regards the relation between natural law and positive law, certainly Cathrein reprises Aquinas's theses on the two modalities of derivation (*ad modum conclusionis* and *ad modum determinationis*), though without emphasizing the distinction between them. But in any case the moral bindingness of positive law depends entirely on its conformity to natural law, which in itself can

constitute a true legal order needing the positive order especially for a more effective protection of the natural laws themselves. Hence Locke is not entirely forgotten, while the polemic target is Kant and his distinction between morality and law, the moral order and the legal order.

According to Cathrein (1893, 216–7, n. 297), without a natural legal order, positive law could never be deemed unjust, there would be no intrinsically unjust actions, and international law would be impossible. This is considered that part of positive law which is most directly dependent on natural law, and hence superior to the law of the state itself.

Despite this strong natural law theory, Cathrein endorses the positivist idea of the importance of constituted authority. When faced with the issue of whether the judge can directly resort to natural law, Cathrein agrees that the duty attached to that office is to apply the positive law even though it may be unjust law, unless the injustice is so serious as to force the judge in conscience to resign. This means that safeguarding the constituted order is regarded as a dictate superior to considerations about the justice of any single law.

Cathrein's doctrine, though much admired for its stringent rigour, appeared too rigid and compact to be able to influence legal science, including the kind of legal science that was open to natural law. The immutability of natural law was affirmed in an absolute way (ibid., 175, n. 236–8). Yet Aquinas himself, following Aristotle, had spoken of the *mutability* of human nature, and so of natural law. This implied that the positive legal order had a much more significant role than it was recognized to have by Cathrein, and as a result it proved more acceptable to jurists (see Dabin 1928, 432). Even so, Cathrein's thought has stood as the most consistent model of natural law theory in the legal imagination, especially for the purpose of *refuting* that theory.

In conclusion, the general characteristics of Catholic natural law theory can be listed as follows: theism, a metaphysical foundation based on a correspondence of the order of the good with the order of being, objective ethics and ethical cognitivism, a teleological derivation of the precepts of natural law from human nature, the universality and immutability of natural law, and the axiological conformity of positive law with natural law.

Each of these tenets has been bitterly challenged by adversaries. The most common accusation has been an undue derivation of normativity from human nature (see Kelsen 1949b, 484), that is to say, from empirical natural inclinations, which in fact Locke had rightly rejected as a criterion of morality. But according to Aquinas, the forms of the good, which natural law is aimed at, are learned by reason as "those things to which man has a natural inclination" (*Summa Theologiae*, I–II, 94, 2). So it is reason that distinguishes good desires from bad ones, both present in human nature (see Zuckert 2007). According to Scholastic philosophy, reason is not sufficient for there to be normativity, and the transcendence of being and the good is necessary, and only theism suc-

ceeds in founding normativity. For this reason Catholic natural law theory is opposed to the immanentism and mechanicalism typical of modernity.

In answering these criticisms, Catholic natural law theory has shown a certain capacity for flexibility and evolution, but never to the point of losing sight of the pedigree traced out above. The very understandable general tendency has been to increasingly underline the role of human reason in knowing good and evil, the just and the unjust, thus making such knowledge independent of any given conception of divinity, but never going so far as to embrace immanentism. If the theses advanced by Cathrein, for whom natural law consists in unchangeable precepts drawn from human nature as willed by God,[5] are compared with the more recent ones of John Finnis, for whom natural law consists in evident principles of practical reasonableness, it will become possible to appreciate the way and the extent to which a doctrine claiming to be immutable can change.

Strictly speaking, neo-Scholastic natural law theory is not a theory of law but a theory of morality, a reduction of natural law to moral philosophy (see Brieskorn 2009). This is the main reason why Catholic natural law theory did not succeed in making its way into the debates in philosophy and legal science, remaining a body extraneous to them throughout the first half of the 20th century. However, some claims of natural law not infrequently presented themselves within the theories of positive law. And it is that story that I intend to reconstruct here.

1.1.3. Formalism and Natural Law

In the second half of the 19th century, legal philosophy took its first steps as a discipline independent of both general philosophy and legal science. But the path was not easy, for on one hand, in order for legal philosophy to be recognized as a true philosophical discipline, it had to establish a close connection with the dominant currents of the time, which were positivism, neo-Kantianism, and neoidealism, but on the other hand, these philosophical orientations did not pay adequate attention to the legal phenomenon. Philosophical positivism considered law an antiquated technique of social control; neo-Kantianism tended only to think of it in the framework of outward precepts and their coerciveness; neoidealism either reduced it to economics or drowned it in ethics. Accordingly, philosophers of law almost always appeared heterodox in a tradition of thought they themselves worked in, and so they were looked on with suspicion by philosophers at large. While philosophers demoted them to the rank of jurists, the latter did not regard them as belonging to their club (see Cammarata 1922, for example, as concerns Italy).

Indirect help came from attempts to free legal science from "metaphysics" and from identification with the *iuris naturalis scientia* of modernity, bringing

[5] "Ergo reicienda est *moralis* quae vocatur *independens* seu *laica*" (Cathrein 1893, 161 n. 219).

an empirical scientific approach to bear on legal science in hopes of finding common concepts and rules within the legal system and between different legal systems. In 1890, the German jurist Adolf Merkel (1836–1896) published *Elemente der allgemeinen Rechtslehre* (Elements of the general theory of law: Merkel 1890), which ushered in a "positive science of law," decidedly opposed to natural law. But mere generalization of the contents of positive law could not rescue the latter from contingency and historicity. As Radbruch (1914, 16) remarked, the ambition of the general theory of law to take over philosophical research on the concept of law led to a "euthanasia of legal philosophy." The most vigorous reaction was that of neo-Kantian legal philosophy, which can be considered the promoter of a way of seeing legal philosophy that would condition the entire first half of the 20th century. This current gained much ground, especially in Germany, Spain, and Italy, to such an extent that it can be considered the first, and perhaps so far the only, great European legal philosophy (see Alexy et al. 2002).[6]

Generalization of normative contents is blind if it is not guided by logical transcendental forms capable of giving a scientific solidity and status to epistemological legal knowledge. It was necessary to pass from the technical legal sciences to theoretical legal science. These objectives were pursued with full awareness by neo-Kantian legal philosophy, because a doctrine of the universal forms of law promised to confer a scientificness on legal empiricism. But the legal forms the neo-Kantians were thinking of were not the same thing as those of the general theorists of law, who were concerned with the problem of the legal qualification of actions or facts and not with that of the transcendental conditions of legal experience.

In these transcendental legal forms of neo-Kantianism one can still perceive a vestige of natural law, or at least of its claim to the universality of legal experience and its internal consistency. This fact should not be underplayed, because this is a standard that is very difficult to satisfy on a strictly formal plane. That this presupposition can by itself be interpreted as a sign of natural law theorizing is recognized by Kelsen himself:[7]

> With the postulate of a meaningful, that is, non-contradictory order, juridical science oversteps the boundary of pure positivism. To abandon this postulate would at the same time entail the self-abandonment of juridical science. The basic norm has here been described as the essential presupposition of any positivistic legal condition. If one wishes to regard it as an element of a natural-law doctrine despite its renunciation of any element of material justice, very little objection can be raised; just as little, in fact, as against calling the categories of Kant's transcendental

[6] On neo-Kantian legal philosophy see also Section 8.2 in this tome and Chapter 1 in Tome 1 of this volume.

[7] It is well known that according to some commentators Kelsen's thought is a form of natural law theory without natural law. René Marcic (1919–1971) sought to apply Thomist natural law theory to the pure theory of law (see Marcic 1969; see also the debate with Kelsen in Voegelin 2004, 126ff.).

philosophy metaphysics because they are not data of experience, but conditions of experience. What is involved is simply the minimum, there of metaphysics, here of natural law, without which neither a cognition of nature nor of law is possible. (Kelsen 1949a, 437)

The problems brought into focus by neo-Kantian legal philosophy can only be understood in relation to the problem of the distinction between the natural sciences and the human sciences. In 1883, Wilhelm Dilthey published his *Einleitung in die Geisteswissenschaften* (Introduction to the spiritual sciences: Dilthey 1883). The peculiarity of the cultural and symbolic expressions of the human world moves away from the empirical methods of the natural sciences and invites questions about the way we come to know the values and judgments of relevance with which the world produced by human works is interwoven.

The disputes that arose on the proper place of legal science largely depended on the very way of understanding its object, that is to say, the concept of law. From the start, jurisprudence appeared to be a borderline science as to both its object and its method. The classificatory spirit of the time could not accommodate this eccentric position of law and explored all possible ways to avoid it, but without yielding any convincing and definitive results.

The *moral sciences*, which the neo-Kantians preferred to refer to as *cultural sciences*, created for them two difficulties of opposite kinds: On the one hand, in these sciences the possibility was lost of clearly separating science from philosophy, description from evaluation, and explanation from understanding, while on the other hand contents of a historicist and relativistic nature were introduced into philosophical speculation. This led to the need to face the problem of the relationship between historical reality and values. In the cultural sciences, values played a role similar to that of neo-Kantian forms. But they were much too like the objects of abhorred metaphysics and so had to be treated adequately.

1.1.3.1. The Nature of Law

The Kantian transcendental project is at once subjective and universal. The effort to identify the conditions for the possibility of every experience in the law had to be accompanied by a conviction that this experience could not purely and simply be reduced to a shapeless set of facts or to an essentialist structure relating to positive law as such.

If we want to seek traces of natural law theory in neo-Kantian legal philosophy, however weak these traces may be, we will have to start from the firm belief in the objective value of science and, above all, in the possibility of conferring scientific dignity on legal experience. This conviction was founded more on the method of legal science than on its object. According to Rudolf Stammler (1856–1938), who will be taken here to be the most representative exponent of neo-Kantian legal philosophy, one of the errors of natural law theory is to believe that scientific validity lies in the results of the method used and not

in the method itself (Stammler 2000, 91).[8] And yet the method of neo-Kantian legal philosophy itself has some characteristics that are proper to natural law.

In two respects Stammler's thought is less distant from natural law theory than he would like. From the point of view of legal theory, the distinction between pure or a priori legal concepts and empirical or a posteriori legal concepts is based on the universality of the former, which the latter lack. Consequently, the distinction between a pure theory and an empirical theory of law is clearly an epistemological substitute for the traditional ontological distinction between natural law and positive law. From the point of view of the purpose of law, natural law is taken into account again but in an original way rich in potentialities for development. Stammler rejects the ontological or anthropological sense of nature and rather sees nature as a search for a "uniform and universal essence" or, even more precisely, as the "permanent unity and systematic uniformity" of an area of experience (Stammler 2000, 73). And it is precisely here that lies the greater proximity of Stammler's thought to natural law theory, despite the influence of the Marburg school (see C. Müller 1994).

The fact is that this concept of nature is applied to law itself, understood as an idea of social cooperation, which presents itself as a specific object needing special investigation. We thus move from a natural law based on human nature to an investigation of the "nature of law," which has a teleological character. In this sense, although the distinction between natural law and positive law cannot be understood as a genetic one (as a distinction based on origins), the systematic distinction according to which the nature of law is found in the idea of a legally ordered life in general preserves its value (Stammler 2000, 76, 166). Stammler expressly recognizes that "all positive law is an attempt to be just law" (ibid., 24) and that the purpose of natural law is to become positive law. Above all, however, he claims that it is necessary to preserve the general justice of the legal order by respecting what we would recognize today as the principles of the rule of law. These principles make it possible to respect the nature of law and the social purpose of the legal order. Law is in fact an indispensable means of social unity.

According to Stammler, law is a form of social life, for no society is possible unless the pursuit of common purposes is constrained through an external rule. This constraint is the logical condition of social activity and therefore constitutes its form, while the material is the world of needs that informs social activity itself. For Stammler (1928, pars. 35, 56), the concept of law lies wholly in the formal element. In this way he argues that normative content is irrelevant to the purpose of the concept of law, a thesis typical of the stance against natural law. Nevertheless, it is for the sake of common purposes that freedom and autonomy have to be somehow limited.[9]

[8] On Stammler see also Section 1.3 in Tome 1 of this volume.

[9] This teleological conception of social science came under sharp criticism from Max Weber (1907).

For these reasons the formal or logical concept of law, which in itself is inert on a practical level, has to be integrated by the *idea of law*, that is, by the value of justice. In this way law becomes a principle of social behaviour on the basis of the ideal of a "community of freely willing men" (*eine Gemeinschaft frei wollender Menschen*), or men who voluntarily submit to the rule of law for a social or cooperative ideal (ibid., 204; my translation).

Stammler thus subscribes to a view that would persist in legal philosophy in the first half of the 20th century: The search for just law is admissible only as a practical ideal of law (from a deontological perspective), not as a theory of law, since the latter concerns the *is* of law and not its ought. The concept of law is constitutive, while the idea of law is only regulative. Even so, investigations on right law (*richtiges Recht*) were considered a proper part of legal philosophy—and not, as Kelsen would later claim, part of the ethical or political sphere or at any rate of a sphere external to the law—and in this way the ideal of justice took on an importance internal to positive law itself.

As is well known, Stammler translated the idea of natural law into that of "a natural law with changing content" (*ein Naturrecht mit wechselndem Inhalte*) (Stammler 1924, 174; my translation). This expression has given rise to two broad interpretations, for they can be taken to mean that right law is *formal law* or that is it *cultural law* (Radbruch 1950, 60). Certainly Stammler (2000, 89) does not share the natural law thesis on the invalidity of unjust law and maintains that such law is not logically contradictory and does not in the least authorize its arbitrary violation. Stammler's recourse to natural law means that in stating what right law is we have to follow a principle of reason held up as a social ideal, an ideal of mutual respect among people united under law (see ibid., 159). So this, too, is a formal ideal, echoing the principle of natural justice under which equal cases must be treated equally. Since in applying this ideal we have to take changing empirical circumstances into account, the content of right law is by nature changeable. In any case, the problem of justice pertains to the philosophy of positive law and has to remain wholly internal to it.

The separation between law and morality could thus be captured by following two different paths: one that excludes every moral element from the nature of law and one that searches for a morality internal and proper to law, and clearly distinguished from general morality. Stammler opts for the second way. Since the presence of moral aspects in the nature of law could not be denied, law's internal control on morality can preserve the autonomy of the legal sphere. "The land must not be governed by a foreign power" (ibid., 39). Here we are looking at what today we would call "ethical positivism."

If we now compare Stammler's thought with Cathrein's, the central point appears to be the separability of the is of the law from its ought. Cathrein had claimed that unjust law is not true law, just as a fake friend it is not a true friend. Stammler replied that the most appropriate comparison is not with friendship, which is a concept already enveloped in value, but with a sermon:

An unjust law is a real law just as a bad sermon is still a real sermon (see Stammler 2000, 88). Stammler added that the concept of law is not contradicted by a content that might command polygamy, the burning of widows, slavery, or the exposure of weakly children. Yet he could not deny that this contradicts the nature of law as informed by the principle of mutual respect among people united under law.

The distinction between the *concept* of law (deriving from Kant) and the *idea* of law (deriving from Hegel) was aimed at separately satisfying two demands of legal knowledge that were difficult to reconcile. On the one hand, the theoretical investigation required an understanding of law independent of its particular and factual historical realizations and free of evaluative content. In this respect, epistemological constraints went hand in hand with those of legal certainty. On the other hand, the practical investigation entailed that positive law should be subject to value judgments and to possible criticism by the moral conscience where this law aspires to become an obligatory rule of human behaviour. Between the concept and the idea there was the slender common element of the importance of otherness or intersubjectiveness.

Neo-Kantianism thus takes on the task of holding together, though in a sort of artificial cohabitation, the two fundamental problems of legal philosophy, that is, the theoretical-cognitive one and the practical-normative one (Banfi 1926, 195).

In the subsequent development of neo-Kantian legal philosophy it proved very difficult to maintain a separation between the concept and the idea of law in the manner dictated by Stammler. In Italy, a criticism of legal positivism had already been advanced precisely by neo-Kantian thinkers (see Petrone 1895, Bartolomei 1901). However, it was only with Giorgio Del Vecchio (1878–1970), the greatest Italian neo-Kantian legal philosopher, that this became evident.[10] Del Vecchio gradually moved toward natural law theory. This was possible thanks to a major change in the way to go about dealing with the problems regarding the concept of law.

In the first place, while Stammler derived the concept of law from a reflection on legal science and on its transcendental bases (theoretical legal science), Del Vecchio, working from the Kantian distinction between *quid ius* and *quid iuris*, assigned this task to legal philosophy, which he understood as capable of an autonomous cognitive approach to its object.

In turn, philosophical investigation does not confine itself to *logical* research but also includes both *phenomenological* research on the universal or common character of legal experience and *deontological* research relating to the ought of positive law (the triadic theory of law).[11] This implies that a philo-

[10] On Del Vecchio see also Section 11.2.1 in Tome 1 of this volume.

[11] This tripartite division of the tasks of legal philosophy has been widespread, especially in Latin America and in other countries in Europe that speak Romance languages, in part because

sophical knowledge of law by the same token includes both its logical concept and its own ideal, that is, its ought. The relation between the two consequently becomes much closer than that prefigured by Stammler, both belong to the same global cognitive enterprise.

In characterizing the experience of law on the basis of a principle of practical evaluation, in keeping with the line of thought embraced by the Baden school, we are already taking that experience to be part of ethical life and a modality internal to it. This means that the concept of law is not entirely normatively inert: It is "a value-laden claim like any other." Morality and law are not separate but distinct (this is the doctrine of the differential features of law), since there are two ways of evaluating human action, the one internal to the subject (the person) and the other intersubjective and external, where possible actions between multiple subjects are coordinated on the basis of an objective ethical principle (see Del Vecchio 1962, 226). It is even conceded that law and morality belong to the same ethical system and so that there cannot be any contradiction between them (cf. ibid., 227), a thesis that natural lawyers also maintained, though in a non-formal way. Here one can notice an attempt to translate the pre-Kantian or Leibnizian natural law theory in a formalistic fashion. This means that the concept of law already has a "practical" character, and so that it is not in the least neutral or normatively inert, as Del Vecchio kept repeating. At this point it becomes clear that the relation between neo-Kantianism and natural law theory turns entirely on the way the concept of law is understood, since the scientific dimension and the practical one did not seem compatible with the philosophy of the time.

According to Del Vecchio, positivity does not belong in any essential way to the concept of law, which strictly consists in the intersubjective form of legality, something that a law as a juridical proposition possesses even before being enacted and even after it is repealed (see Del Vecchio 1911). Accordingly, one would also need to admit that even a proposition of natural law, which for Del Vecchio can only be a proposition deducible from reason alone, has a juridical form on a par with positive laws. As a result, the only difference between positive law and natural law will rest on imperativeness and coerciveness, which are the characteristics typical of the positivity of law. However, one can no longer see what purpose this concept of law serves.

For instance, the legal form of slavery is curiously defended by Del Vecchio not on the basis of the positive laws that allow slavery but on the ground that the concept of slavery possesses the formal characteristics of law, being a form of property. Thus slavery realizes the *concept* of law but not its *idea*: "It is legal

of the numerous translations of Del Vecchio's works. The influence of this theory also extends beyond neo-Kantianism. One need only note that Bobbio's distinction among the approach to law, the theory of law, and the ideology of law can in some respects be considered a reworking of the three-dimensional theory of law (Bobbio 1965a, 112–4).

but not just" (Del Vecchio 1962, 368; 1922, 89). However, if legality is independent of positive legality, then we cannot see why the prohibition against slavery cannot be considered legal in addition to also being "just." In short, it is impossible to maintain the validity of unjust law without giving weight to positivity in the concept of law.

Moreover, since the form of legality is independent of positivization, it would seem that any coordination of social actions is in itself "legal." It follows, however, that the role of the ethical principle is lost, as it is lost the distinction between law and other social rules, which are likewise bilateral and external.

But in reality, if we are to fully appreciate Del Vecchio's thought, we will need to consider his well-known investigation on justice, where legality itself is linked to a formal concept of justice, which in turn is more easily connected with justice in an ideal sense, conferring a more unitary dimension on legal-philosophical reflection (see Del Vecchio 1924).

In the last phase of his thought, Del Vecchio moved increasingly closer to a form of rationalist or metaphysical natural law theory, a fact attesting the demise of neo-Kantian legal philosophy.

Back in 1921, a keen, though much discussed, critic of neo-Kantian legal philosophy, understood to encompass both Stammler's and Kelsen's version, highlighted the aporias and weakness of this conception, identifying them in the rigid separation between transcendental forms and empirical reality; in the rejection of the Kantian "thing in itself," in such a way as to prevent the ideas of reason from having a regulative and normative role; and in the very decline of the object of legal science (see E. Kaufmann 1921). The same author later noticed the tendency of the time to pass from a neo-Kantian epistemology to the ontology of Aristotle, Aquinas, and above all a reinterpreted Hegel (cf. E. Kaufmann 1931). In short, the division between the nature of man and the nature of law was challenged.

In effect the neo-Kantian conception contains insurmountable aporias. The main difficulties derive from the "positive" character of law, which the neo-Kantians certainly did not intend to challenge. And yet, subjecting legal positivity to logical-formal conditions of a Kantian type doubtless meant recognizing its inadequacy for the purpose of defining the nature of law. For this reason the neo-Kantian conception of law has been considered as collateral or complementary to legal positivism. In this very view, however, lay a trap, in that the increasing importance of the formal legal relations was destined to obscure the defining role of legal positivity.

It has also been shown to be impossible to formulate a logical concept of law wholly indifferent to values. What does the neo-Kantian concept of law refer to? The attempt to answer this question made it necessary to either return to facts, forsaking the universality of law, or to take the path of values, conferring greater cognitive importance on the idea of law (see Treves 1934).

1.1.3.2. Law and Values

Taking the *cultural sciences* seriously meant searching for a connection between facts and values, something that Kantian orthodoxy did not allow. Thus a heterodox strand of thought developed that also proved attentive to Hegel's teaching. Attention to method was not pursued to the point of losing sight of the meaning of the object of study.

To better illustrate these problems I will turn to a thinker whose writings on law are sparse but who nonetheless exerted an underground influence on legal-philosophical speculation in the first half of the 20th century (see Hobe 1973, Carrino 1983). Emil Lask (1875–1915) clearly rejected metaphysical natural law theory, arguing that it Platonically duplicates legal reality.[12] Only empirical reality exists, but as Rickert had observed, this reality is "irrational." From a philosophical point of view, this same reality is "the scene or the substratum of transempirical values or meanings of general validity" (Lask 1950, 4). Legal philosophy looks at reality from the standpoint of absolute values: It reflects on the meta-empirical meaning of empirical law, and in this way it rejects both metaphysical natural law and relativist historicism.

> Natural law wants to conjure the empirical substratum out of the absoluteness of value; historicism wants to conjure the absoluteness of value out of the empirical substratum. (Lask 1950, 12).

Here I would only like to stress the nonpositivist aspects of this theory of law. Lask thought that the only possible form of natural law theory was the metaphysical one. But he was wrong.

In the first place, for Lask, law is characterized by typical values, which can certainly be viewed in light of the idea of justice, but the latter in turn is worked out on the basis of different conceptions of the world. These legal values can be perceived only in their operativeness in historical life, and yet they preserve their absoluteness, that is to say, they remain outside the world. In this concretizing of values into norms, a finalistic conception of law is revealed on which the production of legal norms, institutes, and concepts is linked to an idea of purpose that governs the correctness of law. In general, the process through which law is formed is teleological.

The idea of purpose, as we have seen, was also present in Stammler, but it was still generic and in substance individualistic. Things change when Lask maintains, following Hegel and Gierke, that empirical law can take on a universal meaning only if connected with a specific social value, the transpersonal one of community life, displacing Stammler's atomistic ideal (see Lask 1950, 17ff.). What comes into relief, then, in an outlook that can be considered Aristotelian, are goods and purposes not proper to individuals singly

[12] On Lask see also Section 1.4 in Tome 1 of this volume.

considered but to individuals bound to the life of a human community, even though Lask insists on the distinction, previously underlined by Wilhelm Schuppe (1884), between an empirical use and a transcendental use of the teleological principle.

> The destination (*télos*) immanent in particular relationships of life, such as property, family, rank, class, or state, is to provide the "objective and real principle of legal philosophy." (Lask 1950, 15)

So there are goods or values that can only be attained *through* law and *in* law, and this is a typically natural law perspective. The real object of legal science is law with its world of values and not only the laws or statutes (cf. Lask 1950, 38).

Another idea that gains ground is that the phenomenal substratum requires reference to values and that these differ from one another owing to the difference in the substrata by virtue of which they are valid (*hingelten*). And in this way, doubt is implicitly cast on the asserted irrationality of the substratum.

If there are values specific to law, even if tied to a given conception of the world among others, then it can be said that there is a "nature" of legality in the Hegelian sense of the objective spirit and that there are tasks that must be performed by the human community. And this is a natural law principle set in the world of history and culture. Lask takes up Jellinek's doctrine of the "ethical minimum," a minimum core of common ethical ideas seen as the internal structure of socio-typical value.

The doctrine of the value typical of law also has the effect of no longer interpreting law itself as a social technique in the service of extrinsic ends (something that Lask wrongly accused Kantian individualism of). Law can instead be viewed as much more than a simple means: It can be understood as a fundamental element in the articulated structure of the objective spirit (see Lask 1950, 13). Here, too, we can recognize a nonpositivist attitude.

It can therefore be claimed that a necessary condition for a conception to be considered nonpositivist and as open to natural law theory lies in its consideration of law not only as a fact and an instrumental value but also as a value in itself, that is, not only as a means but also as an end in itself. At this point the central problem of legal philosophy becomes that of the relation between law and value.

As far as value is concerned, there are only three possibilities: a form of knowledge can be *blind* to value, it can be *connected* to values, or it can *itself* be valuative. In the two latter cases the discussion is about the objectivity of value. As is well known, in the first decade of the 20th century the controversy over values (*Werturteilstreit*) was decisive in defending the scientificity of the social sciences and their independence from politics. The value-free principle, deriving from the impossibility of any rational and objective knowledge of values, did not in the least imply that values are arbitrary, contingent, or purely emotional, or even that the social sciences can do without them. The relation-

ship to value is endowed with some intelligibility based on our understanding and recognition (*Bekenntnis*); otherwise, it would be a baseless act of faith.

In any case, as we have seen, one cannot avoid considering law as geared toward values and aiming at typical values as distinguished from the canonical values of truth, goodness, and beauty. Gustav Radbruch (1878–1949), carrying forward the legacy of Lask, sums up the latter's legal philosophy as follows: "Law is the reality whose meaning [*Sinn*] is to serve justice" (Lask 1950, 75).[13]

To understand in what sense Radbruch's conception represents a further small step toward natural law theory, we need to pay attention to some evolutionary elements.

In the first place, necessary consequences are drawn from a consideration of law from the viewpoint of the world of culture, in which Is and Ought in some way meet, thus resolving the incommunicability that Kantianism typically sees between them. Legal normativity can be understood only insofar as it is linked to cultural facts that identify and concretize it. This makes it possible to put to good effect Lask's idea of the interrelatedness of methods in the study of law, a necessary outcome of the interconnectedness of Is and Ought.

Radbruch fully consciously sought to bring to fruition the conception put forward by Stammler, who had developed the role of the idea of law in legal philosophy but did so only in a "methodic" sense. It was now necessary to give it a "systematic" dimension, since the core meaning of law lies wholly in its idea, that is, in its being oriented toward the value of justice. The result is an overturning of Stammler's conception: The concept of law is considered a mere substratum that must be illuminated with meaning, indeed a meaning that cannot even be formulated without reference to the idea of law: "The concept of law can be defined only as the reality tending toward the idea of law" (Radbruch 1950, 69). The idea of law is obviously inspired by Stammler's right law, again taking a neo-Kantian outlook (Wiegand 2004).

Driven by this relation to justice as a value, legal-philosophical reflection takes on greater internal compactness. It is not divisible into separate research sectors, as in the triadic theory of law, and becomes a global and unitary enterprise. Its task is to understand law through its ideal type, that is, through all its most elevated paradigmatic aspects, with no exceptions. Hence Radbruch is against a reductionist conception of law, whether it is the kind that disregards the merit of law or the kind that disregards its effectiveness. Law is now fully considered as a distinctive cultural object not to be confused with power or morality. None of the particular cultural instantiations exhaust the potentiality of the ideal type, and they all manifest the great mutability of cultural products, but always within the same ideal frame. However, it would be improper to set this scheme of thought next to the model of the relation between

[13] On Radbruch's Formula see Chapter 2 and Section 9.1 in this tome, and Section 10.2.2 in Tome 1 of this volume.

the principles of natural law and their historical concretizations, since the idea of law captures not the ideality but the global sense of legality and its typical praxis.

Law is not justice but a complex and specific way of *relating* to justice. Indeed, if we examine all the aspects that according to Radbruch are present in the idea of law, we realize that the latter is internally and radically conflictual, both because of the conflict of values that constitutes it and because of the opposition between value and contingent reality. For Radbruch, the values present in the idea of law consist in justice, purposiveness (*Zweckmässigkeit*), and legal certainty. Justice is seen as "an empty category that may be filled with the most varied contents (cf. Radbruch 1950, 131). It is a formal value, linked to equality and equity, but is not formalistic, because it controls the way we can formulate and interpret the content of law. Purposiveness concerns the content of law, and so the suitability of the means to the end pursued. This process of realization has a political and particularizing character, and precisely for this reason it is potentially opposed to the general equality of justice. Precisely at this point we meet Radbruch's so-called relativism (see Spaak 2009). The choice between political values cannot be scientifically grounded but is rather entrusted to our judgment according to conscience, which must not be confused with mere arbitrariness. In any case the sphere of choice is not infinite but can be referred to three constellations of political values: individualistic, trans-individualistic, and trans-personalistic. This means that general political aims are also subject to the general condition of significance. Lastly, there is the question of legal validity, which is linked to positivity, and yet it is also subject to value judgments, which makes certainty functional to peace and order: "Justice is the second great task of the law, while the most immediate one is legal certainty, peace, and order" (Radbruch 1950, 118).

The framework of this conception is undoubtedly positivistic, both because of the formal character of justice and because of the priority given to certainty, but it is supported by the conviction that a certain degree of justice will in any event be achieved by the very *form* of legality. As we know, this conviction would subsequently be proven wrong, and then Radbruch would show he was not prepared to renounce justice for certainty, or substantive justice for merely formal justice.

> Where there arises a conflict between legal certainty and justice, between an objectionable but duly enacted statute and a just law that has not been cast in statutory form, there is in truth a conflict of justice with itself, a conflict between apparent and real justice. (Radbruch 2006b, 6–7)

In order to emphasise the positivistic orientation of the first phase of Radbruch's thought, an assertion is often invoked that is entirely contrary to the famous Radbruch's formula: "It is the professional duty of the judge to validate the law's claim to validity, to sacrifice his own sense of the law to the au-

Gustav Radbruch (1878–1949)

thoritative command of the law, to ask only what is legal and not if it is also just" (Radbruch 1950, 119). But if it depended only on that, then even Cathrein ought to be considered a legal positivist philosopher. In reality, as Stanley Paulson (2006) has rightly pointed out, the positivist orientation of Radbruch's first phase is certainly not founded on a separation between morality and law and carries with it a theory of justice or of the way in which law is related to justice.

In effect, law proceeds by successful and unsuccessful attempts alike, which nonetheless remain formally valid in view of the good of peace and order. However, the fact remains that they are "failures," that is, they do not fully bring out the nature of law, which is to be just. In any case, human works of justice are never endowed with absoluteness, so they cannot claim to prevail over individual conscience (see Radbruch 1950, 118).

Against true natural law philosophy, Radbruch makes two accusations that are in fact not new: that this philosophy defends the scientific intelligibility of values and their enactment, and that it volatilizes the material substance of law, thus undervaluing its resistance to values, or losing sight of the historicity of law (see Radbruch 1950, 121). Even so, he does not make the nature of law wholly dependent on its historical sources, and specifically on those of the state, which undoubtedly controls its contents (purposiveness) but not its form. Just as science preserves its autonomy even when its results are used by the state, so law—a tool of the state—withstands every improper use and imposes its conditions on the political will (cf. ibid., 199). At least this is the conviction that drives Radbruch in his first period.

Neo-Kantianism and the philosophy of culture did away with the couplet of 19th-century legal positivism based on the conjunction between the facticity thesis and the separability thesis. But they also rejected the couplet of natural law doctrine based on the conjunction of the normativity thesis and the morality thesis. They thus inaugurated that search for the third way that is still underway today. Is this an enterprise that can hope for success? Radbruch started to move in this direction, but on the horizon there already loomed problematic issues regarding legal normativity, or the type of constraint created for users of law, first among whom the judges. But this issue cannot adequately be addressed without first specifying the ambit or scope of legal normativity and the object of legal science. Can law be reduced to statutory law?

1.1.4. Anti-Formalism and Natural Law

Legal formalism dealt with methods of investigation and the construction of concepts, taking as its empirical object the normative datum of the state's positive law. But now we may want to ask whether positive law itself can fully be identified in this way, and whether it is necessary to go beyond normative statutes. This new attitude can be captured in the dictum "Law does not

dominate but rather *expresses* society" (Cruet 1908, 336; my translation, italics added).[14]

The antiformalist reaction, already very much present in the last decade of the 19th century, was given a new lease on life by the reaction against the exegetical school in France and by the debates on the application of the German Civil Code (BGB) in Germany, and it lasted until the eve of World War II.

Legal antiformalism is a label that generally encompasses a heterogeneous cluster of theories of law, prominent among which are the sociological ones. Distinctions and differentiations can also be made by looking at the particular aspects of law and the legal practices from which this current proceeds.

These aspects can in principle be said to lie in the general problem of the origin and purpose of law and in the more specific one of the sources of law and the way positive law ought to be interpreted and applied.

This radical change in the approach to positive law affords new opportunities for natural law to make its voice heard, though antiformalism often distances itself from it. But we must not allow ourselves to be conditioned by similar statements, because natural law as a problem can hide in other guises. The historical school of law, too, had been a fierce adversary of natural law, and yet the method used by German Pandectism—a method the historical school eventually endorsed, not only because of its Scholastic conceptualism but also because of its universalistic pretensions—had aspects that undoubtedly savoured of crypto–natural law (see Wieacker 1952, 228ff.). The presence of a natural law vein in sociological theories of law has been stressed, among others, by Kelsen (1911, 16; cf. also Menzel 1912) as well as by Bobbio, who regarded them as "a form of updated natural law theory" (Bobbio 1965a, 141; my translation).

1.1.4.1. The Living Law

In general, antiformalism rejects the formalist thesis that positive law exists only when legal propositions are formulated and made official. If it is true that law has a practical character and is constructed in view of a purpose, as Rudolf von Jhering (1877–1883) showed, then the existence of law can be said to already start with its initial formation in social life. The science of law has to be able to describe this process by which positive law is formed. So, for example, in the 1913 work *Grundlegung der Soziologie des Rechts* (Foundations of legal sociology), Eugen Ehrlich (1862–1922) sums up the idea as follows:

> At the present as well as at any other time, the center of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself. (Ehrlich 2002, LIX)

[14] The French original: "Le droit ne domine pas la société, il l'exprime."

Social relationships are thought capable of generating legality on their own (they are jurisgenerative), preceding the possible official formalization of law. From this standpoint, natural law can no longer be accused of not being true law by reason of its not having been positivized or formalized, though the accusation that it is ideal or unreal law stands. In this connection, Ehrlich links the theme of natural law to legal philosophy, which in his opinion only deals with the legal ought, while the sociology of law as a theoretical science of law (*Rechtswissenschaft*) deals with the facts of law, those that Jellinek called "normative facts," according to the outlook of a positivism that in truth is too elementary and naive. But Ehrlich, one of the founders of the sociology of law, was not a philosopher (see Villey 1968, 353): He was a historian of law looking to recover what had been lost in the teaching of the historical school, that is to say, the view that law is rooted in the social order.[15] We should now take up the question whether and in what sense natural law theory is present in this theoretical science of law.

The sociological conception of law undoubtedly has the same enemy as natural law: the thesis of the legal monopoly of the state and the negation of legal pluralism. With natural law it shares the thesis that laws as social rules guide the action of the members of society at large (rules of conduct) and are not only those primarily aimed at officials (particularly judges) for the purpose of resolving controversies in a certain way (rules of adjudication). The sociological conception thus also shares with natural law the thesis that coercion is a secondary trait in the definition of law (see Ehrlich 2002, 61), in that law is such to the extent that it is accepted by the members of a community (*Anerkennungtheorie*). Furthermore, likewise similarly to natural law theory, the sociological conception rejects the separation of law and morality and so the idea that judges may not decide cases on the basis of rules that do not issue from the state (cf. ibid., 39–40).

The strong suit of this conception consists in its showing that "the practical concept of law" is in fact very different from that prefigured by the legal science of the time, which therefore stands accused of being prescriptive and even ideological. Indeed, both judicial decision-making (see Ehrlich 1903) and legal reasoning in general (see Ehrlich 1918) are informed by psychological and social factors and are very far from confining themselves to logical deduction from norms. Hence the attention to the ethics of the legal profession and to legal science seen as an exercise of practical reason (*praktische Jurisprudenz*).

Lastly, we have to remember, and stress, the conception of "living law," that is to say, the "law which dominates life itself even though it has not been posited in legal propositions" (Ehrlich 2002, 493). Much more than statutory law, the living law captures the idea that law isn't so much a specialized social technique as it is what guides human behaviour. Once again this idea is close to

[15] On Ehrlich see also Section 22.3.1 in this tome and Section 3.3 in Tome 1 of this volume.

natural law theory, or at least it could be defended from that perspective (see van Klink 2009).

Despite all these possible similarities, Ehrlich's conception is actually naturalistic rather than like natural law. Like Otto Gierke, Ehrlich is interested in the origin of positive law and finds it in "the inner order of associations" and the order of human groups, which spontaneously organize in response to increasingly complex needs and interests. When Ehrlich turns to the problem of distinguishing legal norms from other social norms, he resorts to the feelings of the members of social groups, reducing the problem to a question of social psychology. One may well wonder by what criteria a feeling can be identified as "legal," distinguishing it from others without having first cleared up the difference between law and nonlaw. If the sociology of law as a theoretical science of law needs to resort to social psychology to define the concept of law, this means that it cannot on its own achieve its explanatory objectives. Moreover, Ehrlich's social psychology is vague and approximate and is exposed to the charge of irrationalism. Undoubtedly, among the driving forces of the legal development of social institutions there are also emotional factors. Ehrlich himself dangerously invokes the need for an intervention by charismatic and exceptional personalities in resolving the most arduous problems of justice and the common good (see Ehrlich 2002, 207). In the end, claiming that law is what people believe it to be does not solve the problem, especially when there are conflicting beliefs. But in this respect, too, Ehrlich's work is pioneering.

There is thus configured a third path next to the idea of law as will, as legal positivism claims, and that of law as reason, as natural law theory claims: It is the idea of law as feeling or empathy. This is a strand of thought also pursued by a contemporary of Ehrlich's, the Russian thinker Leon Petrażycki (1867–1931), who later distinguished official law from an unofficial or "intuitive law" independent of external authority, and in this he would be followed by other sociologists and philosophers of law down to our own day (see, e.g., Podgórecki 1974; Treviño 2007, part III).[16] Petrażycki considers natural law a form of unofficial law that is still primitive and naive: He thus sets out to replace it by disclosing its mechanisms of psychological projection (see Petrażycki 1955, chap. 6, sec. 33), and then anticipating someway Scandinavian legal realism (cf. Pattaro 2005, chap. 15).

In the natural law tradition, by contrast, there is the constant idea that law is a normative and not merely a psychological concept. Even the doctrine of the natural inclinations, which might make one think of Ehrlich's legal feeling, is worked out with reference to a concept of human nature based on a creationist theology and metaphysics, such that having an obligation is not confused with feeling obliged.

[16] On Petrażycki see Chapter 18 in this tome and Section 16.2 in Tome 2 of this volume.

The importance of Ehrlich's conception lies more in its *pars destruens* than in its *pars construens*, and more in its descriptions than in its explanations. His confutation of the paradigm of legal formalism is based on facts rather than on theory. He very effectively shows that the practice of law actually unfolds in a different way than is prefigured by official legal science, and on this very premise he challenges that science, though in his own turn he fails to offer a clear solution. He thus recovers some aspects of the natural law tradition (not always wittingly), but grafts them onto a positivist framework, seen as a refuge from neo-Kantian formalism. His appeal to the doctrine of the "nature of the thing" (*Natur der Sache*)—which unlike Gény he applies to the field of public law—could have opened philosophical reflection to the reasons why social life organizes itself in similar or analogous forms, but Ehrlich (2002, chap. 15) never abandons his empiricism, which is wary of generalizations. It goes to his credit, however, that he did not emphasize the collective will of the social group to the detriment of the individual, as other sociological currents would instead do (see, for instance, Levy-Bruhl 1951).

In conclusion, sociological antiformalism claims not only that law has social origins but also that it is often produced by society unintentionally, and above all that it already exists as effective positive law even before its possible conceptual or legislative transcription. And this is a step in the right direction compared to the historical school of law.

1.1.4.2. Positivist Neo-Thomism

While Ehrlich and the sociology of law emphasized the presence of nonstate law alongside that of the state, French institutionalism turned to the problem of the social origin of the state. The state is a macro-institution that has the same nature as all other social institutions. It is a construction built starting from the institution, the market, and the contract (see Maspétiol 1968). It is therefore necessary to work out a general theory of institutions, of which the law is an essential component; in other words, a theory of institutions is needed that is at once properly social and properly legal.

This theory is marked from the start by the cultural background of its founder, Maurice Hauriou (1856–1929), a scholar of administrative law who at the same time professed himself a liberal, a Catholic, and a follower of Aquinas's philosophy (see Millard 1995, 386–87).[17] As a liberal he was linked to the 1789 Declaration of the Rights of Man and of the Citizen; as a Catholic he took an active part in the cultural renewal of the pontificate of Leo XIII and is thought to have been close to the political-religious movement known as Le Sillon and to the milieus of liberal Catholicism; as a Thomist philosopher he did not look back to neo-Scholasticism but pursued a personal synthesis of his

[17] On Hauriou see also Section 12.2 in Tome 1 of this volume.

own in which major influences of Bergson's and Durkheim's thought can also be noticed. In any case his stated objective was to show that Christianity is a driving force of civilization capable of building on the advances of modernity (see Jones 1993, chap. 7).

He was hostile to idealist subjectivism and behavioural social science, mistakenly suspecting that his colleague Léon Duguit was a proponent of that discipline. The dominant idea was the continuity between nature and spirit, and so between the natural and the cultural sciences, seeing analogies and correspondences between biological processes and social ones—a typically Bergsonian idea that, as we know, would reach its theological conclusion in the thought of Teilhard de Chardin. In French institutionalism we see the application of social vitalism to the theory of law in the form of objective idealism.

Hauriou was avowedly an advocate of natural law. But in his strictly legal writings he spoke very little about it, and in his theoretical work, the 1925 *La théorie de l'institution and de la foundation: Essai de vitalisme social* (Theory of institutions and of foundation: An essay on social vitalism, Hauriou 1970), he says nothing at all about it. Accordingly, it would seem logical to turn to the occasional writing in which he speaks more at length of natural law. And here it can be ascertained that, in his view, natural law is not about guiding institutions and is not even to be identified with justice but rather consists in a set of rules relating to the defence of individual rights. Starting from the general principle that "law is a sort of conduct geared toward order and justice" (ibid., 795; my translation),[18] he conceives natural law as that amount of justice that is guaranteed in every true legal order, which is tasked with reconciling the need for stability and continuity with the need to respect people's rights. So natural law is not ideal law, for that would amount to confusing it with justice, but rather law already present on its own in human history. The precepts of natural law rest on the data of the natural history of humankind and on the process of civilization but are manifested as a historical belief in egalitarian and democratic principles. This is a naturalistic vision, and it has aptly been defined "a positivist neo-Thomism" (*un néotomisme positiviste*: Brimo 1969, 65). Without any justification, Hauriou upholds both the absoluteness of natural law and its cultural and historical character. He defends it strenuously, so much so that he accuses Savigny of having deprived legal science of the contribution of natural law (see Hauriou 1918),[19] but at the same time, like a true positivist, he does not assign it any place in legal science.

[18] The French original: "Le droit est une sorte de conduite qui vise à réaliser l'ordre et la justice."

[19] In France, World War I provoked a reaction against German legal science, deemed responsible for the conflict, and so also a rebirth of natural law doctrines, seen as typical of Latin peoples (see Battaglia 1929, 79).

Hauriou's real contribution to the doctrine of natural law lies not only in the view of public liberties as part of constitutional legitimacy on account of their supra-legality, superior to the written constitution itself (and here he is referring to the 1875 constitution, which did not include a bill of rights; cf. Hauriou 1923, 298), and not only in the conviction that the general principles of law are not enacted but on the contrary are "discovered" by the judge, but also and especially in his concept of institution.

In this connection, Hauriou's approach to positive law cannot adequately be understood without bearing his Christian and Thomist inspiration in mind. The idea of the work to be realized in a social group or for the benefit of this group is certainly not Hegel's idea but is an even more refined way to prefigure the concept of practical reason, that is, of reason that guides action and makes it alive from within. Hence positive law presents itself as a social practice governed by reason and not by will. Hauriou insists that "the guiding idea of the enterprise" (what Hauriou calls an *oeuvre*) is not to be confused either with the notion of end or with that of function, because it remains immanent in the process of its realization and is not even exhausted by it. This means that positive law is in an ongoing state of becoming, even as it imparts stability to the institution that has produced it, and it contains its own yardstick. Positive law is pervaded by the dialectic between determinacy vs. indeterminacy, so its historical concretization is never completed once and for all.

> There is the domain of function: the administration, and a determined group of public services. Then there is the domain of the directing idea: the political government, which works in the undetermined area. And the fact is that the political government is of much more vital interest to citizens than the administration, which shows that what is undetermined in the directing idea has more influence over men than what is determined under the form of function. (Hauriou 1970, 102)

The proper relation between positive law and institutions is not the relation between a tool and its function or between a technique and its purpose, but is rather a means-end relation in which the means are inherent in the end itself, since that confers stability over time, without which institutional enterprises cannot be such. This relation of means to end is precisely that of Aristotle and Aquinas.

Lastly, Hauriou appears to be very attentive to the process by which the guiding idea is interiorized by those who take part in the institutional enterprise: He thus rejects an extrinsicist vision of law, though some have accused him of collectivism (see Platon 1911) and even of being a precursor of Nazism (on the manifold interpretations, see Gray 2010, 33ff.).

The task of the theoretical jurist is not to deal in natural law, but to work out a scientific conception of positive law. Still, it is a task inevitably influenced by cultural and philosophical presuppositions. Hauriou's conception is undoubtedly marked by an unspecified and implicit natural law theory.

Despite the philosophical uncertainties, Hauriou brought to legal science a principle that belongs to the history of natural law: Cooperative activities are possible only if there is also a common direction despite the variety of intents and interests. On this view, the theory of institution is equipped to embrace the concepts of authority and the common good, which as is well known belong to the Thomist natural law tradition, a tradition that other exponents of French legal institutionalism indeed also look to.

The first of these is Georges Renard (1876–1943),[20] a disciple of Hauriou's who, after a first work of a more legal character (see Renard 1930), tried his hand at the arduous enterprise of setting out a general philosophy of institutions (see Renard 1939), a philosophy he develops applying the concepts distinctive to Thomist metaphysics and, above all, that of the analogy of being (in the footsteps of Lachance 1933). We have now entered that second phase of Thomism marked, as noted, by a certain independence from traditional Scholasticism.

According to Renard, the notion of institution is analogical, and so is that of law. In this way he seeks to overcome all dualisms and also to pursue a social pluralism positing a unity across differences. Here we will not be concerned with the philosophical importance of this conception of law or with its fidelity to Aquinas's thought, both of which have been authoritatively and emphatically called into question (see Bobbio 1936). What is important to stress is rather the way in which natural law is regarded.

Renard does not proceed from precepts of natural law from which to derive positive law, as was instead usual in neo-Scholasticism. Natural law must not be seen as an ideal model or even as a source from which to derive positive laws but as "the analogical reason of law, the *ratio juris*" (Renard 1970, 293), or what links up the different positive legal systems and is not exhausted by any of them: "The analogical reason is only a potency with limitless possibilities of actualization" (ibid., 300). As Renard says, quoting Lachance, natural law is "sheer law." In fact natural law is not understood to exist outside positive law, just as man does not exist in general, since only concrete men exist. Even so, while the concept of man is univocal and not analogical—and according to classical metaphysics it points to a specific essence—Renard's concept of law does not have any substantive content of its own and dissolves within the social group into a set of formal relations among order, authority, and the common good. The result is that of more or less justifying *any* legal order, thus seriously undermining the possibility of using higher criteria by which to judge the justice of positive law. And this leads to social conservatism, or at least it deprives natural law of its function of criticizing social injustice, something for which there was a great need at that time in particular.

[20] Aside from Renard, others who claim to be followers of Aquinas are Joseph T. Delos, who applied the theory of institutions to international law (see Delos 1931), and Georges Gurvitch, who upheld a transpersonal conception of law (see Gurvitch 1932).

Lastly, to Renard we owe the formula "natural law with a progressive content" (Renard 1927, chap. 4; my translation). The formula is set in opposition to the previously mentioned one by Stammler, "natural law with a changing content," but it has the defect of not setting conceptual limits on the legal sphere. Jacques Leclercq would try to recover this line of thought in the formula "natural law with changing and progressive applications" (Leclercq 1927, 45; my translation), but that, too, remains vague.

French institutionalism is very significant in the history of natural law theory, in that it develops some perspectives on society and law that encourage us to reflect on the problems natural law is concerned with: the plurality of the sources of law; antistatism, in opposition to Raymond Carré de Malberg; social pluralism; and the search for shared ends and values (see Gurvitch 1935). The influence of these convictions has been much greater than has institutionalism as such. Still, the increasing emphasis on the social objectivism of legal rules by comparison with the conception defended by Hauriou himself, who also defended natural rights, helped to highlight two lines of thought within natural law theory: the traditional one of neo-Scholasticism, based on the tenets of natural law, with the risk of turning them into a legal order superior to the positive order; and the one that emptied natural law of specific contents to make it the principle of the objectivity of the positive legal order, with the risk of depriving it of its critical function. In either case, the subjective rights of the person were underdetermined.

1.1.4.3. Filling the Gaps and Finding the Law

The orientations so far examined are antiformalist by virtue of their approach to the study of law. Law has to be regarded as a phenomenon which derives its original structure from society and which is aimed at making social life possible. The legal formulation is considered a product of the social origins of law. But there is also another antiformalist orientation, one that proceeds from the problems connected with the application of the written law and reaches the conclusion that a written text alone is insufficient in identifying what the law is. What is contested is the principle of the completeness of a legal system as such, a principle that follows as a corollary of the dogma of the legislator's omnipotence. What is claimed is that there needs to be an appeal to legal resources not governed by the legislator's will. This can be considered a "jurisprudential" antiformalism understood in both senses of that term as referring to legal practice and legal science.

This orientation, too, even more than the previous one, paves the way for a rebirth of natural law. Corresponding to the different ways of addressing the problem of filling legislative gaps and finding the law are different attitudes to natural law.

1.1.4.3.1. Irreducible Natural Law

The French jurist François Gény (1861–1959) was the first to challenge the positivistic vision of the sources of law in its totality within the frame of a theory of legal science.[21]

Gény starts out from the interpretation of the written law with a view to establishing the legislator's will, which he recognizes as having a central role, though not in the formalist and literal sense of the exegetical school or the formalist and conceptual one of the Pandectist method. Since there are often lacunae in the written law in relation to the demands of the concrete case, the problem arises of how to fill those gaps. To this problem Gény devotes most of his theory of legal science. This means that in his opinion the shortcomings of the written law are much greater than is commonly thought, and also that there are other sources of law to which to have recourse in working out what the law says. The task of filling the gaps belongs to the jurist, not the judge, because the nonformal sources of law demand two sorts of work, on the one hand finding or recovering the law and on the other giving it a technical elaboration. If, instead, the main task were the judge's, we would have to either acknowledge the existence of an already formed natural law or entrust the judge with a role as a *maker* of law. Gény rejects both solutions. The search for the law has to be both *free*, that is, not constrained by positive authority, and *scientific*, that is, founded on objective elements, or *données* (see Gény 1954, vol. 2, 78).

These nonformal sources present themselves as facts, and in this way a positivist conception of science is maintained, but among these facts there are also the demands of reason and appeals to values, and this takes us away from mere factualist empiricism. Gény is a follower of Bergsonian philosophy and subscribes to its attempt to harmonize philosophical positivism with metaphysics and to its recourse to intuition as a form of knowledge (see Oppetit 1991). There is thus prefigured both a broader conception of natural or nonpositive law—expressed in the concept, deriving from Montesquieu, of the nature of things ("la nature des choses": Gény 1954, vol. 2, 75–9; cf. Villey 1965), formed on the basis of a combination of elements that are real, historical, rational, and ideal—and a narrower and more specific conception that identifies natural law with the rational datum. As a testament to the major influence of Gény's thought, it has also been noticed that the real or natural datum finds greater emphasis in Duguit, the historical one in Saleilles and Hauriou, and the ideal one in Ripert and Josserand.

In Gény's work the presence of natural law is at one and the same time pervasive and elusive. Volume 2 of his main work is expressly devoted to *L'irréductible droit naturel* (the irreducible natural law), and Volume 4 turns to the problems of the conflict between natural and positive law (Gény 1914–

[21] On Gény see also Section 12.5 in Tome 1 of this volume.

1924). Gény distinguishes not only ideal law from natural law (ibid., vol. 1, 52–3) but also and especially, in an open controversy with Cathrein, moral from legal natural law (ibid., vol. 4, 217; see also the criticisms in Dabin 1928, 456–7). Natural law has an integrative and subsidiary function in comparison with its function in the classical and neo-Scholastic approach, for it is reduced to the necessary minimum and consists of universal principles that are infinitely mutable in their application. Gény distances himself from Stammler's natural law with variable content, because he defends a fixed and stable centre of evident principles with ethical and legal but highly indefinite content. This "irreducible natural law" is seen as a framework law or, as Rommen says, "a skeleton law" (Rommen 1998, 151).

One must not seek an authentically philosophical perspective in Gény's thought. From this point of view he is an eclectic, as is appropriate for a jurist to be and as is usually the case with all those who accord primacy to the concrete experience of law and do not intend to sacrifice that experience to an abstract conception. The central idea is that natural law, like positive law, belongs to the practice of law and to its historical execution.

As much as Gény broke the positivist streak of the 19th century, his thought also gave dissatisfaction to many moderate legal positivist theorists (see Ripert 1918) and to natural law theorists themselves (cf. Villey 1963). That said, Gény's natural law theory is innovative in several respects: (1) His way of conceiving natural law is rigorously secular, or at least it is so in its intentions (see Gény 1933);[22] (2) in seizing on natural law to defend the autonomy of law as such, Gény, polemicizing with Salleilles, does not resort to external props (like the spirit of the people, the social bases of law, public opinion, or popular consent) but rather appeals to custom and the nature of things; (3) his use of analogy, clearly distinguished from interpretation, as the logical structure proper to legal science makes possible the connection between written law and natural law; (4) natural law tends to be identified with the problem of the nature of law; and (5) Gény refrains from equating natural law in a narrow sense with the idea of justice, an idea that belongs to the ideal datum and has emotional characteristics linked to beliefs and intuitions and yet is also part of the object of legal science.

Unlike Stammler, Gény tends to treat all aspects of law—including ideal ones—in terms of scientific truth, because he has a conception of the experience of law as a unitary body that can be fully realized only if aimed at realizing justice at a given time and in a given space in accordance with appropriate rules (see Gény 1914–1924, vol. 1, 47–55). He is well aware, however, of the tension between law and justice, as can be appreciated from the attention he devotes to the right to resistance.

[22] In 1923, Gény established a chair of natural law calling it "Introduction philosophique a l'étude du droit" (Philosophical introduction to the study of law).

Unlike Gény, other French jurists also influenced by Bergson's thought have undervalued the rational character of natural law in favour of intuitive law, thus embracing a legal science grounded in feeling, or *Gefühlsjurisprudenz* (see, for instance, Le Fur 1937, and the commentary in Collina 2007).

1.1.4.3.2. A Transient and Frail Natural Law

Between the coming into force of the German Civil Code and the Weimar Republic there came the German free law movement.[23] It originated from the Society for Legal Science, founded in 1903 by Hermann Kantorowicz (1877–1940) and Gustav Radbruch, though the latter would subsequently to dissociate himself from the movement, as he was not happy with the term *freies Recht*, preferring instead *außerstaatliches Recht* (see Kantorowicz Carter 2006, 666). In 1906, under the pseudonym Gnaeus Flavius, Kantorowicz published the manifesto of this movement and titled it *Der Kampf um die Rechtswissenschaft* (The battle for legal science: Kantorowicz 2011) echoing Jhering's *Der Kampf um's Recht* (The struggle for law).

This movement, too, emerged in reaction to legal positivism: It sprang from the combined influence of the historical and the positivist schools in elaborating the German Civil Code. The central issue now was no longer only that of the gaps in statutory law but also that of its utter inability to account for the whole of positive law from manifold points of view. The first problem lies in the uncertainty involved in the recognition of the appropriate positive norm, both because theories of legal validity are not unequivocal and because concrete cases cannot be made to fall within univocal categories. The methods for interpreting norms are manifold and do not all lead to the same result. Logical methods of argumentation are in competition with one another: reasoning by analogy, argumentation *a contrario*, recourse to general principles, presumptions and legal fictions, the construction of legal concepts. In this situation jurisprudence, in the twofold sense as the science of law and as case law, is free to settle on the solution it prefers. And then the jurist and the judge are faced with the alternative between deciding according to their motivated subjective preferences, as the French judge Magnaud maintained, and looking for the best possible interpretation of the law (see Lombardi Vallauri 1990a).

As can be appreciated, the free law movement was interested in the tasks of the judge and not only in those of the jurist. Some proponents of the movement, such as Ernst Fuchs, worked in the legal professions. Legal science itself was seen as operative and creative, while Gény was still committed to his descriptive model. The free law movement deliberately abandoned the positivist

[23] On the free law movement see also Section 3.1 in Tome 1 of this volume.

model of legal science once and for all and opened up to the perspective of practical reason, though it did so in a confused way.

All these conditions certainly predisposed people favourably toward natural law, but it won't suffice to reject positivist legal theory by branding it as a form of natural law theory. In reality, the common way of thinking in natural law was very similar to that of positive law: In both cases the concern was ultimately to have a set of norms. Ronald Dworkin will consider this a semantic conception of law, against which he set an interpretive or practical conception. The free lawyers moved precisely in this direction. Their ambition was to modify the approach to positive law. The point was not so much to reveal the inadequacy of the state's law and the presence of other sources of law as to modify the concept of positive law itself.

Free law is all positive law, to be sure. However, the latter is regarded not as fully realized and defined from the outset but as a process always moving toward completion by working from normative materials of various kinds, including those originating from the state. Positive law is human work and constantly under construction. Among these normative materials there are undoubtedly some that are not positive, like the general principles of law, values, fairness, *rationes decidendi*, and principles of reasonableness, but none of that warrants our setting the free law movement next to a doctrine of natural law, because the decisive element lies in their foundation. The term *free* in *free law*, I would argue, has a very different meaning than it does for Gény, who understood it to describe scientific research as independent of political authority, whereas here *free* describes positive law itself, which does not in principle depend on any predetermined parameters, of either a voluntaristic or a rational character. *Free* means "incomplete." In this sense, the free law movement is against both positivist legal theory and the doctrine of natural law. Nevertheless, from the former there derives the conviction that law is founded on power, will, and choice, while from the latter there derives the demand that the choices made by the jurist and the judge should not be arbitrary but rationally justified.

In the 1906 manifesto, Kantorowicz mentions natural law on several occasions: "*The new conception of law presents itself as a resurrection of natural law in renewed form*" (Kantorowicz 2011, 2008). But he immediately clarifies that this novelty of "natural law of the twentieth century" consists in freeing itself from its universal and unchangeable character so as to take on a particularistic and historical one, so it has the merit of being the first and original form of free law as nonstate law. Obviously, this natural law has very little to do with Catholic metaphysics, still very much present in Gény's thought, and it rejects every form of Scholasticism. It is a natural law as "transient and frail as the stars themselves." Kantorowicz exemplifies that remark by making reference to Stammler's *Richtiges Recht* (Right law), Ehrlich's *Frei Rechtsfindung* (The free finding of law), Mayer's *Kulturnormen* (Cultural norms), Wurzel's *Projek-*

tion (Projection), Stampe's *Interessenwägung* (The weighing of interests), and Rümelin's *Werturteile* (Value judgments) (ibid., 2008–9).

The new ideals are sought in the social function of legal prescriptions and in the social effects of judicial decisions. Jurists and judges have to be inspired by the new postulations of appropriateness to the values of the people, of professionalism, of impartiality, and of fairness. If these are respected, "the movement strives with all its might towards a goal that contains all the others stated, the highest goal of all legal action: justice" (ibid., 2028).

The reference made to the values espoused by the people is clearly a reference to Savigny's thought, with the important difference that by that time the idea of an objective legal order specific to the people had been lost. Social relationships are understood through the people's consciousness about norms—a consciousness they develop as they interact in concrete situations—and are not universal but transitory and contingent, always changing as society changes. They are not based on human nature but require an act of recognition and of will by the people and an act of normative understanding by the jurist and the judge. It is worth mentioning in this regard that the Swiss Civil Code, enacted in 1907, contains the famous Article 1, authorizing judges to act as if they were legislators when no law is applicable. The attention paid to the judge's role, the interpreter's personality, and his or her emotions also explains the influence the free law movement had on American legal realism, sensitive to the distinction between explicit and implicit law (see Kantorowicz and Patterson 1928, 692; cf. also Herget and Wallace 1987).

The stress laid on the social perception of justice has led some scholars to claim that the free law theory indirectly paved the way for Nazi legal theory and practice, but this claim has been persuasively rejected (cf. Grosswald Curran 2002, 162). In any case, free law is not an invention of legal interpreters but is already present in social life in an implicit way and *in statu nascenti*.

In conclusion, one has to wonder whether the appeal to values as historically perceived—and ultimately the appeal to social consensus and common opinion in general—deprives legal theory of its critical strength, and so whether legal theory is compatible with natural law. As was noticed by one of the founders of the *Institut International de Philosophie du Droit et de Sociologie Juridique*, natural law at the start of the century found itself in this impasse: If it is unchangeable, it is contrary to life; if it is variable, it winds up being confused with the vague and dangerous concept of public opinion (see Le Fur 1937, 181).

1.1.4.3.3. The Aims of Law

The excessive weight given to the interpreter's individual evaluation of the law led the jurisprudence of interests (*Interessenjurisprudenz*) to seek a more objective basis on which to address the problem of normative gaps. For this reason,

recourse was made to an investigation of those interests that have been at the root of legislative norms, this for the purpose of evaluating norms anew.

The central idea is that law is a way to deal with the conflict among the interests present in every human society. Official law consists in the resolution of this conflict by political authority, but legislative gaps require a new evaluation by interpreters.

This definition of law clearly has a finalistic character (the teleological school). Once more, we can see here the influence of Jhering (1877–1883), according to whom law is created by its aims, while according to the proponents of the Pandectistic school and the jurisprudence of concepts (*Begriffsjurisprudenz*) the aims of law do not belong in its definition. So the effort was to better specify Jhering's orientation, identifying the aims of law in its underlying interests. But this, too, is a highly indefinite notion, which as Binder observed tends to have an empirical-descriptive character, thus losing its original teleological dimension.

Philipp Heck (1858–1943) specified that this was not just a matter of material interests but also of cultural tendencies (*Begehrungsdispositionen*), thus including as well the highest interests of humanity, such as religious or ethical ones (see Heck 1948, 33). But this should lead to diversification in the criteria for evaluating interests. In reality, this school paid attention to economic interests above all others, thus in some respects anticipating the economic analysis of law.

In the first place the judge will have to respect the legislator's solutions for solving conflicts among interests. If a norm presents lacunae, it will be necessary to integrate it, protecting those interests that according to the legislator are worthy of protection. But if cases come before the court that have not been taken into account by the legislator, then the judge has to behave as if he or she were a legislator. The preference accorded to analogy over the *argumentum a contrario*, a form of argument obviously favoured by formalism, makes it possible to see a continuity between the work of the judge and that of the historical legislator.

The fundamental novelty of the jurisprudence of interests consists in having introduced a new method for interpreting the state's norms, a method that rejects the idea, still present in the free law movement, of interpretation confined to the text of law. Not the text but the aim of law (or *ratio legis*) can show what its lacunae really are. So as we ponder over the relation between the jurisprudence of interests and natural law, it is to this novelty that we specifically have to look.

The official attitude of the jurisprudence of interests is one of opposition to natural law, since natural law is conceived on the model of the conceptualism of the Pandectistic school and all a priori conceptions of law (see Rümelin 1948, 7ff.). Legal science must instead start from the social facts tied to interests, and must follow their transformation into legal prescriptions, in which the extralegal dimension is still very much present. Accordingly, legal norms can

ultimately be found to derive from legal and extralegal concepts that are interconnected. In any case, concepts are an epiphenomenon and do not have any legal causality: "Law is not created by concepts but by interests, by the end pursued" (Heck 1948, 35).

In spite of the stated intents of the jurisprudence of interests, traces of natural law theory can be espied in that movement, and they can be summed up as follows.

To begin with, the choice between the formalistic or conceptual method and the teleological one is undoubtedly guided by a value judgment about the aims of law, a judgment that confers a specific meaning on law.

Secondly, resorting to interests and the conflict among interests is tantamount to seeking the genesis of law in social relations that are "natural," or at any rate certainly not created by the sovereign's will. There are also the interests of the legislators, who want their commands to be practicable (an interest in practicability, an interest of presentation). For this reason, according to Heck, it is not enough to refer only to the aim of law, for that causes one to lose sight of the conflict among real interests at its basis. The science of law looks well beyond the legislators' work, which is submitted to the jurists' judgment: It looks to real life or, as Heck puts it, it "wishes to serve everyday life."

Lastly, the web of interests goes far beyond the confines of a national legal system, and so legal systems should be conceived as open-textured. A merit of the jurisprudence of interests is to have appreciated the practical importance of comparative law. In the background one can glimpse the conviction that interests potentially have a certain intrinsic order and that law can go back to the original composition of interests.

Legal antiformalism, in all of the versions considered, is representative of two fundamental concerns: On the one hand is a concern with the connection between law and real life; on the other, a concern with the connection between legal science and the social sciences. The former is a practical concern; the latter, a theoretical one. They can coexist, on condition of subscribing to the view that inherent in the social relations of real life is an objective order which science can demonstrate and which constitutes a criterion for measuring, judging, and interpreting legal prescriptions. In this sense the aspirations of natural law can be considered in a way present, in different degrees of intensity, in legal antiformalism. After all, expressed in real life are not only facts but also values, and the two are inextricably interwoven. Consequently, legal science cannot avoid making value judgments, and the spurious idea of natural law as an objective social order has to accept the mutability and contingency of social life.

1.1.5. Beyond Formalism and Antiformalism

The conflict between formalism and antiformalism, which marked the first half of the 20th century, substantially developed around the question of how to

conceive legal science and its relation to other sciences. But it is also necessary to mention another direction of thought, driven by the intention to overcome the divide between formalism and antiformalism by challenging the primacy of legal epistemology over legal ontology.

The phenomenological orientation had limited resonance in legal philosophy, to be sure.[24] But, over and above any reference to Edmund Husserl's philosophy, it did wind up bridging legal reflection between the first and the second half of the 20th century. The motto adopted by this orientation was that of a "return to things themselves," that is to say, an effort to perceive the essence of law, without the filter of legal science and cutting through the law's historical manifestations, which are purely empirical and transient. From this perspective, law is a modality of intentional conscience concerned with social actions in which bonds are formed between the I and you in the form of rights and duties marked by reciprocity.

For the phenomenological orientation, the examination of social acts, which affect law (especially the act of promising, in private law, and that of commanding, in public law), has neither a factual nor a normative character but a purely theoretical and structural one. This vision of law is not based on concepts, which are built for abstraction, or on consent, which is not by itself a basis of truth, but on eidetic intuitions, which precede all experience and confer a meaning on it.

Law is considered to belong to a third sphere of being, clearly distinguished from that of facts and from that of values. Consequently, phenomenological description strips law of its practical character, both in the instrumental sense as a means of social utility and in the valuative sense as an embodiment of justice. The study of positive law loses all scientific importance and is demoted to the status of a mere technique, but the study of natural law is equally delegitimized, both on the theoretical plane, as belonging to an outdated form of metaphysics, and on the practical plane, since it, too, is a cultural phenomenon devoid of absoluteness and so of any capacity to found positive law. In short, true law is wholly separated from valid law and from just law.

Phenomenology paves the way for a new philosophical approach to law, distancing itself both from the social metaphysics of natural law theory and from the social science of positivism (see Bobbio 1934, 137).

Reinach (1883–1917) explicitly takes on the problem of the relation between his conception of pure law and natural law, which he rejects because of its ideal character and its unfounded universalism (see Reinach 1983, 133–9). He admits that in certain cases the propositions of pure law can help fill legislative gaps. He also admits that there is a problem of connection between essential laws and the particular communities of life in which they are realized. But for him these are wholly secondary aspects that do not concern the cen-

[24] On phenomenology of law see also Chapter 4 in Tome 1 of this volume.

tral objective of the phenomenological conception of law. In truth, however, if the practical character of the idea of law is denied, then we are talking about something different from what jurists, judges, and legislators deal with.

Despite this originality of phenomenological speculation, there is no doubt that its function is to highlight the meaning of historical social acts, connecting them with their eidetic structure, which certainly does not derive from human will. The world of social acts in their essential purity is not an artificial world. In this, phenomenology is very distant from a positivist theory of law. The reason for moving away from natural law theory, regarded as a purely deontological doctrine, is that according to Reinach these social acts apply not only to the human world but also to every imaginable world, that is to say, they are not founded on philosophical anthropology. Phenomenology aspires to rid itself not only of the psychological dimension but also of all anthropomorphism if it is to be pure theoretical thought. But this heady separation between pure ultramundane law and mundane empirical law is very difficult to maintain. It has been noticed in this connection that in fact, in spite of Reinach's intentions, not every content of positive law is compatible with his a priori law (see Seifert 1983, 227–30). Edith Stein (1891–1942) is aware of this. She traces the phenomenological roots of law to the person, understood as an intersubjective and empathetic being. Hence the possibility of critically judging the laws of the state (see Stein 1925).

Indeed, Gerhardt Husserl (1893–1973), the son of Edmund Husserl, deals with the relation between the essence of law and its positive force, taking the central problem of legal philosophy to lie in legal validity. This validity has a temporal and spatial character and, at the same time, a normative one (*normatives Sein*). The anthropological dimension thus reappears in the Heideggerian form of human existence as being-in-the-world (*in-der-Welt-sein*), and the world of positive law and that of pure law are connected (see Husserl 1955).

Every legal system has a temporal character and belongs to a determined life-world (*Lebenswelt*). But the circulation of legal ideas and the very continuity of positive law can only be achieved through a process of detemporalization (*Entzeitung*), making it possible to move from one vital sphere to another. This process brings out the fundamental legal structures, seen as nuclei of meaning stripped of their historico-temporal form and furnished with a claim to universality. This is not true natural law, because we are talking about truth propositions deprived of normativity and of ought. Nevertheless, without these normatively inert legal apriorisms, human orders and legal norms would not have an ultimate foundation, since pure and simple human volition is not a satisfactory justification for the nature of the thing called law.

So the phenomenology of law has shown up an aspect that undoubtedly belongs to the problems of natural law, which is to say that present in positive legal systems are persistent objective legal categories, common archetypes, and legal invariants that take on the particular form of life-worlds. This makes

it possible to speak of an identity of the legal sphere despite the differences among historical arrangements. However, natural law needs not only the universality of its categories but also the normativity of its principles. The *punctum dolens* of legal phenomenology lies in the relation between Is and Ought: On the one hand legal phenomenology belongs with those philosophies that separate the two worlds, while on the other it aspires to *overcome* this separation.

The phenomenological orientation would survive the very conception that brought it into being. Evident traces of these problems can be found throughout German legal thought in the wake of Pufendorf's *entia moralia*, reinterpreted in light of the concept of the "nature of the thing" as a *Sollenstruktur.* But we are now very distant from Reinach's original intentions.

The first rebirth of natural law thus happened simultaneously in different philosophical and cultural orientations and in different conceptual sectors. Catholic natural law theory worked out a complete conception that was made increasingly flexible and complex by the legal science influenced by it. Formalism progressively opened up to legal values, so much so as to include them in the concept of law. Antiformalism denounced the loss of the social bases of positive law and fought against statism. In this way, it came up against non-positive law, both because of the sources of that law and because of the indeterminacy of the state's law and the incompleteness of the legal system, with the consequent problem of the gaps and aims of law, and in reference to legal universals that are variously concretized in positive legal orders. By that time the problems of natural law had crept into the very theory of positive law. Dissatisfaction with 19th-century positive law theory was too widespread to be underestimated, and it was owed to both the concept of law and to the processes by which law is interpreted and applied, but the philosophical landscape was too fragmented and confused. Navigating between Is and Ought meant finding one's way between the rock of sociologism, which reduced values to facts, and that of neoidealism, which sublimated facts in the absolute spirit.

1.2. Natural Law and Totalitarianism

These intellectual vicissitudes of the concept of law were put to the test by an epochal event that deeply marked European history and split the 20th century in two. The advent of totalitarian regimes highlighted the inadequacy of legal formalism, the very easy drifting of antiformalism, and the political inertia of the metaphysical vision. Although the legal culture of the *Rechtsstaat* drew strength from a glorious tradition, it appeared incapable of fending off the economic and political forces at work in human history. We will limit ourselves to Nazi totalitarianism, because it drew on the legal culture at that time regarded as the most advanced in Europe.

1.2.1. Nazi Law

The heavy economic toll of World War I—coupled with the crisis of liberal individualism and the humiliating peace conditions imposed on the German people—contributed to the isolation of Germany from the strand of European culture that developed out of the Enlightenment. This also had immediate effects on legal culture, which had been deeply marked by German legal thought since the 19th century. That precisely German legal thought proved not just incapable of keeping the totalitarian state in check but was even willing to support it in many cases is a lesson in history that must not be forgotten. The Nazi regime was supported by great jurists like Julius Binder, Carl Schmitt, Ernst Forsthoff, and Karl Larenz (see A. Kaufmann 1983).[25]

As far back as 1922, Ernst Troeltsch clearly identified the antagonism present in Europe:

> Those who believe in an eternal and divine Law of Nature, the common nature of human beings and the unity of destiny pervading mankind, and find the essence of humanity in these things, cannot but regard the German doctrine as a strange mixture of mysticism and brutality. Those who take an opposite view—who see in history an ever-moving stream of unique forms, each of which is shaped on the basis of a law which is always new—are bound to consider the West-European world of ideas of cold rationalism and equalitarian atomism, a world of shallowness and Pharisaism. (Troeltsch 1934, 201–2)

In reality, neither legal positivism nor natural law theory can be listed among the main causes of totalitarianism, but neither did they pose a true obstacle to it, the former because of its exsanguine formalism, the latter because of its theoretical and practical weakness. The accusations the proponents of the two groups subsequently exchanged were clearly ideological, each seeking to turn history to its own advantage. Historical facts can disprove a doctrine only when deliberately and directly applied to it.

Whereas the neoidealist philosophy of Italian Fascism rejected both Catholic metaphysics and modern natural law theory, Nazi propaganda made abundant use of the expression *natural law*. Even so, we are clearly situated outside and against the natural law tradition, as can be appreciated by the overwhelming revival of natural law theory in postwar Germany.

Here we will confine ourselves to listing the reasons why Nazi culture was not compatible with natural law, as they are significant for the history of natural law theory in the second half of the 20th century.

Nazi law has an avowedly particularistic character. The intention was to restore Germanic law to its original purity. At the 1933 Leipzig Congress, jurists argued for the need to expunge from the law of the Third Reich all Latin influences, all universalistic abstraction, and the germs of liberal individualism.

[25] On Nazi legal philosophy see also Chapter 9 in Tome 1 of this volume.

A new history of law was to start! But we must not confuse the Third Reich's imperialist ambitions with the universalistic appeal rooted in the idea of natural law. It is true that there was a revival of Gierke's conception of natural law (*gierkische Renaissance*), but only with the most moderate wing of Nazi legal science (e.g., Koellreutter 1932).

Nazi law has a naturalistic character, for it is rooted in the ethno-biological bases of the German people (*Blut und Boden*, or Blood and Soil) and in a specific race (*Rassenseele*). The *Volksgemeinschaft* (or people's community) is conceived as a natural and organic unit to which single individuals are functional. The natural law tradition, by contrast, very clearly draws a sharp distinction between natural laws and the laws of nature: the former are normative, being formulated by practical reason, while the latter are factual. The law of the strongest is not strictly a natural law but, if anything, a law of nature.

Nazi legal culture affirms the principle of the primacy of the political. Accordingly, the distinction between friend and enemy prevailed over the legal and humanitarian principle of equality (see Schmitt 1932a). Without this principle, natural law is nonsense.

Consequently, Nazi law rejects normativism and embraces the principle of effectiveness. The normative ought is replaced with the strength of the concrete order (ibid.). Law is merely a tool in the hands of power. The state is a machinery (*Apparat*) that answers directly to the Führer (*Führerprinzip*). *Führung* (leadership, rulership, command) does not mean *Regierung* (government), since the commands issued by authority of the *Führer* do not guide the action of free and equal persons, who need reasons for action, but strictly determine their conduct as an efficient cause, and that is contrary to the spirit of the rule of law.

In 1934, after the Night of the Long Knives, came the ex post facto enactment of the "Law Regarding Measures of the State Self-Defence," which retroactively legalized the killings committed during the purge (Evans 2005, 72). The importance of this statute goes beyond the circumstances of its enactment, because it introduced a dispensation from the principle of nonretroactivity in the Nazi legal system. This, too, is contrary to the spirit of the rule of law.

Nazi law rejects the concept of subjective rights (see Larenz 1935), which it considers to be at the origin of liberal individualism (cf. Höhn 1934). The individual has no rights as such but is only recognized as having a personality in the community (*Gemeinschaftspersönlichkeit*). This, too, is contrary to the natural law tradition, in which we find the origins of subjective rights as antecedent to the will of the state. Aversion to subjective rights would become very important to understanding the characteristics of natural law theory in the postwar period.

If the state is an expression of the concrete order of the life of a given people, then it is identified with justice. No longer is it possible to draw a distinction between formal and substantive justice: "Law is what benefits the people"

("Recht ist, was dem Volke nutzt": Radbruch 2006a, 13). This means that arbitrary power and violence are law if deemed useful to the people, and that what any authority commands for the benefit of the people is for this very reason just.

Lastly, moving the party outside the legal control of the state is in marked contrast with the conception of the *Rechtsstaat*, as Nazi law stands above the law. Schmitt's doctrine of the "state of exception" (*Ausnahmezustand*) is incompatible with the rule of law and is founded on moral relativism of a Hobbesian type. As far back as 1937, Ernst Fraenkel qualified the Nazi state as "discretionary" (*Massnahmenstaat*), in that government by decree outbalanced government by general norms.

Since the judge has to interpret the law in the light of the Nazi *Weltanschauung*, one can no longer speak of the neutrality of the judiciary. The principle *Nulla poena sine lege* is no longer valid, since there can be behaviours contrary to the community yet not directly written into law. It is replaced with the principle *Nullum crimen sine poena*, an overt violation of habeas corpus. It may even be too charitable to speak of the creation of a "dual state," because governmental institutions themselves frequently operated in contempt of the law (see Fraenkel 1941).

Nazi law thus violated two necessary conditions of natural law theory: the substantive condition regarding the moral content of legal norms, and the formal one regarding the legal system as a whole, a condition requiring respect for the principles of the rule of law. It is very difficult to imagine a legal system as contrary to the natural law tradition as the Nazi regime was. So one would at least expect the proponents of natural law to have been among the staunchest opponents of the Nazi regime. But, surprisingly, with some remarkable exceptions, such as Rommen (1998), that was not to be, and we now need to identify the reasons for it.

In criticising Nazism, Catholic theology found itself in a more favourable position than Reformed theology, which from Luther to Barth had consolidated and reinforced an attitude contrary to natural law. Yet the intellectual reaction that German Catholicism had to Nazism was inadequate and, to an even greater extent, unsatisfactory.

There are historical and cultural reasons that explain this weakness of Catholic natural law theory. The first of these was the legacy of the *Kulturkampf*, which compelled Catholics to show their ability to integrate and cooperate in social and political life. Conspiring with that influence was an initial affinity with some of the themes that drove Nazism—two in particular, namely, communitarianism, in contraposition to liberal individualism, and a tendency toward anti-Semitism (actually much less marked than in Protestantism)—but without foreseeing or desiring its violent outcomes. But after 1933, following the *Gleichschaltung*, a policy designed to absorb all non-Nazi organizations and keep them in check, it became clear that the compromise the Catholic Church came to with Nazism was no longer viable. Even so, a very cautious at-

titude prevailed that favoured indirect to frontal criticism (see Dietrich 1987). The Church became overly concerned with defending the possibility of carrying on its religious mission in German society, and too little concerned with the common good of this society as a whole (see Dietrich 1988). Along with racism, however, there was a point that Catholicism absolutely could not accept, and that is Rosenberg's 1937 statement that "National Socialism always claimed the whole of man and his entire personality." This claim clearly bespoke an antireligious attitude.

Aside from the moral and political responsibilities, which will not be an object of investigation here, an important theoretical lacuna in Catholic natural law theory was highlighted. In principle, starting from *Rerum Novarum*, Catholic natural law sought to respond to all the central problems of social and political life. But in fact, it paid too little attention to the strictly political aspect. A realist attitude to all political regimes, including dictatorships, had taken hold in the conviction that it was enough to require that they meet certain conditions, especially as concerns the *bona particularia* of the family and educational freedom (see Böckenförde 1961–1962). In the Catholic natural law of that time there was no adequate reflection on the rule of law, limited government, or democracy, all questions that were already present in some form in Aquinas's thought.

In these circumstances the concept of the common good—one of the fundamental pillars of Catholic natural law theory—failed to yield evaluation criteria (when truly needed) capable of critical and operational force. Accordingly, natural law fell into a void and became an inert or merely abstract doctrine, incapable of holding concrete political institutions to critical scrutiny. It appeared evident that a doctrine of natural law is not complete if it cannot also express a political theory.

Moreover, the metaphysical bases of Catholic natural law theory, developed by neo-Scholasticism, favoured the elaboration of abstract principles valid for every time and place, even though, for this very reason, such principles turned out to be decontextualized and inert on the sociopolitical plane. On the other hand, nonmetaphysical natural law—variable, irreducible, or progressive—was vague and for that reason could not furnish stable and reliable criteria of judgment.

1.2.2. The Nuremberg Trials

The Nuremberg trials undoubtedly compelled people to reconsider the possibility that natural law could be effective in cases of clear contempt for human dignity. There was a widespread conviction that Nazi war criminals had to be brought to justice under the law, but there was also broad disagreement about the *justification* for such punishment. Particularly indicative in that regard is the following statement by Kelsen:

> Justice required the punishment of these men, in spite of the fact that under positive law they were not punishable at the time they performed the acts made punishable with retroactive force. In case two postulates of justice are in conflict with each other, the higher one prevails; and to punish those who were morally responsible for the international crimes of the Second World War may certainly be considered as more important than to comply with the rather relative rule against ex post facto laws, open to so many exceptions. (Kelsen 1947, 165)

That noncognitivist and cognitivist theorists agreed on this point is evidence of at least some objectivity in the criteria for identifying injustice, or "at least a rudimentary non-relativist ethic" (Alexy 1999a, 33). And that brings natural law back into play. Still, on the legal plane, the way punishment of those found guilty is justified is by no means irrelevant, and in this respect the divide remains between legal positivism and natural law theory.

For a better grasp of the issue, we ought to remember that it fundamentally concerns international law, which was considered less rigorous and developed than domestic law, that is, less purified of natural law elements. Cathrein had previously argued that it is impossible to justify international law if there is no natural law.

A rigorous application of the principles of the *Rechtsstaat*—especially the principles *Nullum crimen sine lege* and *Nulla poena sine lege* in connection with the prohibition on retroactivity in criminal law—would have made the punishment of Nazi war criminals illegal (though not unjust). Since, as was just observed, it was thought necessary for punishment to have the seal of legality, different justification strategies were adopted within the two groups.

Legal positivism would obviously have been fully satisfied if at the time the acts were committed the positive laws (national or international) had contained provisions making those acts crimes. But nothing of the sort existed in the international law in force at the time. Accordingly, the advocates of legal positivism fell back on a search for principles already contained in the law, however much not fully developed, and went looking for them in the interstices of the Kellogg-Briand Pact of 1928 or the 1899 Hague Convention. These were certainly very defective legal rules if judged against the positivist ideal by which the punishment distinguishes the law from morality. But these attempts proved unsatisfactory, since the model of law held up by traditional legal positivism, centred on the commands of the sovereign state, was incapable of adequately accounting for international law (in general, see Paulson 1975). So, in a last-ditch attempt, some exponents of legal positivism abandoned the thesis of the stringency of the principle of nonretroactivity (see Kelsen 1945c), but this meant sawing the branch on which people were sitting, for if such a principle can be defeated by a superior value, then this means that, at least in some cases, moral principles prevail over legal ones. Hitler also thought the same thing, though espousing a very different concept of morality.

Hart's conception goes in the same direction as Kelsen's, though in relation to the issue of obedience to the sovereign's commands, in stating that "laws

may be law but too evil to be obeyed" (Hart 1957–1958, 620, and also Hadelmann 2005). But if a valid norm must not to be obeyed, then it is normatively inert, that is to say, it is not a real norm.

Even within natural law theories, a range of positions can be observed. Traditional metaphysical natural law theory makes a strong case for the invalidity of unjust laws and accordingly holds those who obey such laws legally responsible. Consequently, a positive law that simply recognizes natural law principles, which by definition everyone already recognizes from the start, cannot strictly be considered retroactive. This thesis as a general proposition appeared overblown to many theorists of law, and apt to seriously undermine the certainty of law. As is well known, Gustav Radbruch formulated a more downsized version of it, independent of metaphysical natural law theory:

> The positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people, unless the conflict between statute and justice reaches such an intolerable degree that the statute, as "flawed law" [*unrichtiges Recht*], must yield to justice. (Radbruch 2006b, 7)

Radbruch's formula essentially says that extreme injustice cannot count as law. There is therefore a certain connection between law and morality, though it is limited to extreme cases. Moreover, Radbruch introduces another thesis:

> Where there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law, then the statute is not merely "flawed law," it lacks completely the very nature of law. (Ibid.)

Hence in addition to unjust laws there are nonlaws. Radbruch would reaffirm his natural law theses in *Vorschule der Rechtsphilosophie* (Primer on the philosophy of law: Radbruch 1948a), where legal philosophy is conceived as a doctrine of right law (*richtiges Recht*).

This opens up a third way of natural law theory, in which the formal principles of the rule of law are part of the concept of law. Nazi laws should not have been complied with because they violate these principles. But this strand of thought, developed, as is well known, in the United States by Lon Fuller, has no echo in the European cultural landscape, and one can understand the reasons why. For one thing, not all Nazi laws were thus vitiated and, for another, the rules followed at Nuremberg were themselves applied retroactively, at least as regards the *nulla poena* principle, and so in violation of a fundamental principle of the rule of law. It must be recognized that there was no way to circumvent this problem: It was necessary to frontally address the question of the substantive justice of law.

In fact neither legal positivism nor natural law theory in their pure form were invoked by the judges of the Nuremberg Court. A pragmatic path halfway between the two prevailed: On the one hand an effort was made to demonstrate the prior existence of international rules of law (for this reason, for

instance, the application of rules on crimes against humanity was limited to the war context), and on the other there was invoked the particular nature of international law, marked by an appeal to the common conscience and to the principles of basic humanity widespread "among civilized people."

The Charter of the International Military Tribunal contained an affirmation of the principle of individual criminal liability for the most serious violations of international humanitarian law, even when people acted out of obedience to higher orders. This is an important point in the history of natural law in the second half of the 20th century, as it put an end to the state's absolute sovereignty and provided legal recognition of the values of morality and conscience.

The time had now come to consider not which legal philosophical conception had favoured Nazism, but what conception of the law could help to avoid it being repeated.

1.3. The Second Revival

1.3.1. The Enforcement of Natural Law

As we have seen, the first revival of natural law was characterized on the one hand by a consolidation of Catholic doctrine and, on the other, by the dissemination of ideas linked in some way to natural law but essentially rooted in a dissatisfaction with formalistic positive law theory. Between the first and the second revival there is the watershed of World War II, which radically changed the framing of the problem much more than World War I had (see Kühl 1990, A. Kaufmann 1991). It appears evident that the first issue to be addressed, before turning to the role of natural law in the *theory* of law, is that of its role in the actual *practice* of positive law.

The Nuremberg trials did not remain an isolated case, especially in the *Bundesrepublik*. Specifically, the German courts and the Federal Constitutional Court of Germany itself in some cases expressly used the Radbruch's formula to ground the conviction of Nazi war criminals, and in more recent times it also used the formula in its decisions on the so-called Berlin wall shootings by the *Volkspolizei*, or *VoPo* (see Alexy 1999a, 19–22). Natural law in the form of a minimum objective morality had a concrete influence in judicial practice, and not only in West Germany.

Natural law would soon crop up in the legislation of the Federal Republic of Germany as well, particularly in criminal and family law. But that is even more evident in the *Grundgesetz* and, more in general, in all the constitutions enacted after World War II, which were presented as a supra-statutory law superior to the state's powers (see Rosenbaum 1972, 106–30).

This presence of natural law elements in the rules and practice of positive law may be overt or hidden, but regardless, in it lies the new and distinctive trait of the second natural law revival.

It is certainly not a new thing for the positive law to be applied and interpreted by also taking extralegal elements into account, especially after the theses advanced by the free law movement. The new development instead lies in the active presence of natural law in the lawmaking processes, that is, in the positivization of law at large.

In Italy the Association of Catholic Jurists—inspired by the 1942 radio message in which Pius XII reaffirmed the eternal validity of natural law, this time with the inclusion of human rights (cf. Gonella 1942)—coined the significant formula "natural law in force" (Angeloni et al. 1951). In Germany, too, people spoke of "positivized natural law" (G. Müller 1967, 10–2; see also Foljanty 2013). This was also an appeal to the jurist's and the judge's conscience and to legal ethics in relation to unjust law, in such a way that the problem of the justice of positive law would not be deemed extraneous to the judges' professional role, as legal positivism by contrast maintained. If the whole legal enterprise takes justice as its aim, then the theory and philosophy of law should take justice into account, with a consequent deep transformation of the paradigms at work in the tradition of legal science since the 19th century. In fact, however, it was not so or at least it did not happen in a significant way. The theory appeared more resistant to natural law than practice has been. The appeal to natural law often did not correspond to a different way of seeing the theory of legal science.

1.3.2. Common Values and Natural Law

The presence of natural law in postwar legal philosophy came about through a progressive and significant transformation of moral culture in general.

The reaction against the crimes perpetrated by the totalitarian regimes helped to consolidate a broadly shared substantive ethic, regardless of the foundations on which such an ethic is made to rest. Instead, as we have seen, in the first half of the 20th century the only full-fledged conception of natural law was the Catholic one, which finds a specific justification on theological, metaphysical, and anthropological bases. This made it possible to hold up common or shared moral values without having to endorse foundations that many were not prepared to accept. So, for example, there were those who maintained that natural law and individualistic modern ethics were incompatible (see Piovani 1961). Consequently, the traditional relation between positive and natural law was replaced with that between law and morality. This also avoided the need to invoke "nature," which in ethics divides much more than it unites. But setting aside both the legal character of natural law and its natural character meant a profound transformation of the traditional issue, whose real effects would not show themselves until a few decades later. For the time being we should only note that, unlike what is the case in natural law, the existence of shared values is a factual matter which is predicated on consent, but which at the same time also presents itself as endowed with normativity.

The passage from natural law to an ethics of shared values was also perceived in the Catholic culture as an opportunity for dialogue (see Delhaye 1960). Neo-Scholasticism had by now abandoned its typical syllogistic method and presented itself in a more discursive form, more attentive to a deeper distinction between law and morality (cf. Graneris 1949) and moderately open to the historicity of law (cf. Olgiati 1944). But it was essentially aimed at supporting the traditional theses of neo-Thomism, with few serious attempts at bringing the theory up to date, especially in the areas of human rights, international law, and social ethics (see Messner 1950, Auer 1956, Verdross 1958, and Ütz 1958–1963).

Within Catholic natural law theory the most significant innovations originated from the epigones of the second phase of Thomism, which as previously remarked was based on a direct reading of Aquinas's works in light of the philosophical problems of the time. Here we will simply emphasise the contribution of two thinkers that in some respects influenced the Second Vatican Council: the Frenchman Jacques Maritain (1882–1973) and the Pole Georges Kalinowski (1916–2000).[26]

Maritain believed firmly in the ductile capacity of Thomism to seamlessly bring the emergent cultural values into its fold: These were values he himself identified and at times harbingered, as by making the case for world governance. Rejecting the state's sovereign omnipotence in the name of the priority of the human person (see Maritain 1951), he understood the importance of democracy (cf. Maritain 1988b). A supporter of the Universal Declaration of Human Rights, he was committed to showing the connection between human rights and the traditional problems of natural law (see Maritain 1988a). In particular, giving further impetus to the spread of the ethics of shared values, he defended the possibility of practical accord and cooperation among very different ideal and cultural families on the theoretical plane, prefiguring Rawls's overlapping consensus (see Maritain 1990). His exile to the United States, during World War II and for some years after the war ended, allowed him to appreciate American political culture, from which he drew inspiration (see, for instance, Pound 1942). Maritain's social and political writings, in both Europe and the United States, can be said to have been more influential than his general philosophical thought.

As regards natural law more directly, Maritain regarded its principles not as general precepts but as universal "dynamic schemes" operating in all cultures in an unconscious way and amenable to a wide variety of concretizations (see Maritain 1951, 93–4). The idea is taken, once more, from Bergson, but is elaborated on the basis of a cultural concept of human nature. Positive law—the primary meaning of law—obviously belongs to the cultural dimension and is the fruit of practical reason, which imparts order to human actions by means

[26] On Maritain see also Section 3.2 in this tome.

of "knowledge through inclination." This means that the derivation of positive law from natural law *ad modum conclusionis* must also be conceived not in a deductive sense but as a historical concretization among many possible ones. Maritain did not succeed in further specifying this strand of thought, which he intended to back up with the support of cultural anthropology (see Maritain 1986, Viola 1984). Even so, it stands as a variant on the other previously discussed interpretations of the relation between natural law and positive law in the framework of Aquinas's thought.

From this perspective, Maritain's thought on natural law unwittingly crosses into a tradition of thought that spans from Vico to Gadamer, the latter also having invoked ideal schemes of action (Gadamer 1960, 302ff.). Natural law constitutes a necessary condition for the practicability of positive law, an internal source of guidance for the latter that cannot be disregarded. This "just by nature" never exists in a pure form but is manifested through its cultural concretizations, which require the exercise of the judicial form of *phronesis*, or practical reasonableness.

Georges Kalinowski, for his part, addressed natural law not directly but looking at its cognitive presuppositions. If value judgments and norms themselves do not have any truth value, then natural law and the moral law, however interpreted, do not have any rational justification. Kalinowski, coming from the famous Polish school of logic, contributed to the development of deontic logic at the same time as the Dane Alf Ross, the Finn Georges Henrik von Wright, and the German Oskar Becker were conducting their investigations, but independently of them. Careful to defend the peculiarity of practical knowledge, which had aroused the interest of other researchers inspired by Thomist thought (see Y. Simon 1934), he maintained that science cannot properly set the truth conditions for practical knowledge, which instead require philosophical perspectives, that is, strictly dialectical ones. According to Kalinowski, first value judgments are based on evidence and support one another with the aid of the virtues, while second value judgments are verifiable on a logical plane (cf. Kalinowski 1967). In his opinion it is necessary to abandon a static concept of human nature, typical of modern natural law theory, and to clearly distinguish normality from normativity, which is compatible with the mutability of human nature (see Kalinowski 1983, Kalinowski and Villey 1984).

Christian culture was not limited to the Thomist school but also developed in a secular version. Recourse to an ethic of shared values also made for greater freedom from a Christian perspective. Here begins what was previously indicated as the third phase of Thomist natural law theory, in which what is at stake is no longer fidelity to a school but the intersection of different philosophical models, from Aquinas to Kant.

The Italian philosopher Alessandro Passerin d'Entrèves published a study that was emblematic of this new cultural atmosphere (Passerin d'Entrèves

1951). Although this was clearly an introductory text and was modest in its tone, it is representative of this secular turn in natural law theory of Christian persuasion. The goal was to reconstruct a tradition of thought that preserves its critical role in Western social and political history. The effort, proceeding from the natural light of reason, capable of distinguishing good from evil, the just from the unjust, was to find norms that are not only a measure of human action but also a judgment on its value. According to Passerin d'Entrèves, who followed Aquinas in a non-Scholastic way, it is possible to have a rational foundation of ethics. Law is recognized as having a moral character and is thus brought back into the fold of morality, yet there is a specificity to it that is not based on the stifling distinguishing traits of tradition but on the possibility of translating moral norms into legal principles. Precisely in that effort, according to Passerin d'Entrèves, lies the task proper to natural law, the task of serving as an interface between morality and positive law. It is interesting to note that in this way a traditional aspect of natural law was vindicated that had been entirely forgotten, namely, the important role natural law plays not only in the formation of legal language and the construction of legal categories, but also in the way in which law is produced and put into practice (cf. also Y. Simon 1992). It is thus shown that the validity of law stands on more than mere legality.

In the same strand of thought, though with greater attention to the teaching of historicism and the transcendence of faith (see Fassò 1956), we find the Italian legal philosopher Guido Fassò (1915–1974), who in 1964 published a study on the historical role of natural law theory to reaffirm its validity in Western political history. Fassò notes that it is impossible to understand the meaning of constitutionalism and the liberal state without considering natural law. But it needs to be observed that, like Passerin d'Entrèves and unlike the other previously mentioned Thomist authors, Fassò places a premium on natural law theory, and above all defends the role of reason in law, which in keeping with the English tradition is viewed by him as *artificial reason*, a reason at once not absolute and clearly distinguished from the sovereign's imperious will (see Fassò 1999, 217–52).

The experience of totalitarianism also led Protestant theology, traditionally very distrustful of natural law, to reexamine its views on the relation between nature and grace. A systematic attempt was made to examine the manifold natural law models (see Wolf 1955, 1947). By comparison with the strand of thought contrary to natural law—positing the existence of two kingdoms and spanning from Luther to Barth—the Calvinist treatment of moral conscience left open the possibility of natural revelation (*revelatio generalis*) beyond specifically evangelical revelation, and this made possible a dialogue with Catholic theology (see Böckle 1965 and also Reber 1962). The central problem therefore becomes what Brunner calls the point of connection (*Anknüpfungspunkt*) between the action of God and man's response. The admission of the existence of various arrangements or orders of creation and justice (cf. Brunner 1943),

thus making room for natural law, leaves unprejudiced the question of subjective human action burdened by sin, and makes it necessary to set power on a theological foundation. That is precisely the outlook on which Protestant theology approaches law and politics (see Künneth 1954). Brunner rejected the equation between law and power and on that basis took exception to legal positivism. Even so, every formalization of natural law is extraneous to the Protestant vision, and there is a preference for turning to conscience. What is good cannot be preestablished once and for all: The good lies in obedience to God's command at any given moment (see Brunner 1939, 33). This paved the way for a situational ethics, which had already been prefigured by Bonhoeffer (1949, 215), and which intersects with the existentialist trends of the time. On this path, Protestant thought is somewhat cautious toward natural law as an objective secular ethics, as is evidenced by the writings of Ellul, who passionately stressed the subversive strength of Christianity against established institutions, first among which the ecclesiastical ones (see Ellul 1946, 1988). But even in Catholic theology the traditional way of seeing natural law was challenged (see, for instance, Böckle and Kaufmann 1966).

1.3.3. The Nature of the Thing

The shock of the war led many legal philosophers to reexamine their own thought, and there were many "conversions" to natural law, some in truth certainly dictated by opportunism but others sincere. On the opposite side there was a return to philosophical positivism in the guise of logical neopositivism and analytic philosophy, which presented themselves as methods of scientific investigation to be applied to legal science as well. But in general the urgency of providing a theoretical answer by which to account for the facts of history—not a preconstituted answer or one or deriving from an implied general vision—prevailed over the need to stay true to any given current of thought. This helped legal philosophy gain greater autonomy from general philosophy, setting in motion a distancing process that was destined increase over time.

As legal philosophy began to take on a history of its own not ancillary to general philosophy, a conflict emerged between those who as a priority saw legal philosophy as an epistemology of legal science and those who defended its speculative character. This brought back the perennial contrast between legal positivism and natural law theory. But now it was clear that the effort was to give an answer to the same problem, that of defining positive law. On the one hand the general theory of law, following in Kelsen's footsteps, took an epistemological course, thus freeing itself of the particularism of legal dogmatics; but on the other, the legitimacy of a philosophical conception of positive law was vindicated. The conflict was set precisely on the plane of the general approach to positive law, and so no longer was there a distinction between the philosophers' philosophy of law and that of the jurists.

Among the philosophical currents of the first half of the 20th century that appeared to be most involved in the drift toward totalitarianism was undoubtedly neoidealism. This current was responsible for dismantling the cognitive credentials of legal science, reducing the essence of law to an act of subjectivity that posits norms and continually overcomes them, and absorbing individuality within the subjectivity of the absolute spirit. The legal philosophy of neoidealism, in both its historicist version and its absolutist one, took the strongest conceivable stance against natural law, even outdoing philosophical positivism in this regard, despite some attempts at recovery (see, for instance, Antoni 1959).

If normativity comes from the immanent acts of the spirit in its internal dynamism, then in principle there is no limit to the subjectivity by virtue of which norms are set. It was thus necessary to reconsider the foundation of legal normativity so as to set limits to be respected. This is the general thrust of the second revival of natural law. Indeed, nature, understood as a simulacrum of objectivity, became the constraint the spirit tends ceaselessly to overcome. And yet the reduction of nature to pure facticity was the main theoretical obstacle that made it impossible to recognize a source of normativity in nature itself. It was the challenge of overcoming this obstacle—through orientations grounded in a creationist metaphysics, though not always—that engaged natural law theorists after World War II.

Although the strategies employed in addressing this challenge were manifold and quite varied, they often overlapped in important respects, and the effect was to produce a certain eclecticism.

A common element can be identified in what has been called the "doctrine of the nature of the thing," but only if we give that doctrine a much broader sense than that used by those who expressly looked to it. In this way we can understand all those conceptions that seem to embrace the idea of an objective structure which the positive legal creation of norms is called on to somehow respect.

The doctrine of the nature of the thing had been put forward by Radbruch in a form that was still subsidiary to positive law, where it was seen as the objective meaning to be extracted from the conditions of life and as the force driving the transformation of legal institutions in response to social change (see Radbruch 1948b, 147). But it was reprised in a broader way in the postwar period (see Baratta 1959).

The modest version of the doctrine of the nature of the thing is the one that recognizes the importance of that nature when it comes to interpreting and integrating the law itself but not as regards the *sources* of law. This was the version espoused by Bobbio (1958), who thus lent support to Radbruch's theses, giving them an even more restricted form. But in this form the doctrine has very little importance for natural law, except to the extent that fairness is a concern of natural law.

Bobbio notes that the doctrine of the nature of things is hostile to voluntarism, statism, and legislative fetishism—the same enemies as those of natural law. But as much as Bobbio may avoid a metaphysical concept of nature, he cannot avoid the naturalistic fallacy. In the manner of the antiformalist sociological conception, he recognizes the pluralism of legal sources but confuses the sources from which law is derived with those on which basis norms are qualified. In reality, the doctrine of the nature of the thing must be linked to teleological and sociological methods that guide the judge and the jurist in interpreting legal norms and the nature of legal institutes. That is all.

In reality, even for natural lawyers the doctrine of the nature of the thing was not meant to add a new source of law competing with the positive law or superordinate to it. It was instead meant to challenge the positivist doctrine of the sources of law itself or, more precisely, to challenge the way statutory law was conceived as a source of law. It was not a matter of introducing a new source—that of the nature of the thing—alongside the others, but rather of rejecting the idea of law as an issuance of the legislator's will. On the contrary, law was subjected to constraints both at the moment of its production and at that of its interpretation. These constraints had the same function as the traditional ones of natural law (that is to say, they were among the elements required to define the validity of law or to establish its normativity), but they differed from the latter in some significant respects. The fundamental difference lies in the *realism* of the nature of the thing. The facts invoked by the nature of the thing are not bare or "naked" but are instead enveloped in values. And here the difference among the various renderings of the doctrine of the nature of the thing depends on how they see the kinds of facts to be taken into account and the kind of relation these facts bear to values. That doctrine rejects the metaphysical abstractionism of traditional natural law theory, precisely because the latter does not succeed in making natural law effective. For all these reasons, the doctrine as a whole can be regarded as an attempt at a profound revision of natural law theory (see Poulantzas 1965).

What emerged as the central legal-philosophical problem was that of the relation between facts and values, between real law and ideal law, since their separation, that is, dualistic thought, was considered responsible for the inertia of theory toward history.

The different versions of the doctrine of the nature of the thing often depend on the nature of the facts considered. These can be any of the following: the very mode in which law is experienced, the human condition, the ontological structure of legal culture, and the concrete legal situation. Let us take them up in turn.

1.3.3.1. Law as Experience

The philosophy of law as experience, which did not intend to break entirely with idealism and historicism, found its greatest expression in Italy. The

principal proponent of this orientation was Giuseppe Capograssi (1889–1956), who did not abandon the central importance of conscience proper to idealism but did reject its absoluteness (see Capograssi 1959b).[27] Law is not a set of rules but an activity that expresses itself in different forms reflecting the different ways in which individuals relate to one another and to goods (see Capograssi 1959c). These relations are always present in legal systems, and the problem is to protect their meaning in the application of law. Capograssi defends the individual against the voracity of the state's power and works out a form of Christian existentialism inspired by Augustine and Rosmini. Like Vico, he seeks natural law in the historical development of positive law, by looking at the way law comes into being rather than at its normative or prescriptive form. Law as such, unqualified, is a unitary practical experience whose aim is to strive for the infinite, all the while preventing individuals from escaping such a striving.

Capograssi's influence on Italian legal culture was a major one and favoured the development of the natural law orientation, though he himself was not strictly an advocate of natural law in the traditional sense.

In its further development, the philosophy of law as experience saw the need to better delimit what is distinctively legal in human experience, distinguishing that element (the law) from other forms of practical life. In this sense it is the nature of legal experience that presents itself as the "thing" to be defined. Thus, for example, Enrico Opocher (1914–2004) looked to the trial and to litigation in identifying this specificity involved in putting into practice the value inherent in law. This strand of thought is meant to avoid both transcendental formalism and historicism, as well as legal positivism and traditional natural law theory, so as to affirm law as a value (see Opocher 1983, 267–315). Without a doubt, the centrality of the value of justice, the primacy of reason over will, and the recognition of truth in legal judgment are all natural law aspects, but in the thought of Opocher the temporal process by which the value of law is objectivised is not governed by any well-defined criteria other than the formal Kantian criterion of the coexistence of freedoms.

1.3.3.2. The Human Condition

Another orientation looks above all at human existence and its relational conditions of development. This strand of thought ought to be further distinguished into two orientations.

There is first of all an attempt to apply the philosophy of existentialism to reflection on law and society, though the results have not, in truth, been remarkable, this owing to the original vocation of a conception born of the uprooting of humans from their place in the world (see Battaglia 1949). It is very

[27] On Capograssi see also Section 11.3.1 in Tome 1 of this volume.

difficult to find natural law in a philosophy that defends the primacy of existence over essence. Nevertheless, in various respects existentialism undoubtedly contributed to this second rebirth of natural law.

Personalism, which owes a lot to the effort made by Emmanuel Mounier (1905–1950) to give it wide currency and a revolutionary edge, in turn played a central role in renewing social anthropology, placing it at the centre of philosophical reflection (see Mounier 1936). Personhood, in which being and the good are identified, takes on the role of a supreme value. The dignity of the human person is considered a sacred value, and the person himself or herself is seen as a plexus of social relationships reflected in the political form of participatory democracy. Personalist thought is certainly not analytical, so it would be vain to seek in it any systematic working out of moral principles. Even so, the primacy of the human person, taking the place of creationist metaphysics, becomes the valuative basis for a new expression of ethical and legal principles.

Also very much present in atheistic or secular existentialism is the theme of social justice, both in the form of a hopeless denunciation and in that of a commitment to the construction of emancipatory social relational structures, as can be appreciated in the thought of Maurice Merleau-Ponty (1908–1961). In the place of a natural law there is undoubtedly the demand for responsible choice as the fundamental basis of human existence (see Scarpelli 1949). Further, existentialism was also behind the effort to explore the basic forms of social life, from mere coexistence to political society down to communion (see, for instance, Berdjaev 1936). Today a certain return to existentialist perspectives can be observed in studies in Law and Literature.

The attempt to bring the existentialist perspective to bear on the categories of legal science remained isolated (see Cohn 1955). It was trenchantly criticized by Kelsen (1957, 161), who compared it to a vogue that made its way to the suburbs after it lost its lustre in the metropolis, though it was defended by Arthur Kaufmann (1958, 23).

More significant, in that it came into being within legal-philosophical reflection, was the other strand of thought, for which "the thing" to be thematized as having an essential nature was the cultural world created by humans, and so also the strictly legal world.

We take as emblematic in this regard the thought of Werner Maihofer (1918–2009).[28] The facts of culture cannot be treated like natural facts, because value is immanent in them from the start. Value therefore does not remain a pure subjective element of the conscience, as Radbruch maintained, but rather enters the world of being. However, this being is not that of nature but that of history—the order of human coexistence created by humans themselves (see Maihofer 1958). Therefore, the nature of the fact is the process

[28] On Maihofer see also Sections 10.2.1.2 and 10.2.3 in Tome 1 of this volume.

by which we realize we have to be in the world of being. Dualistic thought is superseded by a monistic vision aiming to overcome the dichotomy between Ought and Is, between subject and object.

Konkrete Naturrecht (or concrete natural law), as Maihofer called it, has a typological character, in that it is founded on the roles that humans play in concrete social life, understood as formed by plexuses of rights and duties, expectations and obligations. These roles represent relationships of coexistence, and they change over time, but at every moment in history they are normative, meaning that rules are drawn from them according to the method of the Kantian categorical imperative and that of the principle of reciprocity. Maihofer does not mean to put forward an ideal of justice or even to defend a new source of law, but is only interested in ascertaining that the layperson and the jurist alike follow positive law in light of rules proper to the meta-positive law on which positive law is founded.

This strand of thought was the same as that of the others, but with some variants, sometimes more attentive to the prelegal limits on the contents of legal validity (see Welzel 1951), and sometimes proceeding on the basis of Scheler's material ethics, more concerned with the relation between historical conscience and the universal values of the person to which the law is linked (see Coing 1950). But all agree in rejecting a metaphysical foundation of natural law as incompatible with the historicity of human existence.

So why still call it "natural law"? Perhaps because, though created by humans, it presents itself as an objective constraint, albeit a historical one, on individual conscience? This still seemed to be too extrinsic in the eyes of a more consequent natural law theory. Although Sergio Cotta (1920–2007) also adopted a phenomenological and existentialist perspective, he criticized Maihofer's theses, arguing that they lead to a dissolution of human authenticity behind the mask of social roles. In this way law would not be an expression of the mode of being distinctive to humans (see Cotta 1991). For this reason it is necessary to connect natural law to the fundamental modes of human coexistence, understood as the set of conditions and principles required for an authentic existence of the relationships that form the basis of legal phenomena. The focal problem of natural law is not to identify precepts dictated by human nature but to justify the obligatoriness of positive law, which cannot in turn be explained on factual or voluntaristic bases (cf. Cotta 1981). This conception, too, as I see it, is inscribed in the general horizon of the doctrine of the nature of the thing, but since the "thing" is now our being human that binds the structure and content of the legal phenomenon, the basis of the law turns out in the final analysis to have a metaphysical character.

1.3.3.3. The Ontological Structure of Law

The third version of the doctrine of the nature of the thing turns directly to the structure of positive law considered in itself. In it a marriage is forged between Is and Ought, between the social fact and normativity.

If we take Arthur Kaufmann (1923–2001) to be representative of this strand of thought, we again see an effort to bring Thomas Aquinas's philosophy of being to bear on the concept of law as regards the distinction between essence and existence.[29] This leads one to exclude the both essentialist path of idealistic natural law and the empiricist one of legal positivism, thus looking for a third path.

> Positivism regards the validity of the norm to be the result of its effectiveness; idealistic natural law regards validity as the criterion of the effectiveness. The problems concerning "law and power," "justice and certainty," are finally insoluble for both views. (A. Kaufmann 1963, 81–2)

The third way consists in considering positive law to be internally never fully realized once and for all but always in search of the realization of its own essence. The universal is met only in the particular. The nature of the thing lies in its manifesting itself in the particular concretization of something universal. The law-thing always has a historical character, so as Gerhart Husserl previously noticed, law has the "time-structure of historicity." This means that natural law itself, which is equated with justice, has a historical character (see A. Kaufmann 1957, 11ff.), though it is not on that account relativistic. Natural law must not be confused, as Aquinas's followers have often done, with the fundamental principles of law and morality, which have an abstract and decontextualized character. Lying somewhere between these principles and mere positivity is precisely natural law, in that it confers a normative ought on the latter. Legal positivism is accused of defining positive law in such a way as to assert as true the thesis already implicit in that very definition, namely, the thesis of the separation between law and morality.

If we instead look at the effective reality of law, we cannot exclude the presence of evaluations and moral values in law.

From this perspective, law can no longer be equated with positive law, as legal positivism would have it. After all, this distinction had been enacted in Article 20 of the *Grundgesetz*, establishing a bond between the judge and the *Gesetz und Recht* (statutes and the law). The statutes are only one element of law, which also includes what the concrete case contributes in an institutional way to the formulation of the rule, bringing in legal principles, general clauses, maxims based on experience, and so forth (cf. Esser 1956). The statutes and law are to one another as power is to action, and possibility to reality. The stat-

[29] A conception of the nature of the thing even more closely derived from Aquinas's thought was developed by Herbert Schambeck (1964).

utes are not yet the reality of law: They are only a stage—a necessary one, to be sure—in the path toward the realization of law (see A. Kaufmann 1977, 157).

At this point legal philosophy finds itself having to take the path of hermeneutics, which can no longer simply be seen as the art of interpreting texts, since it reflects the very nature of law, which lies in its being structurally indefinite and open-ended (see A. Kaufmann 1965). Also developed in those same years were the philosophical hermeneutics of Gadamer (1900–2002), likewise sensitive to the question of the "nature of the thing" (see Gadamer 1993).[30]

In Italy Emilio Betti (1890–1968) had actually already worked out a hermeneutic conception of legal interpretation that from a philosophical point of view was based on the philosophy of values advanced by Nicolai Hartmann (1882–1950). But Heideggerian hermeneutics had come into being in direct opposition to the purported objectivity of the philosophy of values, in which it perceived a hidden desire for power and a failure to recognize the subject in his or her capacity for moral choice. Nevertheless, replacing the distinction between essence and existence with the ontological one between being and entity did not seem to make it possible to specifically recognize regional ontologies, among which is that of law. Indeed, Kaufmann, criticizing Maihofer, notes that law as a regional ontology can be developed only as a philosophy of essence in Edmund Husserl's sense (see A. Kaufmann 1963, 84–5). Still, it is true that what law is depends on the question of why there is law, which in turn takes us back to the social nature of the human being. So there arose the issue of the configuration of a philosophical hermeneutics suited to working out the concept of law.

Gadamer's conception, though dependent on that of Heidegger, sought to reconcile the permanence of values with their status of dependence on a given ethos, so as to avoid cultural relativism. The basic effort was to pursue a nonmetaphysical objectivity of values. To this day there is an ongoing discussion about whether this goal has been achieved in an acceptable way. It needs to be recognized that the relation between philosophical hermeneutics and natural law theory remains problematic. But the connection between philosophical hermeneutics and the call to rehabilitate practical philosophy (see Riedel 1972–1974) makes it possible to address present-day problems involving the concept of law, the identification of law with social practices rather than with norms, and the role of the virtue of *phronesis* (see Kriele 1979).

So between legal positivism and rationalistic natural law theory there opens up the third way of "hermeneutic natural law theory," which rejects (*i*) the dualism between Is and Ought, (*ii*) the identification of law (*ius*) with statutory law (*lex*), and (*iii*) the view of law as already set, embracing instead a view of law as a process in action.

[30] On Gadamer and legal hermeneutics see Section 23.4 in this tome and Section 10.3.5 in Tome 1 of this volume.

1.3.3.4. *Ipsa Res Iusta*

We can finally turn to a version of the nature of the law-thing that invokes not the general structure of positive law but the concrete legal situation, in whose regulation ultimately lies the aim of the legal enterprise.

Michel Villey (1914–1988), polemicizing with rationalism and the abstractionism of modern legal science, and making use of the experience of Roman law and Aristotle's philosophy, argued for the primacy of the concrete case, requiring the judge to look to social relations in working out the correct balance between rights and duties (*res iusta*).[31] Law already exists in things (*id quod iustum est*) and must be recognized by observing social reality on the basis of a dialectical method. The rule drawn from the concrete situation is valid only for the situation itself, and so is not strictly speaking law. Villey reserved the concept of norm for a general provision deriving from human or divine authority. Hence what is designated as "natural law" is not a set of norms or principles but is rather a set of relationships between humans and things and among humans themselves: These relationships are inevitably changeful but always reasonable (Villey 1976a).

In a keen historical reconstruction, Villey (1975) shows that our way of seeing law and putting it into practice has changed so much over time as to lose its original reason for being. Christian theology has given us the primacy of law, and modern thought has set into motion a process of subjectivization of law that exists to this day with human rights (see Villey 1983). The conjunction of these two cultural factors has pushed law into the arms of morality and into the science for which both modern natural law theory and legal positivism are responsible. Hence Villey's real contribution to the problems relating to natural law lies in his conception of law in general, since the primacy of law and of subjective rights, which are two sides of the same coin, frustrates the *ordo rerum* and turns law into a purely artificial construct for administering conflicting claims.

It has to be recognized that by observing the impossibility of returning to the past, Villey identified two essential themes for the fate of natural law: that of the epistemological status of jurisprudence and that of the role of the legal subject.

The view of jurisprudence as a science, and not as an art, put natural law in a blind alley, because the natural sciences rejected any teleological conception of nature, and the human sciences, though open to values, could not set values on a philosophical foundation. Moreover, the practical character of law and its being geared toward the concrete case were in any event lost.

The second issue was even more important. The premodern legal tradition had stressed the objective character of natural law. There is to this day a

[31] On Villey see also Section 3.3 in this tome and Section 12.6 in Tome 1 of this volume.

discussion about whether Roman law and medieval thought adequately recognized natural rights, which certainly develop fully in modernity. Hence natural law theory is called on not only to account for natural rights but also to work out the question of whether the objective dimension or the subjective one takes priority. While natural law in an objective sense met with the obstacle of the rejection of teleological conceptions of nature, natural law in a subjective sense now turned to the concept of the human person, which is a development of the legal subject in modernity. Consequently, the theory of natural law faces the thorny problem of the relation between the human person and human nature.

The second revival of natural law is marked by the need to fight the spectre of totalitarianism. This seems to be possible only on condition that natural law be seen as immanent in positive law itself, such that neither can be known without the other. With a play on words, natural law can be said to belong to the nature of positive law. This is an epochal turn by comparison with preceding natural law theory, which was intent on deriving positive law from natural laws, a turn that had earlier been timidly preluded by antiformalist positive law theory. Its immediate result was an opening of legal science itself to the questions with which natural law is concerned. Yet jurists rarely went beyond a more or less rhetorical appeal to moral values, since the whole apparatus of European legal dogmatics had been constructed in such a way as to be impermeable to natural law. But in philosophy and theory of law, conceptions developed that were often not metaphysical but avowedly open to recognizing objective constraints within positive law. Underlining the historical strength of these constraints is the fact that they are reduced to problems pertaining to the "nature of the thing," which is a nonmetaphysical way of defending the conjunction between facts and values.

1.4. The Third Revival

We have seen that in the two decades after World War II there was more discussion about the relation between positive law and natural law than about the content of the latter. In fact, the strengthening of a shared morality also inclusive of public life made less dramatic the issue of the relation between law and morality and more crucial that of the definition of positive law (see Viola 1989). No significant reflection was devoted to what moral values were connected with positive law, while the main interest was on whether these values were external or internal to the concept. It is on this issue that the debate between natural law theory and legal positivism was focused.

The dominant philosophical theme in this frame of thought was that of the normativity of positive law and its basis. According to the most rigorous natural law theory, positive law is in a proper sense obligatory to the extent that its norms are binding on the substantive moral plane. Full legal validity

implies axiological validity. Accordingly, one is not legally obligated to obey immoral laws. It follows, however, that legal obligation is entirely absorbed within, and identified with, moral obligation. The most moderate version of natural law theory admits that the formal validity of legal norms in itself makes these norms obligatory, though only *prima facie*. This is a presumptive normativity that must be validated all things considered. On this basis, which to some extent takes into account the principle of legal certainty, a dialogue with legal positivism became possible. Legal positivism in turn gradually departed from its traditional insistence on the primacy of the sovereign's will and on legal sanctions—both entirely inadequate in explaining normativity in a strict sense—while also rejecting Kelsen's hypothetical normativity: In so doing, legal positivism moved toward a conventionalist approach to legal obligation. This also explains the increasing success and spread of Hart's theory of law. In general, the influence of Anglo-Saxon analytical jurisprudence grew in non-English-speaking countries, chipping away at the traditional primacy of German philosophy and legal theory.

The transformation the basic legal positivist model underwent as a result of the ideas advanced by H. L. A Hart (1907–1992) was mainly targeted at Austin's conception of the legal norm as the sovereign's command. However, it also obliquely took aim at Kelsen's concept, which from a descriptive point of view had maintained the same vision of the law as Austin's (*keine Imperativ ohne Imperator*). The basis of legal legitimacy shifted from the sovereign's perspective to the behaviour of officials and other participants in putting law into practice, a conception on which the acceptance of legal rules rests solely on the way they are used. That shift paved the way for the importance of practical reason in legal theory and yielded effects that could hardly be contained within any strictly legal positivist conception (see Hart 1994b). Indeed, with foresight Kelsen had kept practical reason away from the pure theory of law, considering it a Trojan horse of natural law theory (see Kelsen 1979, 52–7). Although Hart supported a clear-cut separation between law and morality, he himself saw that separation in the weak sense ("there is no necessary connection") and not in the strong sense ("necessarily, there is no connection") (Postema 2011, 325, n. 50).

If we take the standpoint of practical reason, we cannot take a strictly causal or psychological approach to power relations—the raw material of legal obligation. On the contrary, we will have to pay special attention to the reasons for complying with or accepting normative precepts, even if these reasons are not necessarily moral ones. What is important is the change that took place in way law was considered, no longer as a piece of machinery (as a social technique) serving to elicit acquiescence in view of the aims of peace and social order, but as a social practice in which all users of law participate in a responsible way. Hence the stronger emphasis on the effectiveness of law and the theory of legal interpretation.

This evolution of legal philosophy was part of a more general trend in philosophical thought in the last decades of the 20th century, a trend that led to a rehabilitation of practical philosophy (see Riedel 1972–1974) and acknowledged the peculiar role of *prudentia* over *scientia*. Contributions from very different streams of thought were made to the reappraisal of practical knowledge, ranging from the philosophy of language (Stephen Toulmin, Richard Hare, Kurt Baier) to rhetoric (Chaïm Perelman), scientific constructivism (Wilhelm Kamlah, Paul Lorenzen, Oswald Schwemmer, Friedrich Kambartel), the revival of the categorical imperative as a principle of universalizability, neo-Aristotelianism, discourse ethics (Jürgen Habermas, Karl Otto Apel), and Gadamerian hermeneutics. This unexpected convergence was supported by a common search for a rational justification of practical judgments without which ethical, political, and legal debates are meaningless.

In this effort, continental philosophy converged with analytical thought, though taking different approaches and methods. We need to be fully aware of this attention to practical reason and to the different ways of seeing it if we are to properly capture the modalities of the third rebirth of natural law. But before legal theory could take full advantage of these new philosophical trends, it had to wait for a profound transformation in the general framework of positive law.

1.4.1. Interpretation and Legal Reasoning

At the end of the 1960s, the climate was no longer favourable to postwar natural law theories, and legal positivism clearly prevailed. Moreover, and as a general rule, when the structures and institutions of positive law become firm and stable, and when interpretive practice is consistent and not very controversial, a reliance on the procedures to be followed and a widespread agreement on the way in which to proceed will favour and strengthen the plausibility of legal positivism. Only when controversy heats up—and there is no longer a solid consensus on the proper way to assess the validity of legal norms or to interpret them—new spaces and opportunities for natural law theory can open up. It is a different matter when natural law has to be applied, for it can be used not only to challenge but also to legitimize constituted power, as happened in Franco's Spain or in Argentina under the generals.[32] However, this conclusion stands only so long as broad social consent is maintained regarding the main contents of normative ethics. Natural law theory can be characterized as potentially revolutionary in principle (see Kelsen 1934b, par. 8), even though in practice it has often been conservative.

[32] On the question of whether an emerging democracy has an obligation to take action against the leaders of a past dictatorial regime for crimes against humanity on the basis of the precedent of the Nuremberg trials, see Nino 1998.

In those years the task pursued by legal positivism was to construct a theory of law on neopositivist and analytical bases. The legal system, as the proper focus of legal positivism, has been described with specific reference to its formal and procedural structure, while special attention has been paid to legal science and its epistemological bases. And yet, the theory of law was internally divided by the debate between formal conceptions of law deriving from Kelsen and realist ones of Scandinavian origin.

A bird's eye view of such a positivist theory of law will reveal the following components: (*i*) a rigorously value-neutral theory of legal validity (law as fact); (*ii*) the state's law as the paradigmatic and focal form of positive law; (*iii*) a vision of the legal system as an orderly set of coercive norms; and, in general, (*iv*) a theory of legal science as a logical organization of the contents of norms (see Bobbio 1979). Moreover, in the manner of the language analysis, greater importance is ascribed to issues relating to the interpretation of legal texts and terms.

In general, the linguistic turn—which characterized the philosophy done proceeding from both Wittgenstein's and Heidegger's thought—made the concepts of meaning and understanding central to philosophical investigation and led to the discovery of a close link between language and action, as well as between language and the interpretive community. This cultural context was favourable to legal thought, which had always been engaged in issues of interpretation (see Jori 1994).

There is no necessary connection between a formalistic theory of law and formalism in the application of law and in legal reasoning. For example, Kelsen's theory of interpretation is certainly not formalistic, and Hart's recognizes the possibility of interpretive discretion. But if interpretation and argumentation take on a major role in legal theory itself, as the view from practical reason implies, the theory's formalism is also seriously threatened. And that is precisely what happened. Which explains why a description of the developments of the theory of interpretation and of the theory of legal reasoning is necessary, since it was primarily through these theories that a climate favourable to the third revival of natural law could develop.

The disconnect between law as described in legal theory and law as a practical enterprise was growing beyond the physiological threshold dictated by the evolution of society. More in particular, while on the one hand legal positivism defined law as a set of norms flowing from a stable hierarchy of sources (certainty) amenable to logical ordering through the work of the jurist (consistency) and capable of satisfying the demands of justice without any integration (completeness), on the other hand law as a practical undertaking instead brought to light the inevitable uncertainties of legal decisions, the role of general clauses, and the inadequacy of a rigorously neutral logic and of purportedly infallible interpretive methods (cf. Engisch 1956).

At first this interference of legal practice in the theory of law was avoided: Problems pertaining to the interpretation of law were carefully kept sepa-

rate from problems concerning its application. Accordingly, the theory of law dealt with the interpretation specific to the jurist, and legal science was seen as a theoretical activity aimed at faithfully reproducing the legal system. The activity of judges and officials in the application of law, by contrast, was left to investigations of a descriptive or sociological kind. Consequently, whereas the theory of doctrinal interpretation had a normative character—for it prescribed how a jurist should behave in dealing with legislative language—investigations of judicial interpretation showed how law was *in fact* applied, that is, by recourse to value judgments and subjective choices by the interpreter. These analyses showed that the ideology of interpretation is necessarily present in practice (see Wróblewski 1972).

In the background of this theoretical framework it is still possible to detect the influence of Savigny, whose theory of interpretation was framed in large part as a response to the demands of legal doctrine and legal science. Furthermore, it can be easily acknowledged that while in common law countries the theory of legal interpretation develops toward a judge-centred approach, in non-English- speaking countries, based on civil law systems, it takes a jurist-centred approach. In the latter there is a stronger tendency to apply deontic logic to the interpretive processes of legal science, conceived as a meta-language aimed at describing a prescriptive language which is precisely that of norms (see, among others, Alchourrón and Bulygin 1971). However, it becomes clear that even the interpretations and doctrines of jurists have an ideological character, in that they manipulate the legal system in its contents, too, even as they claim to make it rigorous on a formal plane (cf. Tarello 1971).

This is one of the fundamental points of dissent between formalist and realist theories of law. The former are still bound to a conception of meaning as preconstituted by the legislator and passively reproduced by the interpreter, while the latter maintain a sceptic conception on which meaning is "ascribed" by the interpreter at the interpretive stage.

Although theories of natural law do not have a theory of legal interpretation of their own, they are rooted in an ancient tradition linked to the plurality of the sources of law, to the rejection of the idea that rules are rigidly hierarchical, to the importance of jurisprudential and judge-made law, to the centrality of reasoning by analogy, and to the role of *auctoritas doctorum* in the very production of law. This tradition goes from Roman law to the *ius commune* (see Lombardi Vallauri 1967). However, despite appearances to the contrary, the same tradition is also still at work in the interpretive practice of civil law systems, at least if we look carefully at actual interpretive processes (the common law of civil law systems).

One can thus easily understand why formal theories of law are accused of "logicism," that is, of reducing law to formal logic of a deductive type. In the attempt to defend legal certainty, the real processes by which law is formed

and applied are neglected. Logicism is substantially a form of "legalism" (see Lombardi Vallauri 1981).[33]

By contrast, in relation to realist legal theories, the disagreement of natural law theories concerns not the description of interpretive processes but the ethical noncognitivism and the psychological reductionism from which realists proceed as background assumptions. As much as value judgments and value choices play an inevitable role in the interpretive activity aimed at finding the solutions that can be deemed the fairest or most correct among all possible alternatives, this does not mean that the interpreter's discretion is wholly arbitrary and escapes the control of reasonableness and the need for an adequate justification. If value judgments are irrational and purely ideological, then it is impossible to manage or control the interpreter's unavoidable discretion. But if we can recognize that between the two extremes of scientific rationality and irrationality there is the wide landscape containing the reasonable, the probable, the fitting, and the equitable, then the natural law tradition still has something to say in defending the value of the certainty of law.

In turn, if legal reason is one of the possible aspects of practical reason, then the role of the interpreter, jurist, or judge is also to check and develop the *ratio legis*. So we have here a reversal of the perspective of classical legal positivism, from the idea of interpretive discretion as a threat to the legislator's will to its being a necessary instrument for perfecting the law (*Rechtsfortbildung*). Only in context can law be perfected and its compliance with practical reasonableness tested and fostered through the resources of case law and of judicial activity, and among these resources one should not underestimate the role of precedent, or *ratio decidendi* (cf. Kriele 1979). Nobody holds a monopoly on the use of reason.

As was to be expected, the development of the theory of interpretation gives greater importance to the theory of legal reasoning. Indeed, between interpretation and argumentation there is continuous circularity (see Ricoeur 1995): In order to interpret legal texts it is necessary to reason, and in order to reason in law it is necessary to interpret legal texts (see Viola and Zaccaria 2011, 98ff.). Legal argumentation has a pragmatic character in that its goal is practical, being concerned with justifying judicial decisions. As a result, interpretation itself becomes a decision when a solution is chosen among the admissible ones. Practical reason is aimed precisely at justifying decisions, supporting them with arguments in principle acceptable to everybody. The fact is that something can be valid as a "reason" only if endowed with universality, however much on certain conditions and in certain spheres.

[33] The line of thought that refuses to separate the interpretation of law from its application and rejects the logicism of legal dogmatics is well rooted in Italian jurisprudence, aside from specific natural law orientations. See Carnelutti 1951a, 1951b, Caiani 1954, Ascarelli 1955, and Betti 1971.

In addition to marking the difference between ascribing a meaning to a legal text (the activity proper to interpretation) and justifying a decision (the activity proper to reasoning), we should also note that in argumentation an intersubjective relationship is present that is usually absent in interpretation, or at least is usually believed to be absent. Argumentation takes place among a subject who proffers an argument; a discursive situation, which is a pragmatic context or, more broadly, a form of life (see Aarnio 1987, 211ff.); and another subject or an audience to be convinced by appealing to reasons for action.

The logic of law can be divided into two main branches: the new rhetoric, whose main focus is persuasion rather than demonstration (see Perelman and Olbrechts-Tyteca 1958)—and which, in a broader form, includes the theory of topics (cf. Viehweg 1953) and dialectics (cf. Giuliani 1974), and even the more recent fuzzy logic (see Zadeh 1975, Haack 1996)—and argumentation theory in a strict sense, which follows a demonstrative method, albeit renouncing absolute claims (see Aarnio et al. 1981). Argumentation theories of legal reasoning, which developed in those years in Europe (especially in Germany, Poland, and the Scandinavian countries) are manifold (cf. Feteris 1999), but the most important of them agree in considering legal reasoning a special case of practical reasoning, in that legal and practical reasoning alike are governed by the same general rules, even though the former is also subject to the constraints dictated by positive law.[34] Hence, no sharp separation can be maintained in legal reasoning between law and morality, just as—in line with what has already been noted—it is also very difficult to maintain such a separation in legal interpretation.

The presence of elements external to positive law—elements originating in an area in which legal practice borders with and blends into ethical claims and social factors—is particularly evident in the distinction between *internal* justification, which presupposes the premises from which to deduce or infer a decision, and *external* justification, aimed at resting these premises on a rational foundation (see Wróblewsky 1974). The latter kind of justification—the privileged field of legal reasoning—has to resort to resources that are external to legislation and belong in a broad sense to law as a practical enterprise, an activity that extends to doctrine, precedent, and legal maxims and is sensitive to normative and value claims.

From this point of view, positive law cannot be claimed to be a self-enclosed and self-justifying world (see Hruschka 1972), nor can the natural law model be considered obsolete or ruled out. All these theories are certainly united by their rejection of metaphysics and by the conviction that it is impossible to found ultimate values. But then the practical universality that reason claims for itself once again leads one to call its philosophical bases into ques-

[34] On 20th-century theories of legal reasoning see Part 4 of this tome, and particularly Chapters 23 through 25.

tion. Not only is there at work a belief that a common element can be found among the plurality of ideas on justice, but also, and especially, the appeal to a universal audience made up of all normal and competent humans in effect presupposes an anthropological commonalty that is typical of natural law doctrines (see Perelman 1945).

The development of studies on interpretation and legal reasoning has shown the inadequacy of both the positivist and the natural law paradigms separately taken. Law cannot be reduced to a fact without losing something important to its concept, but it cannot be reduced to a value, either, without losing its effectiveness, which distinguishes it from morality. For this reason one can easily understand that theories of legal reasoning themselves tend to turn into true and complete theories of law, or at least they tend to generate such theories from within, distancing themselves both from legal positivism and natural law theory, thus helping to confer on legal thought in the closing decades of the 20th century a characteristic that has lasted down to the present.

Since a theory of law is aimed at working out a concept of law, it is legitimate to expect from it a full-blown conception of positive law rather than a mere description of particular aspects of it, however important such aspects may be. But in the practical domain every description makes it necessary to first determine what aspects of the experience are truly relevant and meaningful in the eyes of the theorist. Every judgment on relevance is inevitably a value judgment. Accordingly, from the standpoint of practical reason the concept of law is at once descriptive and normative. The claim that practical reason is based on a purely descriptive method can lead either to incomplete conceptions or, worse, to ones that are irrelevant to law as a practical enterprise.

For these and many other reasons, in the 1970s the need was felt for a profound renewal of the theory of law, with major effects on the eternal conflict between legal positivism and natural law theory, precisely the conflict we are here interested in.

1.4.2. Christian Natural Law Philosophies

We should now go back to Catholic natural law theory in the last phase of its evolution in the 20th century. Let us recall that by "Catholic natural law theory" is meant what can be considered an expression of the official tradition of the Catholic Church. As noted, this strand of thought was influenced above all by Aquinas's thought as subsequently strengthened. There are doubtless other forms of natural law theory inspired by Christian values, often in a dialectical position vis-à-vis ecclesiastical natural law.

From a philosophical point of view, as much as the orientations of the past abandoned arid Scholastic formulas, they substantially remained unchanged and were expressed in abundant often boilerplate literature serving to spread a

conception (see, for example, Pizzorni 1978), with only rare examples of speculative originality (e.g., Pieper 1953, 1963). The central idea is that of natural law as an objective order of ethico-legal values corresponding to the demands of human nature "conceived aright," that is, on the basis of Catholic Church tradition as supported by Thomist metaphysics (though with few references to Holy Scripture, it should be stressed). The argument was that Christian ethics is fully capable of a rational foundation and so is also valid for nonbelievers. But this rationality is not to be understood in the sense of modern natural law theory, of which Enlightenment natural law theory is seen as the highest expression on account of its subjectivist and immanentist outcomes. There was no interest whatsoever in the evolution of legal and political philosophy, but even more significantly, no account was taken of the nascent claims of practical reason. At the same time, however, this did not account for the whole of Catholic natural law theory.

With the pioneering work of Josef Fuchs (1955), the question of natural law came very much into prominence in the Catholic moral theology of the time, which not infrequently freed itself of the shackles of neo-Scholasticism (see Häring 1954), and which, under the thrust of ecumenicalism, conversed with Protestant theology (see, in general, Gustafson 1978). At first, the renewal of moral theology took an existential orientation more attentive to the concrete exercise of moral action in the conditions that shape the life of faith and charity and with the help of grace, avoiding philosophical discussions on the foundation of natural law, which Fuchs instead addressed frontally. These theological debates had an influence on the Second Vatican Council (1962–1965), and with French Catholic philosophy they indirectly contributed to an evolution of the Catholic Church's official doctrine of natural law. But we need to be clear about where these innovations of the Council really lay.

Natural law as divine law and as an objective order of moral values was reemphasized in full continuity with tradition, but now greater attention was being paid to the question of subjectivity in moral choice. Natural law is present in the moral conscience, whose intangible dignity was stressed (*Gaudium et spes,* par. 16). Consequently, the role of freedom was thrown into greater relief, though with an eye to the objective moral good (ibid., par. 17). The result was a full reconciliation with the problem of human rights, seen as natural rights founded on natural law (see the encyclical letter *Pacem in terris*, 1963). These rights were seen in an anti-individualistic light and were blended into the principle of solidarity. There was a reaffirmation of the primacy of the human person as "the subject and goal of all social institutions" (*Gaudium et spes*, par. 25), and the principle of laicity came into view in the recognition of the autonomy of temporal realities (ibid., par. 36). At the height of the Cold War there was an insistence on the question of peace and the ability of the international legal order to make it possible (ibid., chap. 5). Lastly, in a special declaration of the Council dedicated to the right to religious freedom (*Digni-*

tatis Humanae), this right was presented as the central locus of conscience and of personal life plans in relation to public powers.

The focus of the Second Vatican Council in regard to natural law can thus be said to have lain precisely in the relation between law and conscience, a question that was already being energetically discussed in moral theology at the time (e.g., Böckle 1965). This question, which would be taken up *ex professo* in the 1993 encyclical *Veritatis Splendor*, falls within the sphere of the problems of practical reason, or at least that was a step in this direction.

The encyclical *Humanae Vitae* (1968) reopened a discussion that until a short time earlier had subsided: It was devoted to the philosophical bases of natural law and its contents. The importance of this encyclical lies not so much in the specific question that provided the occasion for it, namely, contraception, but in its way of addressing that question, by appealing more to natural reason than to religious principles. So the problem arose as to whether this encyclical was binding on those believers who were not convinced by the reasons given. Catholic natural law theory once more found itself facing the arduous task of reconciling the rational foundation of moral norms with the principle of authority. At the same time it was evident that the common morality to which the contents of natural law were tied had begun a process of erosion and destabilization.

One of the unintended consequences of the encyclical was to focus natural law on questions of *private* morality, while for the Catholic tradition natural law was primarily concerned with *social* morality.[35] Accordingly, natural law was identified *tout court* with the moral law. When in the last two decades of the 20th century a renewed interest was taken in the social doctrine of the Church, the contribution of an updated natural law theory proved to have only a limited capacity for innovation.

The debate sparked by *Humanae Vitae* was concerned more with moral theology than with philosophy. Indeed, precisely in theology, among other fields of study, we find a claim being made for the autonomy of reason in a sense very close to Kant's. Moral normativity springs from human reason, which is set outside the order of being and makes it an ought (see Auer 1971). We are no longer only talking about the personal autonomy at issue in the debate between law and conscience but about the moral autonomy or "self-legislation" (*Selbstgesetzlichkeit*) of reason. Needless to say, this was a context in which natural law in the Thomist tradition disappeared,[36] or else it was pro-

[35] On the mistrust of natural law as a tool susceptible of ideological use, see Ratzinger 1964.

[36] It is interesting to note that in political theology in general, and in liberation theology in particular, there is no appeal to natural law, and sometimes there is even some hostility toward it (see Gutiérrez 1973). Liberation theology, animated by wholly legitimate demands for justice, draws on primary evangelical sources (the option for the poor) and on socioeconomic analyses influenced in some respects by Marxism. It is inspired by Bartolomé de Las Casas rather than by Francisco de Vitoria (cf. Gutiérrez 1989). In this way, there is brought back to life the anar-

foundly refashioned (see Auer 1977), and its place was taken by the ethos of the world (*Weltethos*). This seminal idea would find its ultimate development in the *Declaration toward a Global Ethic*, written by Hans Küng and approved in Chicago on September 4, 1993, by the Parliament of the World's Religions (see Küng and Kuschel 1993, cf. Küng 1998).

Natural law theory—which at this point should more accurately be described as "Christian," in that it challenged the traditional tenets of Catholic natural law theory—now went off in two directions depending on whether or not it accorded importance to nature as the order of being in providing a foundation for moral norms. A new discussion emerged on the correct way to interpret Aquinas's thought in light of the alternative between the Aristotelian and Kantian conceptions of practical reason (cf. Höffe 1971).

What has been presented as the second phase in the interpretation of Aquinas (see Section 1.1.2 above) set the stage for a critical use of his thought open to comparison and evolution. This is the third phase of 20th-century Thomist hermeneutics. What I mean is aptly summed up as follows:

> To be a Thomist today in a judicious and effective way is undoubtedly to have a sense of tradition, as St. Thomas himself had, but also a sense of historicity, progress, and philosophical criticism. (Van Steenberghen 1987, 196; my translation)[37]

This view of Aquinas's thought as no longer a complete system but a critical method ushered in a fragmentation into specific or sectoral studies in which greater attention was paid to theology than to philosophy and to ethics than to metaphysics (cf. Bonino 1994). This made possible interpretations of Thomist natural law that did not a priori exclude the influence of modern philosophy, particularly of Kant's thought, which since Cathrein's time had been regarded as the main adversary. Obviously, conflicts of interpretation did arise—at times acutely, all internal to the Catholic world—but this helped to breathe new life into problems that had grown stale.

One of the best fruits of this turn is found in Martin Rhonheimer's interpretation of the Thomist doctrine of natural law (cf. Rhonheimer 1987). Through ample documentation the thesis was maintained that the appeal to "nature" in natural law has to be seen as an appeal to reason, which (unlike what Auer thought) was conceived as an integral part of human nature and as having a personalistic structure. This reason is in turn the "practical" reason linked to the Aristotelian ethic of virtues (see Rhonheimer 1994). As we shall see, this vibrant abandonment of a "naturalistic" conception of natural law was very similar to the one previously pursued by John Finnis in 1980.

chic vein of Christianity and its controversial tendency to go beyond the boundaries of the legal framework (cf. Sohm 1909).

[37] The French original: "Être thomiste aujourd'hui d'une manière judicieuse et efficace, c'est avoir sans doute, comme St. Thomas lui-même, le sens de la tradition; mais aussi le sens de l'historicité, du progrès et de la critique philosophique."

Also belonging to the sphere of Christian natural law theory is the thought of Otfried Höffe (1943–), who draws on the legacy of modern natural law theory and its constructivist method of political society for a meta-positive criticism of law and the state (see Höffe et al. 1987 and also Ilting 1978).[38] To modern natural law we owe not only the theory of natural rights, the precursors of human rights, but also that set of principles and guarantees that form the basis of the rule of law and of democracy. Höffe rejects legal positivism in all forms: Austin's imperativist one, Kelsen's normativist one, Hart's empiricist one, and Luhmann's procedural one. But Höffe also abandons the very term *natural law*, because of its naturalistic connotations, and prefers to speak of *political justice*, understood by him to consist in a transcendental structure proper to a free community based on the principle of advantageous coexistence of freedoms in a distributive sense (see Höffe 1987). As is evident, this conception fits into the present-day debate on theories of justice, whose roots in natural law are unquestionable, with particular reference to Locke and Kant (see Höffe 2006).

An opportunity for the development of natural law theory, though in a different sense from the conceptions just referred to, is afforded by the ecological emergency, which suggests that we shouldn't separate human nature from nature in general (cf. Viola 1997, 45–60 and chap. 4) or at least to reconsider the relation between them (see Zacher 1973, Hösle 1991).

In conclusion, in the 1970s, neo-Scholastic natural law theory was radically challenged by Christian thought, and new paths were tried out that moved away from a "naturalistic" conception of natural law—and at times from a "metaphysical" conception of natural law as well—and closer and closer to conceptions of law framed from the perspective of practical reason. There emerged the central role of the dignity of the human person receiving consent, at least formal consent, over and above cultural and ideological differences.[39] Still, it bears noting that these investigations pay scarce attention to the legal sphere, favouring instead the moral and political spheres. At the same time, the declining interest in the legal issues addressed in natural law in Europe is made up for in the United States by a growing and continuing interest in Aquinas's ethical and legal thought.

[38] On Höffe see also Section 10.4.2 in Tome 1 of this volume.

[39] An influential voice in favor of natural law sprang out of the different sphere of Marxist theory. Ernst Bloch, well aware of the distinction between natural law as a critical ideal and its contingent historical incarnations, considers natural law a watchdog necessary for the dignity of the human person in connection with the values of equality, fraternity, and solidarity, though there remains the utopian vein expressing the need to go beyond positive law once social and economic exploitation is eliminated (see Bloch 1961). On Bloch see also Section 10.2.1.2 in Tome 1 of this volume.

1.4.3. Evolution of Positive Law

As noted, when natural law becomes an object of moral philosophy or theology, its strictly legal aspect is undervalued. But in the 1980s the revived interest that legal and political philosophy took in natural law was favoured by a profound transformation of the general configuration of positive law founded on the primacy of the state's law. This evolution hasn't yet attained a stable order. In this context, natural law reemerged in changed forms both as a constraint on normative contents and in a deontological role in criticizing institutions and shaping the law.

Legal positivism in turn found itself facing a serious theoretical difficulty largely owed to the increasing expansion of human rights in domestic and international law. Indeed, it is very difficult to continue to maintain that law is a fact, since law is clearly shaped by evaluations and value judgments. For legal positivism, the imperative to rely on an empiricist philosophy is an obstacle to formulating an adequate descriptive theory of positive law as it actually is. To insist on this philosophical background is to fall into a philosophers' philosophy of law, though this time not involving any *idealist* philosophers. So there emerged a normative version of legal positivism (ethical positivism) proper to a jurists' philosophy of law concerned to defend the value of liberty and self-determination, both threatened by the confusion between law and morality (see, in Italy, Scarpelli 1965). However, if legal positivism is understood as an ideological or political option, then it is not clear why the opposite option, namely, natural law theory, is to be seen a priori as devoid of meaning.

The transformation of positive law is marked by three closely connected processes that are still underway: legal decodification, constitutionalization, and internationalization. It is interesting to note that, especially in civil law countries, these three evolutionary aspects have in common the crisis of the state's law. Note that state-law has been the reference point for logicist legal positivism. We will now have a look at these three phenomena in the legal history of our day, only so as to identify the spaces which opened up for the third revival of natural law, but which at the same time conditioned its forms of manifestation.

When the postwar constitutions began to reveal their potentialities, the first effect was that the code regime gradually lost centrality (legal decodification). This is quite understandable, since there is now a law (supra-statutory law) that stands above statutory law. But we are not only talking about a formal change in the legal system, since this superior law dictates the values and aims that ordinary legislation has to pursue. The innovation relative to the past is that these values and aims, which by their nature have an ethico-political character, are now also "legal," in that they are enshrined in that eminently legal document which is the constitution. Every form of legislation has always been governed by values and aims, but these were considered external to the strictly

legal sphere. This made it possible to construct a concept of law and of legal science with a view to securing the autonomy and separation of law from other spheres of practical life. But now this is no longer possible, in part because the plurality of these values and aims would be wiped out by the standardizing uniformity of the categories of legal dogmatics. In this connection, there is an increase in special laws and sectoral regulations owing to greater sensitivity to social pluralism. Accordingly, the code takes on the role of a residual law to which to have recourse only if special laws do not exist or contain lacunae. This fragmentation of legislative material into legal micro-systems is undoubtedly a sign of the disappearance of that unitary will that once characterized the state's internal sovereignty (see Irti 1979).

The idea that there are values and aims that in themselves are strictly "legal" is typical of natural law theory throughout the ages. The present-day legal situation can be read as confirmation of this thesis, but one can likewise maintain that such values and aims are "legal" only insofar as they are "positivized" in constitutional charters, in such a way that legal positivism is not ruled out. A characteristic of the third revival of natural law is its not automatically implying a decline of legal positivism. But the question remains: Can constitutions legitimately take any value or aim as fundamental?

If we now turn to these values and aims, we can easily appreciate that the constitutions enacted after World War II share a certain commonalty of value in form and substance, at least as a matter of fact (see G. Dietze 1956). All contain affirmations of justice regarding the rights of individuals and the organization of socioeconomic relations. As a whole they delineate the general characteristics of the common good that society is bound to pursue. Accordingly, the legal ought is no longer an issue solely concerned with constructing a picture of ideal law, as was typical of the traditional deontological task of legal philosophy. The legal ought is now in the first place an issue about the *validity* of law, and so is an object for legal science and theory. This is a fact that has major consequences for the very concept of law. The teleological structure of practical reason is now clearly seen to be a constitutive part of legal knowledge.

The affirmation of the primacy of the constitution is supported by its being written, long, and rigid, as well as by judicial review. There is thus prefigured a process of progressive constitutionalization of positive law that profoundly changes its identificatory structure.

Contemporary constitutionalism is a much more complex legal phenomenon than the provision of fundamental laws, since it implies a transformation of the very concept of juridical law. It would be misleading to consider constitutional law only as the addition of one more step, the highest, to the hierarchy of norms. The superior character of constitutional law distinguishes it from the statutory law not only as a matter of a lexical ordering but also in a strictly qualitative sense. The relationship between them is not one of univocality but one of analogy. Even though the world of positive legal rules has

always been peopled by manifold forms that cannot be slotted into any single category, legal science has always searched for a main overarching category. Legal principles are now consolidated into normative form, a form that legal positivism tends to make into, or somehow connect with, the form of statutory law, always considered central, while natural law theory defends the normative autonomy and priority of those principles.

Obviously, constitutional law is not natural law, because it too is artificial and produced by human will. However, like natural law, it is a founding law and it governs civil coexistence. Its role is to urbanize values, making it possible to transform them into legal norms through rational processes of progressive determination, balancing, and weighting. It is *jurisgenerative*. In this way the principle of authority, or the primacy of the will, is limited, checked, and completed by the principle of reasonableness, which is substantiated by attitudes of openness toward the reasons proffered by others.

If we look at the jurisprudential practice of constitutional courts around the world, we can easily observe the presence of arguments drawn from moral and political philosophy. The arguments for decisions often resemble discourses on natural law, especially ones relating to personal statuses, the problems of life, and birth and death. Unwillingness to recognize all this as evidence of a return to natural law largely derives from an identification of natural law theory with the antipluralist contents that have traditionally accompanied it. But if natural law is founded on ethical objectivism, then all claims supported by reasons, rather than by mere preferences, are in a sense forms of natural law, or at least they can legitimately claim to be so. Nevertheless, it should be specified that the relation between positive law and natural law has been converted into that between law and morality.

The teleological tendency of legal reasoning is further supported by the spread of human rights in the practice of domestic and international law. The central importance taken on by human dignity sets in motion a process of constitutionalization of the person, a process that not only implies a recognition of the presence of objective values but also confers legal weight on the conscience of individuals and their autonomy (see Spaemann 1996).

The objectivism of values and the subjectivism of choices often coexist in a sharply conflicting way. The sharing of a common morality, which seems to have been strengthened by consent about human rights, actually dissolves with the passage from general declarations of rights to the practice of respecting those rights. And law now has to deal with moral pluralism that law itself has favoured. Human rights have no boundaries and develop a transversal language or *lingua franca*, establishing communication between legal systems previously conceived as self-enclosed. Positive law opens up to communicative perspectives with universalistic tendencies.

International law—which has always been regarded as defective law in legal science, even by Hart—becomes a reference point in the world dialogue on

law, and in addition to developing as interstate law, it develops into the new forms of transnational and supranational law, as well as into the law of international organizations. International law is undergoing processes of constitutionalization, manifested in part in the recognition of peremptory principles, which after all were already present in the traditional *ius gentium.* Indeed, just to give one example, 1969 the Vienna Convention on the Law of Treaties states that there are norms existing as *ius cogens*, such that no exception to the can be carved out by an *inter partes* agreement.[40] In this way, supra-statutory norms are now recognized even in international law, with the consequence that, at least in theory, the will of states no longer counts as the last word. In general, despite the fragmentation of legal systems, there are standardization processes that make it possible to prefigure a global law, however much in a way that is still vague.

In this context, here only sketched out in broad strokes, there are doubtless new opportunities for the theory of natural law, but only if that theory can express itself in a new way and offer a better interpretation of contemporary law than that of rival theories.

1.4.4. The Third Theory of Law

The epoch-making work that ushered in a new phase in contemporary legal-philosophical culture is Ronald Dworkin's *Taking Rights Seriously* (Dworkin 1977). This work, ostensibly a revision within analytical jurisprudence, is in reality an attack on Hart's legal positivism. It follows a third way (see Mackie 1977a) that does not just distance itself from both legal positivism and natural law theory but goes deeper, seeking to revolutionize the epistemological approach of the theory of law. In this respect Dworkin's conception, setting aside its particular and questionable aspects, preserves to this day a meaning paradigmatic of the new trend in the legal philosophy of the last two decades of the 20th century.

Dworkin (1986, chaps. 2–3) distinguishes between semantic theories of law (which he intends to challenge) and interpretive theories, which he instead endorses. The former, which include most legal positivist theories from Austin and Kelsen to Hart, attempt to define the grounds of law through its identificatory criteria, as if the law were a preexisting object to be explained and as if there were a "nature of positive law." The latter instead believe that if we are to describe a social practice like law, we have to take a practical approach, justifying both the principles followed by those who use law (especially lawyers and judges) and the coercive force of such principles. In this second case, practical knowledge is seen not only in an applicative function but also

[40] The notion of *ius cogens* was anticipated before World War II, and promoted afterward, by Alfred Verdross (1937, 1966).

as a distinct form of human knowledge based on interpretive concepts whose content is determined in relation to paradigmatic cases.[41] Thus Dworkin goes back, though in an independent way, to a hermeneutical perspective influenced by pragmatism.

In this context the traditional problem of the separation between law, on one side, and morality and politics, on the other, loses the centrality it has in semantic theories. Once law is conceived as a social practice, it is easy to understand why legal reasoning often resorts to moral or political arguments. These arguments are elements of law as much as the arguments that are usually understood as typically legal. The following question therefore needs to be addressed: How have natural law theories responded to the demands of the interpretive theory of law? In fact, the natural law theories so far discussed have a clear semantic and classificatory character.

Once more we have to distinguish a broad and all-encompassing view of natural law theory from a narrower and more specific one. The former has an exclusively metaethical character in that it looks to the investigative method of practical reason, while the latter also has an ethical character in that it looks to moral contents.

In a broad sense, all conceptions that reject the separation, descriptive or normative, between law and morals can be considered natural law theories. This can be said to apply also to all nonpositivist theories of law, that is, to all those conceptions that significantly make reference to an objective morality in legal theory. However, we would be misunderstanding the natural law tradition if we equated natural law theory with the connection between law and morality, as is often done today.

In a narrower and more appropriate sense, natural law theory is not only a theory of morality but also an ethic connected in some way with "human nature" and "natural reason," and it is also a theory of law because it argues as well for the legal character of natural law (cf. Y. Simon 1992, chap. 5). If it is true that the appeal to nature can be seen in a broad sense—in such a way that respect for human dignity or the fundamental values can also be seen as a consideration of the "moral nature" of the human being—the legal character of natural law is precisely what ultimately specifies natural law theory. From this point of view, nonpositivist conceptions are not, strictly speaking, natural law conceptions.

The history of the relation between law and morality has shown that there is no necessary connection between natural law *qua* moral theory and natural law *qua* legal theory. One can without contradiction accept the moral theory of natural law and at the same time maintain the separability thesis (see Soper 2007). But in the authentic tradition, ancient and modern alike, natural law *is* law in a strict sense.

[41] On the distinction between critical concepts, natural-kind concepts, and interpretive concepts, see Dworkin 2011, 158–70.

In virtue of all these possible combinations, the interstitial area between legal positivism and natural law theory today is increasingly widening, owing in part to the recurrent criticism of the value-free principle, and in part to the refusal to acknowledge the normative character of human nature in keeping with the thesis of the naturalistic fallacy. The rich debate within nonpositivism seems to render marginal the traditional opposition between the two extremes, an opposition that appears to have been overcome with the charting of a third way. Nevertheless, every so often in this middle ground, the atavistic conflict between the two hostile siblings flares up in new clothes, with visions closer to the two extremes.

So in a sense the third revival of natural law also concerns nonpositivist conceptions, leading to the rise of a debate within natural law theory broadly construed. The same thing happens in the house of legal positivism between the exclusivist orientation and the inclusivist one. Both legal positivism and natural law theory face an identity crisis. Neither can entirely reject the other's good arguments, and they labour to integrate them into their own conception in the most diverse ways, with results sometimes enlightening and sometimes confused.

It is worth noting, in general, that the reasons behind the third revival of natural law are much more complex than those of the two preceding revivals. It is not only a matter of revisiting the concept of law but also of dealing with ethical pluralism. The inevitable involvement of legal theory in moral conflict pushes all contenders willy-nilly into the arms of moral argumentation (once identified with natural law) as they find themselves advancing competing interpretations of the fundamental constitutional values.

In the cultural area we are considering in the last decades of the 20th century there are no major legal-theoretical innovations in natural law theory in a strict sense. Those who carry forward the tradition of Catholic natural law theory—like Francesco D'Agostino (2006) in Italy; Francisco Carpintero Benítez (1999), Jesus Ballesteros (2001), and Andrés Ollero Tassara (1996) in Spain; and Carlos I. Massini-Correas (2006) in Argentina—are mainly and perspicaciously committed to criticizing legal positivism above all from an anthropological and moral point of view, vindicating the need for a philosophical foundation of legal theory. In this way the debate primarily develops around the question of aims and values and not as a matter of legal theory in a narrow sense.

From the English-speaking area, which maintains its cultural leadership, comes the most interesting attempt to combine the natural law tradition from Plato onward with contemporary legal theory. In 1980, the fundamental *Natural Law and Natural Rights* came out, written by John Finnis (2011), testifying to the seminal character of Hart's thought, considering that like Dworkin, Finnis is a disciple of Hart.

The remarkable novelty in the thought of Finnis, who sets out to wed the Thomist tradition with the analytical method, consists in its being the first true

theory of positive law framed from the perspective of natural law theory. More precisely, he gave us a natural law theory of positive law: "There is no proper place for a positivism outside natural law theory" (Finnis 2012, 71).

As we have seen, the prevailing tendency in Catholic natural law theory in the 20th century was to regard positive law as a tool for realizing natural law on metaphysical and theological bases, that is, on bases extrinsic to legal science. And even when there was an insistence on the rational laicity of the principles of natural law, as happened in the second half of the century, the effort did not yield a conception of positive law of its own competing with the legal-positivist conception. Finnis, by contrast, maintained that analytical descriptive jurisprudence needs the theory of natural law to establish its own internal principles and to support the practical attitudes of those who use law, as well as it needs a justification of authority and of its exercise in keeping with natural rights and the common good, and generally also in keeping with the rule of law. From a methodological point of view, the decisive move was that of rejecting in legal science the method of the distinction *per genus et differentiam specificam* and adopting the Aristotelian and Weberian method of the ideal or exemplary type and secondary cases. Only a full definition of law can stress law's close connection with morality in the unique flow of practical reasoning. But this does not mean that formal validity is in itself insufficient in giving rise to legal obligation, but the latter does need a deeper justification.

In this way Finnis defuses the disquieting Augustinian dictum *Lex injusta non est lex*, which made a dialogue with legal positivism impossible. But at the same time he rejects the clear-cut distinction between law and nonlaw embraced by legal positivism and traditional natural law theory alike, and he brings in the idea of the gradualness of obligation in realizing positive law in its fullness, an idea also already present in what was earlier termed "hermeneutical natural law theory." So here we have all the conditions needed for the civil law countries to embrace Finnis's thought, which for the moment is more influential in South America. In Europe the dominant problem continues to be that of the debate between positivism and nonpositivism, a debate centred on the relation between law and morality, and so on the separability thesis, and it is to this matter that we now turn.

1.4.5. Non-Positivism and Natural Law

The emblematic historical event of this period is no doubt the fall of the Berlin wall in 1989. This episode in history can be interpreted symbolically as expressing a desire to put an end not only to a political and cultural separation but perhaps also to *any* separation. Boundaries do not vanish, to be sure, but they are no longer seen as walls of division and exclusion: They rather become the locus or lingua franca enabling an exchange with the other in which to listen to their reasons. The borders become a common ground.

Finding one's bearings in this common ground, which is no longer rigorously positivist and certainly not avowedly that of natural law, is not easy. Labels are no longer helpful. The neoconstitutionalist label is ambiguous and inappropriate, because it can have different and opposite meanings, signalling the difficulties of contemporary legal positivism. It is necessary to look at the real problems brought into focus by the new object of observation, that is to say, law in the constitutional state and in the global legal order. Positivist legal theory is forced to make some major adjustments. How far can it go without morphing into natural law theory?

This is a story that in a strict sense belongs to the evolution of legal positivism.[42] Here we need only identify the moments of greatest proximity to natural law positions in the broadest sense.

The relation between law and morality can be observed from three points of view: that of the contents of legal rules, that of the normativity of law, and that of the formal structure of legal rules (see Viola 2009). To what extent does the revision of legal positivism in each of these three spheres take legal positivism dangerously close to natural law theory in a narrow sense?

To answer this question we have to bear in mind both the underlying theory of morality—which in natural law theory, as is well known, is objectivistic—and the way the role of legal theory is understood, a role that in natural law theory is to work out the criteria on which basis to justify our obedience to law. It is *in conjunction*, rather than separately, that these two theses properly configure a conception as being closer to natural law theory in a narrow sense.

In the nonpositivist camp, which is growing bigger and bigger, we will only look at some paradigm examples of each of the three points of view just indicated.

1.4.5.1. The Claim to Correctness

Robert Alexy (1945–) rejects both the descriptive thesis of the separability of law from morality and the normative thesis of separation, arguing that between law and morality there are actually necessary connections on both a conceptual and a normative level.[43] Nonpositivism is distinguished from legal positivism in that it believes that essential to the concept of law is not only the element of legality, understood as conformity to the legal system and the social effectiveness of legal norms, but also the moral element, essentially centred on fundamental human rights, which have become positive principles of law in the form of "optimization commands" (cf. Alexy 1986). Nonpositivism is also distinguished from pure natural law theory, according to which only the moral

[42] On legal positivism and the challenges of neoconstitutionalism see Chapter 10 in this tome.

[43] On Alexy see also Sections 10.3 and 25.4 in this tome and Sections 10.3.2.2 and 10.4.3.1 in Tome 1 of this volume.

element is essential. But we should note that this certainly is not the tradition of natural law, which has always been attentive to the positivity of law. And that brings Alexy's nonpositivism close to natural law theory in a narrow sense.

If immoral normative contents are unjust in the extreme, they can make legal norms invalid (and here Alexy accepts Radbruch's formula), but in most cases the outcome is a defect the legal system can remedy with its own internal resources. This is possible because positive law has an open texture, meaning that it is necessarily indeterminate. The judge, the prototypical participant involved in putting law into practice, is required by the claim to correctness to state the law by recourse to principles both moral and legal. Judges do this through a balancing procedure, revealing the presence of moral principles internal to the legal system. Through the use of these principles, the claim to correctness becomes a claim of a moral kind, in that it invokes a morality that can be founded at the level of rational justification and is not just a claim of empirical consent proper to positive morality. In this respect the theory of law becomes part of the more general theory of moral argumentation, which looks to just morality as its regulatory ideal. In this connection, correctness (*Richtigkeit*) substantially amounts to rational acceptability based on good reasons (see in general Alexy 1992).

Alexy, as noted, has developed a well-known theory of legal argumentation (Alexy 1978) within a general theory of practical rational discourse. His thesis is that legal discourse is a particular case of practical discourse at large, in which the demand for justice is asserted within the constraints and conditions of the legal system (this is the special-case thesis, or *Sonderfallthese*). This means that in law, freedom of discussion is constrained by procedures set up to confer greater certainty on the expectations of citizens, but the fact remains that legal argumentation to all intents and purposes is part of practical rationality and its actualization in social reality.

The *Sonderfallthese* has been criticized, among others, by Habermas (1992), who in agreement with Neumann (1986, 90) has argued that legal and moral justice are heterogeneous, accusing Alexy of subordinating law to a morality conceived in the manner of natural law. But in order to properly speak of subordination in the sense just explained, one would have to show that in Alexy's theory the constitutive moral element of law takes priority over the other two—which it does not. On the contrary, while in most cases a moral defect cannot by itself make a legal norm invalid, a defect involving the formal characteristics of legal validity does in a strict sense deprive a norm of its legal quality. From this point of view Alexy's theory is less close to natural law theory in a narrow sense. However, if we compare his theory with Finnis's, there is one difference we will notice, among many others, in that it envisions a very different relationship between general practical reasoning and specifically *legal* practical reasoning. For Finnis, the latter is a phase internal to the general flow of practical reasoning, and even though it can be isolated, it does not yet lead

to a concept of law in the full sense. For Alexy, the *Sonderfallthese* is instead conceived as an *Integrationsthese*, that is, as a way to strengthen the weakness of general practical discourse. This means that the need to realize justice in the *concrete* overrides the demand for its *full* realization. The legal system looks to practical reason as its deontological ideal (see Alexy 1987, 407). We can still hear the echo here of the neo-Kantian distinction between the concept and the idea of law. Even so, the effective presence of fundamental rights, coupled with the law's open texture and the role of principles, is such that the *Sonderfallthese* comes very close to the fullness of the moral claim.

1.4.5.2. Law's Normativity

The Argentinian philosopher Carlos Santiago Nino (1943–1993) starts out from a rejection of conceptual essentialism, arguing that conventionalism has made possible a plurality of concepts of law, all legitimate on the basis of the point of view adopted.[44] The choice depends on the aims assigned to the theory of law. This makes it possible to achieve compatibility between the descriptive concept of law proper to legal positivism—a concept useful in carrying out historical, sociological, or comparative investigations—and the normative concept proper to natural law theory, useful as a basis for legal decisions and claims. Accordingly, the atavistic dispute turns out to be essentially "trivial" (see Nino 1980a, 543; cf. also Carrió 1983).

The normative concept of law is appropriate if our purpose is to *justify* obedience to the law, and not simply to *explain* such obedience, and if we take up the point of view of participants in legal practice, who in turn can participate on the basis of internal reasons or acting on extrinsic motives, but who are ultimately sensitive to the social practice of moral discourse (see Nino 1984).

On these bases it can be stated that the answer to the question Why obey the law? is moral and that moral discourse, which legal discourse has to take into account, is the only discourse with an autonomous and fully justificatory character.

Nino, inspired at one and the same time by Hobbes and Kant, is a supporter of ethical constructivism, which is certainly not the metaethics of traditional natural law theory (see Nino 1991, 64–72). Although moral facts are *constructed*, and so involve human work, the resulting construction is not thereby arbitrary, in that it is subject to limits and conditions dictated by its presuppositions and by its functions, which are to resolve conflicts and promote social cooperation. Moral discourse therefore has an ideal structure from which one can also derive a way of conceiving moral agents. The latter must be thought of as endowed with autonomy, that is, as capable of freely accepting the princi-

[44] On Nino see also Section 10.2 in this tome.

ples that guide their behaviour, and also as capable of rational communication; otherwise, moral discourse would be impossible. So this moral agent is ultimately the same as that of Kantian natural law theory. Moral discourse looks for intersubjective values or moral truths, whose role is ultimately to justify the legality of a legal system.

The justification of obedience to law cannot rest on law itself; otherwise, we would have an infinite regress. Nor can the chain of competence norms be infinite. It leads to norms that are not legal in the same sense as other norms. In general, it must be recognized that the constitution is not the most fundamental practice of a society, for in its own turn it rests on a more fundamental practice that also explains why we observe the constitition even when it is modified in a regular way. This is essentially Kelsen's intuition about the basic norm (*Grundnorm*), though Kelsen erroneously configures it in a hypothetical sense. In reality, the basic norm, which imparts validity to the ensuing constitutions, is not a legal norm according to the descriptive and institutionalized concept of positive law but an extra-legal principle of a moral character.

Hence the concept of validity, used from the internal point of view, is a normative concept that implies extra-legal or moral norms. Obviously, this is in the first instance a positive morality, but it is nonetheless subject to the practice of moral deliberation, in turn subject to revision by intersubjective critical morality. The most favourable political arena for the latter is that of deliberative democracy (cf. Nino 1996), which is enacted above all in processes interpreting and applying the law.

If we want to credit law with authentic normativity belonging to the sphere of morality and not merely with the exercise of force and coercion, then we will have to abandon any insular conception of law as a freestanding enterprise. Every legal system possesses an internal normative reserve that is not strictly legal-formal and makes the obligatory force of its norms possible (see Nino 1994).

In conclusion, Nino maintains that if the theory of law is to have an active role, that of justifying obedience to law, it has to abandon conceptual positivism, which, being based on the separability thesis, cannot say if and when we have to follow legal norms. If law belongs to the sphere of practical reason, then once we appreciate that fact we can appreciate that law is a moral reason for action.

Very close to this conception is that of Manuel Atienza (1951–). He, too, maintains that acceptance of the rule of recognition requires a moral judgment (see Atienza 2001, 112), a line of thought he has recently summed up as follows:

> […] the two main reasons for rejecting ethical noncognitivism (and relativism, though obviously not understood as a position of descriptive ethics) are the following: (1) it does not allow the reconstruction of important aspects of legal practice (particularly the justification of legal decisions); (2) it is self-frustrating. The alternative should be a (minimal) moral objectivism which, in contrast to relativism, defends the thesis that moral judgments incorporate a claim to correction

and, in contrast to absolutism, defends the thesis that moral judgments (such as those made by courts of last instance) should incorporate final reasons (in practical reasoning), but these should be open to criticism and, as a result, be fallible. (Atienza 2007, 244)

1.4.5.3. A Natural Law of Positive Law

The third perspective to be considered concerns the connection between law and morality as an element on which depends the way we conceive the very structure of positive law. This is a line of thought pioneered by the American jurist Lon Fuller, who in the formal principles of the rule of law identified a real morality internal to law (see Fuller 1969), to the point of speaking of "a natural law of institutions and procedures" (Fuller 1981, 32). But this perspective is now further broadened because of the variety of the forms of contemporary law, which is growing increasingly diversified both within each political community and without, in the international, transnational, and supranational sphere. Legal rules themselves do not all have the same obligatory force, and more and more frequently there are cases of soft law.

In this context we clearly see the inadequacy of the criterion of formal validity for identifying the positive law. This criterion is based on the origin of norms, an origin that today, more than ever, is not unitary, just as there are no stable hierarchies of sources of law. Consequently, the focal point shifts from the origin to the use of norms. The legal character of the rule is instead sought in the way the rule has to be put into practice, that is, how it is to be interpreted and applied. The formula of the rule of law can thus be understood as a meta-rule on the use of legal rules (see Viola 2011, 5). It is a normative conception of legal practice that concerns both the conditions that make rules practicable and the presence of special institutions of a political and jurisdictional character. It appears more and more evident that positive law is made up not only of norms but also of doctrines, principles, concepts, and institutions. All this concerns not only the contents of law but also its formal structure.

The upshot of the foregoing considerations is that there is no way to put law into practice without first making reference to the traditional principles of the rule of law, as is shown by the frequent recourse to this formula in international legal documents and in European treaties. But there is controversy today about what these principles are and how they relate to the concept of law.

On the one hand, the evolution of contemporary law seems to require reformulating these principles in an effort to forge a rule of constitutional law and a rule of international law (cf. Viola 2007), while, on the other, considering such principles as a constitutive part of the concept of law means seeing them in a normative sense and prefiguring, in the manner of Fuller, an ethic proper to positive law and sensitive to the ontological or historical characteristics of human nature. This, after all, is also the meaning of Hart's appeal to "the minimum content of natural law," since this "natural necessity" which law has to

take into account is to be seen not in a causal sense but in a rational one (see Postema 2011, 330). This is the way in which practical reason has to take human nature into account.

So if we believe, in the manner of Dworkin, that the principles of the rule of law are not only formal but also substantive—in that they now incorporate human rights and the guarantees of contemporary constitutionalism—then the ethic of positive law grows even thicker, well beyond Fuller's intentions.

According to Luigi Ferrajoli (1940–), the legal validity of norms rests on a judgment that is objective and axiological yet internal to the legal system (see Ferrajoli 1989, 353) and is a "positivization of the law of reason" (Ferrajoli 2010, 2782); indeed, it is a substantivist version of the rule of law.

At this point nonpositivism finds itself facing a dramatic alternative,[45] for it must choose between embracing ideological legal positivism and opening the door to the claims of natural law.

Those who believe that the ethical substance of law is entirely contained in constitutional principles and is only waiting to be made explicit by deductive logic have to show they can avoid the ideological thesis that a law is just by virtue of its being constitutionally valid. But in effect nothing that is positive can escape the criticism of reason, and that also applies to constitutional principles, which are the positivization of fundamental values. Besides, if we recognize cognitivism *within* the legal system, then it will be difficult reject it *outside* the system. Hence natural law theory, seen as a rational search for a better way to protect human dignity, is a defence against ideological legal positivism. There are undoubtedly objective judgments on the violation or the protection of human dignity, and indeed positive law itself assumes as much.

By contrast, those who believe that the positivization of fundamental values does not imprison the meaning of those values or eliminate their prominence over the positive datum—thus asserting a role for ethical discourse in general—find it hard to continue on a path of support for legal positivism. Witness, for instance, the words of the Italian constitutionalist Gustavo Zagrebelsky: "In the presence of principles, social reality expresses values, and law is valid *as if* natural law were in force. Again, and this time for a reason connected to the law's very mode of operation and not as regards contents, law grounded in principles meets natural law" (Zagrebelsky 1992, 162; my translation), even though, incomprehensibly, he does not deem this a sufficient reason for abandoning legal positivism.

The only way to lay the ghost of natural law to rest is to deny that the problem of legal normativity truly belongs to legal theory, confining it to the outside, that is, to politics or morality (cf., e.g., Guastini 1996, 515), but in this way positivist theory remains incomplete as an explanation of law, as well as inert on the normative plane (see Gardner 2001).

[45] Ferrajoli prefers to speak of a "new legal positivism." Cf Section 10.5 in this tome.

1.4.6. The Open Texture of Practical Reason

In conclusion, nonpositivism has shown up some critical aspects of legal positivism, legitimizing the third revival of natural law as a search for just law internal to the framing of positive law and as a constitutive element of its positivity. We will now try to sum up these themes developed on the natural law approach.

(1) A characteristic of constitutionalism is the positive existence of a *lex superior* standing above ordinary legislation. The problem is to define the normative status of this supra-statutory law, which places a constraint on the content of ordinary norms. Dworkin and Alexy regard these principles as structurally and qualitatively different from positive norm, but since the same principles bear on the interpretation and application of law, that recognition according to the positivist conception amounts to opening the door to morality in law (see Prieto Sanchís 1997). Hence legal positivism is forced to choose between working out a different theory of constitutional principles and openly declaring itself incompatible with constitutionalism (cf. Troper 1992, 37), the latter option being something frankly paradoxical, as a theory based on facts cannot then turn around and reject them.

(2) The second characteristic, closely connected to the first one, consists in placing legal argumentation within moral argumentation. As noted, constitutional decisions often become a locus of moral evaluation when it is necessary to judge whether ordinary law is consistent with constitutional values, and these processes of reasoning are very similar to those typical of modern natural law theory. According to Atienza, "the approach to law as argumentation is committed to a minimum objectivism in ethics" (Atienza 2006, 53; my translation).[46]

(3) The positivization of human rights not only does not do away with the need to search for nonpositive law but, on the contrary, makes that an even stronger need. Rights are not something original but are an ethico-legal reflection of values. Today the language of values has taken the place of that of natural law. Values are translated into reasons that ground the ascription or recognition of rights.

This does not entail a return to the philosophy of values. To be sure, this current had a major influence on legal philosophy at the time of Dilthey, the neo-Kantianism of the Baden school, and Scheler. But, as previously noticed (see Section 1.3.3.3), it became unyielding in the hands of Hartmann, for whom value is an absolute that exists in itself (*Ansichsein*), regardless of whether anyone recognizes it (cf. Hartmann 1949, 154). Consequently, no dialogue was possible between values and the facts of history—which was precise-

[46] The Spanish original: "[…] el enfoque del Derecho como argumentación está comprometido con un objetivismo mínimo en materia de ética."

ly the problem to be addressed. The urbanization of values, for the purpose of toning down their violent and conflicting character (cf. Schmitt 2011), was the objective of the movement to rehabilitate practical philosophy (cf. also Mengoni 1985).

(4) Another opportunity for natural law theory lies in the principle of reasonableness, which has become the reference point for the processes through which rights are balanced and for the argumentation typical of constitutional courts. If conflicts between fundamental rights are to find a solution that can be considered reasonable, judgments of suitability, necessity, and proportionality in the narrower sense, through which the principle of reasonableness finds expression, have to satisfy their claim to objectivity. Since these are evaluative judgments, a cognitivist perspective is required. Nor can it be objected that we are only talking about instrumental judgments about the means adopted, because at least the judgment of proportionality in a narrow sense also requires evaluating the goals pursued by the legislator, their importance, and the degree to which it is useful to achieve them. Balancing is not a mechanical or merely procedural operation but requires judgments of relevance and comparative weight.

The very principle of equality, which lies at the root of that of reasonableness, entails value judgments about the objective difference between the situations to be compared, and that in itself justifies the differential treatment of those situations. If practical evaluations cannot be regarded as objective, the whole enterprise of the constitutional state would have no rational basis.

That these moral evaluations are also subject to restrictions and constraints dictated by positive law does not make them incompatible with natural law theory understood in a narrow sense, which defends the presence of natural law within legal positivity itself.

(5) Contemporary pluralism rejects the principle of authority and and asks that disagreements be settled on the basis of reason. The Hobbesian formula *Auctoritas non veritas facit legem* is incompatible with the constitutional state. The main task authority takes on is to make sure that the rules governing the practical discourse on which basis to choose among competing conceptions of life are practicable and complied with, and in this sense it turns out that authority can no longer stand on its imperative role alone. The exercise of natural reason is brought into prominence, but it has to reckon with the limits and constraints of positive law.

(6) Finally, the current debate on the universality of human rights sees a reconsideration of the natural law tradition. If human rights are universal, it is reasonable to search for a basis or justification of them in the traits common to all of humanity. This does not necessarily entail an appeal to human nature understood in a biological or teleological sense, but it certainly commits us to searching for and identifying values common to all humans. However, it remains an open question whether recognizing freedom also means recogniz-

ing human nature, since freedom is possible only among natural beings (see Spaemann 1994a, 79). On the other hand, denying the universality of human rights in every possible expression and maintaining their relativistic particularism does not help to explain their origin or their present currency, but only their possible ideological use. It is no accident that studies in international legal philosophy are multiplying and cosmopolitan theories of law have been developing.

In conclusion, nonpositivism, as we have seen, offers three ways of seeing the connection between law and morality: that of integration, where law is distinguished from morality by the need to make practical discourse effective; that of the incorporation of law into social morality, which provides the basis for law's obligatoriness; and that of a full or partial absorption of morality into law, which thus takes on an internal moral value.

These three orientations come close to natural law theory in varying degrees but are not full-fledged natural law theories. This is so above all because of the widespread refusal to recognize "human nature" as having some role in legal theory. In place of natural law there is moral law, but in legal theory the latter is perceived as a foreign body. Legal theory seeks to defend itself with the separability thesis, but in so doing loses its full capacity to explain the legal phenomenon. The only option left is to forgo the full autonomy of legal theory, recognizing its dependence on political philosophy and moral philosophy.

Law has to have a dialogue with morality if it is to avoid collapsing into morality itself, just as politics has to have a dialogue with religion if is to avoid becoming a religion itself. Practical reason cannot be worked out in sectors entirely separate from one another (see Spaemann 1994b). In this way, however, the legacy the 20th century inherited from 19th-century legal science theory is seriously jeopardized, and new scenarios open up that are still very uncertain.

The third rebirth of natural law, as we have seen, is widespread, though it is quite incomplete relative to the ancient and modern tradition. But as theories change, so do traditions. As long as there is meaning to the distinction between just and unjust actions, and as long as something is recognized that is unchangeable in positive law, which by definition is changeable, then what enlivens natural law theories will always allow a new resurrection of them.

Chapter 2

NATURAL LAW IN GERMANY IN THE 20TH CENTURY

by Stephan Kirste

Despite at least three revivals during the 20th century, natural law seems to have lost its importance at the end of the past millennium. Natural law theory as well as its subject of investigation has shifted from the philosophy of law to ethics. Natural law is no longer regarded as law in the strict sense of the concept. It does not consist of norms promulgated on the basis of authoritative competence and procedural norms and executed under certain constraints. The theory of these law-related moral norms now belongs to philosophical ethics—not to jurisprudence—even though it is still discussed and taught at law faculties.

However, natural law's loss of importance is not the result of the vehement critique of its ideological basis but of its success. The formal and material criteria the German natural law theorists have elaborated in an exchange with other central European and North American scholars have largely been adopted in German constitutions and other statutes. The formal criteria any law should fulfil according to natural law theory, criteria such as legal certainty and equality of application, have been accepted in legal theory as well as in legal practice in the 19th century, i.e., in the age of historicism and positivism in Germany. Criteria of material justice, such as human dignity, basic liberties, and legal equality, found a more difficult path into positive law. The process of their incorporation into positive law can be seen as the history of natural law in 20th-century Germany. Accordingly, the core tenets of natural law are no longer a spirit floating above the water; despite severe setbacks during the Third Reich—where we find the approaches of a National Socialist *Naturrecht*—they have become positive law and are now treated in the same way as other legal principles.

This development in Germany is a good illustration of how natural law emerges only when positive law degenerates in times of crisis or in times of transition from one legal regime to another, or simply when it ignores basic moral demands. The three "renaissances" of natural law—around World War I, in the aftermath of the Third Reich, and after the fall of the Berlin Wall—with the following reunification of Germany were such moments of crisis, when the old legal regime had come to an end and did not provide guidance for the future.

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2.1. The Starting Point

In the beginning of the 20th century, historicism and legal positivism dominated jurisprudence. Only norms which had developed as expressions of the spirit of the people (*Volksgeist*), as Friedrich Carl von Savigny put it, or which were formulated by the supreme will of a sovereign were considered law. If the idea of natural law was not bluntly rejected, these higher, nonpositive norms were considered changeable though not arbitrarily alterable. Especially the positivism in public law (*staatsrechtlicher Positivismus*) of Paul Laband (1838–1918), Karl Friedrich Wilhelm Gerber (1823–1891), and to a certain extent Georg Jellinek (1851–1911) found no justification for any legal norms prior to the implementation of positive norms.

Perhaps the most outspoken critic, but certainly not the only one, was Karl Magnus Bergbohm (1849–1927), proclaiming what follows: "In my view the pest plants of natural law, in whatever form and disguise they may ever appear, open or concealed, have to be destroyed root and branch" (Bergbohm 1892, 118; my translation). More moderate voices, too, would prefer "to go back to normal" instead of bothering with natural law (see Anschütz 1914, 26). Others spoke of "wishful thinking" with respect to natural law and emphasized the realistic and critical approach of legal positivism (cf. Somló 1927, 308ff.).[1] Even Gustav Radbruch (1878–1949), who played an important role in the post World War II natural law discussion, held that value judgments, which are the basis of natural law, could not be expressions of knowledge but only of confessions.

2.2. Natural Law Theory in the First Third of the 20th Century

Despite the predominant positivism in German jurisprudence and legal philosophy at the end of the *Kaiserreich* and the Weimar Republic, the natural law tradition had not been forgotten at all. On the contrary, the first renaissance of natural law was prepared under the seemingly all-embracing cover of positivism. Two developments were responsible for this renewed interest in the extrapositive foundations of law. The first impulse came from the scientific point of view: Can a strictly empirical jurisprudence be called a science at all, or is it "like the wooden head in the fable of Phaedrus, fine enough in appearance, but unfortunately it wants brain," as Immanuel Kant (1887, 44) had put it in his *Metaphysics of Morals*. Natural law as the unity of the empirical diversity of the positive laws—this was the idea pursued by neo-Kantian scholars. Taking a path different from this formal approach, other thinkers looked for answers to the pending "social question." They were more interested in the substantive answers provided by the old natural law tradition.

[1] Hans Kelsen (1881–1973) called it "ideology" (Kelsen 1927–1928b, 78ff).

The experiences of World War I were of great importance. As Erich Kaufmann (1880–1972) put it, "these experiences have forced us to subject our thoughts about law and the state to new scrutiny" (E. Kaufmann 1921, 3; my translation). Phenomenological scholars like Erich Kaufmann, as well as neo-Hegelian thinkers like Julius Binder (1870–1939), had to reexamine their convictions.[2] They thought of the Great War as an "eye-opener" alerting them to the shortfalls of legal positivism and naturalism. Accordingly, Rudolf Smend (1882–1975) wrote: "The natural lawyers knew more about the state than Laband and Max Weber, much more than their adepts and dispraisers and critics, and much more than what the common accounts of their history say about them" (Smend 1994, 182; my translation). In most cases, however, the revival of natural law in the first third of the 20th century in Germany was not an original approach to the topic: It was a renewal. It is in this sense that many of these approaches were "neo-" theories: neo-Kantianism, neo-Hegelianism, and neo-Thomism.

More than referring to the *Metaphysics of Morals*, neo-Kantianism reminded the scholarly community of the transcendental approach of critical philosophy. Natural law did not mean a set of norms as a basis for the deduction of just provisions in positive law, but rather consisted of the conditions for the possibility for secure knowledge in law. Empirical knowledge cannot be systematically gained and explored if there is no unifying idea as a focal point. The idea of law (*Rechtsidee*)—that is, the idea of justice—was regarded as the focal point of law. Rudolf Stammler (1856–1938) considered a fixed set of substantive norms as the content of natural law to be an unproven assumption (see Stammler 1896, 171). They are the expressions of the ongoing process of producing paradigms for the legislator to look to. They also served as tools for the recognition of positive norms. Accordingly, Stammler spoke of "natural law with changing content" (Stammler 1988, 185; my translation):[3] The form remained the same, while the content was constantly changing. What he positively developed was a set of abstract guidelines for positive law, which in his "doctrine of right law" (*Lehre vom richtigen Recht*) were decidedly not considered norms (see Stammler 1902).[4]

Leonard Nelson (1882–1927)—a neo-Kantian thinker, though he drew much inspiration from Jakob Friedrich Fries and in this sense was more neo-

[2] "This turn from a material philosophy to a worldview [*Weltanschauung*] and metaphysics has been aided by the dreadful experiences that have befallen mankind, and Germany in particular, in the last couple of years. Whoever had not been woken up from his slumber by the impending auspices woke up with this catastrophe […]. The World War awakened mankind from its daydreams, and with watchful eyes it observes the ruins of the world of positivism and naturalism" (Binder 1925, XLVI; my translation).

[3] The German original: "Naturrecht mit wechselndem Inhalt."

[4] On Stammler see also Section 1.1.3.1. in this tome and Section 1.3 in Tome 1 of this volume. On neo-Kantianism in general see Chapter 1 in Tome 1 of this volume.

Friesian than neo-Kantian—proved that empirical knowledge of law can never achieve necessity. He rather adopted the transcendental method. That is why a conception that could confer necessity and certainty on the experiences of law would have to be constructed a priori (see Nelson 1964, 21).[5] Without such necessity, norms would not be capable of any obligation.

Whereas this argument was close to the Marburg school of neo-Kantianism, the ongoing discussion in the Heidelberg school (i.e., the southwestern school of neo-Kantianism) was absorbed with the question of how a knowledge of values was possible at all (Paulson 2002a, 11ff.). Emil Lask (1875–1915), who had a major influence on Gustav Radbruch, tried to avoid the assumptions of both legal positivism and natural law (see Lask 1982, 198).[6] Whereas legal positivism was considered merely historical, natural law theories claimed to be ahistorical (see ibid., 191ff.). This dualism could be avoided if law was conceptualized as a reality related to a certain legal value.

The neo-Hegelian scholar Julius Binder (1870–1939) placed greater value on historical and social aspects than neo-Kantian philosophers did. He, too, understood all law as oriented toward the idea of law. This idea of law contained the concept of community, which he thought would form the individual's personality (see Binder 1925, 283). As long as positive law was guided by this idea of law, different historically concrete and correct laws would be possible. Thinking along Hegelian lines, Binder's disciple Karl Larenz (1903–1993) rejected the idea of a higher law but attempted to uncover the "immanent idea of law" in positive law. He considered this an expression of the objective spirit.[7]

The neo-Thomist approach to natural law looked to certain material principles that should guarantee justice in positive law. The respective scholars tried to recall the timeless moral foundations of all laws, thus rejecting any voluntarism in jurisprudence. According to Victor Cathrein (1845–1931) human reason is only a *receptive* norm-inventing capacity, not a creative one (see Cathrein 1901, 126). During this first phase, natural law did not play an important role in Protestant legal theory or in Protestant theology. Only the individual consciousness was important for building moral reasons for action, but legal norms seemed to belong to the *civitas terrena*. This two-kingdoms doctrine was later made responsible for justifying legal positivism. But it did leave the individual consciousness as a source of resistance and even, for some, of a right to resistance.

Apart from these approaches reviving traditional concepts and methods of philosophy and further developing them, only a few natural law schools in the first third of the 20th century related to contemporary philosophical theories. One of these comprised natural law theories based on the concept of the sciences of spirit (*Geisteswissenschaften*) as developed by Wilhelm Dil-

[5] He raised that line of criticism against positivism as early as 1917; cf. Nelson 1917, 2.

[6] On Lask see also Section 1.1.3.2 in this tome and Section 1.4 in Tome 1 of this volume.

[7] On Binder and Larenz see also Chapter 5 in Tome 1 of this volume.

they (1833–1911) and elaborated by Theodor Litt (1880–1962). Although they considered all law to be cultural phenomena made by humans on the basis of their legal consciousness, Dilthey accepted the idea of natural law understood a complex of norms not made but discovered through a knowledge of values (see Dilthey 1990, 78). The central category of the humanist approach to natural law was that of life. Dilthey (1957, 4) considered his theory an attempt to understand life not from any abstract point of view but through the expressions of life itself. On this basis, Erich Kaufmann (1880–1972) criticized neo-Kantian theories of natural law for their abstract formalism, and instead accentuated their historicity: "Only living forms are capable of enabling life; and only these forms share the fate of life, to be amenable to death" (E. Kaufmann 1921, 101; my translation). The source of this natural law that would enable social life lies not in reason but in the "heart of the human being," as Rudolf Laun (1927, 29; my translation) put it. This philosophy of life in jurisprudence generally accorded a higher value to legal emotions than to the rational construction of law. By acknowledging the impact of legal consciousness and the legal emotions (*Rechtsgefühl*), it would be possible to prevent the uncontrolled subjectivism in law to which a strict formalism would lead (see Isay 1929, 225). These thinkers urged an awareness of the emotions and their embeddedness in the "trans-subjective stream of history" as a means by which to counteract the subjective arbitrariness of legal judgments to which positivistic or neo-Kantian theories would lead (see Holstein 1926, 1ff.).

Another new theory of natural law—which was first elaborated at the beginning of the century, even though it became most influential only after World War II—was the originally phenomenological "Material Value Ethics" (*Materiale Wertethik*) of Max Scheler (1874–1928) and Nicolai Hartmann (1882–1950). They, too, rejected neo-Kantian formalism. They were aware, however, of the epistemological problem of natural law. By applying Edmund Husserl's phenomenological methods to ethical knowledge, Scheler tried to enable an experience of values, which were not mere constructions but pre-existing material ideas. The content of the norms of natural law is based in these values, its form as embodied in norms stems from the "empirical striving of men." Accordingly, such a natural law is changeable due to this form (see Scheler 1966, 224; cf. ibid., 532ff.).

In the first half of the 20th century, natural law theory did not influence the courts. The German Imperial Court of Justice (*Reichsgericht*) had at best a legitimizing understanding of it: "Natural law," it stated, "is to be understood as a sum of legal norms that are binding on all mankind by virtue of nature itself, not by positive enactment […] to these norms belongs every citizen's duty of allegiance to his fatherland and its people." And the court considered the "welfare of the state the supreme law."[8]

[8] Rulings of the *Reichsgericht* in Criminal Law (RGSt) 62, 65ff. (67); my translation.

Thus, when Ernst Beling (1866–1932), at the end of the Weimar Republic, wrote "The dream of positive law is over" (Beling 1931, 1; my translation), this was an accurate account of legal philosophy in Germany but not of legal practice across the country's jurisdiction.

2.3. Natural Law During the Third Reich

2.3.1. Is there a National Socialist Natural Law?

In the early 1930s, National Socialist legal philosophy was quite heterogeneous (Pauer-Studer 2014, 15ff., 118ff).[9] A common denominator, however, was the rejection of legal positivism as a liberal theory. This conviction did not, however, amount to a return to classical natural law. The traditional content of natural law was in fact also abandoned. It was replaced by the National Socialist legal ideology, which again had nothing in common with the neo-Kantian idea of law (*Rechtsidee*).

National Socialist supra-positive law was supposed to be less abstract in its form than traditional natural law. For some authors in a misunderstood Hegelian tradition this higher law was meant to overcome the former dualism of natural law and positive law. It was therefore conceptualized as a unity—natural and immediate, as well as an ideal and normative. Some authors spoke of natural law as the "characteristic order of the species of a people, a pre-legal, 'natural,' or 'divine,' genuine reality" (Best 1939, 1203; my translation). The idea was expressed as follows by Hans Frank (1900–1946), founder of the National Socialist *Akademie für Deutsches Recht* and "Commissioner of the total control (*Gleichschaltung*) of the judicial branch and the renewal of the legal order": History "gave us a consciousness that the concept of what law is depends upon the blood-inspired conviction of man, accordingly determined by race. If National Socialism creates a law founded not on so-called universal abstractions but on a people's sense for its race, the accord with the sense of ethics, too, will be secured" (H. Frank 1934, 8; my translation). The "new natural law" was considered to have only one aspect in common with the natural law of the Enlightenment, namely, "the firm belief that there is an absolute, eternal law, a law that flows from the essence [*Wesen*] of a naturally given subject" (Fehr 1938, 31; my translation). This encouraged others like Hans-Helmut Dietze to declare, "[o]ur present turning to natural law becomes more and more obvious" (H. Dietze 1936b, 818; my translation; cf. H. Dietze 1936a, 108, 204ff.).

The historical and naturalist aspirations of National Socialist legal philosophy also shaped the content of norms transcending positive law. Many authors explicitly or implicitly looked to the ideological foundations of National So-

[9] On Nazi philosophy of law see also Section 1.2.1 in this tome and Chapter 9 in Tome 1 of this volume.

cialism in Hitler's *Mein Kampf* and Alfred Ernst Rosenberg's *Der Mythos des zwanzigsten Jahrhunderts* (The myth of the 20th century: Rosenberg 1930). The fundamental categories in this anti-individualistic worldview were the people (*Volk*), the race (*Rasse*), and the unity of blood (*Blut*). The individual's status was only that of a member of the mass of the people (*Volksgenosse*). Mixed with components of Nordic mythology,[10] a naturalist ideology of the unity of the homeland, the common German language, and heroic history served as the foundation of this "blood-filled natural right to live as a natural law of the race" (H. Dietze 1936b, 819; my translation). This "natural law" was a decidedly unequal, anti-individualistic,[11] racial-elitist, and anti-universalist law.[12] It was meant to contain values that bind the legislator, but only in the form interpreted and specified by the Führer, Adolf Hitler.

The quest for a National Socialist "natural law" united many legal scholars of formerly different schools of thought—some of them remained influential in the early years of the Federal Republic of Germany and even in the renaissance of natural law after World War II. Hans Julius Wolff (1898–1976), for example, held it to be true in 1933 that "we are moving into a new natural law epoch."[13] Ernst-Rudolf Huber (1903–1990) tried to find a middle ground between a temptation to "backslide into Scholastic natural law theory" and lib-

[10] "It has always been the case that for the Nordic man the inner approximation to the nature of the laws of life is valued as being higher than the absolute arbitrariness of the state legislator" (H. Dietze 1936b, 819; my translation). The German original: "Höher als die absolute Willkür des staatlichen Gesetzgebers gilt dem nordischen Menschen von jeher die innere Wesensgemäßheit einer lebensgesetzlichen Ordnung."

[11] "The ethnic-organic worldview locates the original (primary) reality of mankind not in the individual human being (or in the individual soul) but in the people" (Best 1939, 1201ff., 1202; my translation). The German original: "Die völkisch-organische Weltanschauung sieht nicht im Einzelmenschen (oder in der Einzelseele), sondern im Volk die ursprüngliche (primäre) Wirklichkeit des Menschentums." This collectivist imprinting of law is expressed in principles like *Gemeinnutz vor Eigennutz* (the common interest prevails over the individual interest) or *Das Ganze vor dem Teil* (the whole is more important than the part).

[12] "However, contrary to the old natural law, the new natural law is no longer a law of mankind. The new natural law no longer encompass all peoples, all men, wherever they may live. It captures only a particular people, community, and national unity" (Fehr 1938, 25; my translation). The German original: "Aber entgegen dem alten Naturrecht ist dieses neue Naturrecht kein Menschenrecht mehr. Das neue Naturrecht umspannt nicht mehr alle Völker, alle Menschen, wo immer sie wohnen. Es ergreift jeweils nur ein Volk, nur eine Gemeinschaft, nur eine kulturelle und nationale Einheit."

[13] "The new German state knows […] a material idea of law, a highest legal value capable of sanctioning all delegated legislations. Even though this idea of law may not yet be clarified, one can recognize its shape already. We are moving into a new natural law epoch!" (Wolff 1933, 8; my translation). The German original: "Der neue deutsche Staat kennt […] eine materielle Rechtsidee, einen obersten rechtlichen Wert, der alle delegierten Rechtssetzungen zu sanktionieren geeignet ist. Wenn diese Rechtsidee auch—wie das Gefüge des neuen Reiches überhaupt—theoretisch noch nicht geklärt ist, so kann man sie doch schon in ihren Umrissen erkennen. Wir treten in eine neue naturrechtliche Epoche!"

eral normativism, legal positivism, and conceptual jurisprudence (see Huber 1939, 276). Other proponents of natural law in National Socialism certainly wanted to establish at least some limitations to the dictatorial power of the regime but their efforts were frustrated. This is true of Herbert Kraus (1884–1965). Illustrating his conception with many quotations from the speeches of Adolf Hitler and his *Mein Kampf*, Kraus intended to prove that "natural legal thinking belongs to the foundations of the National Socialist legal world view. The National Socialist is an adept of natural law" (Kraus 1933, 2419; my translation). From this normative ground he tried to impose limitations on imperialistic conceptions of world politics by elaborating a concept of international law. In 1937, he was removed from his position and worked at Columbia University; he was then reintegrated into German academia in 1945.

This National Socialist higher law gained practical importance in the interpretation of the overused general legal principles such as public morals (*Sittlichkeit*, *gute Sitten*). The *Völkisches Gesetzbuch*, which was to substitute the German Civil Code (BGB), though it was never enacted, contained several "basic rules" that were to be applied if the code provided no provision on the issue at hand. These "rules" contained the essentials of National Socialist higher law. The first basic rule stated, "The supreme law is the wellbeing of the German People"; the second, "German blood, German honour, and the health of our heritage [*Erbgesundheit*] are to be kept clean and to be preserved. They are elementary forces of the law of the German people [*deutsches Volksrecht*]." Following these "basic rules" was a catalogue of rights and duties. These rights were to be enforced "in good faith" (*Treu und Glauben*), however, and in accord with the acknowledged principles of the racial community's life (*völkisches Gemeinschaftsleben*). The community's wellbeing is to be preferred to individual utility.

In sum, the anti-positivist National Socialist legal theory and practice assumed a higher law. This higher law had formal similarities with natural law and served the same function as a legitimating foundation of positive law. However, by virtue of its anti-universalist and anti-individualistic content, it departed substantially from the natural law tradition. This higher law was a strictly immanent law without universal claims. All the transcendent values of the classical natural law tradition (the individual human being, the common good, liberty, equality, and the like) mutated into naturalistic "values." The hope of salvation was pinned not to the incarnated God but to the person of the Führer Adolf Hitler (see Schild 1983, 450ff.). Mankind became the biological unity of the people as a race, and the free individual degenerated into the people's dependent accomplice; only among the people was there some equality—making exception for the leaders of each societal level—but there was no equality between peoples. As far as scholars explicitly spoke of natural law, they instrumentalized the pathos of the natural law tradition for the elaboration of the National Socialist ideological myth of law (see Cassirer 1946, 298).

With respect to the outline just provided of the structure of a National Socialist higher law and its impact on positive law, Gustav Radbruch's dictum that "Positivism has made German lawyers defenceless" (Radbruch 1947, 9; my translation)[14] cannot be followed (Walther 1988, 263ff.). National Socialist legal theory and practice did not follow the ideas of legal positivism; neither did it carry forward the natural law tradition with respect to the content of its fundamental principles; it did work out, however, a conglomerate of higher principles of law which performed the same function natural law did in the history of legal thought (Neumann 1994, 147). These norms were not merely a subconsciously working ideology that a strict positivist, unaware of the ideas at work in him, would have become a victim of: They served as the explicit normative foundation of positive law in the Third Reich.

2.3.2. Natural Law at the Foundation of the Resistance to Hitler

Traditional natural law was not forgotten during these twelve years. This tradition was kept alive by a variety of groups, including by different circles in the opposition against Hitler. Importantly, the natural right to resistance was discussed in Catholic as well as in Protestant circles. Apart from elitist conceptions of a future Germany, elements of the Catholic social doctrine of the late 19th and early the 20th centuries gained some importance in the *Kreisauer Kreis*. In the 1934 Barmer Declaration, the Confessing Church (*Bekennende Kirche*), which formed around Martin Niemöller and Dietrich Bonhoeffer, rejected the totalitarian claim to power and insisted on the right of the individual consciousness and the transcendent designation of the church. They later openly criticized the concentration camps and the oppression of individuals and of society by the National Socialist regime. This Protestant opposition based on the rights of the individual is of special importance for the post–World War II development of the natural law theory in Germany, because,

[14] "The traditional conception of law, namely, the doctrine that 'law is law,' which is undisputedly the prevalent opinion among German lawyers, was defenceless and powerless against such an injustice in the form of law; the adepts at this doctrine were compelled to acknowledge any law as law, no matter how unjust. Jurisprudence must go back to the centuries-old common wisdom of antiquity, the Christian Middle Ages, and the Age of the Enlightenment, recognizing that there is a law higher than positive law—a natural law, a divine law, a law of reason, in short a supra-legal law in comparison with which unjust law remains unjust even if cast in the mould of positive laws" (Radbruch 1947, 9; my translation). The German original: "Die überkommene Auffassung des Rechts, der seit Jahrzehnten unter den deutschen Juristen unbestritten herrschende Positivismus und seine Lehre 'Gesetz ist Gesetz,' war gegenüber einem solchen Unrecht in der Form des Gesetzes wehrlos und machtlos; die Anhänger dieser Lehre waren genötigt, jedes noch so ungerechte Gesetz als Recht anzuerkennen. Die Rechtswissenschaft muß sich wieder auf die jahrtausendalte gemeinsame Weisheit der Antike, des christlichen Mittelalters und des Zeitalters der Aufklärung besinnen, daß es ein höheres Recht gebe als das Gesetz, ein Naturrecht, ein Gottesrecht, ein Vernunftrecht, kurz ein übergesetzliches Recht, an dem gemessen das Unrecht Unrecht bleibt, auch wenn es in die Form des Gesetzes gegossen ist […]." See also Radbruch 1946, 105ff.

in contrast to the first three decades of the century, Protestants then actively joined the natural law debate.

In the different groups of resistance against the regime, and Adolf Hitler in particular, the classical theories of the right to resistance was as much discussed as the question of a right to murder a tyrant. As the Protestant Adolf Arndt (1904–1974) later asked, "was it murder […] to lay one's hands on Hitler, or was it murder not to stop Hitler?" (Arndt 1948, 430; my translation).

2.4. Natural Law after World War II

The second renaissance of natural law in Germany began with the end of the National Socialist regime. The revival of the classical ideas of the natural law tradition was so fervent that some authors criticized natural law a "fashionable term."[15] Unlike the first renaissance of natural law, the second one was supported not only by legal philosophy but also by legislation and adjudication. Characteristic of this epoch was a tendency towards a concrete, historical, and realistic natural law and a stronger emphasis on emotional capacities for the cognition thereof (see Hubmann 1954, 319ff.).

2.4.1. Natural Law in the Philosophy of Law

The reactions of legal philosophy to the experiences of the National Socialist regime were quite heterogeneous. United in their attempt to find legal norms that would limit the legislator's arbitrariness, these thinkers adopted very different basic philosophical assumptions. We find elements of Aristotle, Cicero, the Stoics, Christian Scholasticism, Max Scheler's and Nicolai Hartmann's ethic of material values; fewer receptions of Kant and Enlightenment natural law philosophy;[16] and even of Ernst Bloch's socialist natural law, drawing on the early Marx and the idea of human dignity (see Bloch 1961).[17] If there was any single uniting attitude, it would have to be a scepticism of bold theories. On the one hand, we find a reflection on the timeless principles of tradition. On the other hand, this did not yield a mere return to the classical forms of natural law. Almost no one relied on the formalistic approach of neo-Kantianism.

[15] Heydte 1948–1949, 185ff. Other authors, however, question the idea of a renaissance. Wilhelm R. Beyer (1947) put his finger on the arbitrariness of the contents of natural law, which exclude the possibility of any return to a similar conception. Ulfrid Neuman held that the practical problem of doing justice to redress the National Socialist atrocities was so dominant, and the lines of theoretical continuity so thin, that it would not be appropriate to speak of any "renaissance" of natural law, even assuming a single understanding of natural law par excellence (see Neumann 1994, 154).

[16] For an overview, see Hollerbach 2004, 278ff.

[17] On these developments of German legal philosophy see also Section 10.2 in Tome 1 of this volume.

Even Kantian philosophers like Julius Ebbinghaus (1885–1981) criticized the natural law theory of the Marburg school for its formalism. Instead of looking to Kant's *Critique of Pure Reason*, the *Critique of Practical Reason* or the *Groundwork of the Metaphysics of Morals*, he drew heavily on the idealist's legal theory as set out in the *Metaphysics of Morals* (Ebbinghaus 1952, 229). Within the confines of Kant's concept of law, he stated: "Only these laws limiting the external freedom of human beings belong to the laws of nature, without which this liberty cannot, under any condition, be united with the freedom of all under laws" (Ebbinghaus 1960, 322ff.; my translation). In a dualistic view, he held that natural law does not contain any enforceable individual rights, but only objective duties of the legislator.

Just like in the first renaissance of natural law in the 20th century, in the postwar period an important role was played by neo-Scholastic natural law. In 1947 came the "manifesto of neo-Scholastic natural law conceptions" (Hollerbach 2004, 280; my translation), Heinrich Rommen's *Die ewige Wiederkehr des Naturrechts* (The eternal return of natural law: Rommen 1947). It contained the characteristics of the neo-Scholastic natural law: the ontological quality of its principles, the congruence between divine and human reason, the unchangeability and universal validity of those principles, and the primacy of the Church's authentic interpretation (cf. Hollerbach 2004, 280).[18] Johannes Messner (1891–1984) wrote a monumental work of 1372 pages, *Das Naturrecht* (Natural law: Messner 1950), dealing with institutions based on the neo-Scholastic foundations of natural law, the basic needs of human existence, and the individual consciousness. Messner drew a distinction between "elementary natural law"—with basic principles like the golden rule, which he felt are obvious to everybody—and "applied natural law," the concrete natural law for specific areas of activity in society.

Some of the new philosophical approaches to natural law in the Weimar Republic found a deeper reception in academic legal philosophy. In a much-discussed essay, *Die obersten Grundsätze des Rechts* (The highest principles of law: Coing 1947), Helmut Coing (1912–2000) built his theory on the humanities approach of Max Scheler's and Nicolai Hartmann's ethic of material values. Here he was looking to set out the most fundamental principles that would guide and limit legal orders in their attempt to provide a powerful guarantee of peace. Agreement with these principles secures the validity of the legal order. The source of recognition for these self-contained principles is the human consciousness of values. At the core of these principles we find freedom and the dignity of the person. Hans Welzel (1904–1977) strongly opposed this idea. He held that the only aspect which survives "from the world of natural law thought […] is not a system of eternal, material legal principles, but the ongo-

[18] Ellul (1948, 101) believed that the individual could err, but the Church could never have a lapse of reason.

ing task of positive law, to take care that the struggle for the right configuration of social relations remains a *spiritual* debate and is not stopped by predation or even by man's extinction by man" (Welzel 1980, 253; my translation).

The need for guidance for all legislation and legal practice was so deeply felt after World War II that even worldviews hitherto reluctant to join the concert of natural law conceptions overcame their doubts. Among these were the Protestant approaches. In the Calvinist tradition, Emil Brunner (1889–1986) emphasized the religious foundation of natural law through the revelation of the Bible (Brunner 1947, 269). In his view, natural law should be primarily concerned not with individual rights but with the state's objective justice (see Brunner 1947, 388).[19] Hermann Weinkauff (1894–1981) wanted to deduce principles of natural law from man's status in creation, especially his being an image of God (see Weinkauff 1951, 95ff.). Unlike those thinkers, who were optimistic about the recognition of natural law, Karl Barth (1948) radically rejected the idea based on the Lutheran interpretation of humankind's fall from grace.[20]

From the late 1940s to the early 1960s, in a public mood comparable to the one that prevailed after World War I, when Martin Heidegger had written his *Sein und Zeit* (Being and Time), several authors tried to make use of existentialism for the foundation of natural law. Friedrich August Freiherr von der Heydte (1907–1994) put it as follows:

> Forever lonely, forever deserted, alone with his fear of the meaninglessness of the present and the nothing of tomorrow, the single human being is thrown into a world of ruins. In this world, all historical, political, economic, and social order, indeed all order, is shaken to the core, and nothing seems to be certain and nothing original, nothing true, nothing real. In these ruins, the arms of the octopus of a nameless, amorphous, dispossessed mass, the machine that suppresses man, and of inevitable, catastrophic events snatch at the individual man to steal his last property, his I, namely, his already experienced and potentially experienceable being. Such times need a philosophy that leads man from meaningless and valueless availability [*Vorhandensein*] to his "existence," meaning the conscious unique "being" and "self-being" that is based on free decision—that lets him rediscover, understand, and experience his I and plan the possibilities enshrined in the I. Our times need an existential philosophy. (Heydte 1948–1949, 187ff.; my translation)

In a similar vein, other authors tried to develop existentialist conceptions not only of law in general but also of natural law. The later attempt is surprising insofar as existentialism emphasizes the momentary, situative character of hu-

[19] On other Protestant approaches, see Würtenberger 1952–1953, 584ff.

[20] "Any attempt to come at a concept of nature as a starting point and object of reasonable systematization on the basis of the Protestant understanding of Scripture would ultimately lead to a harmonization that would be in direct contradiction with Luther's fundamental conceptions. This would be the case even if we acknowledged that Luther allotted a much too narrow role to the use of reason" (Forsthoff 1947–1948, 686; my translation). The German original: "Jeder Versuch, auf dem Boden des evangelischen Schriftverständnisses zu einem Naturbegriff als Ausgang und Gegenstand vemunftmäßiger Systematisierung zu gelangen, würde zu einer Harmonisierung führen, die mit den Grundanschauungen Luthers notwendig in Widerspruch treten müßte, und das selbst dann, wenn man der Ansicht beitreten wollte, daß Luther dem Vernunftgebrauch ein zu enges Feld eingeräumt habe."

man existence. August von der Heydte, Erich Fechner, and especially Werner Maihofer (1918–2009) acknowledged the impact of the individual and of unbound conscience;[21] however, they tried to show that law belonged as well to being (*Dasein* or *Alssein; being-there* and *being-as*). This *Dasein* is based not on the individual alone but on the individual's dialogue with others. This basic relation is the foundation of all societies in its need for protection. According to von der Heydte and Fechner, the norms produced by this existential dialogue and meant to secure it are the "emerging natural law."[22] Werner Maihofer considered this structure of the *Dasein* as the ideal-typical fact (*Natur der Sache*; the nature of things/matter) from which other norms can be developed.[23] Natural law is part of the meaning of human existence, as it is the product of existential decisions. This is to say that natural law does not preexist these decisions but is the product of its innermost exegesis of their being. Natural law is therefore thoroughly historical.

The idea of an ideal nature of things as the foundation of a natural law that would avoid the abstractions of enlightened or idealist concepts of *Vernunftrecht* without falling prey to legal positivism was picked up in many postwar conceptions of natural law. The question of an adequate definition of the "nature of things" was never solved, however (Stratenwerth 1957). Still, it is paradigmatic for the new natural law in Germany—not a natural law rooted in strong ideological assumptions or abstractions but the ideal law of the here and now, a "historically elastic natural law" (Spranger 1948, 409; my translation). These tendencies are summed up by the title of Arthur Kaufmann's book *Naturrecht und Geschichtlichkeit* (Natural law and historicity: A. Kaufmann 1957). Natural law with its evolutionary, historical aspect was of great concern: "The historicity of law is the decisive dimension which makes it a human law […]. Only historical law that is open to man in his concrete being is truthfully human law" (A. Kaufmann 1994, 222; my translation). In accordance with the Scholastic tradition, other thinkers, like Alfred Verdross (1890–1980), distinguished an eternal and a historical layer of natural law (see Verdross 1971).

[21] Just like Heydte (1948–1949, 197), Günther Küchenhoff (1948, 46) considered natural law to be *Gewissensrecht*, that is, law stemming from consciousness.

[22] "Only after a deed does this emerging and daring natural law prove to be correct. This natural law has to be ventured in order to come to be. Accordingly, it is subjective in its origin, but objective in its purpose. This objectivity is the genuine criterion of natural law. This criterion is the reason that natural law remains what it essentially is, even if it cannot be proven or be attributed the certainty of an absolute and timeless validity" (Fechner 1954–1955, 325; my translation). The German original: "Dieses werdende und gewagte Naturrecht erweist sich dabei erst nach der Tat als richtig. Es muß gewagt werden, um überhaupt zu sein. So ist es in seinem Ursprung subjektiv, in seinem Ziel aber objektiv. Diese Objektivität ist das eigentliche Merkmal des Naturrechts. Mit ihm bleibt Naturrecht, was es wesentlich ist, auch, wenn ihm die Sicherheit absoluter zeitloser Geltung nicht mehr nachweisbar zuerkannt werden kann."

[23] For an overview, see Sprenger 1976 and the essays in Kirste and Sprenger 2010, esp. Hochhuth 2010, 82ff.

Whereas these conceptions of natural law sought a solid moral foundation of positive law, a more urgent practical problem was how to cope with the atrocities of the National Socialist regime. At the Nuremberg Trials, the regime's most important officials were charged with crimes against humanity (see Carl Haensel 1950, 253–94, defence lawyer at the Nuremberg Trials). But what to do with the judges and officers who acted in compliance with National Socialist laws or with other norms adopted by the regime. Were these legal norms at all? Were they legal even if they did not even aim at justice? Under the prohibition against retroactive criminal law, one could not impose present democratic and liberal standards on these past crimes. If the validity of positive norms were dependent on their coherence with natural law, many of the National Socialist norms would lose their validity and could not serve as justifications for these cruel actions. The discussion about these problems began right after the war, and one of the most debated and so far most relevant voices was that of Gustav Radbruch (1878–1949).[24] He rejected the idea that law and morals form a strong unity whereby any deviation of positive law from natural law would render the former invalid. However, from the still neo-Kantian perspective of the Heidelberg school, Radbruch looked at the law from the perspective of values (Paulson 2012b, 141). In his *Rechtsphilosophie* of 1914 and 1932, he considered law to be the reality that aims at the idea of law (see Radbruch 2003). In his view, this idea of law effects a unity of three legal values: those of the justice, utility, and certainty of law (ibid., 73ff.). In his famous and still much-debated article *Gesetzliches Unrecht und übergesetzliches Recht* (Statutory Lawlessness and Supra-Statutory Law: Radbruch 1946, 105ff.), he developed this well-known formula: If a statute gives rise to a conflict among these values, none of them can be altogether neglected without changing that law into something different. The utility of law, however, is the least important of those values. In a conflict between the two remaining values, the certainty of law ranks as more important until the injustice of law passes a threshold that Radbruch (ibid., 107ff.) defines by the criterion of its being unbearable (*unerträglich*). If a law violates elementary demands of justice under this criterion, it becomes a "flawed law" and may even altogether lose its character as law, at which point it must give way to justice.[25] Radbruch recognized the vague-

[24] On Radbruch see also Sections 1.1.3.2 and 9.1 in this tome, and Section 10.2.2 in Tome 1 of this volume.

[25] "The conflict between justice and legal certainty may well be resolved in this way: The positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people, unless the conflict between statute and justice reaches such an intolerable degree that the statute, as 'flawed law,' must yield to justice. It is impossible to draw a sharper line between cases of statutory lawlessness and statutes that are valid despite their flaws. One line of distinction, however, can be drawn with utmost clarity: Where there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law, then the statute is not merely 'flawed law,' it lacks completely the very nature of law. For law, including positive law, cannot be otherwise defined than as a system and an institution whose very meaning is to serve justice" (Radbruch 2006b, 7; English translation of Radbruch

ness of this criterion but found no way to sharpen it. In his view, examples of laws violating justice in such a strong way would be arbitrary laws and laws that deny human beings their human rights and treat them as *Untermenschen*. Accordingly, a contradiction with the basic assumptions of natural law would invalidate positive law. As disputable as this inference from the value of law to its character as law may be, this "Radbruch's formula" was broadly accepted not only in German jurisprudence (see Alexy 1992) but also in the German judicial practice. As vague as the criterion is, it helped to not only bring the Nazi criminals to justice but also to redress the cruelties of the German Democratic Republic, especially the crimes committed at the Berlin Wall. The formula still serves in contemporary debates as a well-recognized argument for balancing law and morals.

2.4.2. Natural Law in the German Constitutions after World War II

The framers of postwar federal and state constitutions did not rely on the vague and varied form of natural law principles; they adopted basic principles of natural law, and through more or less transparent democratic processes transformed them into positive law. The German Basic Law of May 23, 1949, begins with the protection of human dignity (Art. 1 I). It continues in Art. 1 II with a statement of human rights. Germany's Basic Law thus transforms some central principles of the natural law tradition into positive law and contains further guarantees in the form of basic rights.

The constitutions of the German states followed very much the same course—some of them even preceding the Basic Law. Remarkable in this respect is Art. 1 III, IV, of the Constitution of Rhineland-Palatinate, which was drafted under the influence of Adolf Süsterhenn (1905–1974):[26] "The rights and duties of public power are founded on and limited by the requirements of the common good as determined by natural law. The institutions [*Organe*] of legislation, adjudication, and administration are bound to ensure these principles" (my translation). This was not a singular phenomenon. Many of the early German postwar state constitutions invoked "Christian social morals and social justice" (Preamble to the Baden Constitution of May 18, 1947) or stated

1946, 107–8). The German Original: "Der Konflikt zwischen der Gerechtigkeit und der Rechtssicherheit dürfte dahin zu lösen sein, daß das positive, durch Satzung und Macht gesicherte Recht auch dann den Vorrang hat, wenn es inhaltlich ungerecht und unzweckmäßig ist, es sei denn, daß der Widerspruch des positiven Gesetzes zur Gerechtigkeit ein so unerträgliches Maß erreicht, daß das Gesetz als, unrichtiges Recht der Gerechtigkeit zu weichen hat. Es ist unmöglich, eine schärfere Linie zu ziehen zwischen den Fällen des gesetzlichen Unrechts und den trotz unrichtigen Inhalts dennoch geltenden Gesetzen; eine andere Grenzziehung aber kann mit aller Schärfe vorgenommen werden: wo Gerechtigkeit nicht einmal erstrebt wird, wo die Gleichheit die den Kern der Gerechtigkeit ausmacht, bei der Setzung positiven Rechts bewußt verleugnet wurde, da ist das Gesetz nicht etwa nur 'unrichtiges Recht,' vielmehr entbehrt es überhaupt der Rechtsnatur."

[26] Süsterhenn drew a distinction between specifically Christian levels of natural law and universal principles (see Süsterhenn and Rüfner 1948).

that the state had learned from its own violations of human dignity and thus enacted a new constitution in order to prevent future injustices (Constitution of Bavaria of December 2, 1947). Heinrich Mitteis (1889–1952) also saw natural law as playing an important role in securing a future: "Germany will become a full-fledged member of the society of nations only when it recovers its faith in the law, in the unbreakable principles of law enshrined in the convictions of natural law" (Mitteis 1948, 43; my translation).

The Austrian scholar René Marcic (1919–1971) thought that "together with Art. 79 III Basic Law," these provisions revealed "the supra-positive validity of law in general (natural law)" (Marcic 1952, 52; my translation). He considered the West German Constitutional Court (*Bundesverfassungsgericht*) "a guardian not only of the constitution but of natural law" (ibid.). His Austrian colleague Felix Ermacora (1923–1995) was right to reject this idea, and at the same time he pointed to the very significance of these principles: "The provisions contained in the Basic Law that have been attributed the nimbus of timeless law are on the contrary powerfully acknowledged law aimed at ordering society within time" (Ermacora 1955, 527; my translation).

2.4.3. Natural Law in the Postwar Courts

These constitutional principles seemed to permit an open reception of natural law by the courts. In the decade after World War II, courts on all hierarchical levels applied natural law at least in hard cases. They emphasized the foundation of the fundamental principles of the state (democracy, the rule of law, the *Rechtsstaat*), the basic rights, and certain institutions (marriage, family, local autonomy) in natural law. The Federal Constitutional Court "acknowledges the existence of higher law that binds even constitutional power" and found itself "competent to measure the positive law against that standard."[27]

In the long run, however, this did not in general mean a dense connection of natural law and positive law. The court explicitly referred the Radbruch's formula and applied it to National Socialist norms,[28] as well as to the cases involving border guards shooting escapees at the Berlin Wall.[29]

[27] Rulings of the Federal Constitutional Court (BVerfGE) 1, 14ff. (14 u. 61)—Südweststaat; my translation.

[28] "Legal validity can be denied to National Socialist 'legal' provisions if they so evidently contradict the basic principles of justice that a judge who applied or acknowledged its legal consequences would administer injustice instead of justice" (BVerfGE 23, 98ff. [98 u. 106]—Ausbürgerung I; my translation). The German original: "Nationalsozialistischen ‚Rechts'-vorschriften kann die Geltung als Recht abgesprochen werden, wenn sie fundamentalen Prinzipien der Gerechtigkeit so evident widersprechen, daß der Richter, der sie anwenden oder ihre Rechtsfolgen anerkennen wollte, Unrecht statt Recht sprechen würde."

[29] "So far the Federal Constitutional Court has dealt with the problem of 'unjust law in the form of statutes' only in noncriminal cases. It has taken into consideration that in cases of an intolerable contradiction between statutory law and justice, the principle of legal certainty can

Arguments grounded in natural law have been used not only by the Federal Constitutional Court of Germany but also the constitutional courts of the states and the Federal Court of Justice (FCJ). Under the presidency of Hermann Weinkauff, the FCJ ruled on the deportation of Jews: "Decrees that do not even aim at justice—decidedly denying the idea of justice and disregarding the legal convictions inherent in all civilized peoples who uphold the dignity of the human person—do not produce law, and any action taken under such decrees remains unjust."[30] The natural law orientation of the FCJ was relevant not only in criminal law but also in civil law matters, as in its decisions on marriage.

The influence of natural law vanished with the differentiation among positive law, legal dogmatics, and jurisdiction based on jurisprudence. Beginning with the 1960s, natural law lost its significance, and only the Radbruch's formula survived as a source for the courts' decisions (see Faller 1995, 12ff.). In 1974, Peter Häberle (1934–) could not only postulate a "Theory of the Constitution without Natural Law" but also diagnose it.[31] The transparent democratic process set up under constitutional law would give constitutional theory an advantage over natural law theory, which tends to dogmatize its findings. Apart from constitutional theory, the second heir of natural law was human rights theory. In a major project, for example, Johannes Schwartländer (1922–2011) investigated the history and systematic importance of human rights.[32]

From then on, natural law became an object of criticism. Its social function and the class structure of its principles were analyzed from a sociological point of view (see F. Kaufmann 1973, 126ff.; Rosenbaum 1972, Breuer 1983a, Breuer 1983b, 127ff.). Following in the footsteps of Hans Kelsen, on the one hand,

be judged less important than material justice. To that end the court has invoked the arguments offered by Gustav Radbruch […]. In these cases the court has repeatedly emphasized that the invalidity of statutory law has to remain an exception […]. As the time of the National Socialist regime has shown, however, the legislator can enact severe 'injustice' […], and so a statutory norm can be denied obedience if its contradiction to justice is intolerable" (BVerfGE 95, 96ff. [134ff.]—Mauerschützen; my translation). The German original: "Das Bundesverfassungsgericht war bisher mit dem Problem des 'gesetzlichen Unrechts' nur im außerstrafrechtlichen Bereich befaßt. Es hat in Betracht gezogen, daß in Fällen eines unerträglichen Widerspruchs des positiven Rechts zur Gerechtigkeit der Grundsatz der Rechtssicherheit geringer zu bewerten sein kann als der der materiellen Gerechtigkeit. Es hat dazu auf die Ausführungen von Gustav Radbruch […] Bezug genommen […] Dabei hat es mehrfach betont, daß eine Unwirksamkeit des positiven Rechts auf extreme Ausnahmefälle beschränkt bleiben muß […] Indessen habe gerade die Zeit nationalsozialistischer Herrschaft gezeigt, daß der Gesetzgeber schweres 'Unrecht' setzen könne […] und deshalb einer Norm wegen unerträglichen Widerspruchs zur Gerechtigkeit von Anfang an der Gehorsam zu versagen sei."

[30] Rulings of the Federal Court in Criminal Matters (BGHSt) 2, 234ff. (238ff.); my translation.

[31] "After all, a single democratic constitutional theory today can accomplish more than any conglomerate comprising many natural law conceptions" (Häberle 1974, 439ff., 444; my translation).

[32] See, for example, Schwartländer 1978.

and Karl Popper, on the other, Ernst Topitsch (1909–2003) uncovered natural law's ideological character. In 1971, Jürgen Habermas (1974, 89ff., 93ff.) argued it to be an ideology by which to legitimize the power structures of governments. On epistemological grounds, Topitsch and Hans Albert (1921–) criticized natural law theories as "systems of circular arguments and empty formulas that can be used for the justification or rejection of any possible legal or social order, whether existing or dreamt up. It is to this unlimited susceptibility to manipulation that they owe their success" (Topitsch 1971, 36ff.; my translation).

Despite this strong criticism based on the analytical arguments put forward in the 1980s (Hoerster 1979, 78ff.; 1986, 2480ff.), Ralf Dreier (1987, 372) spoke of a new renaissance of natural law. Its core would lie in a theory of justice, distinguished from older forms of natural law by its refined theoretical instruments. Scholars inspired by John Rawls, such as Otfried Höffe, developed concepts of justice that combine the findings of legal positivism with the natural law tradition (see Höffe 1983, 305). Whereas Höffe took Kant as his starting point, Vittorio Hösle (1997, 776ff.) relied more on Hegel's idealism, making some remarks on natural law as well. This third and smaller renaissance came just in time to inspire the courts, after the fall of the Berlin Wall, to again use natural law—and particularly the Radbruch's formula—in dealing with the injustices of the German Democratic Republic.

2.5. Natural Law at the End of the Century

The history of natural law is usually told as the story of its decline. Especially in the second renaissance, many authors spoke of a loss of awareness of the foundations of law in faith and in morals. It was argued from an external sociological point of view that natural law lost the conditions for its emergence and sustenance. Others have held that natural law would have faded owing to its internal contradictions.

In the third renaissance, too, natural law reappeared not as law but rather as a reflection on the moral preconditions of law. Natural law has indeed come to an end. Because it does not consist of norms based on competence and procedural norms and accordingly enforced, it cannot be considered law. But this is not a *failure* of natural law: It is rather a success. In undifferentiated legal systems of times past, natural law contained principles of good law. The 19th century has realized its formal principles and has given law a predictable and stable form. The theory with which to reflect this form was legal positivism. It was a reductionist theory insofar as it excluded as unscientific any and all further substantive questions concerning the justice of law. And yet human beings want just laws. Moreover, democratically legitimized framers and legislators will try to give flesh to that claim to justice. They did so in postwar Germany in the framing of constitutions and in other laws. This is the success of natural

law: It does not float freely above positive law, demanding its own realization. Instead, it has been embodied in the law—in constitutions and declarations of rights. Only now can positivism be an appropriate method for understanding the law, once natural law has become positive. To that extent, natural law is no longer reductionist. Natural law theory and legal positivism share the view that law is a given entity. At the same time, they both neglect to a certain extent that it is also a product of interpretation. Thus, not only natural law but also positivism shifts from the concept of a given law to a hermeneutics of law. The determination of the weight of hermeneutics is a different topic, however.[33] The law-related aspects of morality can now be discussed more freely in disciplines other than law, such as ethics and moral philosophy.[34]

[33] One approach can be found in A. Kaufmann 1975, 337ff. For a linguistic approach, see Christensen and Sokolowski 1999, 15ff.

[34] The Catholic philosopher Spaemann holds that "natural law today cannot be understood as a catalogue of norms, a kind of meta-constitution. It is rather a mode of thought, one that critically revises all legitimation of action" (Spaemann 1973, 276; my translation).

Chapter 3

20TH-CENTURY PHILOSOPHY OF NATURAL LAW IN FRANCE

by Stamatios Tzitzis and Guillaume Bernard

3.1. Introduction

Twentieth-century natural law theory in France can be described as having two faces: On the one hand there have been few authors of consequence (though they did commit a few words to paper), but on the other hand they counted among their number some jurists who have made significant contributions to that subject matter. On the whole, the 20th century was marked by the prevalence of legal positivism, this for two reasons: there was an initial hostility between lawyers of domestic law and legal philosophy (the latter discipline is regarded as subordinate at law schools in France and is even frowned upon by legal historians); and, in addition, there has been much ignorance surrounding natural law, which is generally confused with the general principles of law (based on reason) as well as with a theologically oriented metaphysical law (comparable to the moral law).

However, the contemporary French legal system does not exclude the idea of natural law. By reason of the ideology of human rights, natural law is itself by and large locked into submission, especially after the *Liberté d'association* opinion the French Constitutional Council rendered on July 16, 1971. Indeed, under this decision the 1789 *Déclaration des droits de l'homme et du citoyen* and the Preamble to the 1946 Constitution were recognized as authoritative sources of law, giving rise to what has come to be called the "constitutional core". At bottom, French positive law is a combination of legal positivism and modern natural law, the latter serving as a basis on which to legitimize the former or criticize its provisions.

So it is an ambivalent place that natural law occupies in the French legal system. And that may explain why the doctrines originating from the notion of natural law and its role in the system are reduced to the notion of the rights attributed to humans (the inalienable rights enshrined in the *Déclaration des droits de l'homme*). Nature is reduced to human nature and, under the influence of neo-Kantianism, the latter is returned to what is thought to be its noblest expression: reason. "Official" natural law thus comes down to a rationalist law.

So there exists a twofold phenomenon: on the one hand there is the underlying existence of natural law (making it possible to find certain legislative provisions unconstitutional and, as a general rule, contrary to the natural rights of man), but at the same time natural law is excluded from playing any role in

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positive legal production. Consequently, once we move outside the sphere of human rights, natural law vanishes from the positive legal order, surviving only thanks to the theoretical work of lawyers or philosophers. However, through a series of perfunctory readings of Plato, Aristotle, Cicero, and other authors who in antiquity wrote on the philosophy of law, natural law has come to be misunderstood in a variety of ways, holding back the effort to arrive at a rigorous conception of it. Many authors in France have taken old philosophical doctrines as their starting point but tried to explain them using modern concepts. That led many to confuse law and morals, and in particular natural law (*jus naturale*) and the moral law (*lex naturalis*).

3.2. Eclectic Natural Law: An Outcome of Sociology

Natural law reached its heyday in the 18th century within a contractarian framework and reached its apex with the 1789 *Déclaration des droits de l'homme*, recognizing rights as attributes of human nature. These rights were identified by reason: They were in this sense rationalist rights, even though they were not called by that name. Rights in the 19th century, after the French Revolution, were grounded in statutory law, in principle an expression of the general will, but more plausibly of the parliament, which is supposed to embody national sovereignty. The stature of the judge was reduced to that of "a mouth pronouncing the words of the law" (*une bouche prononçant les paroles de la loi*), as Montesquieu famously said—whence the rule under Article 5 of the French Code Civil, barring judges from deciding cases by way of general or regulatory provisions.[1] Likewise, jurists were generally bound to confine themselves to analysing the law in a strict literal sense.

Also, there emerged a theory of natural law in reaction to the exegetic method (see Bonnecase 1924, 1933), which dominated in the 19th century, then waned, and then made a comeback as the 19th century rolled over into the 20th. However, there is not much to be said for this reaction: Its proponents simply defended a view of natural law with variable contents. This natural law was thus eclectic, in the sense that multiple sources were combined in fleshing it out, even though it remained rooted in the modern legal conception, which grounded natural law in human nature and its reason. Still, this natural law was no longer the completely unchanging, unrealistic scheme envisaged by the supposedly universal natural law of the 18th century: It was dynamic and sought to be realistic, expressing above all the historical order of societies (and their progress). Sometimes influenced by the German historical school, this natural law carried sociological overtones. These principles formed

[1] Art. 5: "Judges may not issue general and regulatory provisions in deciding the cases brought before them" (my translation). The French original: "Il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leurs ont soumises."

the basis on which all the authors who defended natural law proceeded to lay out their conceptions, but when it came to filling that natural law with content, they each took their own direction.

The exegetical method was criticized by Raymond Saleilles (1855–1912) for the interpretive ossification it entailed. Saleilles (who was also critical of Savigny and the historical school) viewed law and history as two elements of sociology, which in turn he conceived in the manner of Gabriel Tarde (1843–1904). Saleilles considered the natural lawyers' abstract individualism a thing of the past, and in its place he defended realist conceptions of moral personality on the basis of rights informed by social considerations (see Saleilles 1910). Following in Saleilles's footsteps, but more radical in outlook, was François Gény (1861–1959), who was influenced by German thought and defended a naturalist eclecticism, a "reasoned syncretism" combining Kant and Bergson.[2] Gény in turn influenced Julien Bonnecase (1878–1950), whose natural law (see Villey 1963) consisted in the immutable precepts of reason (on a secular understanding of that concept). Natural law was *given*, very much the opposite of the Aristotelian-Thomist conception of natural law as a quest for justice: For Bonnecase, natural law was a code of norms replicating those of positive law (see Gény 1919, 1914–1924).

Another natural lawyer was Maurice Hauriou (1856–1929), influenced at the same time by sociology and by a scientistic approach to law.[3] Hauriou viewed natural law against a Christian Thomist background, and his political views were close to those that drove the French political and religious movement known as Le Sillon.[4] He can be described as a neo-Thomist positivist: His natural law was not set in contrast to positive law but was an ideal that could progressively be realized through the work of the jurists. Law existed as a composite of social order and justice (see Hauriou 1896, 1919, 1923). Hauriou in turn influenced Georges Renard (1876–1943), who was a member of Le Sillon but then left the movement, and after the death of his wife (François Gény's sister) he became a Dominican.[5] He refused to reduce law to the norms enacted by the state. So he embraced natural law, which he conceived as an eternal principle, but amenable to change in its historical applications. Whence his understanding of positive law as the adaptation of natural law to particular cases. So, in his view, positive law was defined by natural law, the latter embodying order, the former justice (see Renard 1928, 1939).

[2] On Gény see Section 12.5 in Tome 1 of this volume.

[3] On Hauriou see also Section 1.1.4.2. in this tome and Section 12.2 in Tome 1 of this volume.

[4] This movement, founded by Marc Sangnier (1873–1950), lasted from 1894 to 1910 and sought to provide an alternative to the anticlerical left by forging a closer alliance between Catholicism and republican ideal.

[5] On Renard see Section 1.1.4.2. in this tome.

3.3. A Moralizing Natural Law: An Outcome of Transcendence

Once a breach into positivism was opened, certain authors quickly noted that there existed *moral* obligations beyond the legal ones of social life. And so it came to be that natural law was assimilated to the moral law. The philosophy behind this moralizing natural law was illustrated by jurists and philosophers alike, the most prominent among whom was Jacques Maritain (1882–1973).[6] In this framework (see Thieulloy 2005, 2006, Villey 1974a), Maritain assimilated natural law to the moral law, itself understood as an expression of the divine law. Wittingly or not, these authors went back to the conception of natural law expounded in Cicero's *De re publica*, in such a way as to fashion a kind of Christian Stoicism. This current helped to lend credence to the idea that a Catholic ethic could not be separated from a natural law conception of the world. But in assimilating natural law to the moral law, these authors wound up rallying in defence of individual rights. Maritain thus went to the point of seeing in the character of Antigone a precursor of the human rights champion!

Even here different thinkers filled their natural law with disparate contents. Joseph Charmont (1859–1922) was a staunch defender of human rights. Influenced by the sociological method, he viewed natural law as a means with which to counteract the lawmaker's immorality (see Charmont 1910). Proceeding from opposite political ideas, and in reaction to positivist scientism, Louis Le Fur (1870–1943) defended the teaching of legal philosophy: In 1931, he was among the founders of the *Archives de philosophie du droit et de sociologie juridique* (Archives of legal philosophy and legal sociology). Moreover, he took part in the movement to revive natural law: Influenced by the second Spanish Scholastics, he developed a conception of *jus gentium* (international law) based on the moral rules (see Le Fur 1937).

Tancrède Rothe (1851–1935) defended a highly theological natural law: Any positive legal rule was subordinated to natural law, in turn conceived as the work of God and the source of all authority. For this author, just as positive law was to be understood as the complex of all positive laws, so natural law was the sum total of all moral laws (see Rothe 1885–1912).

Another of these thinkers was the Protestant Jacques Ellul (1912–1994): Initially influenced by the personalism advocated by Emmanuel Mounier (1905–1950), he would later move away from that conception to espouse a theological approach to law (see Ellul 1946). More recently, the Dominican friar Philippe-Ignace André-Vincent (1911–1986) defended a doctrine of natural law influenced by Stoicism and the second Spanish Scholastics, giving it a marked theological inflection (see André-Vincent 1971, 1974, 1976).

[6] On Maritain see also Section 1.3.2 in this tome.

Definitely less individualistic was the work done in the two decades from 1950 to 1970 by the members of the *Cité Catholique* (Catholic city), at that time a branch of the *Office international des œuvres de formations civiques et d'action doctrinale selon le droit naturel et chrétien* (International office for civic training and doctrinal action according to natural and Christian law), who put forward a doctrine of natural law in which the sacred and the clerical come together to form a sacerdotal movement whose fountainhead was Jean Ousset (1914–1994) (see Ousset 1959).

Even more recently, a group of jurists have attempted to rest law on a moral foundation by invoking a transcendent natural law. This is the route taken, for example, by Yvonne Bongert (1921–2012), who imparts a strong Augustinian flavour to his project (see Bongert 1982, 2003). A similar approach is the one the two criminal jurists Jean Pradel and Jacques-Henri Robert have taken in addressing questions of sexual ethics, for they have not hesitated to see in "natural morals" (*la morale naturelle*) the foundation of all law (see Pradel 2006 and Robert 2007). On this conception, the jurist may not render any judgment or express any view contrary to the physical integrity and morals of the human person. Natural law gives humans a *metaphysical* status underlying their legal status, and that gives them a right to life. This conflation between law and morals is pervasive in the French debate on bioethical issues. Thus part of Catholic thought (especially after the Second Vatican Council, 1962–1965) set out to defend individual rights to support the unprotected (unborn children, the dying), not by reason of their innocence but in virtue of their intrinsic dignity. This has given rise to a phenomenon analyzed by Anne-Claire Aune (2007), arguing that in this way these thinkers have facilitated a haphazard multiplication of individual rights, and not necessarily in a way consistent with Christian morals.

All told, this theological natural law was at once markedly voluntarist (conceived as an expression of divine will) and rationalist: On the model of Ciceronian Stoicism, natural law was conceived as a reason immanent in nature and discoverable by human reason. In the end, all these authors, progressive and conservative alike, found themselves trapped in the very conception they sought to defeat, namely, legal positivism, in that the natural law they proffered for humans resolved itself into God's *posited* law. Altogether different was the classical conception of natural law, on which positive law was just an instrument with which natural law could enact justice. As is stated in the Justininian Digest: *Non ex regula jus sumatur, sed ex jure quod est, regula fiat* (The law is not derived from rules, but rules are from the law: *D.*, 50, 17, 1).

3.4. Objective Natural Law: An Outcome of Dialectics

The philosophy of traditional natural law consisted in a return to an Aristotelian-Thomist conception of law as an objective thing attributed to a person

(*persona*).[7] This sort of investigation has been reprised by two professors at the Sorbonne, Claude Polin and Claude Rousseau, who do so by defending an idea of natural sociability (see Polin and Rousseau 1981). But even before that time it was Michel Villey (1914–1988) who revived the same current of thought with the help of his two closest collaborators: Guy Augé (1938–1994) and François Vallançon (1943–) (see Augé 2000, Vallançon 1998, 2012).[8]

Initially, Michel Villey (1962, 1969, 1987) sought to clarify the history of law by drawing on philosophical sources: Aristotle for an account of praetorian law in ancient Rome, while medieval law and the justice of kingly rule he analyzed in light of Thomas Aquinas. Later on, Villey laid out the various conceptions of natural law (see Villey 1961a, 1961b, Augé 1998, 2005), arguing for the superiority of the traditional method of particular justice (see Villey 2001). He thus proceeded from an Aristotelian-Thomist account of natural law, showing it to be topical and drawing a distinction between general justice (moral virtue) and particular justice (concerning individual rights). Here, too, the Digest also becomes a relevant source: *Justitia est constans et perpetua voluntas jus suum cuique tribuendi* (Justice lies in the constant and perpetual commitment to give everyone their due: *D.*, 1, 1, 10). Justice depends on the will and is embodied in behaviour: It is a matter to be worked out within morals. Law, for its part, is what ascribes to each that which they deserve (*dignitas*).

Aristotelian political justice—*dikaion politikon*, or what is right under the law—cannot be constrained within the formalities of a statutory provision. It is linked neither to nature nor to human reason, and so it must be discovered in the nature of things. It requires judicial prudence, or the judge's ability to make use of reason and the laws. It is in this sense that traditional natural law can be described as objective. It is not based on any Platonic metaphysics that locates justice (*dikaion physicon*) in an eternal idea beyond the world of experience: The art of the wise lawmaker consists in copying this model by applying it to human affairs. Villey showed that traditional natural law is to be sought in interpersonal relationships. The jurist's task is to find the right of apportionment things, this starting from things themselves and within their framework. Law is a reality existing apart from humans: It extends beyond human interiority; it is a "thing," a good proportion; it is discovered through the art of dialectics. The truth of law lies in justice and not in the statutes, which are only a tool in the service of justice. The relation between law and the statutes in traditional thought on law can be summarized as follows: The statutes (posited law) are imposed, while law (that which is just) is discovered; the statutes command, while law points us in the right direction (see Villey 1974b). So Villey

[7] See, in particular, Aristotle (*Nicomachean Ethics*, V, 5, 1130 b; V, 6, 1131 a; V, 7, 1131 b, 1132 a) and Thomas Aquinas (*Summa Theologiae*, II-II, 61, 1–2).

[8] On Villey see also Section 1.3.3.4 in this tome and Section 12.6 in Tome 1 of this volume.

did not set natural law against positive law as a product of culture: He embraced the ancient Greek conception of culture as part of the natural order. Positive law accordingly does not fall under the oversight of natural law, as it would on a moralizing conception of natural law, but is rather part and parcel of the latter.

Traditional philosophy of law draws a distinction between the moral law (or moral command) and natural law (concerned with allotting resources on the basis of merit). It emphasizes that morals and religion are closely bound up (the moral law is subjective, an outcome of an act of will): Morals and law must be distinguished—*Non omne quod licet honestum est* (Not all that is allowed is honest: *D.*, 50, 17, 144)—since the former is about *being*, the latter about *having*; the former makes certain behaviours *mandatory*, while the latter passes *judgment* on those behaviours. But the use of the moral law in the legal domain ushers in individual rights (see Bastit 1990). But Villey (1976b and 2003) also criticized modern thought on law and the dominance of individual rights (see Villey 2008, Augé 1993).

A variety of authors working at different faculties and in different ideological currents continue to take an interest Villey's work. This is particularly true of Garcin (1985), but others include Niort and Vannier (2000), Bauzon (2003), Campagna (2004), and Bauzon and Delsol (2007). Likewise, in 1991, the journal *Persona y Derecho* (based at the University of Navarre in Pamplona, Spain) devoted a special issue to Villey (vol. 25, issue 2) under the title *Escritos en memoria de Michel Villey* (Writings in memory of Michel Villey), and in 1999, the journal *Droits* (vol. 29) published a selection of the speeches delivered at a conference on Michel Villey held on February 13, 1998, at the University of Paris II. Finally, two eminent members of the *Institut de France*, François Terré and Chantal Delsol, head the *Association des Amis de Michel Villey*.

3.5. Conclusion: The Ineffectualness of Natural Law?

Natural law has always interested thinkers of Catholic persuasion more so than others (See Arabeyre et al. 2007, Audren 2008), and there is little doubt that no one today apart from Christian authors is still committed to showing its significance and topicality (See Tzitzis 1999, 2004, P. Simon 2006). For this reason we can only point out the publications put out by the *Confédération des Juristes Catholiques de France* (Confederation of the Catholic lawyers of France) at the initiative of Professors Joël-Benoît d'Onorio and Jean-Michel Lemoyne de Forges (See D'Onorio 1986, 1989, 1994, 1997, Eid and Rassat 1988, and Morange 2002). Noteworthy in this series of publications are the works by Professor Alain Sériaux (1988, 1993, 1999).

Villey no longer has much of a following today. However, the current that does authentically carry on his work stands as an exception in 20th-century France, for in all other cases natural law theory has itself unwittingly recog-

nized the principles of modern natural law it is a prisoner of. Its criticism of modernity thus appears ineffective. Indeed, research in this area is quite poor, so much so that the philosophy of law is regarded as a subject matter of lesser significance, and when it is taught, it is more often than not pejoratively reduced to a "theory" of law (see Brimo 1967, Morvan 2012).

Chapter 4

20TH-CENTURY NATURAL LAW THEORY IN SPAIN AND PORTUGAL

by Antonio-Enrique Pérez Luño

4.1. Method, Scope, and Philosophical Criteria

Designing an overarching approach to the current landscape of natural law theory in Spain and Portugal is no easy task. Traditionally, theologians, philosophers, sociologists, and lawyers have shown an interest in this area over the centuries and have thus put out abundant literature that makes any attempt to capture that complexity a tall order. On the other hand, the undeniable plurality of approaches to natural law in Spain and Portugal makes it appropriate to adopt the open and flexible rationale that Enrico Pattaro suggests in presenting his *Legal Philosophical Library* (Faralli and Pattaro 1980, 17).

In view of the breadth and heterogeneity of natural law theories in Spain and Portugal, drawing sharp and aprioristic distinctions may be useful for partial research projects, but it would be inadequate to the overall aim and scope of in this discussion, which calls for an essentially descriptive approach, though not without offering personal viewpoints when that seems unavoidable. Then, too, these boundaries mean that the thinkers, issues, and theories concerned cannot be discussed exhaustively.

A further comment is in order in regard to some basic methodological foundations for this discussion. Bearing in mind that it is the *current* philosophical and legal panorama that this contribution attempts to describe, it seems advisable to consider theories as something alive, in-the-making, so to speak, thus refraining from drawing any wall of separation among well-established and unalterable doctrinal conceptions. Scholars attempting a historical study of their present time must inevitably engage in some form of *ursprüngliche Geschichte* (original history), in its Hegelian meaning: On the one hand, scholars reconstructing their own time must rely on direct experience, looking at it closely as both actors and chroniclers of the reality they are describing, but at the same time they lack the perspective that only distance can afford.

One final caveat. Although the subject matter covered in this contribution is marked by some shared historical and cultural features that make it possible to bring Spanish and Portuguese natural law theories under a single umbrella, it would certainly be a mistake to take an undifferentiated approach to these two traditions, which have their own histories and peculiarities. Consequently, the formative era of these two traditions, when the interchange of ideas and approaches was more intense, will be treated jointly, while the 20th century, where the differences are more significant, warrants separate treatments.

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4.2. Natural Law in the Spanish and Portuguese Traditions

The institutional study of natural law in Spain can be said to coincide with the 1228 founding of the oldest Spanish university, in Salamanca, where the *ius commune*, civil law, and canon law became a focus of study prompted by deep theological, philosophical, and political concerns. At the same time, a whole range of moral, political, and legal questions that now fall within the scope of *legal* philosophy were addressed on an Aristotelian approach in courses on *philosophia practica*. For a long period, there was instead little interest in positive law. This fact did not escape Perelman's (1975, 5) notice, who remarked that the famous library at the University of Salamanca devotes little space to classical works on Spanish law, while works of theology, moral philosophy, and natural law abound.

From the beginning of the 15th century, and especially during the 16th and 17th centuries, scholars in the so-called *Escuela de Salamanca* (Salamanca school), also more broadly known as *Clásicos españoles del derecho natural* (classical natural lawyers of Spain), produced a copious body of literature collected under the titles *De Justitia et iure* and *De legibus*, which can offer an understanding of the configuration of modern natural law.

A similar role in the spread of philosophical and legal thought in Portugal was played by the University of Coimbra, which gained prominence much like the University of Salamanca in Spain. In the Renaissance era, cultural relations between these two countries were intense, and the theses advanced by the classical natural lawyers of Spain found an eager reception in Portugal.

With the 18th century came an era of decline in the study of natural law—a reflection of the profound economic, social, and political crisis that Spain was going through at that time. The Portuguese universities were not affected as hard by the crisis, thanks to the policies that Marqués de Pombal enacted looking to the European Enlightenment model. By the end of the century, Spain likewise had initiated an Enlightenment movement under King Carlos III. In this period, Portugal and Spain saw the uptake of rationalist versions of natural law, which became especially widespread in the so-called *Escuela Iluminista Salmantina* (Salamanca Enlightenment school). The Enlightenment spirit breathed fresh air into the Salamanca academic establishment, which had become corrupt and was indulging in fruitless exercises. In the study of law, this intellectual rejuvenation was facilitated by the emergence of a deep interest in the study of *Ius Naturae et gentium* (natural and international law) which started to be taught at the *Reales Estudios de Madrid* and later at the Universities of Valencia, Granada, and Zaragoza. No special chair or professorship was established in Salamanca, but the discipline was cultivated as a part of other subjects.

In the 19th century, the institutional introduction of natural law as an academic discipline became a main point of contention within the ideological

controversy between liberals and traditionalists at the university. At the beginning of that century, liberal ideology promoted the establishment of chairs of natural law at the law schools, with syllabuses inspired by rationalism and contractarianism, thus opposing the philosophy schools' conservative and traditionalist tendency to defend a merely Scholastic study of natural law. The influence and spread of German idealism contributed to reviving natural law theories. Some local peculiarity needs to be noted, since the idealist scholar who drew the most interest was Krause (1781–1823), not the great masters of idealism, like Kant, Hegel, and Fichte. The spread of legal historicism and philosophical positivism led to a gradual decline of natural law theory, which by the end of the 19th century had definitely fallen out of favour (see Pérez Luño 2007, Truyol y Serra 2004).

4.3. Natural Law Scholars and Tendencies in the 20th Century

The 20th century saw the birth and development of the main trends and philosophical movements that still prevail. We cannot here enter into a thorough analysis of 20th-century works and doctrines. Instead, we will attempt a summary, describing the cultural horizon enveloping the reflection on natural law that flourished in Spain in the 20th century. The different theoretical positions and research topics will be grouped under three trends: legal naturalism, resting on Neokantian and axiological bases; neo-Scholastic natural law theory; and, finally, those versions of natural law that take an innovative, vitalist, and experiential approach. Several doctrines developed in legal theory and philosophy in the 20th century that built on the different varieties of natural law. That the majority of philosophers can be ascribed to natural law should not be taken to mean that they all espoused the same *concept* of natural law or that this concept should be understood and defined in a uniform way. In fact, natural lawyers in the 20th century make up a highly heterogeneous conceptual landscape. The frequently denounced multivocality and equivocalness of natural law is solidly borne out by this variety of natural law theories, no matter how widespread or preponderant any single version may have been. Hence the need to set out some theoretical distinctions in approaching this broad philosophical current.

4.3.1. Axiological and Neo-Kantian Approaches

In addressing the situation of natural law in Spain before the Spanish Civil War, which broke out in 1936, reference needs to be made to a group of scholars who studied some of the most influential movements in legal philosophy in the first half of the 20th century, looking to give them widespread circulation across Spain. These scholars tried to rest their natural law conceptions on bases other than those on which were built the 19th-century neo-Scholastic

and Krausist doctrines that then prevailed in legal philosophy outside Spain. In most cases, this new foundation for natural law was developed taking axiological and neo-Kantian approaches.[1]

Among the most significant advocates of neo-Kantianism was Adolfo Bonilla San Martín (1875–1926), according to whom there are two basic elements to any legal rule, namely, its content and its form, the former being established by experience, the latter instead being *a priori*. So-called natural law can only be a study of the *a priori* forms of legal experience, a sort of legal logic, a specific formal normative structure with no concrete subject or content of any kind (see Bonilla San Martín 1897).

A higher degree of fidelity to neo-Kantianism can be found in the works of Francisco Rivera Pastor and Wenceslao Roces, both of whom were especially influenced by Stammler but found his formalism excessive, so they liberally drew on other philosophical theories in order to mitigate that formalism. Wenceslao Roces (1897–1992) played a decisive role in spreading neo-Kantian legal philosophy in Spain through his exemplary translations of the main works of Radbruch and in particular of Stammler. Francisco Rivera Pastor (1878–1936) wrote some important studies on the legal application of Kantian thought: These include his essays *Algunas notas sobre la idea kantiana del derecho natural* (Some notes on the Kantian idea of natural law) and *La razón pura en sí misma y como fundamento del derecho* (Pure reason by itself and as a foundation for law). His most ambitious attempt to bring Kantian, or rather neo-Kantian, ideas to bear on the legal realm was his monograph *Lógica de la libertad* (The logic of freedom: Rivera Pastor 1913), a work whose main purpose lies precisely in reframing the basic concepts and categories of legal theory from a neo-Kantian natural law perspective. The influence of Radbruch and Stammler can be appreciated in Rivera Pastor's effort to move beyond Kantian formalism.[2]

4.3.2. Neo-Scholastic Natural Law Doctrines

Most neo-Scholastic natural law doctrines were developed after the end of the Civil War, a period in which they reached a position of almost absolute predominance among the legal philosophers of the time. These theories referred to or drew on classical sources, particularly those of the Spanish school. There were nonetheless attempts at assimilating the main contemporary Catholic natural law trends, the effort in most cases being to make the new theories more or less flexibly compatible with traditional thought.

[1] On neo-Kantianism in general see Chapter 1 in Tome 1 of this volume.

[2] On Stammler see Section 1.1.3.1 in this tome and Section 1.3 in Tome 1 of this volume. On Radbruch see Section 1.1.3.2, Chapter 2, and Section 9.1 in this tome, and Section 10.2.2 in Tome 1 of this volume.

One of the most significant centres for the study of natural law theory was created in the early decades of the 20th century at the University of Zaragoza around the figure of Luis Mendizábal Martín. Among his disciples was his own son, Alfredo Mendizábal Villalba, as well as Miguel Sancho Izquierdo, Enrique Luño Peña, and (at the beginning of his academic career) Luis Legaz Lacambra.

This is a group of scholars that in the 1970s I suggested we refer to as the Aragonese school of natural law, and even though they were committed to neo-Thomism, were also influenced by the neo-Kantian legal philosophy of Stammler and Radbruch, and most importantly by that of Giorgio Del Vecchio.[3]

Luis Mendizábal Martín (1859–1931) acted as a liaison between the 19th-century treatises and the natural law pursued in the early 20th century. His works—from the 1890 *Elementos de derecho natural* (Elements of natural law: 1905) to the *Tratado de derecho natural* (Treatise of natural law: Mendizábal Martín 1928), which went through seven editions, the last one reelaborated by his son, Alfredo Mendizábal Villalba (1897–1981)—represent at the same time the hindmost example of the ways and concerns of 19th-century natural law and an opening to the new horizons and problems the discipline was turning to at the beginning of the following century. Mendizábal Martín defined natural law as law enacted by proper reasoning on the basis of facts and of divine law. His conception of natural law does not rigidify into an inflexible system, nor is it incapable of taking historical circumstances into account; rather, taking an approach to natural law then widely accepted among Hispanic scholars, Mendizábal conceived natural law as a reality in tension with the requirements of daily life.

Mendizábal Martín's disciples, Miguel Sancho Izquierdo (1890–1988) and Enrique Luño Peña (1900–1985), followed the philosophical guidelines established by their teacher in structuring their treatises on natural law. They both proceeded from the idea of order, and on this basis they set out the relations between the moral and the legal order. The latter is determined by an aim that acts as its regulating principle and consists in the notion of the common good in its strictest Thomist sense. Following the doctrine of the Salamanca school, Luño Peña argued for the need to concretize the primary principles of natural law, that is, to deduce consequences from natural law and project those consequences onto the sphere of practical and historical situations. This deductive method was implemented by way of necessary conclusions and approximate determinations. In addressing the relationship between law and morals, he summarized the Salamanca school theses by putting forward the idea that these two normative realms of human conduct ought to be conceived as related by a union without unity and a distinction without separation (see Luño Peña 1968, Mendizábal Martín 1928, Mendizábal Villalba 1925, Sancho Izquierdo 1955).

[3] On Del Vecchio see Section 1.1.3.1. in this tome and Section 11.2.1 in Tome 1 of this volume.

As concerns the first half of the 20th century, mention should be made of the works of Fernando Pérez Bueno (1877–1934), who taught at the University of Madrid and earned his Ph.D. from the Collegio di Spagna in Bologna in 1902, defending a dissertation titled *Breve esposizione delle dottrine etico-giuridiche di Antonio Rosmini* (A brief exposition of Antonio Rosmini's ethico-legal doctrines). He was the main advocate of Rosminian thought in Spain, especially with his book *Rosmini: Doctrinas* ético-jurídicas (Rosmini's ethico-legal doctrines: Pérez Bueno 1919). He professed a natural law inspired by Thomism, but he was also open to other currents, as is evidenced by his interest in sociology and the foundation of human rights. The end of the Civil War marked the beginning of a new phase in the evolution of natural law in Spain. The variety of theoretical directions prior to the 1936–1939 Civil War, reflecting an ideological pluralism, was displaced by the overwhelming supremacy of so-called Catholic natural law, which reigned under Franco's authoritarian regime. The literature on natural law in postwar Spain was highly uniform: Neo-Scholasticism had already enlisted many proponents, and from 1939 onward it became the de facto standard adhered to by virtually every legal philosopher, as well as by most theorists of public or private law. Even scholars with no Thomist background, such as Luis Legaz, Enrique Gómez Arboleya, and Salvador de Lissarrague, produced research in which they showed an interest in natural law and particularly in the Salamanca school. It would clearly be an overstatement to say that the political regime established in Spain by Franco after the Civil War pretended to support a "revival" of Spain's classical natural lawyers. Clearly, the so-called *Movimiento Nacional* (National movement) had some issues of greater urgency to address, culture not being among their primary concerns. But then the context was such that it made sense to use the Salamanca school to political advantage, thus manipulating its teaching in a way that had never been done before. Several reasons can explain this situation, but the primary and most evident one had to do with the international isolation in which Franco's regime found itself after the defeat of both Nazi and Fascist totalitarian regimes. Lacking an *external* political legitimacy in the eyes of contemporary democracies, the dictatorship had no choice but to look for an *internal* legitimation rooted in the past. This phenomenon led to an exacerbated ideological nationalism, fuelled by a distrust and hostility toward anything that could undercut the cultural policies of monolithic unity imposed by the regime. The Salamanca school was therefore chosen as an autochthonous thinking model through which the glories of the lost Empire could be restored.

Among the most representative natural lawyers of the Franco era was Francisco Elías de Tejada (1917–1978), who put forward a Catholic existentialist conception based on the idea that God plays a decisive role in the practical realm, arguing that in this way human agency can be grounded in objective values. One of Elías de Tejada's pupils was Francisco Puy (1936). He edited

and wrote *El Derecho natural Hispánico* (Hispanic natural law: Puy 1973), whose title may be equivocal, since not all the thinkers discussed are Hispanic, nor can they in any strict sense be considered followers of the Salamanca school. But, on the other hand, some of the most significant contemporary trends in Spanish neo-Scholastic natural law are represented in that work. In strict neo-Scholastic terms, Puy summarizes the task of legal philosophy as twofold, serving to guide both law and politics according to a transcendental and hence transcending goal, namely, to strive toward the absolute goodness inherent in God—an idea of natural law that can encapsulate the entire conception espoused by this school (see Puy 1973). Another thinker who embraced a strictly neo-Scholastic natural law was Eustaquio Galán (1910–1999), in whose *Ius naturae* (Natural law: Galán 1954) natural law is contended to entail a *iustum* (or just state of affairs) ordained by God or by Nature. Natural law therefore exists as a prepositive law more valuable than positive law, the latter thus having to conform to the former, which accordingly serves as a paradigm or canon.

Another significant figure in contemporary Spanish neo-Scholastic natural law was José Corts Grau (1905–1995), who for a long time served as vice chancellor of the University of Valencia. He made the case for a radical denial of one the core tenets of legal positivism, that of the separation of law and morals. In his *Curso de derecho natural* (A course on natural law: Corts Grau 1970) he defended the view that legal and moral orders cannot be separated, either metaphysically or psychologically. Such a divorce would mean a failure to acknowledge the universal order, or a breakdown in both divine unity and human unity, a denial of our very nature. Moral and legal subjects are the same, and their ends, far from being mutually exclusive, complement and support each other. For this reason morality is regarded by many neo-Scholastic scholars of that time as an end and law as a means by which to fulfil that end. According to Corts Grau (ibid.), to defend a divorce between the moral and the legal order is to attack the dignity of law, since law is rooted in a moral act and not only originates from morality but also inevitably returns to it. José Corts Grau (ibid.) took on the intellectual challenge of introducing new contemporary trends at the core of neo-Scholastic natural law, to this end studying legal institutionalism or existentialism, paying attention in particular to Martin Heidegger.

Natural law in the *classical* tradition, either in its neo-Scholastic version or in some other conceptions linked to Christian philosophy, still holds importance for a considerable group of lecturers and scholars in contemporary Spain. The direct references to neo-Scholastic natural law made in some encyclicals by John XXIII, particularly *Mater et Magistra* and *Pacem in Terris*, as well as the social and political implications of some Vatican II constitutions, which carry unquestionably humanist and democratic overtones, paved the way for a rehabilitation of Christian natural law, making it compatible and

conversant with contemporary culture. Later pontifical and pastoral activities have acquired an ambivalent meaning: Some actions and documents have carried forward the humanist trend just mentioned, while others have been openly involutional, bespeaking an unfortunate misunderstanding of modern values. These two tendencies have influenced the most recent Spanish Catholic natural law, aimed in some cases at bringing natural law up to date, while adopting clearly pre-conciliar approaches in other cases. A wide group of lecturers in legal philosophy from different Spanish universities have resorted to traditional Catholic natural law to argue that positive law must necessarily rest on a moral foundation, placing moral objectivism ahead of moral relativism and deploying these theses to address a range of contemporary moral and political concerns. Issues involving marriage, divorce, abortion, euthanasia, reverse gender discrimination, secularization, and laicism have been treated in a dense literature by scholars like Jesús Ballesteros, Francisco Carpintero, Francisco Contreras Peláez, Francisco José Lorca Navarrete, Alberto Montoro Ballesteros, Andrés Ollero, and Ernesto Vidal, among others.

4.3.3. Innovative Trends in Natural Law

In the final decades of the 20th century some theoretical attitudes offering innovative points of view came on the scene, sometimes even criticizing the hitherto dominant neo-Scholastic natural law. It is true that the main exponents of what I have called the Aragonese school of natural law, as well as some other neo-Scholastic natural lawyers like José Corts Grau, took an open and receptive attitude to some 20th-century philosophical, legal, and sociological trends, such as existentialism, institutionalism, or solidarism, but for subsequent scholars the innovative or critical attitude was central to their understanding of natural law. It is nonetheless important to notice that these innovative and critical formulations were not set *against* natural law: They were rather conceived *within* natural law itself in an attempt to clarify their meaning and adapt their theses to new contexts and concerns.

No diligent scholar trying to understand contemporary Spanish legal philosophy should overlook the fact that two of our most internationally recognized legal philosophers, Luis Legaz Lacambra and Luis Recaséns Siches, shared two basic features: Both were influenced by Ortega y Gasset's *ratio* vitalism in their formative years, and both showed an interest in the experience of law in some of their last and most influential works. While Ruiz Giménez sought to bring institutionalism and *ratio* vitalism closer together, Legaz and Recaséns can be credited with having noticed the similarities between some *ratio* vitalist premises and the philosophy of legal experience.

Luis Legaz Lacambra (1906–1980) elaborated in his early years a concept of law that shows the imprint of two opposing influences: Kelsenean formalism and Ortega's *ratio* vitalism. In the preface to the second edition of his

1961 *Filosofía del derecho* (Philosophy of law: Legaz Lacambra 1961), Legaz explains that he is trying to characterize his conception using a clearer notion of natural law than the usual one, thus giving natural law a central role in his legal theory. Natural law would thus be responsible for concretizing a "point of view on justice," which accounts for the law's valuative dimension. This dimension was understood by Legaz as merely formal in his early years. Not so in the second phase of his thought: Law, he would later claim, is always a "point of view on justice," and natural law must accordingly be the *best* possible point of view on justice—justice in its purest programmatic form (ibid.).

For Luis Recaséns Siches (1903–1977), the object of natural law lies in its axiological dimension (natural law he referred to for some time as *estimativa jurídica*, a study in legal estimation, but he later returned to the traditional label, so as to avoid the logomachy that can arise when two names are used for the same object). Natural law, as he conceived it, is built on ideal objective values from which necessarily valid guidelines are derived. These values belong with human existence, and in particular with specific situations experienced in life. Natural law therefore must not be understood as an expression of facts, since in the realm of being there are good and bad phenomena, fairness and unfairness, convenient and inconvenient facts, virtues and vices, health and illness. Natural law must be understood as a set of normative principles, not as a description of ontological realities: It expresses not an is but an ought, providing what Recaséns Siches calls estimative criteria (see Recaséns Siches 1959, 1983).

Some of the most solid, stimulating, and innovative work in contemporary Spanish natural law is that of Antonio Truyol y Serra (1913–2003), who in the 1950s elaborated a systematic and historical summary of natural law theory. He saw law and morals as two different but interrelated normative realms. This conceptual distinction does not entail the sort of separation alleged by legal positivism. The intertwining of the two orders reaches its most important expression, according to Truyol, in social morality, that is, the part of morality that sets out the duties one has as a member of society (see Truyol y Serra 1950).

An innovative thrust can also be appreciated in the thought and work of Joaquín Ruiz Giménez (1913–2003), who held the chair in legal philosophy at the Complutense University of Madrid. His doctoral dissertation, subsequently published in book form (1944), became a pioneering study in Spanish legal institutionalism. An effort to revivify natural law can also be appreciated in the theses advanced by Mariano Hurtado and José M. Rodríguez Paniagua. The latter offered a suggestive natural law conception based on legal axiology. It is widely recognized among contemporary Spanish scholars that Jose Delgado has played a leading role in critically revising natural law. There are three basic aspects to his innovative attitude. The first lies in his prospective reading of the Salamanca school; the second in his interest in facing one the biggest challenges that contemporary culture poses to classical natural law, that of the historicity of legal concepts; and the third in his effort to resolve the centuries-old

tension between natural law and legal positivism. That is why some of the most solid legal-philosophical constructions of our time (Hart, Rawls, Dworkin, Alexy) are interpreted by him as theoretical attempts at solving the crisis of legal positivism, but without explicitly taking sides with traditional natural law. Also undeniably innovative is the conception of natural law proposed by José Luis López Aranguren, who accepted natural law as making a claim to legality and keeping law open to historical, cultural, political, and social forces. Much influenced by Aranguren's theses, as well as by the teachings of Ruiz Giménez and Peces-Barba, is Eusebio Fernández, who argues for a critical and deontological natural law understood as a set of principles expressing the concerns of public morality and held up as a standard that must inspire and limit positive law (see Pérez Luño 2007).

Jesús Ballesteros (1943–) is considered José Corts Grau's main disciple. He wrote a very meticulous Ph.D. dissertation later published in book form in 1973 under the title *La filosofía jurídica de Giuseppe Capograssi* (The legal philosophy of Giuseppe Capograssi: Ballesteros 1973). In Spain, this work did much to spark an interest in the most important proponent of the Italian conception of the experience of law, Giuseppe Capograssi.[4] Ballesteros offers a natural law interpretation of legal experience according to which legal knowledge is not understood as a sheer external projection of certain logical methods, because knowledge cannot be separated from human action: Law is considered a product of life experience, life itself being regarded as an ethical experience (see Ballesteros 1973, 1984).

The Spanish natural law tradition has drawn on many scholars especially committed to providing a historical approach to natural law. This tradition has weakened of late, but it still brings out some significant contributions. Among those who have developed historiographical reflections within an experience-of-law framework is Francisco Contreras Peláez, who stands out for his valuable work in analyzing Kant and Savigny from the perspective of a natural law and legal philosophy (see Contreras Peláez 2005a, 2005b). In a similar fashion, Fernando Llano Alonso has done significant work on Immanuel Kant's cosmopolitan humanism (see Llano Alonso 1997, 2002). Carlos López Bravo pursues a firm historiographical vocation aimed at studying the sources of natural law, drawing in particular on a thought-provoking critical review of Paul of Tarsus and Isidore of Seville. But his main contribution to natural law historiography lies in his monograph on the philosophy of history and on philosophy and natural law in the work of Giambatista Vico (López Bravo 2003).

I should point out as well my own intellectual experience, which has involved a long-term engagement with these innovations in natural law. Having studied the scholars of the Salamanca school through the teachings of my uncle, Professor Enrique Luño Peña, I never abandoned my interest in their

[4] On Capograssi see Section 1.3.3.1 in this tome and Section 11.3.1 in Tome 1 of this volume.

doctrinal legacy. I have consequently had the chance to write different papers as well as a comprehensive book in which, celebrating the fifth centenary of the discovery of the New World, I tried to renew the *Spanische Naturrechtslehre Forschung* in a threefold fashion: addressing those thinkers or topics that had been neglected or insufficiently investigated; subjecting those doctrines to critical scrutiny by putting them through a "meta-theoretical sieve"; and proposing prospective analyses to explore the contemporary projections of this theoretical legacy (see Pérez Luño 1994). The teachings and stimuli received from other legal philosophers were similarly influential in my attempts to renew natural law. My Ph.D. dissertation, written at the University of Bologna under the direction of Guido Fassò, was defended in 1969. It analyzed the tensions between natural law theory and legal positivism in contemporary Italy. Its Spanish version was published two years later, with a foreword by professor Fassò himself (see Pérez Luño 1971). I then transferred to the University of Freiburg, where I had an opportunity to study under Eric Wolf. In the following years, my contact and scholarly relations with different Spanish and foreign colleagues enabled me to hone my ideas and innovative intentions regarding natural law. With that aim in mind, I have always found it appropriate to distinguish an *ontological*, *dogmatic*, or *radical* natural law—invoking a metaphysically objective order from which absolute and atemporal values can be deduced—from a *deontological, critical*, or *moderate* natural law, which does not deny that unjust positive law counts as law proper but establishes criteria by which to assess that law, thus laying the groundwork for critiquing it and replacing it with a just system. The first sort of natural law I consider incompatible with some important values and exigencies informing our contemporary humanist culture, and for this reason I endorse a rationalist, deontological, and critical natural law. Some have argued that we can grant the existence of values prior to positive law and not aligned with natural law in any way, so long as they are kept in a moral or social realm but not a legal one. I cannot share this position, because it seems quite paradoxical that legal scholars past and present should maintain that the criteria for identifying proper or correct law are not legal. This attitude finds no equivalent in epistemology, where no one would argue that the criteria on which basis to tell truth from falsity should be *logical* criteria; or in aesthetics, where one would doubt that the criteria on which basis to tell beauty from ugliness are aesthetic criteria; or in ethics, where no one would characterize as nonmoral the criteria on which basis to tell good from evil (see Pérez Luño 2006).

4.4. Natural Law in Private Law

The spread of natural law under Franco's regime was not confined to the legal-philosophical sphere: It also reached some other relevant areas in the life of the law, affecting in particular the methodological attitudes of scholars specialising

in private law.[5] The methodological incidence of natural law expressed itself as an attempt to overcome formalism, thus grounding the interpretation and application of law in valuative premises, which at that time would have rested on neo-Scholastic ethical postulates. For Spanish private law scholars of the time, the methodological approach to law would usually have been based on Christian natural law. This fact responded to the belief, set out by the civil law scholar Antonio Hernández Gil (1915–1994), that the highest and most genuine Spanish legal theory could only be grounded in natural law. This tendency was predominant among those legal scholars who studied the basic concepts and concerns of legal theory and method in that historico-cultural context.

According to Hernández Gil, this theoretical option makes it possible to avoid the risky overtly anti-philosophical tendencies embraced by legal scholars in other countries, thus making it possible to move beyond the antagonism that from a natural law perspective has been argued to exist between the philosophical method and the legal one (Hernández Gil 1945).

This approach also inspired the private law scholar Felipe-Clemente de Diego (1886–1945), who thought that method meant order provided that it could serve different human ends, it was rooted in human nature itself, and it found a fundamental explanation in the science of ultimate causes and reasons, that is, in philosophy. That is why this task cannot be merely mechanical, as legal positivism pretends, but requires a valuative stance that maintains an open tension with the needs of legal praxis, an attitude that only a natural law method can foster. For Federico de Castro (1903–1983), positive law always requires justification. This justification is expressed in a scheme of immutable values legitimizing legal claims that respect them while reducing to sheer non-legal arbitrariness any piece of lawmaking that should contradict them. Natural law offers criteria by which to judge positive law, but since human weakness and the morally neutral character of certain acts are such that a positive law fully coinciding with natural law cannot be applied in the world or in the state, the relationship between those criteria and the law needs to be assessed. In keeping with Thomas Aquinas, De Castro argues that human law can be derived from natural law, either *per modum conclusionis*, establishing consequences and specific applications of a general principle of natural law, or *per modum determinationis*, concretizing what has to be done within the scope offered by natural law. Positive law thus operates against the background of the generality or indeterminacy of natural law. The civil law professor and chief justice of the Supreme Court of Spain José Castán Tobeñas (1889–1969) considered it urgent, in our post–Civil War scenario, to follow both Spanish natural law and universal, classical, and modern natural law. In his works he argued that the dictates of natural law derive from the practical need to elaborate and

[5] On legal philosophy in Spain during the Francoist period see also Section 13.4 in Tome 1 of this volume.

interpret our positive law, always created from an ethical perspective, and that these dictates also benefit from the theoretical advantages that classical natural law provides as a fundamentally homogenous doctrine in the history of Western thought, accessible by all and doctrinally and popularly grounded at the same time. This characterization contrasts with those kinds of modern philosophical theories that keep sprouting up and dying without effectively penetrating the soul of society or being fully understood by legal scholars themselves (see Legaz Lacambra 1975, Pérez Luño 2007).

The influence of neo-Scholastic natural law in Spain under Franco was not confined to the scholarly sphere but also had an impact on case law. Most of the court's solemn invocations of natural law, however, were no more than declarations of principle. A cursory glance at our Supreme Court's opinions under Franco in cases involving values and principles of justice and morality may give the impression that judges were making a conscious effort to stay away from the political pressures of the day. But there is actually a trend in the courts' argumentation that insists on the *supra-historical* and *meta-temporal* status of their moral assessments (cf. Pérez Luño 1990, Pérez Ruiz 1987).

4.5. Natural Law and Human Rights

Legal thought cannot exist or be intelligible if considered apart from the political, cultural, and social circumstances that delimit its spatiotemporal context. Theories and works belonging to one historical phase in thinking about natural law cannot be understood independently of a given system of collective experiences. The peculiarities of the topics and perspectives that have characterized Spanish natural law in recent years cannot be understood without an account of the new circumstances that contextualize its development. The political changes that had taken place in our country by the end of the 1970s resulted in the ouster of an authoritarian regime and its replacement with a democratic state fully respectful of the rule of law. This fact has directly and decisively influenced the research and activities done by current legal philosophers. The most important event to have had a decisive impact on Spanish natural law has been, in my opinion, the enactment of the 1978 Constitution. The social and intellectual mobilization the Spanish Constitution brought about also entailed a commitment, a challenge, and a renewed enterprise in research. To many legal philosophers and theorists of my generation, the Constitution has represented a true milestone that has shaken both our status as citizens and our intellectual development. For Spanish legal culture, the enactment of the Constitution marked the beginning of a research venture still in process.

The central role given to fundamental rights in the 1978 Constitution has made them a crucial aspect of our legal culture. In fact, fundamental rights are assigned the task of framing the exercise of public powers and articulating the implementation of the active subjective status of citizens, namely, their facul-

ties and entitlements in relation to the government and public offices. There is a view, espoused on a critical approach to natural law close to the Frankfurt school, that the rights and liberties granted by our current Constitution can be regarded as institutional conduits through which to answer the great aspirations and needs of Spanish society, and in fact it cannot be denied that this has actually been the case. From other perspectives, linked to the liberal natural law tradition, these rights and liberties are instead more aptly explained as implementing the higher values that ground our *Rechtsstaat* (Article 1.1 of Spanish Constitution). There is no doubt that fundamental rights contain an undeniable axiological core and that they evoke this condition by their very name, as can clearly be appreciated in the language of the Spanish Constitution, where it says that "fundamental rights […] are the foundation of political order and social peace" (Article 10.1 of the Spanish Constitution; my translation).[6] Other theses, inspired by natural law conceptions more sensitive to history, have stressed that liberties are "protean" and necessarily responsive to the cultural, social, and economic changes that have recently been witnessed in recent Spanish politics.

Some legal philosophers, like Javier Antuátegui, Rafael de Asís, Gregorio Peces-Barba, Luis Prieto Sanchís, and Gregorio Robles, have attempted to set on a positivist foundation what the French revolutionaries called *droits de l'homme*. But, as I would argue, a foundation conceived in natural law offers a better account of what makes these rights specifically legal. This can be illustrated by looking at the Romance languages, where the same root accounts for both the word *law* (*derecho*, *diritto*, *direito*, *droit*) and the word *rights* (*derechos*, *diritti*, *direitos*, *droits*), offering evidence of a reality at once normative (legal) and moral (right). This suggests that if we are to explain the term *derechos* (rights) in the expression *derechos humanos* (human rights), we will have a much harder time proceeding from positivist premises than from a natural law approach, and the outcome will be much less convincing, too. This is because positivism is a *monist* theory, so it only recognizes *positive* law as legal. From this perspective, talking about natural, human, moral, or prenormative rights as something different from positive law amounts to a *contradictio in terminis*. As a dualist theory of law, natural law theory distinguishes two normative systems: a system of natural law conforming to a complex of values prior to positive law and tasked with grounding, guiding, and critically limiting all legal regulation, and a system of positive law established and enforced through the binding force of those who hold power in society. Human or natural rights have a deontic status different from that of positive rights but are not independent of them, because every natural right tends to be positivized, and every positive right must adhere to natural law if it is to make a claim to fairness.

[6] The Spanish original: "los derechos fundamentales […] son fundamento del orden político y la paz social."

Natural law has served the persistent historical function of limiting power. On the premise that the civic consciousness is pervaded with the idea that inherent in the human being are values that no political authority can breach, modern natural lawyers have given human rights a rationale that cannot be discarded without at the same time undermining their foundation. The attempts made over the course of history to offer a positivist alternative to the natural law conception of human rights have inevitably led to compromising their political effectiveness. One need only think here of the 19th-century conceit of "subjective public rights" and how important a role they came to play at the time: They were devised by the German public law school as a replacement for the idea of natural rights as liberties enjoyed by citizens vis-à-vis their government, but the premise was that this would happen through the introduction of a subjective status dependent on the government's self-limitation. We should recall, with Antonio Truyol y Serra, that this way of understanding rights emerged in response to the problem of the legal status of international law, meaning that this law could not be recognized as law proper if conceived as merely built on the "will of the states," more as a set of moral or courtesy rules followed by nations (the *comitas gentium*, or comity of nations) than as an actual system of law (see Truyol y Serra 1968, Ballesteros 1992, De Castro Cid 1982, Fernández García 1984, Pérez Luño 2005, and Vidal Gil 2002).

The natural law foundation of human rights has also come up in connection with important concerns of the present day, such as the impact the new technologies have on law, or the quality of life in relation to the environment, or the risks that biotechnology poses to citizen's rights.

The study of the legal ramifications of the new technologies has sparked a growing interest among legal philosophers and theorists in Spain. Ortega calls this "the issue of our time," which could not but draw the attention of natural lawyers, just as it has involved the main areas of legal research in developed countries. In recent decades, the conceptual and textual universe of legal scholars has seen a profound and radical change with the transformation of the cultural, political, and economic premises experienced in contemporary technological societies. English-speaking countries might want to devote greater attention to the phenomenon that in Spain has been termed *contaminación de las libertades* (polluting the freedoms), referring to the new forms of breach that rights and liberties are subject to with the indiscriminate use of communications technology, and in particular the Internet (see Garriga Domínguez 1999, Pérez Luño 1976, 2004).

Human rights in the present day demand an adequate sensitivity to the "ecological paradigm" on the part of jurists and legal philosophers and theorists working in the natural law tradition. This requires a critical reflective attitude, assuming the responsibilities deriving from the new challenges and issues that environmental threats pose in the economic, social, political, and legal spheres. It stands as an unavoidable task for legal practitioners and theorists

alike to strive to improve the quality of life and guarantee a balanced and sustainable development and biodiversity (see Ballesteros 1995 and Bellver 1994).

Natural law has also shown itself to be a topical approach by taking an interest in what biomedicine, bioethics, and biotechnology entail for human rights. This is a research area closely bound up with the social and legal repercussions of the new technologies, an area in which the question of the quality of life emerges with its own significance. Hence the interdisciplinarity of this field. Human dignity, identity, and privacy are values and rights that from a natural law perspective must be protected before certain biotechnological investigations can proceed. The notion of human nature—a core aspect in the natural law tradition—takes on a new topicality and urgency in light of current bioethical issues (cf. Ballesteros and Fernández 2007, Marcos del Cano 2004).

4.6. 20th-Century Natural Law Theories in Portugal

It was previously mentioned that positivism gained a foothold in Portuguese legal culture in the last part of the 19th century, and in the beginning of the 20th century this trend continued and grew stronger. The spread of a positivist and scientist mentality contributed to a decline of natural law, so much so that the study of this discipline became relegated to seminaries and theology faculties. Several circumstances can explain this situation, three of which are as follows.

The first is the creation of a law school in Lisbon in 1913. This academic centre was founded from the outset as a lay and republican alternative to the conservative and traditional old Coimbra School of Law. The new Lisbon School of Law had no place for the natural law tradition, which was considered a carryover from a past incompatible with the open and progressive mentality that jurists-in-training were encouraged to develop. The innovation fostered at this new law school soon also spurred a drive for renewal at the old Coimbra School of Law, whose lecturers were unwilling to ignore the call for modernization.

The second circumstance lies in the spread of a legal method based on commenting and elaborating on legal rules, a method begun at the Lisbon School of Law and shortly thereafter taken up at Coimbra as well. The main feature of this method consists in its drawing on the French exegetical school. Much less influential were other approaches to legal positivism, like German legal dogmatics and general legal theory or British analytical jurisprudence. Some scholars showed an interest in utilitarianism, as well as in some evolutionist approaches to positivism. All this activity led to a progressive abandonment of methods linked to the neo-Scholastic or idealist-Krausist natural law theories that had peaked at the beginning of the 19th century.

The third circumstance is that some lecturers, researchers, and students from the Coimbra and Lisbon Schools of Law began to embrace progressive,

reformist, or even revolutionary political ideologies. In the early 20th century some lecturers at these two Portuguese law schools drew inspiration from different forms of the so-called *socialismo de cátedra* (i.e., socialism defended and developed from the position of an academic chair), as well as from Marxism and anarchism, in addressing the concept, meaning, and social function of law (see Moncada 1960, Lacasta Zabalza 1988, and Merêa 1955).

A clear theoretical example of the attitudes of legal scholars opposed to natural law can be found in the early works of Domingos Fézàs Vital (1888–1953), a professor of public law. Much influenced by the legal sociologism of the French legal theorist Leon Duguit, Fézàs Vital rejected the notion of a subjective right.[7] He considered this concept to be a continuation of the sort of metaphysical ideas defended in natural law, since it assumes the existence of legal powers that people have even before they are recognized as having those powers under the positive rules issued by the state. His later positions are representative of the turning point that brought about the crisis of positivism and ushered in what has been called *Die ewige Wiederkehr des Naturrechts* (The eternal return of natural law: Rommen 1947). Certainly, in the mid 1920s, Vital forsook positivism and legal sociologism for legal institutionalism under the influence of Maurice Hauriou and Georges Renard, whose doctrines he helped to spread in Portugal.[8] From that point on, he attempted to elaborate a neo-Thomist institutional theory that would lay the groundwork for legal institutions in Christian natural law. This attitude would make him one of the ideologues of the Estado Novo personified by Antonio Oliveira Salazar's political authoritarianism, and he would even become one of the inspirers of the 1933 Portuguese Constitution, a key legal text in that legal-political system (see Fézàs Vital 1929).

The renewed Portuguese interest in natural law found its most representative figure in Luis Cabral de Moncada (1888–1974), professor and dean of the Coimbra School of Law, who can be described as the most respected 20th-century legal philosopher in Portugal.[9] From the late 1920s he set out to criticize positivism and its consequences on legal education, and he accordingly promoted the inclusion of philosophy of law as a compulsory subject in the curriculum as law schools. This intellectual attitude, always favouring natural law, evolved from neo-Scholastic premises to approaches closer to phenomenology, neo-Kantianism, and existentialism. Being deeply knowledgeable in German legal doctrine, Moncada was influenced by Radbruch's and Stammler's theses, and he critically studied Kelsen's thought. He gained international recognition with an *honoris causa* doctorate conferred by the University of Heidelberg (see

[7] On Duguit see Section 12.3 in Tome 1 of this volume.

[8] On Hauriou see Sections 1.1.4.2. and 3.2 in this tome and Section 12.2 in Tome 1 of this volume. On Renard see Section 1.1.4.2 in this tome.

[9] On Moncada see also Section 14.3 in Tome 1 of this volume.

Jayme 1993). His natural law conception, receptive to existentialism, comes through in the way he distils what he takes to be the three main beliefs espoused in midcentury Europe: (*i*) the idea that social and political life must be built from the inside out as a projection of a deeper dimension than individual life itself and as a type of existence revolving around the religious idea of salvation; (*ii*) the conviction that law and the state are neither ends in themselves nor merely instruments by which to achieve economic goals but are rather human "tasks" entrusted to culture and hence means to spiritual ends; (*iii*) the belief that in order to fulfil those ends, it is necessary to appeal to higher, objective, ahistorical values making it possible to rise to a superior axiological cosmos insulated from the whims and fantasies of the day. According to Cabral de Moncada (1945), the problem of natural law is no longer a metaphysical but an ontological and axiological issue. This is so because, in the phenomenology of conscience and historicity, the autonomous sphere of the spiritual being has taken shape as a new logos, a logos dependent on, intertwined with, and conditioned by other vital circumstances but still counting on its own laws, sense, and aims. It is the current task of natural lawyers to figure out the structure of the values we call spiritual and to identify the laws we ought to observe in keeping with those values. The highest place in this scheme is reserved for social justice and the common good. This natural law only requires a belief in the reality of the spirit but does not have to take on board any metaphysical or religious conception. Even so, there is no denying that these conceptions have an *in limine* legitimacy, and in fact only by embracing such conceptions is it possible to fully achieve the aims of natural law, which poses not only a theoretical intellectual problem but also a practical problem concerned with action. Intelligence alone will not suffice: There also needs to be the support of the human will. We will never be truly human unless by deep searching we can find a conviction and belief that will open us to the perspective of the absolute, understood as the ultimate sphere in which to assert our reason and give meaning to all our needs and deeds as spiritual beings in this world (see Moncada 1945, 1966).

The teachings and works of Cabral de Moncada significantly influenced the most remarkable Portuguese legal philosophers of the second half of the 20th century: Machado, Castanheira Neves, and Brito.[10] Joâo Baptista Machado (1917–1991) lectured on international law and legal philosophy at the new Oporto School of Law. In his early academic years, he devoted a good deal of study to Hans Kelsen, some of whose works he translated into Portuguese, thus contributing to spreading Kelsen's thought in Portuguese legal culture. In his mature years he sought to move beyond two basic premises of Kelsen's theory: normativist positivism in legal theory and axiological relativism as a ba-

[10] On Machado, Castanheira Neves, and Brito see also Sections 14.8, 14.9, and 14.11 in Tome 1 of this volume, respectively.

sis of legal legitimacy. Machado thus worked out a natural law theory seeking to revise its traditional neo-Scholastic underpinnings in an ambitious project to bring it up to date, to which end he drew on a variety of theoretical sources, including existentialism (where we can see influence of Cabral de Moncada), hermeneutics, and theories of justice, demonstrating a knowledge of contemporary thinkers like Habermas, Luhmann, and Rawls (see Ferreira da Cunha 2006). Antonio Castanheira Neves (1929–) lectured on legal philosophy at the University of Coimbra and has been quite critical of both legal positivism and natural law theory. His criticism of legal positivism stems from his rejection of that brand of legal reasoning which proceeds by subsumption and syllogism. He also rejects the idealism and abstractness that pervades many natural law conceptions. Against these notions and approaches he sets a real, concrete, and historical law whose content takes shape in the ongoing process of solving empirical legal cases. He thus takes the view that court rulings are essentially the determination of what must be considered legally correct in any legal system (see Neves 1993). Some commentators have noticed some analogies that the works of Castanheira Neves bear to hermeneutical theory or even to Dworkin's law-as-integrity theory. The matter is taken up directly in one of Castanheira Neves's more recent works (Neves 2003), where he clarifies that his own position is quite different, since it places greater emphasis on the experiential dimension of law and in the end entails a necessary connection between theoretical reflection and actual praxis in the legal sphere.

The 1974 Carnation Revolution, whose main legal and political result was the 1976 Constitution, resulted in the replacement of an authoritarian regime with a democratic state in Portugal. This important political transformation had cultural ramifications that also affected the attitudes taken to natural law. So, in legal historiography, Antonio Hespanha, of the University of Lisbon, replaced traditional natural law, which had served as theoretical foundation for the conception of legal history developed by Paulo Merêa (1889–1976), with the philosophical premises of postmodern culture (Hespanha 1978). Likewise, José Gomes Canotilho, of the University of Coimbra, replaced the conservative natural law that prevailed under the political rule of Antonio Oliveira Salazar and Marcelo Caetano with critical legal conceptions clearly aligned with a progressive approach (see Gomes Canotilho 1986). José Manuel Pureza, also of the University of Coimbra, has worked to revise cosmopolitan natural law as a foundation for international law with a view to addressing the problem of pluralism and multiculturalism. The effort is to steer clear of any ideal and abstract universalism that might be encouraged by the standardization of international legal principles and values (see Pureza 1996). Mention should be made as well of the sociologist and legal theorist Boaventura de Sousa Santos (of the University of Coimbra) for the research he conducted in Latin America.[11] De

[11] On Santos see also Section 14.12 in Tome 1 of this volume.

Sousa Santos rejects the paradigm of modernity, which in the legal realm found expression in the natural law pursued in the Enlightenment era, and sets that paradigm against a postmodern one understood as a new critical conception of experience and a reframing of legal and political common sense in light of an emancipatory aim. Against rationalist natural law, grounded in what he calls "indolent reason," he sets a utopic rationality committed to liberation and emancipation. In the Enlightenment era, natural law turned law into a myth that now needs to be demystified, considering how the legal system has proved unable to adequately solve some of the most pressing social issues. A response to this progressive criticism of law requires a series of institutional mechanisms, procedures, and reforms designed to make law accessible and useful to the greatest possible number of citizens (see Santos 1995, 1998, 2003).

4.7. Conclusion: Premises for an Assessment

By way of a summary, it can be observed that natural law theory currently finds itself at a crossroads in Spain and Portugal alike, in a landscape marked by new influences, profound changes, and unsettling uncertainties. In recent years, the paradigms that have traditionally been articulated in natural law and legal positivism seem to have run their course. Just like Pirandello's famous characters, many of the youngest Spanish and Portuguese legal philosophers and theorists are "in search of an author." An attempt in recent years to move beyond the doctrinal baggage inherited from the recent past has served as an incentive to swiftly import theoretical models deemed more appropriate to the changed circumstances. Under the amorphous label of post-positivism, legal positivism has sought to take up a motley range of programmes and theories, including those carried forward in analytical philosophy and neoconstitutionalism, as well as the work done addressing feminist, ecological, and multicultural concerns and the criticism of the global society. This reinvigorating attitude seems fully legitimate to me in view of the concerns it addresses and the anti-conformism it fosters, and only time will make it possible adequately assess the results, since no definitive conclusions can be drawn by observing a panorama still *in fieri*, to use a legal phrase.

As a final consideration, I should point out what I understand to be the biggest danger the most innovative movements in Iberian legal theory and philosophy are exposed to, namely, the danger that they should too eagerly make a clean sweep of the natural law era of the past, thus undiscriminatingly doing away with currents whose centuries-old history and plural meanings have engendered a variety of implications and nuances that cannot be packaged into any simplifying criticism. By bringing moral values to the law at different times and across different legal cultures, natural law has made possible an engaged attitude, giving evidence of a historical function that urgently needs to be clarified and taken into account, failing which Spain and Portugal would

paradoxically see the rise of attitudes that reject natural law while invoking rationally grounded objective values (however much in a historico-sociological sense) and defending the need to recognize basic human rights and values as legitimizing ends or guidelines for every legal system, thereby claiming a connection between law and morals. These positions therefore implicitly recognize well-known natural law premises. Indeed, we are witnessing an opening to human values and rights and to the historical conscience typical of the natural law theses developed with an eye to innovation; we are seeing the effort of parts of critical legal theory to salvage the most vivid aspects of a humanist natural law conceived in defence of the notion of human dignity (see Bloch 1961); and, finally, we can also observe attempts to revive practical reason and to address the problems of our contemporary globalized and technological society by working from a renewed theory of justice—all these trends show that the big questions linked to the historical development of natural law doctrines are alive and well. For, in any event, as Karl Jaspers (1949) once observed, our overall image of history and our consciousness of the present situation are interdependent: The deeper our consciousness of the past, the more authentic our participation in the present moment.

Chapter 5

20TH-CENTURY NATURAL LAW THEORY IN ITALY

by Francesco Viola

To explore the history of natural law theory in 20th-century Italy (see Fassò 1964a, 109–28; Pérez Luño 1971, Marini 1987, Lorenzi 1990) there is no need to make reference to political unification of the country in the second half of the 19th century: We can refer to a much older tradition of thought that rather marks the persistence of a cultural approach, despite chequered political and social vicissitudes. The fact is that the cultural unification of Italy came long before its political unification. Since every culture can be considered as an interpretation of human nature, it is legitimate to wonder whether there is a propensity of Italian culture towards a specific doctrine of natural law.

I will limit this exploration especially to the period that goes from the years after World War II, down to our own day, and I will entirely neglect studies on the history of natural law, even though they have had major importance in Italy. Does a natural law doctrine exist that is dominant in Italy in the second half of the 20th century?

I will say straightaway that the answer to this question will be a negative one. Rather than of a unitary doctrine it will be necessary to talk of some typical approaches to the problems of natural law that are persistent in Italian culture and derive from its tradition of thought.

5.1. The Italian Tradition

In this tradition the common fabric of society is represented by Catholic ethics, whose principles and values, until a few decades after World War II, were amply shared, though not always adequately practiced. For the Italian people, the Catholic ethic was identified for a long time with ethics *tout court* and it had no rival alternatives of any importance.

On this common basis there developed two orientations of thought that can emblematically be seen as going back respectively to St. Thomas Aquinas (1225–1274) and Giambattista Vico (1668–1744), both Neapolitan philosophers. The former represented both the theological origin of this normative ethic and its possible rational foundation, natural law being at once divine law and law of reason. Vico—to whom we owe a philosophy of history attentive to the way in which natural inclinations and the principles of reason are developing in the minds of men and in the work of civilization—represented the demand for a bond with praxis and with the concrete experience of social life

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and politics. Hence reason and history, divine will and human culture are the elements always present in the background to this tradition of thought.

One of the unquestionable characteristics of Italian reflection on natural law is given by the fact that these two orientations of thought, not incompatible per se, rarely fertilized one another but developed along parallel and often antagonistic lines.

The Italian interpreters of Aquinas have given life to varying interpretations oscillating between voluntarism and rationalism, but often rejecting attention to the historicity of human experience.

The followers of the Viconian line of thought, which actually did not produce a true legal-philosophical school and for long periods fell into oblivion, were concerned above all with the interpretation of political and civil history, abandoning Vico's undoubted religious inspiration and his attention to law.

If now, leaping forward a few centuries, we look, even superficially, at the 19th century, we have to recognize that the philosophical bases were not adequately developed in the sphere of Catholic thought, which had the monopoly on natural law theory.[1] Everyone recognizes a large dose of eclecticism in Christian thought itself and, more broadly, in all Italian philosophical culture down to our own day.[2] In the first half of the 19th century the only detailed discussions of natural law had an avowedly rationalistic imprint.

The glorious tradition of Christian thought had been seriously damaged by the impact with the Enlightenment, but it was not entirely dead. In the second half of the 19th century some scholars interested in legal and political problems quite consciously returned to the conception of natural law of St. Thomas Aquinas. Among them for depth of thought there stands out Luigi Taparelli d'Azeglio (1793–1862), who worked out a complete and detailed doctrine of natural law that still today is of some importance (see Taparelli d'Azeglio 1849). Among these scholars there was certainly a conservative orientation aiming to oppose the spread of liberal individualism. Nevertheless, there is, especially on the part of Taparelli d'Azeglio, an endeavour not to impose the principles of natural law from above, but to see them as in some measure immanent in the history of customs and social praxis.

Following Pope Leo XIII's encyclical *Aeterni Patris* (1879), Catholic thought again found its identity and reprised the tradition of natural law as

[1] One of the few exceptions is the philosophical system of Antonio Rosmini (1797–1855), a Catholic priest that succeeded in creating a dialogue between the Christian philosophical tradition and modern thought. For this purpose he valorised Kant's thought against sensism and empiricism. However, he was isolated and looked on with suspicion within the Catholic Church itself.

[2] A typical example of eclecticism in the legal-philosophical field is the thought of Gian Domenico Romagnosi (1761–1835), who blends naturalism and ethical finalism. It is not clear whether he is to be considered a supporter of natural law theory or of legal positivism. Nevertheless, he is a major scholar on theory of society and constitutional law.

a basis for a moderate and prudent recognition of human rights (see Menozzi 2012).

In Italy the neo-Thomist movement developed until after World War II and to it we obviously also owe a determined conception of natural law. The orientations of this School were to have a lot of weight, for good and for bad, on the image of natural law that spread in Italian culture before and after the World War II.

In Italy neo-Thomism was a movement of thought linked to the Catholic Church much more than in other European countries. We have to remember that in Italy there were no state theology faculties, and still there are none. Catholic culture, even more after the political vicissitudes linked to the unification of Italy, was steeped in an ecclesiastical and clerical dimension. Consequently the neo-Thomist conceptions of natural law experienced a double separation: from lay culture, and from legal culture. They were set apart as theological-philosophical and ethical problems, while the prevailing orientation of jurists continued to be linked to legal positivism in legal science,[3] though anchored to Catholicism in private morality. Accordingly the Thomist doctrine of natural law remained in a defensive position towards lay culture and was not able to develop a capacity for dialogue and valorisation of the universality of reason.

If we then look at the way of thinking of natural law, it mainly centred on the affirmation of absolute and unchangeable norms independent of historical variations and founded on the rational will of God or on human nature steeped in finalism in virtue of the principle of creation. A certain ramification was possible on the basis of the Thomist distinction of the derivation from natural law *ad modum conclusionis* or *ad modum determinationis.* Nevertheless, recourse to historical experience was not seen as necessary for knowing the principles of natural law, but rather for being aware of the variety of their applications (see Olgiati 1944).

The very concept of law was identified with justice seen as a supreme synthesis between internal action, linked to virtues, and intersubjective and social rules (see Olgiati 1932). The reduction to ethics leads to a loss of the autonomy of the concept of law. The neo-Thomists had to defend themselves from this accusation, and some, in order to face it, tried to separate more deeply external action from internal ones (see Graneris 1949).

From the accusation of lack of historicity, neo-Thomist thought was defended by invoking the distinction between ancient and Christian natural law, on the one side, and modern natural law on the other. The latter was held to be responsible for an abstract and unhistorical conception of natural law, while

[3] Dominant in the world of Italian jurists in the first half of the century is the institutionalism of Santi Romano, which is a rigorous legal positivist. On Romano see Section 11.4 in Tome 1 of this volume.

the former, in the wake of Aristotle, was held never to lose sight of the concreteness of moral experience. However, the true reason for the rejection of modern natural law theory lies in its links with rationalism and deism.

On the lay side,[4] historicism and idealism, which were the dominant philosophy of the time and denied the normative character of human nature, had in turn appropriated the thought of Vico to themselves, the other great interpreter of the Italian spirit, bending him to the needs of an immanentist philosophy of history. Benedetto Croce in 1910 and Giovanni Gentile in 1915, with their interpretation of Vico's thought, profoundly conditioned the approach to the Neapolitan philosopher but not so much to link him to Hegelian philosophy, rather because of the excessive importance given to the themes of aesthetics and poetics in comparison to legal ones, considered to have a low theoretical profile.[5] Accordingly, historicism was no less abstract in its intellectual positions and the clash between Catholic and lay thought was played out on the plane of the greatest theoretical systems. In these cases the fierce battle on principles was almost always accompanied by pragmatism not very attentive to values on the practical plane.

One also has to consider the situation of particular difficulty in which legal philosophy found itself. On one side, in order to be recognized as true philosophical speculation, it had to be closely connected to the dominant currents of thought, that is to say, at that time, to positivism, neo-Kantianism, and neo-idealism; on the other side, however, no adequate valorisation of the legal phenomenon came from these philosophical orientations. Philosophical positivism considered law as an antiquated instrument of social control; neo-Kantianism tended to think of it in an outlook of mere appearance and coerciveness; neo-idealism now reduced it to economy (see B. Croce 1909) and now drowned it in ethics (see G. Gentile 1916). Accordingly legal philosophers almost always appeared to be heterodox in relation to the tradition of thought to which they too made reference and were therefore looked on with suspicion by pure philosophers. If the philosophers reduced them to mere jurists, the latter did not consider them as belonging to their guild.

The neo-Thomist orientation, or Catholic spiritualism in general, in actual fact represented the only doctrine of natural law in Italy before World War II. Certainly some demands of the problems of natural law were also accepted by the adversaries of natural law, and particularly those regarding the formation of more just positive law. Philosophical positivism spoke of "social idealities." One can also identify non-Catholic natural law orientations linked to a line of thought that starts from Filomusi Guelfi (1846–1903) and Igino Petrone (1870–1913)

[4] Among the few exponents of secular Catholic culture we can mention Eugenio Di Carlo (1882–1969) of the University of Palermo for his willingness to take into consideration the historical dimension of natural law (see Di Carlo 1966).

[5] On the neo-Hegelianism of Croce and Gentile see Section 11.2.2 in Tome 1 of this volume.

and is linked to the Neapolitan neo-Hegelian School (Augusto Vera and Bertrando Spaventa). But these were positions that were very close to historicism.

The only real doctrine of natural law originally different from the neo-Thomist one can be found in the neo-Kantianism of the Bolognese Giorgio Del Vecchio (1878–1970), the founder in 1921 of the *Rivista Internazionale di Filosofia del Diritto* (*International Journal of Legal Philosophy*), which circulated widely abroad too. The difference does not consist in the contents of natural law, which are still those of Christian ethics, but in the distinction between legality and justice. Del Vecchio maintains that the logical concept of law is independent of that of justice. Legality is a logical form that makes it possible to give legal meaning to social phenomena of intersubjectivity and is neutral from the evaluative point of view. But law moves towards the ideal of justice, which is its principle in terms of contents. The originality and importance of the thought of Del Vecchio, to whom we also owe later valuable writings on natural law (see, e.g., Del Vecchio 1954), is mainly in the working out of a definition of law that overrides the controversy between legal positivism and natural law theory, in that it is only on this basis that it is possible for this controversy not to be a dialogue of the deaf.[6]

On the plane of ethical-political commitment, none of the forms of natural law present in Italy before the war was fully aware of the incompatibility between fascist ideology and natural law, developing an organic and combative critical opposition. This is proof of the abstract character of Catholic natural law in that period and its incapacity to tackle history.

5.2. The Natural Law of Jurists

One of the most important cultural effects of World War II on legal-philosophical problems—as is well known—was renewed attention, not infrequently opportunistic, to natural law. This happened in general in the culture of the defeated countries, that is to say Italy and Germany.[7] There has been much discussion of the responsibilities of legal positivism regarding Nazi and fascist totalitarianism.[8] It is understandable that the whole configuration of pre-war

[6] On Del Vecchio see also Section 1.1.3.1 in this tome and Section 11.2.1 in Tome 1 of this volume.

[7] It is curious to observe the rapid conversion of idealist philosophers to natural law theory. From the school of Croce himself there was to come a defender of natural law (see Antoni 1959). On the revival of natural law theory in Germany see Sections 1.3 and 2.4 in this tome and Section 10.2 in Tome 2 of this volume.

[8] Uberto Scarpelli and Norberto Bobbio vigorously defended legal positivism against this accusation: the former on the basis of the connection between legal positivism and the constitutional and democratic state, the latter on the basis of the distinction between legal positivism as a theory and as an ideology. On Bobbio and Scarpelli see Section 9.3 in this tome and 11.4 in Tome 1 of this volume.

culture was challenged without any distinction being made. Actually the true responsibility should have been sought not so much in legal positivism, but in the separation between ethical and legal culture. The upholders of legal positivism and natural law theory were equally responsible for this.

One of the first results of the rebirth of natural law was renewed attention to it on the part of jurists. Once more the initiative and the impulse came from the Catholic Church. Pope Pius XII had great sensitivity to law and advocated a new international legal order. His appeals were fully accepted by the Union of Italian Catholic Jurists (1951). The central problem was the legal ethics of the jurist and his virtues. The work of the jurist was undoubtedly linked to positive law and the value of legal certainty, but now it could no longer be affirmed that the drama of unfair law should or could remain only a private matter of conscience, especially when it took on very large proportions.

The variety of opinions present in this debate was the unmistakable sign of a development in the problems of the validity of natural law. First of all people once again proposed the neo-Scholastic position whereby natural law had at once a transcendent and a systematic character. Accordingly, where the jurist ascertained the contradiction between the positive norm and the natural one, he or she would have to recognize that the former is not true law (see Barbero 1953, 40). But this *strong version*[9] of natural law theory received very little support and its own upholders did everything possible to reduce its negative impact on the value of certainty and on the duties of the role of the jurist. The *weak versions* insisted either on the difference between the single positive norm and the system of norms as a whole, or on the particular character of the norms of natural law. These were two moderate approaches that allowed a dialogue between positive law and natural law without implying a duplication of legal normative systems.

According to the first perspective there was a substantial difference between the legal system as a whole and the single norm. The former could never clash with natural law, since it was the objective order of social coexistence, an arrangement consolidated through the tests of history and therefore endowed with immanent rationality of its own. In this sense natural law is the sum of the constitutive requirements of positive law itself, whether derived from the structure of action or expressed in the internal values constituting a legal order. This was substantially the position of Giuseppe Capograssi (1889–1956), a legal philosopher who had a great influence on the training of Italian jurists in the post-war period.[10] Capograssi, the upholder of a philosophy of legal expe-

[9] A version is strong if it contains the following assumptions: Non-positive law exists; this law is valid by itself, that is to say without any need of human recognition; this law, being axiologically superior to positive law, prevails over it as regards compulsoriness (see D'Agostino 1993, 71).

[10] On Capograssi see also Section 1.3.3.1 in this tome and Section 11.3.1 in Tome 1 of this volume.

rience, expressly harked back to Vico and spoke of the "natural law of the wise men," that is to say of the result of the work of reason displayed in history, underlining the deep needs of humanity (see Capograssi 1959a). In this framework unjust law has to be somehow taken back, through interpretation, to the interior values of the positive order and thus purified of its contradictions.

We can consider this trend as being a fully natural law theory, although its upholders did not always accept this definition, which in the cultural imagination seemed to be an exclusive monopoly of the *strong version.* In its turn the philosophy of legal experience was engaged in opposing the historicist drift, which threatened it from inside. This task was faced differently by the disciples of Enrico Opocher of the University of Padua (1914–2004): through recourse to classical dialectics and ancient rhetoric (see Cavalla 2005; see also Opocher 1983), in the study of the potentialities inside the legal order (cf. F. Gentile 2000), in investigations of the history of natural law theory (see Todescan 1973), and in legal theory inspired by German hermeneutics (see Zaccaria 1984a, 1984b).

The second trend rejected identification of natural law with a system of precepts. It consisted, instead, in a few fundamental or core precepts and in a set of orientations guiding the production of positive law. Today we would say that natural law is manifested above all through principles, that is to say general orientations for action. Consequently the irresolvable conflict between natural and positive law would come down to a few extreme cases concerning precepts, while it would only have a moral and not strictly legal value in the case of principles.

The innovations thus consisted in a differentiation of the ways of seeing the validity of natural law and in jurists' involvement in these problems, reserved in the past for legal philosophers and moralists. The latter aspect is strengthened by the presence of a legislative text steeped in ethical-political values like the Italian Constitution that came into force in 1948. Since the constitutional text incorporated some principles that belonged to the natural law tradition, the fidelity to law typical of the jurist could be merged in some way with natural law theory. In any case it is significant that people began to speak of the "philosophy of jurists" (see Caiani 1955), which before the war would have seemed like nonsense. This philosophy does not abandon the unhistorical formalism typical of the Italian jurist (see Merryman 1966), but recognizes that values are incorporated in legal and institutional formulas, are "law in force" and therefore must be kept in mind in the procedures of legal interpretation and legal science.

The result of this evolution was a strengthening of the convergence on the constitutional contents of law, which for upholders of natural law theory were founded on the natural law in force, while for upholders of legal positivism they were positive law to all intents and purposes. But agreement always has the effect of paralysing research. At that time in Italy there was no debate on

the contents of fundamental legal values, but only on their classification as natural or positive law ones. A natural law doctrine should instead present itself as a programme of research on the precepts and principles of law, that is to say it should exert practical reasoning to trace and justify legal rules. Moreover, this is by no means extraneous to the tradition of Italian legal science, which harks back to Roman law, to medieval jurisprudence and to *ius commune*, and which—as was well highlighted by Giuliani (1997)—could now use the resources of the new rhetoric and the theory of reasoning. But jurists in the age of codification had abandoned this tradition, unlike Anglo-Saxon jurisprudence. In conclusion, it can be affirmed that the two weak versions of natural law still need to be further extended and developed.

5.3. Natural Law Theory as a Theory of Morality

Hence one should not be surprised if the most vital focus of the debate moved onto the epistemological plane. As it was no longer the contents of precepts that classified a doctrine as natural law, then the stress was to fall on a determined foundation or on a determined justification. Norberto Bobbio perceived this problem with his usual lucidity when he long ago considered natural law theory not as a determined morality, but as a determined theory of ethics (see Bobbio 1965a, 180). This was an objectivistic theory of ethics that presumed to base value contents on the cognitive plane. The conflict between natural law theory and legal positivism thus became a conflict between cognitivism and non-cognitivism of value judgments (c.f. Viola 1993). This epistemological controversy drew the main attention to itself, causing issues of normative ethics to fall into oblivion.

The division now concerned meta-ethics, the conception of science and legal interpretation, and the concept of law, that is to say whether it is fact or value. There developed a strong current of legal positivism with an analytical inspiration, which was inspired by the works of Hans Kelsen, Alf Ross, and H. L. A. Hart and became the main adversary of the natural law theory of ethics, using the *Is-Ought question* as its favourite weapon (see Bobbio 1965a, 172; see also Carcaterra 1969).

Meanwhile, in more general Catholic philosophical culture neo-Thomism faded away and almost disappeared, without being replaced by a different and more adequate interpretation of the thought of Aquinas. It is true that Catholic culture in Italy in the post-war period was greatly influenced by the thought of Jacques Maritain, but especially with reference to political and social philosophy rather than to legal philosophy.[11] In actual fact natural law theory had

[11] Maritain's most interesting work for legal philosophers was published posthumously in Italian even before being published in the original language, but unfortunately did not arouse sufficient attention (see Maritain 1985). On Maritain see also Sections 1.3.2 and 3.2 in this tome.

run off into a thousand rivulets, no longer having a strong and unitary speculative basis. Obviously its eternal and invincible argument was kept alive, that is to say that it is necessary to admit a criterion of moral measurement of positive law if one wants to avoid the triumph of factuality. But the uncertainty remained about the way of founding this *recta ratio* on the cognitive plane and on its strictly "legal" character.

The essential connection between Christianity and natural law theory was sharply challenged by Guido Fassò (1915–1974), a legal philosopher of law at the University of Bologna and—as already stated—the author of the only complete history of legal thought still existing today. Fassò, in whom we again hear the voice of Viconian philosophy, clearly separates the plane of the absolute transcendence of moral and religious values from the institutional and social plane, which is necessary to cohabitation and coexistence and therefore has to accept a certain relativism and historicism of values, with their consequent inevitable secularisation (see Fassò 1969; see also Ambrosetti 1985). The law is set on the latter plane, just as all social or rational moralities are in reality legal forms of coexistence in some contrast with the essential ultramundane spirit of Christianity. In this there is a good dose of mistrust in human reason, which to some extent is reminiscent of non-cognitivism (see Pattaro 1982) and the mysticism of Wittgenstein, but Fassò clearly rejects voluntarism. In this religious background for the construction of legal and political institutions he recognizes the educational importance of natural law seen as *law of reason* (see Fassò 1964b). This is empirical and historical Viconian reason that is not at all eternal and unchangeable, but essential for the guaranteeing of rights and freedom, that is to say for founding the values of constitutionalism. On this plane it is also possible to intercept the natural law theory of Thomas Aquinas, seen by Fassò as an upholder of critical and non-dogmatic reasonableness able to adapt to the historicity of human relations.

Despite the non-absolute value of natural law, this recognition of the importance of practical reasonableness and the use of Thomism along these lines is interesting. Fassò himself makes reference to the English legal tradition, which has developed law from the concrete demands of society interpreted by reason, a law that is not voluntaristic, as continental law is; it is *positive natural law*, to use Roscoe Pound's expression.

It must be remembered that some years before, an Italian with a Thomist background and a deep knowledge of English legal and political thought, Alessandro Passerin d'Entrèves (1902–1985), had maintained that the importance of natural law consisted more in its *historical function* than in its doctrine (see Passerin d'Entrèves 1954). And this historical function was precisely what was emphasised by Fassò, that is to say limiting the power of the state and protecting the individual against the sovereign's will. Crediting natural law with this "historical" merit, Bobbio noticed that for this reason an objectivistic theory of ethics was not necessary, in that the same merit must be attributed to other

doctrines or philosophies that had nothing to do with it (see Bobbio 1965a, 190). But natural law theory is not the only possible cognitive meta-ethic and it is doubtful whether constitutionalism and human rights are defended better on the theoretical plane by cognitivism or ethical relativism. In conclusion, for the fate of natural law theory the crucial point is not the content of natural law but its foundation, that is to say the concept of human nature. It would be senseless to go on speaking of "natural" law if this did not somehow mean an appeal to nature, and nevertheless the naturalistic fallacy would seem to prevent it.

To get over this difficulty it is necessary to offer a non-naturalistic interpretation of human nature and this required a new speculative effort. It was to this theoretical undertaking that Sergio Cotta (1920–2007) devoted his studies; he brought together an original Augustinian inspiration and an ontological revisiting of Husserl's phenomenology (see Cotta 1991). Cotta does not dwell on defending determined contents of natural law, in which he admits a good deal of historicity. The philosophical concept of "nature" cannot be reduced to mere factuality, but indicates the constitutive structure of an existential entity. The entity to which law refers is man. Philosophical investigation shows the structural characteristics of this entity and reveals its coexistential relationality. From this anthropological truth there derive objective duties, that is to say ones valid for every human being. Hence natural law is positive law that is justified by its corresponding to the structure of the entity to which refers. It is not ideal law, or naturalistic law, but *law which is valid* for being an expression of the human being. The principal task of natural law theory becomes justifying the compulsoriness of positive law, which substantially means answering the radical question "why law?" (see Cotta 1981). In this way Cotta manages to trace in positive legal systems some inalienable principles of a structural character, violation of which would make the coexistential relationship impossible (like the duty to respect the innocent and not to subjugate other's will). Such principles are not merely formal, because they express a sort of ontological a priori requisite, and not merely logical, and at the same time they need to be worked out in historical praxis. Limiting natural law exclusively to the first principle of practical reason, that is "good is to be done and pursued, and evil is to be avoided," would mean abandoning the contents of natural law to the becoming of history and to relativistic historicism. Hence it is necessary—according to Cotta—to translate the old metaphysical ontology of Thomism into phenomenological and anthropological ontology.

Cotta's thought to some extent harks back to the theme of the concept of law dear to Del Vecchio, whom he succeeded at the University of Rome. However, Cotta does not reduce the concept of law to mere logical formalism but rather shows that the form of legality implies some anthropological and ontological conditions.

This debate on natural law is set on the plane already specified by Bobbio, that is to say on the epistemological one. Cotta, indeed, agrees that the criteri-

on of historical contents and that of social function are not adequate to define natural law theory. It is not the unity of a school or a doctrine, but the unity of a *research model* characterized by the question on the foundation of the law when it is sought in the nature of man (see Cotta 1989).

Sergio Cotta's teaching gave rise to a flourishing school of disciples, who, starting from a common original inspiration, moved in various directions, at times conflicting ones: the phenomenological orientation in a Heideggerian sense was chosen by Romano (1984), that of philosophical anthropology by D'Agostino (1984), and that of criticism of social functionalism by Montanari (1989).

Lastly, it must be mentioned that a possible resource for natural law conceptions came from logical studies on the ontology of the norm that were developed in Italy in a very sophisticated way by Conte (1989–1995).

This return of natural law problems to the philosophical dimension, in both an ontological and an epistemological sense, though of great speculative value, did not always satisfy the demands of jurists more interested in the contents of law that in its foundation. Besides, jurists favourable to natural law had been satisfied with constitutional values and therefore went back to entrenching themselves in legislative formalism in defence of the certainty of law. By contrast, it was to be jurists animated by left-wing ideologies that attempted alternative interpretations of positive law in the name of a search for more just law (see Barcellona 1973). In any case legal philosophy of law once again estranged itself from the attention of jurists (c.f. Viola 1994).

5.4. The Return of Normative Ethics within Positive Law

From the 1970's a cultural phenomenon of great importance for the search for natural law began to be apparent. We have said that the only undisputed firm point was agreement about the contents of Christian ethics. But in Italian society at that time this convergence gradually vanished. The introduction of divorce (1970) and the legalization of abortion (1978) did away with common ethics and led to pluralistic fragmentation of moral convictions. Since public deliberation requires reasonable accord at least on some central themes, attention began once again to be paid to issues of normative ethics that meta-ethical researches had caused to be neglected.

Debates on just law imply the existence of and therefore the search for objective criteria, and this confers plausibility on the natural law outlook. But the principles and precepts of natural law need to be defended on the argumentative plane from within legal experience. On the other hand—as already mentioned—purely philosophical reflection on law does not capture the attention of jurists oscillating between formalism and ideologism. Nevertheless, the crisis in common ethics shifted to positive law the task of guaranteeing the shared values necessary for all civil cohabitation (see Viola 1989). Paradoxically this is

a situation favourable to natural law, which has always had to respond to two contradictory accusations, i.e., being ethics and not law, and being based on nature as a fact. But now the general concept of "nature" had become the crucial issue of law and morality (see Lombardi Vallauri 1990b).

Today in Italy—as in the rest of the world—the legislation is forced to deal with issues that are ethically important not only on the public plane but also in the private sphere. Accordingly, themes like bioethics, ecology, the future generations, feminism, and gender become significant chapters of legal philosophy. In relation to the answers provided by normative ethics, two conflicting groups are configured, which in a sense reflect the traditional division between laymen and Catholics. Nevertheless, it would be wrong to identify this opposition with that between legal positivism and natural law theory, both because "lay people" too often defend an objective ethic, and because the "Catholics" do not always base their ideas on the normative concept of human nature. Among the numerous contributions to this ongoing debate we can consider the writings of Francesco D'Agostino, who, on the basis of rational justification, rigorously defends the contents of the Christian tradition of natural law (see, for example, D'Agostino 1998). In any case history itself takes on itself the task of refuting the ferocious aggression by Piovani against natural law theory considered as anti-modern (see Piovani 1961, 11).

Natural law theory today does not present itself as a theory of morality, but as an ethic deriving either from the normative character of nature or from a specific use of practical reasonableness. For this purpose it is necessary to regain not only normativity, but also all the breadth of the concept of "nature." Natural law theory—as Luigi Lombardi Vallauri observed—is not concerned only with the nature of man, but also with the nature of things and with the very nature of law. Natural law does not only concern norms of conduct, but also norms of organization (see Lombardi Vallauri 1987). The same procedures, to which today attempts are made to reduce all positive law, are not merely arbitrary, but have to respect certain constraints of value and practicability. Constitutionalism, democracy and human rights have binding internal rules; they have—as Fuller would say—their own internal morality. The "naturalness" of positive law lies in everything that is taken away from the full disposition of human will. In this sense there is a sort of minimal natural law theory that is at the basis of our present-day legal culture. It is based on refusal to reduce values to facts, on rejection of absolute subjectivism (see Lombardi Vallauri 1981) and on the defence of the individual against public power (see Cattaneo 1994).

On the contents of structural or procedural natural law today in Italy there is a high degree of consensus, only recently impaired by the debate on the revision of the Italian constitution. The most difficult problem concerns natural law of conduct, because it remains linked to the controversial concept of the nature of man, around which the division remains between Catholic and secu-

lar thought. For this problem to be solved it is necessary to overcome two obstacles still present in Italian natural law.

The first obstacle is conciliation between the universal form of the precept of natural law and its content, which to some extent is historical (see Sala 1971). It is once again a question of succeeding in fruitfully harmonizing Thomas Aquinas and Giambattista Vico, that is to say reason and culture, principles and history.

The second obstacle lies in the difficulty of developing practical reasoning without being conditioned by ideological presuppositions. Only greater trust in reason and in its practical use (see Viola 1990) can favour communication and dialogue between conflicting orientations. Philosophers have to achieve better knowledge of the argumentative processes of jurists and the latter have to be able to perceive the non-positivistic presuppositions of their arguments and interpretations.

Some signs that look to the future are favourable to a renewed approach to the problems of natural law seen as a search for the first principles of legal reasoning.

Neo-Thomist thought and the influence of Jacques Maritain having been worn out, the line of thought inspired by Thomas Aquinas is struggling to find new lifeblood in Italy (cf. also Azzoni 2008). The Italian translation of the main work of John Finnis (i.e., Finnis 1996) does not seem to have made a major contribution to renewing Italian natural law theory, which is not very sensitive to analytical philosophy. Greater hopes lie in the internal evolution of contemporary positive law and the theory deriving from it.

In this connection the most significant turn consists—in my opinion—in the slow but gradual abandonment of the identification of law with rules. We tend to think of natural law in the same way as we think of positive law. But in positive law today the importance of other normative elements is recognized, over and above the rules established by the authority.

Dworkin's distinction between rules and principles has been widely discussed in Italy. Positive law today appears more like a set of interpretative processes than a pre-established system of norms and the problem of the sources of law is revived. The primacy of interpretation shifts the focus from above to below, from normative validity to the use of legal rules. And then we wonder whether this praxis has some *internal primary goods* or guiding principles, what, if any, they are, and what type of normativity they exhibit. Further, the study of human rights (see Viola 2000) favours reconsideration of the theory of natural law, and forces jurists themselves to abandon all rigorous formalism and challenge the rigid separation between validity and justice, law and morality (see Union of Italian Catholic Jurists 1993).

Nevertheless, although it is now clear that the concept of nature cannot be reduced to mere factualness but has to refer to the unity of meaning of the fundamental ontological spheres of human experience, it is still too far from

and external to social praxis and historical processes, which constitute the real life of law. A pathway still not much explored is that which seeks in historical experience the constants of legal rules, having recourse to the acquisitions of cultural anthropology (see Scillitani 1996), or to trans-cultural laws (see Carcaterra 1992, Cosi 1993), or to the suggestions of Maritain and Gadamer on the "dynamic schemes" of action, or, finally, to the "reflective judgment" of Kant (see Mathieu 1989). One can endeavour to arrive at natural law along a plurality of research pathways.

Chapter 6

20TH-CENTURY NATURAL LAW THEORY IN HUNGARY

by Máté Paksy and Csaba Varga

6.1. Scholasticism and Neo-Kantianism in the Interwar Period

Neo-Scholastic natural law enjoyed a spectacular renaissance in Hungary starting from the end of the 19th century.

Several monographs and articles on Thomas Aquinas and his natural law doctrine came out, written by authors like the internationally renowned Dominican theologian Alexander (Sandor) Horváth (1884–1956), whose work on this topic is summarized in A. Horváth 1941. His theory on social justice led him to criticize capitalism as an economic and social order, arguing that no society can be just when mere parts of an organic unit can promote their separate interests independently of the common good of society, and undermining that good as well. This realization provided a basis for his argument against the right to property as a natural right. Interpreting Aquinas in a unique way, he argued that individual property is not necessarily and absolutely justified by natural law. According to him, economic collectivism can very well be in harmony with the requirements of natural law and justice. This is so because, from the standpoint of the whole, human labour has primacy over the right to property. As a human activity, labour is defined by its specific aim, which is to advance the common good itself. Consequently, on this conception, it is morally obligatory, as well as necessary, that the fruits of that labour be redistributed. This is why he ends by declaring that no Christian social order could be built on capitalism but only on its ruins (see A. Horváth 1928–1929a, 1928–1929b, 1928–1929c, 1928–1929d, 1928–1929e, 1928–1929f, 1929, 1929–1930a, 1929–1930b, 1929–1930c, 1929–1930d).

Since the early decades of the 20th century, the leading school of legal philosophy in Hungary was neo-Kantianism in its various inflections. This dominance was in line with the trends in German-speaking central Europe (see Szabadfalvi 2003a, 2003b). One of the key problems addressed within the neo-Kantian methodological framework was that of natural law, reconceptualized either as an axiology or as the enigma of "ideal law."

This kind of investigation can be seen in the work of Felix Somló (1873–1920), our own "Continental Austin," as he came to be called, since he propounded a legal positivism in the English manner.[1] It is just such a conception that he developed in his *Juristische Grundlehre* (Somló 1917), working within

[1] On Somló see also Section 19.2 in Tome 1 of this volume.

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a neo-Kantian framework and standing firmly against the idea of natural law, which he analyzed as simply an attempt to elevate an eternal and objective legal order above the realm of positive law. In his view, natural law presupposes an absolute and self-evident system of principles, while the rules of positive law can only be contingent. The distinctive feature of positive law, for him, lies precisely in its being enacted by the will of a supreme legislative authority, whose issuances cannot be substantiated on the basis of any values but can only rest, instead, on social recognition, that is, on the fact that its will elicits habitual obedience (see Somló 1917, 1999; see also Szabadfalvi 2001).

In contrast to Somló's pre-Kelsenian analytical positivism, the "synthetic" legal philosophy constructed by Julius Moór (1888–1950) accentuated the role of natural law in defining the very "idea" of law that stands behind all legal developments.[2] He, too, rejected natural law as an eternal, unalterably valid set of norms, since he saw history as testifying to the contrary. Indeed, his conception is an effort to reconcile Kant with Hegel. He was convinced that no one can derive legal norms either from human nature or reason or from "the nature of things." Quite the contrary, he argued that natural law served a negative function as a force constraining the positive law (see Moór 2006; see also Szabadfalvi 1999).

The next step in the definitive deconstruction of the antinomy between natural law and legal positivism came with the new dialectics implied by the "synoptic conspectus" provided by Barna Horváth (1896–1973). For Horváth, natural law is no more than a specific form of, or corollary to, positive law: "Instead of being contradictory or opposite to natural law, legal positivism, in its most coherent form, is only a species of positive natural law" (B. Horváth 1928, 211ff.; my translation). Natural law doctrines that legitimize the positive law or revolutionary change ultimately contribute to strengthening legal positivism. Horváth extended his relativization of antinomic duality to positivism itself. He started criticizing Kelsen, too, realizing how much Hungarian legal philosophy had begun to work in his shadow. Formalistic legal positivism had to accept from the outset that the laws of logic are valid; therefore, on the reasoning that the logical laws and the natural laws alike are held to be eternal and objective, the pure theory of law was bound to also accept a kind of natural law as having a foundational role. What is more, as a kind of "positivist" natural law, Kelsen's doctrine winds up expressly seeking an idea of pure natural law (B. Horváth 1934).

One of Horváth's disciples was István Bibó (1911–1979), who agreed with his teacher in rejecting the antinomy between legal positivism and natural law.[3] Although Bibó devoted his later research to political philosophy, he never ceased to concern himself with issues in the philosophy of law. In international

[2] On Moór see also Section 19.3.1 in Tome 1 of this volume.

[3] On Bibó see also Section 19.3.3.2 in Tome 1 of this volume.

law and under the influence of Verdross, Bibó attempted a theory of the international order excluding any form of violence and founded on humanist moral principles. He was deeply committed to the idea that natural law could be revived in some way, and that this would help to eventually overcome the paralysis of formalistic legal positivism (see Bibó 1976; see also Karácsony 2002).

6.2. Natural Law in the Marxist Conception of Socialism

Under the socialist regime in Hungary (1949–1989), the *prima philosophia iuris* was known as socialist normativism. This was neither a conception of natural law nor a legal positivist one but was rather a legalistic ideology that reduced law to the legislator's political will, not in the least meaning to subject that will to any axiological constraint.

When this normativism started to lose its "official" status and doctrinal relevance, in the late 1970s, Hungarian legal scholars suddenly found themselves facing an abyss. Which is to say that, while legal positivism seemed unacceptable—as a conception far too removed from social reality—the idea of natural law was equally objectionable as "unscientific." In search of a solution in a political climate not tolerant of any alternative to Marxism, some scholars looked to Lukács's later ontology of the social being, an ontology they took up as their philosophical framework.[4] Values could find their place within this ontology as specific ontological parts of the total social reality, being components of the prevailing ideology at work in actual practice. This kind of theoretical construction opened the prospect of a minimalist materialist axiology, a view that, among other things, could make it possible to set pragmatic limits to legislation. The argument went on to show that if the legislator took such minimalist values into account, the law itself as a technique of social governance could become more effective. As a synthetic theory, this was certainly closer to the natural law tradition than to Anglo-Saxon command theories (see Peschka 1974, Péteri 1989). In parallel, Lukács's conception was also used to develop a complex legal ontology in which the workings of the judicial mind could be seen as an equal—albeit complementary—part of what is ontologically meant by law. Accordingly, the natural limitations on the workings of the law spring both from the overall social totality and from the participants' value-consciousness (see Varga 1985). In this scheme, it was even possible to give flesh to a theoretical proposition stipulating an "ideal law": This could be done by reinventing "legal policy," that is, by advancing normative arguments that instead of prescribing political goals could suggest effective legal means for achieving those goals without detriment to Marxism's primitively inherent humanistic tendencies (see Koller, Varga and Weinberger 1992).

[4] On Lukács see Section 7.3.1 in Tome 1 of this volume.

6.3. Between Social and Analytic Theories: Natural Law Today

As the "transition to the rule of law" took place in Hungary without the slightest reference to the idea of natural law, the emergence of new natural law doctrines was neither politically nor historically inevitable after the fall of the *ancien régime*.

The legal-ideological problem of what *transition* meant was pointed out by the first president of the Hungarian Constitutional Court, when, late in his term, he summarized the court's official view by saying that "legal certainty—within the boundaries of what this Constitutional Court refers to as legal continuity—gains its significance against a background of political and ideological discontinuity" (Sólyom 2001, 65; my translation). His argument for an "invisible constitution"—an argument invoked only once, in an early opinion on the unconstitutionality of the death penalty—immediately drew sharp criticism from many who saw it as too close to the idea of natural law, despite the fact that the founding president himself came out and said he had only intended to "protect" the Constitution from the prospect of recurrent politically motivated modifications. Indeed, he may have had a coherence theory of interpretation in mind, an ever-evolving conceptual dogmatics positioned above—and thereby both substantiating and framing—the text of the Constitution itself, in terms of which the Court's established interpretive practice can prevail even if the underlying text is changed. Certainly, to make one example, when the entire Court recused itself from judging past crimes committed under the socialist regime, claiming the priority of legal certainty—meaning that formal continuity acknowledged by the successor regime was prior to any "subjective" preference for justice—no consideration based on natural law was invoked. Even when the Court adjudicated so-called hard cases (on abortion or euthanasia, for example), some of their arguments genuinely grounded in natural law were in fact positivist arguments in disguise pretending to be only engaging in textual interpretation.

After 1990, the new crop of Hungarian analytic theorists took up Oxford philosophy of law as a model, believing that its methodological approach could prove better suited to formally analyzing rule-of-law concepts. So for many (e.g., Bódig 2004, chaps. 2–4, and Györfi 2006), Dworkin could become the "new link in the chain" with which to connect the 1980s radical theories of natural rights with contemporary normative legal philosophy. On the other hand, the so-called social science theorists of law could take satisfaction in having already deconstructed official socialist ideology, so they were in a position to continue along their own paths, begun as early as the 1980s (see, e.g., Varga 1994).

In the 1990s, both the political context and local traditions suggested to emerging Hungarian natural lawyers that they should not reject the historical and sociological bases of law as foundations. Since then, the line of demarca-

tion within the community of legal theorists seems to have been between macro-sociological "grand theories" (like those of Varga and Béla Pokol) and analytical legal theories set against a practical-philosophical backdrop (like those of Bódig and Györfi; cf. Paksy and Takács 2007, 657ff.). With much internal variation, the former group criticized the latter by arguing that if we push sociology out of the way, we won't be able to see law in its full complexity as a socio-historical phenomenon, and will thus wind up with only a limited appreciation of law. The latter group claimed theoretical superiority over the former, arguing that social theorizing cannot explain the *normativity* of law.

On the one hand, from a natural law perspective, the advantage that sociological theories of law have over analytical positivism is that they do not aim at any strict separation of law from morality, so they retain their compatibility with the idea that certain widely shared values may form a necessary part of any legal system. On some of these theories (see Varga 2008), it is tradition that mediates between such values and the legal subsystem. The counterargument made by natural lawyers is that the sociological perspective entails a moral relativism. For once the working legal system is conceived as conditioned by social contexts and historical tradition, then values cannot be claimed to be objective: At best, they can be treated as components of the overall effectivity of the prevailing law and order. This stands in contrast to normative conceptions based on natural law, which as the leading canon lawyer in Hungary argues, makes justice an essential criterion for evaluating law (see Erdö 1999). On the other hand, by endorsing the separation thesis, analytical positivists claim they can bring objective values into harmony. In their view, the kind of a natural law theory propounded by thinkers like John Finnis is indeed closer to legal positivism than, say, to the theoretical perspective adopted by Bergbohm.

A way out of this divide has been proposed by Ferenc Hörcher, with his theory of "pragmatic" natural law. Instead of proceeding from any Scholastic kind of hierarchy between normative orders—natural law above positive law—he discusses multiple dimensions of human nature as the factor that drives individual action. This view is based on a philosophical anthropology according to which humans are fallible by nature, and on this premise it is argued that the only guide we have to go by in life is practical moral knowledge, or what the ancient sages called *phronesis*. From this perspective, adjudication is more than an applied syllogism. Instead, it needs to be recognized that aesthetic, moral, and legal judgments have something in common, and they are moreover interconnected in any particular decision-making situation. In Hörcher's view, if it is possible to speak of legal science at all, it should be called *prudentia juris*, using this term referring to the ultimate moral criteria of knowledge and action in the legal sphere (see Hörcher 2000a, 2000b).

As concerns the very central question of human nature, Hörcher tries to combine a rather pessimistic (anti-Cartesian) anthropology with the effort to revivify the virtue ethics of Aristotle and Aquinas. In Varga 1999, an almost

parallel approach is expounded on a social-science platform based on Villey's interpretation of the early understanding of *dikaion* (justice).[5] This is a flexible measure adapted to the specificity of given cases when used as a criterion of judgment. Slowly but surely, over the course of history, the very idea of having a measure at all has morphed into a linguistically composed technical mediator serving to guarantee both stability and flexibility in modern formal law, where both the social context of the law and the tradition of the given political community are taken into account. Historically speaking, contexts and traditions are bound to change continuously, but in a given situation at a given time its established functioning may serve as an adequately predictable measure. Describing law in practical operation, Varga (1996) takes in earnest the proposition that modern law is a complex social subsystem, one that in Luhmann's terms can be described as being at once cognitively open and normatively closed. The system's openness makes it possible to introduce not only new information and interests but also social values, balanced against one another under the personal responsibility unavoidably borne by the decision-maker. In conclusion, legal argumentation cannot become fully autonomous and still less mechanistic, for the actual workings of the law necessarily reflect the state of the underlying social structure in a changing situation constantly in flux (see Varga 1999).

The autonomy of legal argumentation has been defended by Miklós Szabó in his value-oriented theory, a theory that (*pace* Varga) he calls legal dogmatics. A variant of *prudentia iuris*, its point of departure is the logic of law (*pace* Hörcher). As to method, instead of sketching out an anthropology or working from an idea of law as a set of flexible measures, he focuses on the lawyer's "craft." When confronted with "hard cases," the legal craftsperson's supposed secret lies in a technically channelled practical moral knowledge (see Szabó 2005).

According to János Frivaldszky, a natural lawyer in a more classical vein, society is a network of intersubjective relationships among persons endowed with human dignity. These relationships, prior to the law as no more than the sovereign's command, are based on mutual respect, recognizing each person's dignity. Therefore, the legislator's goal is to sanction these intersubjective relations as legal tenets prevailing in their "political friendship," while the validity of law is closely bound up with those fundamental intersubjective relations and principles of justice which are balanced by the so-called golden rule. Indeed, the law's ultimate end is almost attained once everyone can get their due. On this basis, all of the foregoing considerations serve to define what is just [*iustum*], on the one hand, and to define the nature of things as the measure of whatever judgment is produced in the administration of justice, on the other (see Frivaldszky 1998, 2001).

[5] On Villey see Sections 1.3.3.4 and 3.4 in this tome and Section 12.6 in Tome 1 of this volume.

In conclusion, as much as Hungarian legal philosophers may have pursued a variety of paths in dealing with the challenges they have been facing—witness Tattay (2005a, 2005b) and Takács (2002)—the prevalence of natural law doctrines in their work shows that they share the emphasis on values found in modern European legal thought, while maintaining a link to classical traditions as well.[6]

[6] At the Catholic University of Hungary, natural law theory has been a compulsory course since 2006 (see Frivaldszky 2007).

Chapter 7

20TH-CENTURY NATURAL LAW THEORY IN LATIN AMERICA

by Carlos I. Massini Correas

7.1. Introduction

Natural law theory was the dominant trend in Latin America throughout the colonial period. In fact, at the universities founded by the Spanish crown—especially in those in New Spain (Mexico), Peru, and Cordoba (Argentina)—scholars lectured on *theologia moralis*, or *ius naturae*, expounding the contents of what today is known as natural law theory. They followed the general doctrine of Thomas Aquinas, though framing it within the modern school of natural law. With the independence movements, however, came a secular push, and gradually the positivism of the 19th century began to gain ground in the teaching of legal philosophy, especially at the new universities that emerged under the independent governments.

However, in the beginning of the 20th century, and mainly as a consequence of the spread of the neo-Thomistic movement in Latin America, various authors put forward a conception of legal philosophy cast in the mould of natural law. This phenomenon took place in almost all Latin American countries, but it was particularly strong in Mexico, Brazil, Chile, and Argentina, where natural law schools were founded and books and journals that espoused this vision were published.

7.2. 20th-Century Natural Law Theory in Argentina

In Argentina, the rejuvenation of natural law can undoubtedly be said to have been the work of Tomás Darío Casares (1895–1977), who received his Ph.D. in 1918 with a dissertation on the relation between religion and the state. Casares devoted his life to forging a career in the judiciary, reaching the pinnacle of that career when he was appointed to the Supreme Court of Argentina. From this position, he was able to wield significant influence in the sense of moving beyond the 19th-century legalism and introducing the natural law doctrine in Argentinian jurisprudence. In 1922, Casares founded a series of courses on Catholic culture that later developed into the Catholic University of Argentina (or UCA, short for *Universidad Católica Argentina*) and helped to spread neo-Thomism in Argentina. Moreover, he was professor of medieval philosophy at the University of Buenos Aires and professor of legal philosophy at the UCA, but it was at the latter university that he had numerous disciples and where he founded a school of natural law. In 1934, Casares also

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wrote the foundational book for this school, *La justicia y el derecho* (Justice and the law: Casares 1974). The book went through several editions and is especially remarkable for having been written before all other works in this current of thought. He wrote many articles and several other books, including *La religión y el estado* (Religion and the state: Casares 1919), *Jerarquías espirituales* (Spiritual hierarchies: Casares 1928), *Naturaleza y responsabilidad económico social de la empresa* (The economic and social nature and responsibility of enterprises: Casares 1967), *Acerca de la justicia* (On justice: Casares 1971), and *Conocimiento, política y moral* (Knowledge, politics, and morality: Casares 1981). In his books, Casares defended the central theses of Thomistic natural law theory, claiming in particular that justice plays a constitutive role in the definition of law; that normative practical orders, from ethics to law, are continuous; and that a complete legal order can only be accomplished by transcending the rational-temporal level and opening the order to metaphysical transcendence.

Octavio N. Derisi (1907–2002), bishop, Ph.D. holder, and cofounder of the UCA, also made a major contribution to the development of natural law theory, especially through his outstanding work *Los fundamentos metafisicos del orden moral* (The metaphysical foundations of the moral order: Derisi 1969) and through numerous other books, articles, and contributions. Moreover, as university president (a position he held for many years), Derisi encouraged the spread of natural law theory through a range of initiatives, endowing chairs in that discipline; bringing out publications; organizing lectures, conferences, and congresses; and the like.

Various significant thinkers emerged from the UCA, all of them disciples of Casares. Noteworthy among them was Juan Alfredo Casaubon (1918–2011), a researcher at the Argentinian National Scientific and Technical Research Council (or CONICET, short for *Consejo Nacional de Investigaciones Científicas y Técnicas*) and professor of legal philosophy at the UCA and the University of Buenos Aires. Casaubon also taught logic and wrote numerous books and articles. Among them are *Palabras, ideas, cosas* (Words, ideas, things: Casaubon 1984a); *Introducción al derecho* (Introduction to law: Casaubon 1979–1985); and *El conocimiento jurídico* (Legal knowledge: Casaubon 1984b). Casaubon's contribution mainly lies in his having offered a strictly logical presentation of legal philosophy and having brought analytic philosophy to bear on Thomistic legal philosophy. A contemporary of Casaubon was Abelardo Rossi (1920–2009), a member of the Supreme Court of Argentina who in this role promoted a justice grounded in principles of equity, sometimes resulting in rulings invoking a transcendent reality. He cofounded the Thomistic Society of Argentina and was also professor at the UCA. He also wrote many articles and *Aproximación a la justicia y a la equidad* (Approaching justice and equity: Rossi 2000). Many of his writings on this theme are collected in *Precisiones sobre la justicia* (Clarifications regarding justice: Rossi 1980).

At the UCA there is a generation of natural lawyers (current faculty members or former ones) who have been carrying that current forward. Among them are Bernardino Montejano, author of *Curso de Derecho natural* (Course on natural law: Montejano 1967a), *Los fines del derecho* (The aims of law: Montejano 1967b), *Estática jurídica* (Static theory of law: Montejano 1969), *Ideología, racionalismo y realidad* (Ideology, rationalism, and reality: Montejano 1981), and other books on issues concerning the universities. Another author is Carlos Raúl Sanz, who translated several books by his teacher, Michel Villey, and wrote introductions to them. Sanz also wrote many original articles. Also in this group are Eduardo M. Quintana and Jorge G. Portella, who wrote many good articles and books. Many young authors have emerged from this school: Juan Cianciardo, Pilar Zambrano, Juan Bautista Etcheverry, and Fernando Toller—all professors at the Austral University of Buenos Aires—as well as Santiago Legarre and Daniel Herrera, professors at the UCA. All these young authors have published important books and are now developing their teaching and investigative capacities to the fullest.

Also a prominent thinker is Rodolfo L. Vigo, educated outside the UCA but now a professor there. Vigo was formerly a professor at the University of Litoral in Santa Fe and now teaches at Austral University in Buenos Aires. He has been president of the Argentinian Association for Legal Philosophy, and his books include *Las causas del derecho* (The causes of law: Vigo 1983), *Sobre los principios jurídicos* (On legal principles: Vigo and Delgado Barrio 1997), *Interpretación jurídica* (Legal interpretation: Vigo 1999), *De la ley al derecho* (From statutes to law: Vigo 2003a), *El iusnaturalismo actual, de M. Villey a J. Finnis* (Present-day natural law from M. Villey to J. Finnis: Vigo 2003b), and *Perspectivas iusfilosóficas contemporáneas* (Contemporary perspectives in legal philosophy: Vigo 2006). Vigo's best work is on legal interpretation and legal ethics, where he has made substantial and original contributions. One of his disciples was María de los Angeles Manassero, who recently died at a very young age. She taught at the University of Litoral and at the Catholic University of Santa Fe and wrote an impressive book titled *De la argumentación al derecho razonable: Un estudio sobre Chaim Perelman* (From argumentation to reasonable law: A study on Chaim Perelman, Manassero 2001). I should also include myself in this group, noting only that I have studied in large part under Georges Kalinowski and am a professor of law and ethics at the University of Mendoza; I have also taught ethics at the UCA and have written numerous books, among which *La prudencia jurídica* (Legal prudence: Massini Correas 1983), *Filosofía del derecho* (Philosophy of law: Massini Correas 1994a), *Los derechos humanos en el pensamiento actual* (Human rights in contemporary thought: Massini Correas 1994b), *Constructivismo ético y justicia procedimental en John Rawls* (Moral constructivism and procedural justice in John Rawls: Massini Correas 2004), *La ley natural y su interpretación contemporánea* (Natural law and its contemporary interpretation: Massini Correas 2006), and

Objetividad jurídica e interpretación del derecho (Legal objectivity and the interpretation of law: Massini Correas 2008). Finally I should mention Renato Rabbi-Baldi, professor at the University of Buenos Aires and the author of a praiseworthy book titled *La filosofía jurídica de Michel Villey* (Michel Villey's legal philosophy: Rabbi-Baldi 1990) and of many articles connect different philosophical currents with Argentinian jurisprudence. Villey was the subject of Rabbi-Baldi's earliest investigations, which subsequently turned to the effort to show how the concepts of philosophical hermeneutics can help advance our understanding of judicial practice.

Another current in natural law theory originated in Cordoba. Its initiator was Alfredo Fragueiro (1899–1975), author of *De las causas del derecho* (On the causes of law: Fragueiro 1949), *La analogía del derecho* (Analogy in law: Fragueiro 1952), and numerous articles. Quite evident in his work is the influence of Francisco Suárez. A disciple of Fragueiro was Olsen Ghirardi, who became president of the University of Cordoba and wrote important books, such as *Hermenéutica del saber* (Hermeneutics of knowledge: Ghirardi 1979), *Lecciones de lógica del derecho* (Lectures on the logic of law: Ghirardi 1982), and *Introducción al razonamiento forense* (Introduction to legal reasoning: Ghirardi 2003). Most of his work is focused on epistemology, logic, and legal argumentation. Schooled in the approach set out by Ghiradi was Armando Andruet, a member of the supreme court in his province, a professor at the Catholic University of Cordoba, and an author of various articles on bioethics and legal rhetoric. Teaching in the province of Santiago del Estero is Julio César Castiglione, a follower of Michel Villey, as well as a professor and the author of various books and articles.

Also from Cordoba is Guido Soaje Ramos (1918–2004), though most of his intellectual work was done in Buenos Aires and abroad. He was a member of Argentina's National Research Council and founded, and for many years directed, the prestigious Argentinian Institute for Practical Philosophy and its official publication, the journal *Ethos*. He taught ethics at the UCA and philosophy of law at the same university as well as at the University of Buenos Aires. It was at these institutions that his teaching had the greatest impact, and it was here that he trained many disciples. Soaje did not write any book but did write many articles, some of which were quite extensive and important. He distinguished himself by the accuracy of his investigations and the extent of his philosophical knowledge. Soaje professed a very strict Thomism after the fashion of Cornelio Fabro. He did, however, have a profound knowledge of contemporary philosophy, and German philosophy in particular. Two direct pupils of Soaje are Hector Hernandez and Felix Lamas, who stand out for the systematicity and depth of their inquiries. Hernandez is a professor at FASTA University in Mar del Plata, director of the legal philosophy supplement of the journal *El Derecho*, and the author of *La justicia en la "Teoría Egológica del Derecho"* (Justice in the "egological theory of law": Hernandez 1980) and *Valor*

y derecho: *introducción axiológica a la filosofía jurídica* (Value and law: An axiological introduction to the philosophy of law: Hernandez 1998), among other articles and reviews. Lamas, for his part, is a professor at the UCA, director of the *Revista Internacional de Filosofía Práctica*, and the author of *Los principios internacionales* (International principles: Lamas 1974), *La concordia política* (Political concord: Lamas 1975), and *La experiencia jurídica* (The experience of law: Lamas 1991), among other books.

As distinguished natural lawyer from Tucumán, in northern Argentina, was Edgardo Fernández Sabaté (1918–1982), who followed Maritain and taught at the University of Tucumán until his death in 1982. He also wrote important books whose approach is distinctly personalistic. Among them are *Los grados del saber jurídico* (The degrees of legal knowledge: Fernández Sabaté 1968), *Lecciones de filosofía* (Lectures on philosophy: Fernández Sabaté 1974), and *Filosofía del derecho* (The philosophy of law: Fernández Sabaté 1984). Among his disciples are Adalberto Villeco and René Goane, both professors in Tucumán and authors of articles published in university journals. Villeco, too, wrote many books, among them *En torno a la perfección* (On perfection: Villeco 1976) and *Ateísmo, lógica e historia* (Atheism, logic, and history: Villeco 1969). In a neighboring city, Salta, is Julio Raul Mendez, the author of an important book on metaphysics titled *El amor, fundamento de la participación metafísica* (Love as the foundation of metaphysical participation: Mendez 1985). Mendez is a committed Thomist in the mould of Cornelio Fabro. He also teaches medieval philosophy at the University of Salta.

7.3. 20th-Century Natural Law Theory in Brazil

Brazil initially inherited its philosophical culture from Portugal, and an important role in this process was played by the Jesuits—with their quasi-monopoly on education in the colonial period—who introduced the practical philosophy of the Scholastic school. An exceptional work from this period was Tomas Antonio Gonzaga's *Tratado de direito natural* (Treaty of natural law: Gonzaga 1957), which became the starting point for the natural law tradition in Brazil. Gondaga's *Tratado* was reprinted in 1957. It bears mentioning in this regard that the Brazilian independence movement did not bring about the widespread introduction of secularism and positivism that was seen in most of the countries colonized by the Spanish (Brazil was still a colonial empire). This change instead came with the founding of the republic at the end of the 19th century. It also bears mentioning that positivism bore a strong Comtian imprint in Brazil, and that this was one of the few countries where Comte's positivist religion had a significant following. (There is even to this day a church dedicated to this religion in Porto Alegre.) The late coming of secularism meant that the natural law tradition in Brazil could continue solidly without the interruptions that intervened in the other Latin American countries.

Among the natural law thinkers of the 19th century was José Soriano de Sousa, who in 1880 wrote a remarkable book titled *Elementos de philosophia do direito* (Elements of legal philosophy: Sousa J. Soriano 1884).

By the 20th century, the central theories of the neo-Thomistic school had become widespread in Brazil. Especially consequential in this school were the personalistic ideas propounded by Jacques Maritain and Emmanuel Mounier, for they would later influence philosophers such as Alexandre Correia, the Belgian priest Leonardo van Acker, Edgard Mata Machado, and Alceu Amoroso Lima. Among the personalistic philosophers was André Franco Montoro (1916–1999), who devoted much of his work to the philosophy of law. He was a politician—serving as governor of São Paulo and as a senator—and a professor of legal philosophy at São Paulo's Pontifical University. Moreover, Montoro wrote *Introducao à ciência do direito* (Introduction to the science of law: Montoro 1968), in which he defended Thomistic natural law ideas, backing them up with strong arguments, as did other philosophers of law, like Miguel Reale.[1] Montoro, who was strongly influenced by the Belgian jurist Jean Dabin, maintained that law in its every phase is underpinned by three core axiological elements—the common good, justice, and the dignity of the human person—serving as a guide and a model in the making of law itself. As much as concrete law in each age does not clearly align with these axiological elements, it can nonetheless be described as an effort to achieve such an alignment. In this way, according to Montoro, the principles of natural law are general but not devoid of content: They have a concrete historical sense, and the axiological elements of law play a role throughout the adjudication process, especially when interpreting the law.

In São Paulo in the second half of the 20th century, natural law theory had two noted representatives outside the sphere of personalism. The first one was the Estonian Jesuit priest Stanilavs Ladusans (1912–1993). He was a strict Thomist and for may years directed the Inter-American Catholic Association for Philosophy and the Brazilian Association of Catholic Philosophers. Moreover, Ladusans led a philosophical research group, first in São Paulo and later in Rio de Janeiro, and he organized annual meetings devoted to issues in natural law theory. The minutes of these meetings would later be published in books such as *A análise social filosófico-cristà* (Christian-philosophical social analysis: Ladusans 1988) and *Questoes atuais de Bioética* (Current issues in bioethics: Ladusans 1990). Ladusans also wrote books like *Gnosiologia pluridimensional* (Pluridimensional gnoseology: Ladusans 1982) and numerous articles. To be sure, he was more a promoter and organizer of meetings and publications than an original philosopher. But through this commitment to promote these ideas and give them currency, he exerted considerable influence on the Brazilian philosophical community. Closely connected with Ladusans was the

[1] On Reale see Section 27.5 in Tome 1 of this volume.

Paulist jurist José Pedro Galvao de Sousa (1912–1992). He taught theory of the state at the Catholic University of São Paulo, the Public University of São Paulo, and the University of Campinas, and he wrote highly regarded books like *Iniciacao a teoria do estado* (Introduction to the theory of the state: Sousa J. P. Galvao 1967), *A historicidade do direito e a elaboracao legislativa* (The historicity of law and lawmaking: Sousa J. P. Galvao 1970), *O estado tecnocrático* (The technocratic state: Sousa J. P. Galvao 1973), and *Direito natural, direito positivo e estado de direito* (Natural law, positive law, and the rule of law: Sousa J. P. Galvao 1977). But his most important work was undoubtedly *O totalitarismo nos origens da moderna teoría do estado: Um estudo sobre o "Defensor Pacis" de Marsilio de Padua* (Totalitarianism at the origins of the modern theory of the state: A study of Marsilius of Padua's *Defensor pacis*, Sousa J. P. Galvao 1972), a work of exceptional scholarship on the origins of modern political thought. Galvao was a traditionalist in the mould of Francisco Elías de Tejada, as well as a monarchic activist, and it is for this reason that his Thomist natural law theory picked up the traditionalism of authors like Joseph de Maistre, Donoso Cortés, and Juan Vázquez de Mella.

Finally, there are two active groups currently working in the natural law tradition in Brazil. The first group—based in Porto Alegre, in the state of Rio Grande do Sul, and more specifically at the pontifical university of that state—was formed under the influence of personalism. The main vehicle for its ideas was the journal *Realism*, and in Porto Alegre its members organized annual conferences on natural law, with the participation of John Finnis in 2007. The main representatives of this group are Luis Fernando Barzotto and Wambert Gomes Di Lorenzo. Barzotto wrote a valuable book titled *O Positivismo jurídico contemporâneo* (Contemporary legal positivism: Barzotto 2001); in *A democracia na constituicao* (Democracy in the constitution: Barzotto 2003), he addressed the problem of democracy; he also wrote *Filosofía do direito: Os conceitos fundamentais e a tradicao jusnaturalista* (The philosophy of law: Fundamental concepts and the natural law tradition, Barzotto 2010) and numerous articles on the philosophy of law. Gomes di Lorenzo, for his part, edits the previously mentioned journal *Realism* and is an active promoter of academic and research activities. The second group works in the traditionalist current. It is based in São Paulo and is led by Judge Ricardo Marques Dip, who has published various articles on legal philosophy and criminal law.

7.4. 20th-Century Natural Law Theory in Mexico

It is well known that in Mexico, Spanish Scholasticism achieved great prominence during the Viceroyalty of New Spain until the wars for independence, maintaining a strong footing even as it struggled with masonic and positivist forces, which were very influential in Mexico during the second half the 19th century. However, after the Mexican Revolution (1913–1920), governments

adopted a policy of eradicating all currents of thought linked to the Catholic Church, and among these currents was natural law theory. Of course, this aim was not achieved and natural law theory began to recover in the 1940s, returning to a prestigious position. An important role in this recovery was played by Rafael Preciado Hernández (1908–1988) and Efraín González Morfín (1929–2012). Preciado Hernández taught at the National Autonomous University of Mexico (UNAM, short for *Universidad Nacional Autónoma de México*) for more than thirty years and wrote various works on legal philosophy from a Thomist angle. Among these works is *Lecciones de filosofía del derecho* (Lectures in the philosophy of law: Preciado Hernández 1965), holding that natural law is only a set of rational criteria—criteria of practical rationality—underpinning the legal organization of society and corresponding to the human ontological structure. Other works include *Contra la servidumbre del espíritu* (Against the servitude of the spirit: Preciado Hernández 1940) and *Ensayos filosófico-jurídicos y políticos* (Legal-philosophical and political essays: Preciado Hernández 1977).

González Morfin, for his part, was not just an academic but also went into politics, joining the National Action Party, for which he served as a congressman and also ran for president. He studied law and political science in Innsbruck and Paris and taught philosophy of law and political theory at the Ibero-American University of Mexico. González Morfin was professor emeritus at the Pan American University—the Guadalajara branch—and wrote numerous books and articles, including *Formar personas: Sugerencias y caminos de un pensador* (Forming people: A thinker's suggestions and paths, González Morfín 2002) and *Temas de filosofía del derecho* (Themes in the philosophy of law: González Morfín 2003), to name just a few. He had many disciples, and they have come together to write a book in his honor: *El magisterio de Efraín González Luna Morfín* (The teaching of Efraín González Luna Morfín: González Morfín et al. 2005). His Thomist thought bears a strong personalist and Christian-social imprint. A contemporary of González Morfín was Hector González Uribe (1918–1988), who taught philosophy of law at the National Autonomous University of Mexico and wrote *Teoría política* (Political theory: González Uribe 1972), *Hombre y sociedad* (Man and society: González Uribe 1979), and *Hombre y estado* (Man and the state: González Uribe 1988). His vision of natural law appears to be framed for the most part within the theory of human rights, which in his thinking is the contemporary way of talking about natural law.

Another significant author was Antonio Gómez Robledo (1903–1994), who taught international law at the UNAM School of Law and Greek philosophy at the same university's school of philosophy. He also served as Mexican ambassador to many countries, including Greece. Gómez Robledo was a prominent Platonist and Aristotelian and a well-known translator of classic texts, and he also wrote numerous books, all of them widely praised, which include *Ensayo*

sobre las virtudes intelectuales (Essay on the intellectual virtues: Gómez Robledo 1957), *Meditación sobre la justicia* (Meditation on justice: Gómez Robledo 1963), *Sócrates y el socratismo* (Socrates and Socraticism: Gómez Robledo 1966), *Platón: Los seis grandes temas de su filosofía* (Plato: The six great themes in his philosophy: Gómez Robledo 1974), *Dante Alighieri* (Gómez Robledo 1975), *El ius cogens internacional: Estudio histórico-crítico* (International *ius cogens*: A historico-critical study: Gómez Robledo 1982a), *Fundadores del derecho internacional: Vitoria, Gentili, Suárez, Grocio* (Founders of international law: Vitoria, Gentili, Suárez, Grotius: Gómez Robledo 1986), and *Doctoralis Oratio:* Últimos escritos (*Doctoralis Oratio*: Last writings: Gómez Robledo 1994). His theory is conceived in a classical mould and is mainly Aristotelian, though it also draws on Platonic themes and on the philosophy of values. Eduardo García Máynez (1908–1993) and Luis Recaséns Siches (1903–1977) also played a part in the middle of the 20th century.[2] And even though they cannot be considered natural law thinkers in any strict sense, they did defend positions very close to those of natural law. García Máynez moved away from a Kelsenian position to traditional ideas of natural law, mainly in his books *Doctrina aristotélica de la justicia* (The Aristotelian doctrine of justice: García Máynez 1973) and *Filosofía del derecho* (Philosophy of law: García Máynez 1977). Recaséns Siches, a Honduran Spaniard living in Mexico, distinguished himself for his defence of human rights and for his criticism of legal formalism and positivism. He wrote many other books, including *Direcciones contemporáneas del pensamiento jurídico* (Contemporary orientations in legal thought: Recaséns Siches 1929), *Nueva filosofía de la interpretación del derecho* (New philosophy for the interpretation of law: Recaséns Siches 1956), *Tratado general de filosofia del derecho* (General treatise of philosophy of law: Recaséns Siches 1959), and *Introducción al estudio del derecho* (Introduction to the study of law: Recaséns Siches 1970). Also worthy of mention is Agustín Basave (1923–2006), a professor in Monterrey and a philosopher with an impressively broad range of interests. He wrote various books from a natural law perspective. These include *Filosofía del hombre* (Philosophy of man: Basave 1957), *Filosofía del derecho internacional* (Philosophy of international law: Basave 1985), and *Meditación sobre la pena de muerte* (Meditation on the death penalty: Basave 1997).

At present, the most authoritative representatives of natural law theory in Mexico are Mauricio Beuchot (1950–) and Javier Saldaña (1966–). Beuchot studied philosophy and philology in Mexico and Fribourg (Switzerland) and is a researcher at the UNAM's Institute for Philological Research. Here he directs the Center for Classical Studies, where he conducts research in the philosophy of language, hermeneutics, analytic philosophy, logic, and the philosophy of law: The work is distinguished by its attention to detail and its excellent scholarship. Beuchot has published seventy books and more than two hun-

[2] On García Máynez and Recaséns Siches see also Section 28.4 in Tome 1 of this volume.

dred articles. In the philosophy of law alone, the list includes *Los principios de la filosofía social de Santo Tomás* (The principles of Thomas Aquinas's social philosophy: Beuchot 1989), *Filosofía y derechos humanos* (Philosophy and human rights: Beuchot 1993), *Los fundamentos de los derechos humanos en Bartolomé de las Casas* (The foundations of human rights in Bartolomé de las Casas: Beuchot 1994), *Derechos humanos, iuspositivismo y iusnaturalismo* (Human rights, legal positivism, and natural law theory: Beuchot 1995), *Ética y derecho en Tomás de Aquino* (Ethics and law in Thomas Aquinas: Beuchot 1997), and *Derechos humanos y naturaleza humana* (Human rights and human nature: Beuchot 2000). Although Beuchot undoubtedly works in the classical natural law tradition, he is deeply knowledgeable in analytic philosophy and philosophical hermeneutics, which can clearly be seen to influence his views on natural law and human rights.

Saldaña, for his part, is a professor at the UNAM School of Law and a researcher at the National Research System, part of the UNAM's Institute for Legal Research. He holds a Ph.D. from the University of Navarra with a dissertation titled "Libertad religiosa y derecho natural" (Freedom of religion and natural law) and has published *Poder estatal y libertad religiosa* (The state's power and religious freedom: Saldaña and Orrego 2001), *Derechos del enfermo mental* (Rights of the mentally ill: Saldaña 2000), *Ética judicial: Virtudes del juzgador* (Judicial ethics: Virtues of the judge: Saldaña 2007), and *Derecho natural: Tradición, falacia naturalista y derechos humanos* (Natural law: Tradition, the naturalistic fallacy, and human rights: Saldaña 2012), as well as various articles and book chapters. A faithful disciple of Javier Hervada, he has developed natural law doctrines that (as can be gathered from the titles just listed) he has applied to a range of concrete problems, such as human rights, the rights of the mentally ill, and religious freedom.

Also worthy of mention in Mexico are Virgilio Ruiz Rodríguez, María del Carmen Platas Pacheco (*Filosofía del derecho: Lógica jurídica* [Philosophy of law: Legal logic]: Platas Pacheco 2004), Juan Abelardo Hernández Franco (*Dialéctica y racionalidad jurídica* [Dialectics and legal rationality]: Hernández Franco 2006), Hugo Ramírez (*Derechos humanos* [Human rights]: Ramírez and Pallares Yabur 2011), and Jorge Adame Goddard (*Naturaleza, persona y derechos humanos* [Nature, persons, and human rights]: Goddard 1996). With Beuchot and Saldaña, they all offer different perspectives on natural law theory, contributing to the development of this rich new current in Mexican legal thought.

7.5. 20th-Century Natural Law Theory in Colombia

Similarly to what happened in the other Latin American countries, Scholastic natural law in Colombia—influenced by the Spanish Scholasticism of Vitoria and Suárez—established itself as the predominant practical philosophy in the colonial period, which under the independent republic faced the challenge

posed by Bentham's utilitarianism and Destutt de Tracy's ideology. In this debate, Scholastic natural law theory was tasked with supporting conservative positions against liberal ones. One who stood out in defending conservatism and attacking utilitarianism was the politician Miguel Antonio Caro (1843–1909), who wrote the Colombian Constitution of 1886 and served as president of the republic.

Also in synchrony with what happened in the other Latin American countries, the 20th century in Colombia began with the introduction of neo-Thomism. In legal philosophy, this line of thought was normative (centered on norms), differing from Thomas Aquinas's thought in several respects. Worthy of mention within this current was José Vicente Castro Silva (1885–1968), who held the chair in legal philosophy from the second half of the 20th century until his death. Another leading figure was Pedro María Carreño (1874–1946), a notable jurist, politician, and educator, as well as dean of the National University's law school, where he taught philosophy of law. He wrote *Filosofía del derecho* (Philosophy of law: Carreño 1909), where he defends the central positions of traditional Thomistic natural law theory. In the second half of the century, Abel Naranjo Villegas (1908–1992) developed Thomist thought under the clearly appreciable influence of Jacques Maritain and Etienne Gilson. Naranjo Villegas taught philosophy of law at the Bolivarian University of Medellín and at the National University of Colombia and wrote the book *Filosofía del derecho* (Philosophy of law: Naranjo Villegas 1947). Contemporary with him was Rodrigo Noguera Laborde (1920–2004), who was founder and rector of Sergio Arboleda University and the author of *Derecho natural: Apuntes de clase* (Natural law: Lecture notes, Noguera Laborde 1992), a mainly historical book.

Beginning in the 1980s in Bogotá, at La Sabana University and the Catholic University of Colombia, natural law gained a new impetus with the formation of an outstanding group whose members were for the most part disciples of Javier Hervada at the University of Navarra and felt his influence. Here I should mention Ilva Miriam Hoyos Castañeda (*El concepto jurídico de persona* [The legal concept of a person]: Hoyos Castañeda 1989), Francisco José Herrera, who died at a young age in 1996, Edwin de Jesús Hortta, Gabriel Mora Restrepo, and Claudia Helena Forero—all members of the group at La Sabana. Mora Restrepo and Forero have contributed to neoconstitutionalism and constitutional methodology. Carlos Alberto Cárdenas and Edgar Antonio Marín, both at Saint Thomas Aquinas University, have written a very interesting book titled *Filosofia y teoria del derecho: Tomás de Aquino en diálogo con Kelsen, Hart, Dworkin y Kaufmann* (Philosophy and theory of law: Thomas Aquinas in dialogue with Kelsen, Hart, Dworkin, and Kaufmann, Cárdenas and Guarín Ramírez 2006). The La Sabana group has published several of Hervada's books, and through its work his thought has spread rapidly across Colombia, so much so that one can rightly speak of a Hervadian school in Colombia that keeps growing steadily.

7.6. 20th-Century Natural Law Theory in Uruguay

In the first half of the 20th century in Uruguay, the philosophy of law came under the influence of Kelsen's doctrine, which was not developed to any great extent but did gain widespread acceptance among jurists, so much so as to become entrenched as dogma. The tide began to turn in the 1930s, however, when this secular dogma became a target of criticism in the teachings and publications of Juan Llambías de Acevedo (1907–1972), who taught at the University of the Republic and wrote *Eidética y aporética del derecho* (Eidetics and aporetics of law: Llambías de Azevedo 1940). Llambías de Acevedo propounded an axiological theory of natural law in the mould of Max Scheler, about whom he wrote an important book titled *Max Scheler: Exposición sistemática y evolutiva de su filosofía* (Max Scheler: A systematic and evolutional exposition of his philosophy: Llambías de Azevedo 1966). He conceived natural law as a set of deontological principles and criteria based on an idea of human essence and serving to guide positive law. Also worthy of mention is Antonio M. Grompone (1893–1965), professor of legal philosophy, dean of the law school at the University of the Republic, and the author of *Filosofía de las revoluciones sociales* (Philosophy of social revolutions: Grompone 1932), a book that takes a strong stance against legal positivism.

Among Llambías de Acevedo's pupils was Esther Aguinsky de Iribarne (1925–1999), who became an important figure in her own turn. She followed an axiologist approach and taught philosophy of law at the University of the Republic. Her various book include *Justicia y derecho* (Justice and law: Aguinsky de Iribarne 1965), *Fenomenología y ontología jurídica* (Legal phenomenology and ontology: Aguinsky de Iribarne 1971), and *El pensamiento de Ihering y Hegel* (Jhering's and Hegel's thought: Aguinsky de Iribarne 1975). Classic natural law studies have seen a rebirth at the University of Montevideo through the work of Nicolás Etcheverry Estrázulas (1949–). Etcheverry is professor and dean at that university's law school; he is the first professor in Uruguay to have adopted an overtly Thomistic approach.

7.7. 20th-Century Natural Law Theory in Chile

In a pattern that can be observed in many other countries, contemporary natural law theory in Chile was mainly defined by its opposition to legal positivism, which was predominant in the 19th century and the first decades of the 20th century. Its main precursor in Chile was Rafael Fernández Concha (1833–1912), but the current was also shaped by the influence of the neo-Thomism that emerged in Europe under the influence of the encyclical *Aeterni Patris*. Numerous Chilean intellectuals thus studied Cathrein, Mausbach, Vermeersch, Taparelli, and Mercier, among others—a body of work that in this way played a decisive role in shaping Chilean natural law theory the 20th cen-

tury. Among the intellectuals who worked in this tradition were Roberto Peragallo (1872–1954), who taught philosophy of law at the Catholic University of Chile for more than forty years and wrote *Iglesia y estado* (Church and state: Peragallo 1923), strongly criticizing legal positivism. Another prominent figure was Francisco Vives (1900–1969), who taught philosophy of law at the Catholic University and wrote an introduction to the study of law, later republished as *Filosofía del Derecho* (Philosophy of law: Vives 1941). Carlos Hamilton Depassier (1908–1988) taught at the University of Chile and wrote *Introducción a la filosofía social* (Introduction to social philosophy: Depassier 1949), a book written in a Thomistic vein, and *Introducción al estudio del derecho* (Introduction to the study of law: Depassier 1948). There was also Máximo Pacheco Gómez (1924–2012), who taught an introductory law course at the University of Chile and wrote numerous books and articles, including *Introducción al studio de las ciencias jurídicas y sociales* (Introduction to legal and social science: Pacheco Gómez 1952) and *Las tendencias actuales de la filosofía jurídica* (Current trends in legal philosophy: Pacheco Gómez 1959). Although his conception is Thomistic, he also draws on other thinkers, such as Giorgio Del Vecchio.[3]

A special mention should go to Jorge Iván Hübner Gallo (1923–2006), who taught an introductory law course at the University of Chile for many years and put forward a system of legal philosophy mainly grounded in Thomistic natural law theory but enriched with insights gleaned from the philosophy of values, the theory of institutions (Hauriou, Renard, Delos), and again Del Vecchio.[4] He also wrote numerous books, many of which went through several editions. Among them are *Introducción a la teoría de la norma jurídica y la teoría de la institución* (Introduction to the theory of legal norms and the theory of institutions: Hübner Gallo 1951), with a foreword by Giorgio Del Vecchio, *Manual de filosofía del derecho* (Textbook of legal philosophy: Hübner Gallo 1954), *Introducción al derecho* (Introduction to law: Hübner Gallo 1966), and *Panorama de los derechos humanos* (Overview of human rights: Hübner Gallo 1973). According to Hübner Gallo, the intellect does not properly *create* norms or arbitrarily and artificially build them, but rather *discovers* them as objectively necessary in light of the human ends discovered by ontological investigation. He thus espoused a normativist and ontological conception of natural law, as did many of his contemporaries trained in the rationalist Scholasticism of the 18th and 19th centuries.

A central role in Chilean natural law theory was played as well by Jaime Williams Benavente (1940–), who taught introductory courses on law and legal philosophy at the University of Chile, the University for Development, and

[3] On Del Vecchio see Section 1.1.3.1. in this tome and Section 11.2.1 in Tome 1 of this volume.

[4] On Renard see Section 1.1.4.2 in this tome. On Hauriou see the same Section 1.1.4.2 in this tome as well as Section 12.2 in Tome 1 of this volume.

Gabriela Mistral University. He also took part in the philosophy of law programme taught at the University of Rome and held a Ph.D. from the University of Navarra. He is a prolific writer who has published various articles in European journals—mainly in Spain—as well as numerous books, among which *Panorama de la filosofía jurídica en Chile* (Overview of legal philosophy in Chile: Williams Benavente 1969) and *Lecciones de introducción al derecho* (Introductory lectures on law: Williams Benavente 1994). Although Williams Benavente defends Thomistic natural law theory, he is also conversant with all the other lines of thought in the philosophy of law and has enriched his Thomism with ideas from the philosophy of values and the work of Sergio Cotta.[5]

The youngest generation of Chilean natural law thinkers can be divided into two main groups: One is traditionalist and looks to Osvaldo Lira (1904–1996), the author of *Nostalgia de Vázquez de Mella* (Nostalgia for Vázquez de Mella: Lira 1942) and *Derechos humanos: Mito y realidad* (Human rights: Myth and reality, Lira 1993); the other, by contrast, is more receptive to contemporary thought and looks in particular to John Finnis. A prominent member in the first group is Gonzalo Ibánez Santamaría (1944–). He received his Ph.D. from the University of Paris under the direction of Michel Villey and wrote an important book titled *Persona y derecho en el pensamiento de Berdiaeff, Mounier y Maritain* (Person and law in the thought of Berdiaeff, Mounier, and Maritain: Ibánez Santamaría 1984). He also taught at the Catholic University of Chile and at Adolfo Ibáñez University for many years, also serving as president of the latter university, though he is now engaged in political activity. Also worth a mention is Eduardo Soto Kloss (1942–), though his area of expertise is administrative law. Soto Kloss taught at the University of Chile and is now teaching at Saint Thomas University. He edits the journal *Ius Publicum* and has also edited a very important book titled *El derecho natural en la realidad social y jurídica* (Natural law in social and legal reality: Soto Kloss and Castaño 2005). Next I would mention José J. Ugarte Godoy (1945–), professor at the Catholic University of Chile, and Raúl Madrid (1965–), who holds a Ph.D. from the University of Navarra, has served as general secretary of that university for many years, and has written numerous articles on topics relating to natural law and postmodern thought, especially that of Jacques Derrida. Another author is Alejandro Guzmán Brito (1945–), an important student of Roman law, as well as a legal historian who has written several deep and learned articles and books on the history of legal thought.

In the second group we find Joaquín García Huidobro (1959–), who received his Ph.D. from the University of Navarra. García Huidobro has done some work on natural law theory and ethics and currently teaches at the University of the Andes. His books include *Filosofía y retórica del iusnaturalismo* (Philosophy and rhetoric of natural law theory: García Huidobro 2002) and

[5] On Cotta see Sections 1.3.3.2 and 5.3 in this tome, and Section 11.6 in Tome 1 of this volume.

El anillo de Giges: Una introducción a la tradición central en la ética (The Ring of Gyges: An introduction to the main tradition in ethics, García Huidobro 2005). Another important member of this group is Cristóbal Orrego (1965–), who also holds a Ph.D. from the University of Navarra and teaches at the Catholic University of Chile. He has written *H. L. A. Hart, abogado del positivismo jurídico* (H. L. A. Hart: The advocate of legal positivism, Orrego 1997), an essential book for an understanding analytic philosophy of law, and is also the author of *Analítica del derecho justo* (Analytics of just law: Orrego 2005). Orrego has written the Spanish translation of John Finnis's *Natural Law and Natural Rights*, the central book of natural law theory in the 1980s.[6] I should also mention Alfonso Gómez Lobo (1940–), who teaches moral philosophy at Georgetown University and has sat on the President's Council on Bioethics in the United States. Among his many books is *Los bienes humanos: Ética de la ley natural* (Human goods: Ethics and natural law, Gómez Lobo 2006), a short but fundamental work setting out his personal views on the ethics of natural law. Among the youngest in the group is Max Silva Abbot, who teaches at the Catholic University of Concepción and has written a voluminous and critical book on the philosophy of Norberto Bobbio (Silva Abbot 2008).

7.8. Conclusion

As can be gathered from the foregoing overview, natural law theory in Latin America is an especially strong current of thought that keeps growing and expanding across the continent. The most salient features of this current can be summarized as follows: (*i*) Its current members have been especially influenced by foreign authors like Michel Villey, Sergio Cotta, Javier Hervada, Georges Kalinowski, and John Finnis; (*ii*) despite this foreign influence, significant work has been done by local authors; (*iii*) most of these authors are versed not only in the philosophy of law but also in general philosophy and the history of philosophy; (*iv*) this current promotes vigorous debate and a close dialogue with the other orientations in contemporary thought and has incorporated the ideas of contemporary natural law thinkers; and (*v*) a great many books, articles, and translations of contemporary authors have been produced in this current, resulting in a full revision of the relevant bibliography.

[6] On Huidobro and Orrego see also Section 28.3 in Tome 1 of this volume.

Part Two

Legal Positivism

Introduction

LEGAL POSITIVISM IN THE 20TH CENTURY

by Mauro Barberis

The expression *legal positivism*, more than one century after its first appearance, is widespread in Western legal culture. Various definitions have been offered of it, and they will all be considered in what follows; in fact, most of the civil law theorists mentioned in this chapter have either been labelled legal positivists or have problematized the label, or both. The label itself designates less a theory than a research tradition: a complex of practices, beliefs, and attitudes cultivated by Western jurists and then articulated in clusters of theories. This tradition traces back to the epoch-making turning point of codification—affecting only civil-law countries in a direct way—and it developed by differentiation out of a little older tradition, modern natural law.

The millenary natural-law tradition, which in Continental Europe continues in the various forms of *Rechtsphilosophie*, can be described in turn as a broadly philosophical and normative cluster of theories—where *philosophical* is opposed to *legal*, and *normative* to *cognitive*. On this conception, the *positive* law is only a means by which to achieve the proper end of law: justice. Legal positivism broke away from the latest offshoot of natural law, *rational* law, in order to pursue a broadly legal and cognitive study of positive law. The legal positivist research tradition would thenceforth see a line of development having at least three phases.

The *first* phase began with the great codifications of continental Europe, in Prussia (1794), France (begun in 1804), and Austria (1811). The expression *legal positivism*—which established itself only in the late 1800s on the model of *philosophical positivism*—applies here above all to the Continental jurists' legal dogmatics in the new legal framework moulded by codification, and today often referred to as the legislative state (*Gesetzsstaat*). What distinguishes the legislative state from previous particularistic or *ius commune* systems lies in its formal doctrine of the legal sources; what distinguishes it from what followed, namely, the constitutional state (*Verfassungsstaat*), which main legal source is not legislation but constitution.[1]

Revolving around this formal doctrine of legal sources—which always excludes natural law, and occasionally also legal dogmatics and judicial decisions—is a complex of practices, beliefs, and attitudes, set forth in the codes themselves or taught at the universities, and sometimes referred to as *technical*

[1] The two expressions alike originate in the 20th century, the former as part of a tripartition with *governmental state* and *jurisdictional state* (cf. Schmitt 1932b), and the latter as part of a bipartition with *legislative state* (cf. Häberle 1998; Zagrebelsky 2009, 117–46).

legal positivism. Technical legal positivists use positive law exclusively, identifying it in different ways from country to country depending on the domestic doctrine of the sources. In France, it was established that the only source should be general legislation, namely, Napoleonic codification itself. In Germany, the Roman *ius commune* survived, reinterpreted as national customary law; in England, the common law survived, too, but the Benthamite proposal to codify it wound up rigidifying the system of precedents.

Technical legal positivism—paradigmatically the study of private law by the exegetical school in France and by the historical school in Germany—would branch out into a *theoretical* legal positivism in England, with general jurisprudence, and in Germany itself, with the *allgemeine Rechtslehre*. These are general theories of law distinct from the different domestic legal dogmatics, and which would typically uphold theses such as the following: There is no law outside positive law (no natural law); positive law serves to guide conduct by way of commands or norms backed by sanctions; legal norms are created by the state, and are deductively applicable by the judges; law is an ordered set of norms, i.e., a legal system or order, marked by unity, coherence, and completeness; legal dogmatics could be considered a genuine science of law, at least in the sense of an objective and teachable doctrine.

Theoretical legal positivism—this whole set of theories—would soon be pejoratively labelled legal *formalism*, if nothing else for its abstracting from the different contents of law, thus becoming the polemic target of various neo-natural-law schools, and even more so of those movements referred to as antiformalist: the jurisprudence of interests, the free law movement, the sociology of law, and especially the Scandinavian and the American legal realisms. The main criticism made by the antiformalist movements was that theoretical legal positivism, such as it existed in the 1800s, did not recognize judge-made law—a criticism that does not yet apply, however, to the legal positivist theories of the 20th century, i.e., Adolf Merkl's and Hans Kelsen's *reine Rechtslehre* and Maurice Hauriou's and Santi Romano's institutionalism.

It was in the *second* phase of development, however, once World War II was over and the Nazi extermination camps came to light, that Continental legal positivism fell into its worst crisis. What drew criticism this time were not any specific cognitive theses about law—as had been the case with the antiformalist movements, and as would again be the case with the theorists of the constitutional state—but a broadly normative attitude, that which came to be known as *ideological* legal positivism. This consists in the assumption—in truth already present in the prosopopoeia of the laws in Plato's *Crito*, and common to the whole of Western legal thought thereafter, including natural-law theory—that the law is morally binding, and so that it must be obeyed (by the citizens) and applied (by the judges).

Legal positivism was blamed in particular for having numbed the minds of German jurists and citizens, desensitizing them to the laws enacted under the

Third Reich—an unwarranted charge for many reasons. Indeed, Nazism regarded the formalism of legal positivists as an enemy to be vanquished, preferring to resort to judicial interpretation and to the Führer's orders rather than to the constitution or to the ordinary laws enacted under it. And even more damaging to the charge laid against legal positivism is that Nazism had been presented by its makers as itself being a sort of natural law of earth and blood (see in this regard Chapter 2 in this tome and Chapter 9 in Tome 2 of this volume). Yet the charge resonated widely, considering, among other reasons, that it found a receptive audience among thinkers as far apart from one another as Alf Ross and Gustav Radbruch, the former a rabid legal realist and the latter a legal positivist who embraced a moderate form of natural law. In any event, the charge drove legal positivism into a crisis out of which it would emerge as a deeply changed conception.

This change is owed above all to H. L. A. Hart, the most influential legal positivist theorist of the common-law world—though we are only interested here in the way his famous Separability thesis developed in civil-law legal positivism. The legal positivist tradition, which at that time was already a century old, was characterized by Hart (1973, 1961) in terms of the Austinian dictum: "The existence of law is one thing; its merit or demerit is another." Stated otherwise, what joins all legal positivists would be the Separability thesis, the apparently "simple" (Hart 1973, 55) and undemanding assumption that the term *law* can be defined independently of the terms *morals* and *justice*. Or again, stated in a different way still, the phenomena denoted by *law* and *morals* present *empirical* or *contingent* connections, not any necessary ones.[2]

The definitional thesis wound up assuming an essentially methodological sense: The law can be identified, and hence known, without resorting to moral evaluations. In fact, legal positivism is characterized by Hart 1994b as *methodological* positivism (on which see Section 9.3.1 in this tome), using for the theory a qualifier that Norberto Bobbio (1996) had used more than thirty years before.[3] Such methodological positivism provided the canvas against which to view the natural-law tradition, accordingly reconfigured starting from the Connection thesis of law and morals. To be sure, the Hartian reconstruction is debatable from a historical standpoint, presenting natural law and

[2] As has been noted by Nino 1994 (cf. Section 10.2 in this tome), the concepts of law and of morals can be connected or separated *ad libitum*, at least on a conventionalist conception of language, depending on the definition one chooses for these terms. Angloamerican theorists speak today not of a *definitional* but of an *identificatory* Separability thesis, aimed not at *quid ius* but at *quid iuris*, in terms of a Kantian distinction normally ignored by them (cf. Marmor 2001, chap. 4; Raz 2007).

[3] See Hart 1994b, Perry 2001. Hart, unlike many of his English-speaking epigones, read Continental literature and the same Bobbio. And even though Hart 1973 could not have been influenced by Bobbio 1996—Hart 1973, 77, rather shows the influence of Berlin 1958—that work by Bobbio can conceivably have been an influence on Hart 1994b.

legal positivism as different answers to the same universal and eternal question (Murphy 2003)—but it identified a common ground for debate among different legal and ethical traditions, especially as concerns the civil-law theory of law.

In fact, the most important contributions on law and morals would come from German, Italian, Spanish, and Argentinean thinkers, that is, from countries that had known the military dictatorships and the totalitarianisms of the 20th century. But maybe it was only with Hart that this question—hitherto ignored by general jurisprudence and the *allgemeine Rechtslehre*—became common ground for debate among philosophers and lawyers who had until then ignored one another, the former having mostly concerned themselves with normative philosophy of justice and the latter with cognitive theory of law.

But the theoretical space opened by Hart also made possible the debate between legal positivism and that "third theory of law," sometimes referred to by Continental authors as *nonpositivism* and here termed *neoconstitutionalism*, whose defining feature consists in its identifying in the constitutional principles the true connection between law and morals (see Section 1.4.5 and Chapter 10 in this tome). The evolution of this debate, it should be noted, depended not so much on its being framed in Hartian terms, nor on the shift in focus from the theory of norms and the legal system to themes such as legal reasoning and interpretation. It depended mostly on the changed cultural and institutional context in which the legal positivist tradition was developing, and especially on the shift from the legislative to the constitutional state, the latter seeming to embody morals into law by way of the constitution.

In the *third*, and current, phase in the development of legal positivism, legal theorists, especially the Continental theorists, are attempting to account for the changes that positive law undergo, the major Continental countries drewing up rigid constitutions buttressed by different forms of judicial review. Through such a framework, with rigid constitutions whose interpretation is entrusted to constitutional courts, positive law itself becomes *constitutionalized*, i.e., provided with constitutions formulated in terms of rights or principles which tend to permeate the whole of legal interpretation. The discussion is only on such principles, considered by legal positivists as a mere positivization of moral values, and by neoconstitutionalists, instead, as a new confirmation of the old connection between law and morals.

Just as the evolution of civil-law legal positivism has felt the influence of Hart, so is the evolution of neoconstitutionalism deeply influenced by Ronald Dworkin's criticism of Hart, a criticism initially framed in terms of legal-moral principles, and then in terms of legal-moral integrity or interpretation. Of course, this should not be taken to suggest that the Continental and Latin American discussion is simply an appendix to the debate in the English-speaking world: It is rather the case that the debate's internationalization and the

wide use of English reduce the distinction between the common-law and the civil-law discussion to a merely expository one.[4]

On the other hand, nonpositivism, or neoconstitutionalism, is a distinctly European theory of law, developed above all by German, Italian, and Spanish theorists with reference to Continental institutions of the constitutional state, such as rigid constitutions and constitutional courts. To be sure, the Continental legal positivists and neoconstitutionalists do take up some theoretical schemes of the common-law debate, but the issues and phenomena they concern themselves with are those typically distinguishing the evolution of Continental and Latin American law. Not only do they debate the contentious incorporation of morals into law via the constitution, but they have also developed a theory of norms infinitely more complex than the originary imperativism, a theory of legal systems now confronted with the problem of European integration, and a theory of legal interpretation increasingly tempted by a moral reading of the constitution.

These developments will all be taken into account in this Part 2, which will be organized as follows. We begin in Chapter 8 by discussing the legal positivist theory that developed in the civil-law tradition in the first half of the 20th century. Chapter 9 will be devoted to the postwar debate on law and morals and to the increasing importance that legal reasoning and interpretation have come to play, partly on account of that very debate. Chapter 10 will be devoted to nonpositivism, or neoconstitutionalism, conceived as a third way between legal positivism and natural law, or even as a "postpositivist" account seeking to overcome or update legal positivism. In Chapter 11 we will consider the legal positivist replies to this neoconstitutionalist challenge. And then, finally, in Section 11.5, we will go back and attempt an overall assessment.

[4] We also need to point out a somewhat increasing inability of Anglo-American and Continental theory of law to communicate, at least judging by a recent dispute in which Raz (2007) criticizes Alexy (2007) for not referring to any post-Hartian sources in the English-speaking world, only to be reminded that he himself cites no Continental literature other than an English translation of Alexy. In reality, it is a one-directional incommunicability that we are looking at, with the Anglo-American writers often ignoring the Continental ones, but rarely the other way around.

Chapter 8

LEGAL POSITIVISM IN THE FIRST HALF OF THE 20TH CENTURY

by Giorgio Bongiovanni

8.1. Philosophical Positivism and Neo-Kantian Philosophy of Law

Legal positivism did not establish its dominant position in the 1800s without giving rise to a range of highly critical counter-currents, especially in the late 1800s. These were analyses that, starting from the disavowal of the positivist approach on the part of Rudolph von Jhering (1913, 1884), called into question the positivist method and the criteria by which to identify the law. This phase of the debate in legal theory was distinguished by its close connection with the broader philosophical debate: The effort to underscore the shortcomings of the legal positivist account of the defining traits of law—in answer to the question, what is law?—brought into focus a need to identify the criteria that make jurisprudence a scientific enterprise. Two main approaches to legal and philosophical inquiry were developed in the late 19th and early 20th centuries in response to this need: an empirical one—which could be cast in naturalistic, psychological, or sociological terms, and which took philosophical positivism as its reference point[1]—and a Kantian critical one. On the empirical approach, legal positivism was the critical target of an analysis aimed at offering a new concept of law and a new method for legal science, especially a sociological method; on the Kantian critical approach, the objective lay in a renewed effort to bring positivism conceptually and methodologically up to date. The debate in the early 20th century was in this sense marked by a contraposition between authors in two camps: Arrayed on one side were those who, in the framework of the "revolt against formalism" (Treves 1996, 103, who borrows that expression from White 1949), put forward an empirical approach set broadly in contrast to the basic assumptions of 19th-century legal positivism; arrayed on the other were those who sought to carry legal positivism forward by renewing its method for analyzing law and its substantive beliefs about law. It is this latter endeavour that gave legal positivism the distinctive shape it took in the 20th century, proceeding on the basis of a philosophical sensibility and a view of law and legal science different from the outlook that had shaped legal positivism in the 19th century. Legal positivism in the 20th century had to convincingly address the charge of methodological formal-

[1] According to Norberto Bobbio (1996, 133ff.), there is a single point of contact between legal and philosophical positivism, in that they both seek to distinguish description from evaluation (and it was in part out of the effort to solve this problem that both currents originated in the first place).

E. Pattaro, C. Roversi (eds.), *A Treatise of Legal Philosophy and General Jurisprudence*,
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ism and substantive detachment from reality that had been laid against 19th century legal positivism. In different contexts, the anti-formalist currents underscored that 19th century legal positivism entailed a commitment to a specific set of views about the sources of law (positing the absolute centrality of the statutes), about the proper role of judges as interpreters of the statutes (a role reduced to that of simply applying the statutes), and about the way in which legal concepts are constructed (on the basis of Jhering's method),[2] and the charge was that this resulted in a picture of law entirely disconnected from its reality.[3] As was mentioned a moment ago, these criticisms were answered by looking to neo-Kantian philosophy, and in particular to the two main streams of neo-Kantianism developed from the 1870s onward: that of the Marburg school (with Hermann Cohen, Paul Natorp, and Ernst Cassirer) and that of the Baden school, at the Universities of Heidelberg and Freiburg (with Wilhelm Windelband and Heinrich Rickert).[4] In this connection, idealist philosophy played no more than a marginal role in the first two decades of the 20th century (when it was not criticized outright),[5] and only in the 1920s was it revived, especially in Germany.

Legal positivism in the 20th century thus owes its shape primarily to the effort to answer the criticisms previously made to legal positivism in the 19th century. A special place in the context of the criticisms of positivism was occupied by Scandinavian legal realism, which over the course of the 20th century would develop into one of the main currents in the analysis of law. Indeed, the line of inquiry that Axel Hägerström developed starting from his 1908 *Das Prinzip der Wissenschaft* (The principle of science: Hägerström 1908), relying on the reality principle as the basis for scientific activity, was bound to emerge as a major approach to the philosophical analysis of law next to legal positivism and natural law theory.[6] Although the criticism of formalism and the responses to those criticisms was a phenomenon that ranged across the whole of Europe (Fassò 2001, 188ff.), it is particularly in the German-speaking countries that the debate took place, making it possible for legal positivism to develop along new lines. Indeed, it was in this setting that the legal debate engaged directly with the philosophical debate: The neo-Kantian reaction to scientistic positivism formed the basis on which legal positivism would develop in the 20th century. German neo-Kantian criticism took aim at two metaphysics: the "metaphysics of matter," encapsulated in "the positivist assertion of the absolute or metaphysical quality of scientific truth," and the "metaphysics of the spirit," that is,

[2] On Jhering's method, see Wilhelm 1958, 88ff.; Bobbio 1996, 121ff.; Chiassoni 2009, 285ff.

[3] Treves (1996, 103–4) argues that the three tenets just mentioned form the basis on which three brands of formalism can be distinguished in legal positivism: legal, scientific, and interpretive.

[4] On neo-Kantianism see also Chapter 1 in Tome 1 of this volume.

[5] On the marginal role of idealism in this context, see Korb 2010, 24ff., Stolleis 2004, 68, 167.

[6] See Chapter 13 in this tome for a discussion of Hägerström and legal realism and its development in the 20th century.

the "metaphysico-religious integration of scientific knowledge propounded on a spiritualist and idealist approach" (Abbagnano 1999, 543; my translation). On a neo-Kantian approach, the view of scientific method and objectivity as a matter of factual accuracy alone needs to be superseded by also taking into account the way facts are organized within a theoretical framework. The approach in this sense calls for a "critical reflection on science," and on the basis of the distinction between "the validity of science" and "matters of fact" (ibid.; my translation), it criticizes the effort to reduce knowledge to "empiricism" and accordingly underscores the need to investigate the "conditions under which" knowledge can be said to have been gained by a valid process (M. Ferrari 1997, 4):[7] The task of philosophical reflection is to identify "the conditions for the possibility of scientific cognition," experience and objectivity (Hammer 1998, 179). Transcendental philosophy becomes a method for determining the validity of scientific knowledge and is thus aimed at discovering the synthetic a priori principles underlying such knowledge and the foundations on which it rests. The a priori is reconstructed proceeding from "the fact of science and of the objective realizations of culture": The transcendental method is thus brought into connection with scientific experience rather than with everyday experience (M. Ferrari 1997, 60–1; my translation, commenting on H. Cohen 1883).

This mode of thought both presupposes and entails a "recasting of the transcendental" that makes it necessary to reject any psychologistic reading of Kant and to revise other important aspects of the Kantian approach (ibid., 60; my translation). This rejection of psychologism, and the effort to accordingly rework the Kantian categories, is what makes it possible to describe transcendental philosophy as a "theory of scientific knowledge." So the idea that scientific and cultural experience needs to be analyzed by bringing the a priori into play, by stating the "transcendental conditions for the possibility and validity of knowledge and culture across different areas" (ibid., 5ff.; my translation), rests on the fact that the transcendental cannot adequately be interpreted on a psychologistic basis, and even more so by moving beyond the role of the aesthetic in the transcendental system. The problem with psychologism is that, on this approach, our "knowing" winds up being reduced to "a complex of impressions and representations, that is, to an empirical subject's complex of states and modifications of consciousness" (Lamanna 1967, 4; my translation). From here we get the "phenomenalism" of knowledge and the need to "resort to an unknowable 'thing in itself' as the foundation of phenomena" (ibid., 5; my translation). To "collapse the transcendental into the psychological" (M. Ferrari 1997, 30; my translation), a move implying a distinction between *phenom-*

[7] As has been noted by Friedman, the idea that true judgments stand for or depict "objects or entities that exist independently of our judgements" not only informs the "naked, unconceptualized sense-experience" of empiricism but also underlies metaphysical realism, positing "'transcendent' objects […] existing somehow 'behind' our sense-experience" (Friedman 2000, 26).

enon and *noumenon*, is to deny the Kantian perspective by giving the transcendental a subjective cast.[8] Furthermore, aesthetics and sensibility are seen as aspects of the transcendental analytic: "The transcendental is constitutive of the object; it is resolved into the conceptual process, into the movement of concepts through which the object of knowledge comes into being" (Lamanna 1967, 7; my translation). In this way, experience is understood as "an a priori construction" and does not come about without "the synthetic principles of the intellect." These principles are therefore forms of thought that constitute experience and act as conditions for the possibility of experience: The "a priori is […] the formal condition of experience" (M. Ferrari 1997, 31–2; my translation). This reduction of the a priori elements to the analytic and to logic alone shows the need to construct the theory of experience as a theory of *scientific* experience, and it posits the transcendental as "the complex of methods for the construction of science." By "encasing the transcendental aesthetic within the analytic" (ibid., 63; my translation), we recognize the categorial forms and the synthetic principles as central and have a tool for denying that knowledge can be derived from an object prior to it. The neo-Kantian approach thus sheds the distinction between phenomenon and noumenon as well as that between "intuition and thought" (Abbagnano 1999, 564; my translation).[9]

The revisions just outlined account for the main features of the neo-Kantian approach. These features flow from the idea of constructive character of thought and from that of reality as the "legal determination of phenomena" (M. Ferrari 1997, 35; my translation). On this approach, knowledge is defined not by its object but by "its own structure," that is, by the functions and laws of thought. This means that knowledge is dependent on the transcendental conditions and autonomous "from the object in itself" (Ollig 1997, 35, 37; my translation). To know reality is to move within the "transcendental logic" of the categories and the principles. This logic

> reduces phenomena to the unity of the law: Inquiry does not start from any concrete datum, for any determination [of reality] is possible only by proceeding from the standpoint of the universal, only by determining the quantity, the quality, and the relations by which any single element is distinguished from any other. (M. Ferrari 1997, 69; my translation)

An equivalence is thus established between the law of thought and objective reality: To know is to reduce phenomena to the unity of the law and principles of thought. Thinking thus takes on a formal nature (in that it is structured by forms, that is, by the conditions for the possibility of experience): The critical method lies in "the procedure by which form is separated from the content of

[8] This critical stance entails a need to clearly separate the empirical subject from the transcendental subject (Ollig 1997, 36).

[9] For Kant, as is known, between the a priori logical structures and the nonconceptualized multiplicity of impressions coming in from the senses lie the pure forms of sensible intuition (space and time).

knowledge so as to identify the logical and formal elements presiding over the organization of experience" (ibid., 39; my translation).

Philosophical inquiry is thus made to consist in the endeavour to critically analyze the validity of scientific and cultural knowledge: It is a *critical* endeavour, in that it cannot consist in simply recording the contents of such knowledge but must investigate the (transcendental) conditions under which it is obtained. The task of a transcendental investigation is to set out a foundation for truth and objectivity, that is, for the validity of science and culture. On these premises, German neocriticism underscores the "methodological" or "valuational" component of transcendentalism, a feature that, as was not the case with Kant's original conception, makes it possible to apply transcendentalism in the theory of knowledge and in the ethico-political sphere (Artosi 2006, 19; Holzhey 1997, 486–9; Hammer 1998, 179–80).[10] What has just been laid out is a general programme was specified in several ways through the work of the Marburg and Baden schools.[11]

As discussed, the neo-Kantian paradigm became the paradigm for the new mode of legal-philosophical speculation. Its way of grounding the validity of the sciences made it possible to analyze the legal phenomenon in an innovative way. This is a development owed to the work of important authors who in the late 19th and early 20th centuries adopted Kantian or neo-Kantian epistemologies. Two examples are Rudolf Stammler (1906, 1911) and Gustav Radbruch (1914), who define the concept of law in light of the "aim" or value singled out as needing to be realized.[12] These attempts were important, to be sure, but their role in shaping legal positivism in the 20th century would not be a decisive one, at least not in the first half of that century.

8.2. The New Legal Positivism: Hans Kelsen's *Reine Rechtslehre* vs *Naturalismus* in Legal Science and Natural Law Theory

Undoubtedly, no thinker was more influential in the development of 20th century legal positivism than Hans Kelsen.[13] As he points out in his first work, the 1911 *Hauptprobleme der Staatsrechtslehre* (Main problems in the theory of

[10] It is something of a cliché to present neo-Kantianism as an effort to extend the Kantian method to the human sciences (see Paulson 2005a, 202; Korb 2010, 13).

[11] Oesterreich (1923, 416ff.) identifies seven strands of neocriticism, calling them physiological (Helmholtz and Lange), metaphysical (Liebmann and Volkelt); realist (Riehl), logicist (the Marburg school), the theory of values (the Baden school), relativist (Georg Simmel), and psychologico-neo-Friesian (Cornelius and Nelson).

[12] On Stammler see Section 1.1.3.1 in this tome and Section 1.3 in Tome 1 of this volume. On Radbruch see Section 1.1.3.2 in this tome and Section 1.8 in Tome 1 of this volume.

[13] Kelsen is described by Roscoe Pound as "unquestionably the leading jurist of the time" (Pound 1933–1934, 532, quoted in Paulson 2002a, 11, n. 3). H. Dreier (1986, 16) observes that Kelsen is widely regarded as the jurist of the century ("Jurist des Jahrhunderts"). On Kelsen see also Section 2.3 in Tome 1 of this volume.

public law: Kelsen 1960a), what prompted him to develop his conception was a need to "revisit" the method of jurisprudence and the basis on which it can be deemed a science,[14] not only in relation to the traditional theory of public law but also in relation to the more recent theories (and he is thinking in particular of Stammler). In redefining the method by which to construct the concept of law, and legal dogmatics (*Rechtsdogmatik*) in general, Kelsen proceeded on a new way of conceiving legal science on the basis of the neo-Kantian analysis. Kelsen's effort, in other words, was to set legal positivism on a new foundation by relying on the neo-Kantian epistemology that had recently been developed. The neo-Kantian influence on Kelsen's work is apparent, and Kelsen himself points it out on several occasions.[15] Less apparent is which of the two main neo-Kantian schools played the greater role. Even if there is no agreement on the foundation of Kelsen's theory (see Paulson 2007a, 91),[16] this is an important question, since it is a question that makes it possible to work through some interpretive problems and understand the different phases in the evolution of Kelsen's thought.[17] By way of a preliminary remark, Kelsen's early works (those written in the first half of the 1910s)[18] can be said to bear a closer connection to the neo-Kantianism of the Baden school (although this influence is neither exhaustive nor exclusive): It is in light of this approach that we can best make sense of Kelsen's distinction between *Sein* and *Sollen* (is and ought) and the role he ascribes to these two categories as a basis on which to proceed in the analysis of law, and through this lens we can also have a better grasp of the way he conceives their mutual relation. In later works (at least until the 1934 *Reine Rechtslehre*), Kelsen drew as well on ideas developed by the Marburg school, and these prove useful both in characterizing his theory and in tracing out its evolution. One could thus distinguish an initial phase in which the neo-Kantian influence is more closely tied to the Baden school's philosophy of values and a later phase in which Hermann Cohen's and Ernst Cassirer's logicism moves into the foreground.[19]

[14] Kelsen speaks of "Revision der methodologischen Grundlagen der Staatsrechtslehre" (revision of the methodological foundations of public law), underscoring that "the problem of method […] is […] of the utmost importance" (Kelsen 2008, 51, 53).

[15] Kelsen mentions a variety of thinkers in this regard, among whom Windelband (Kelsen 1922a, 1960a), Simmel, Helmoltz (Kelsen 1960a), Rickert (Kelsen 2010), Lask (Kelsen 1922a, 2010), Cohen (Kelsen 1998), Cassirer (Kelsen 1922b, 1968a).

[16] Gustafsson (2007, 87) quotes this comment by Edel (1998, 195): "Anyone who is trying to come to grips with the neo-Kantianism of Kelsen will be confronted […] with a 'great maze of problems.'"

[17] Two different periodizations of Kelsen's thought in relation to the role of neo-Kantianism are offered by Paulson (1998, 1999) and Heidemann (1997). Nogueira Dias (2005) puts forward a periodization more closely tied to Kelsen's legal theory itself. On this topic, see Jestaedt 2009.

[18] These include, in addition to the *Hauptprobleme*, Kelsen 1911b and 2010.

[19] According to Hammer 1998, 182–3, however, "Kelsen does not adapt any of the theories of his neo-Kantian precedessors, whom he regards as having for the most part failed in their effort to

The formation of Kelsen's thought must also be considered in connection with the legal theory that came before it.[20] As we will see, beyond the general need to systematize legal material, there prevail moments of discontinuity. Although Kelsen worked within a methodological framework different from the one grounding the main theories of 19th century legal positivism, he did proceed from the same need to arrange legal material into a systematic construction:

> It is only and precisely in jurisprudence that the value and rightness of a special construction depend exclusively on whether the underlying principle of construction can fruitfully be used in other ways, too—or on whether this principle, once placed on higher ground as a general maxim of construction, can ensure the simplest and most unitary structure for the global system. (Kelsen 2008, 51; my translation)[21]

However, in recognizing this need in common with previous legal dogmatics, Kelsen was also resolute in looking at that tradition *critically*: The categories of the dominant theory needed to be subjected to deep criticism in working toward a new theory of legal positivism, and this led Kelsen to rethink the relations by which public law is structured, in an effort not only to resolve the antinomies which beset the preceding doctrine but also, and especially, to construct a new general theory of the state. So the need to revise our understanding of law and the basic categories of legal science led to a need to also revise the theory of the state, so as to expose the ideological function served by dominant dogmatics and by the "fictions" at work in the *Staatsrechtslehre* (such as the *Willenstheorie*, or will theory). Kelsen's theory thus has two faces, a theoretico-methodological one and a critico-dogmatic one. This latter aspect needs to be understood in connection with the progressive entrenchment of democracy and constitutional systems (Bongiovanni 2007).

Proceeding from the neo-Kantian approach and from this need for critical reassessment, Kelsen's theory shaped the new face of legal positivism in the 20th century. This path is marked by a few steppingstones. The starting point was to elaborate both a new method for constructing a science of law based on the postulate of "purity" and a new concept of law. Central to this endeavour was the distinction between *Sein* and *Sollen*, a distinction that becomes a

apply Kantian transcendental philosophy to cultural and normative sciences, and to legal science in particular […] Kelsen's own 'original' neo-Kantianism consists in his independent effort to carry out a programme that he shares with the others neo-Kantians, namely, to apply the Kantian transcendental theory of knowledge as a theory of science to fields outside the natural science."

[20] This question comes up in the debate on the formalism of Kelsen's theory. Until the 1980s, the broad consensus was that Kelsen should properly be understood as carrying forward 19th-century German theory and its formalism. This interpretation, however, is rejected in Fioravanti 1987 and Sordi 1987. See also Paulson 2005b. And Kelsen (1929) himself answers this charge of formalism by arguing that his theory is formal in a "conceptual" sense only.

[21] As as pointed out by Paulson (1998, XXIV), "construction […] means in traditional German legal science concept formation."

tool with which to define the methodological outlines of purity and to identify the province of law. The distinction between *Sein* and *Sollen*, together with the neo-Kantian approach, provided the foundation on which Kelsen moved forward in pursuit of both of those aims, on the one hand, as concerns the question of method, developing a "metatheory" of science and legal dogmatics (Heidemann 1997, 49)[22] aimed at bringing to light the indispensable criteria for securing their theoretical validity, and on the other, as concerns the concept of law, laying out a general definition of law revolving around the theory of norms (a definition that, as part of a general theory of law, was also bound to redefine some basic concepts and distinctions). And, as was just pointed out, this entails a need to deeply revise the categories of public law especially with reference to the relation between law and the state.[23] These themes were developed in different ways over the course of Kelsen's thought, to be sure, but it is nonetheless fair to say that the basic building blocks of the *reine Rechtslehre* (or pure theory of law) were put in place from the outset, in the 1911 *Hauptprobleme*,[24] and that what followed was essentially an effort to solve a series of problems and shortcomings that subsequently came to light in the original foundation. This is not to say that this evolution was inconsequential, for it refashioned certain features of the theory in important ways by going deeper into the related questions: This holds in particular for the conception of norms developed within the new theory of law as a system, for on that basis Kelsen reframed the elements of normative validity.

His entire science and analysis of law is grounded in the postulate of methodological purity. This is a principle set in contrast to those modes of analysis where law is reduced to its naturalistic components (as in the example of "psychologism," on which see Paulson 2012a, 93–102) or is otherwise investigated through a pastiche of methods: It follows from this that methodological purity needs to proceed from a distinction between human and natural sciences (taking up the terminology introduced in Dilthey 1989). In laying out his critique, Kelsen embraced a wide range of positions that in different ways found the analysis of law on models developed in the natural sciences.[25] This

[22] This is a point that Kelsen clarified in his polemic with Fritz Sander on the object of philosophical speculation about law: In rejecting Sander's view that legal science should have no role in any philosophical analysis of law, Kelsen argued that "a transcendental logic can only take as its object an area of knowledge and of science" (Kelsen 1922a, 132). On the debate between Kelsen and Sander, see Paulson 1988; Heidemann, 2002, 213–5; Lijoi 2008. See also, in this regard, Section 2.5.2 in Tome 1 of this volume.

[23] Of course, Kelsen's reflection extends beyond the realm of public law to also include international law: See Rub 1995, Walter, Jabloner, and Zeleny 2004, Bongiovanni 2006, and Von Bernstoff 2010.

[24] See Heidemann (1997, 221), for whom Kelsen's main theses can already be found in his early works, and in particular in the *Hauptprobleme*.

[25] The method of the natural sciences figures in the work of Adolf Merkel and in Georg Jellinek's *Zwei-Seiten Theorie* (two-sides theory), and it also informs the conceptions of the anti-for-

contrast comes into relief in the *Hauptprobleme* and in the writings that immediately followed (such as Kelsen 1911), especially where Kelsen discusses the role that on the sociological approach and in the construction of public law is ascribed to the concept of the will.[26] The use of that concept evinces an understanding of law as an essentially causal phenomenon. According to Jellinek's sociology, or social theory of law, law is to be explained (either wholly or in part) as a causal phenomenon. Kelsen objects to that view, arguing that if we reduce the analysis of law by resorting exclusively (or even partly) to causal phenomena and to the paradigms of natural science, we wind up having an inadequate understanding of the legal phenomenon, or at least such reduction is possible only on condition of positing fictive entities and hypostatizations (an example being the idea of the state as a person possessed of a will).[27] Law cannot be conceived on the basis of the empirical necessity that underlies all causal relations but needs to be explained in light of a different sort of relation among phenomena. Kelsen, in other words, is saying that if we are to have an adequate understanding of law, we will have to investigate law using a method other than that of the natural sciences, and in such a way as to identify the specificities that make legal relations unique. Both of these aspects find a unitary solution in the distinction between *Sein* and *Sollen*, making it possible to identify what Kelsen (2010) calls the *normative* sciences—where he locates jurisprudence, and in which are grounded its method and scientificity—and to define the concept of law.

Kelsen (2008, 53) argues this point directly by underscoring that when dealing with "disciplines" that "come into contact by reason of their object"—and among these disciplines he counts those that take the law as an object of investigation—we have to separate "the ones from the others on the basis of their different ways of considering" reality: This makes it possible to avoid the "syncretism of methods" (which cannot "lead to scientifically sound results") and to "free the legal formation of concepts from certain sociological or psychological elements" (for otherwise we would wind up with "an improper way of framing the problems" we propose to solve). These results can be achieved by proceeding from a fundamental contrast, "that which separates the is from the ought."[28] Kelsen's approach is thus premised on the possibility of singling

malists and of those who looked to sociology as a new paradigm for legal science. On naturalism in law (*Rechtsnaturalismus*), see Haferkamp 2007. On the thinkers listed by Kelsen as proponents of this approach (including Bierling, Binding, Ehrlich, Gerber, Gierke, Hold v. Ferneck, Jhering, Kantorowicz, Preuss, Radbruch, Somló, Stammler, Thon, Weber, Windscheid, and Zitelmann), see Paulson 2002a, 230; 1990, 159ff.

[26] According to Kelsen (1960a, 162), "all theorists who accept the idea of the state qua person" posit the "state's will" (*Staatswillen*) as a "substrate" for the state so conceived.

[27] On fictions in science and in law, see Kelsen 1919, offering an analysis of Vaihinger 1914.

[28] Next to this contrast, as we will see, Kelsen (2008, 54) places the equally basic one that "separates form and content."

out two different ways of considering events: one concerned with being (the is) and the other with duty (the ought). This distinction between two modes of analysis (and two corresponding types of sciences and methods) finds its origin in the neo-Kantianism developed by the Baden school, for it runs parallel to that school's distinction between being and values.[29] Kelsen's distinction between is and ought needs to be viewed as a rendering of the one between facts and values: It expresses both the separation between the two domains and the two different ways to go about considering events. The direct source for the distinction lies in the analyses that Wilhelm Windelband and Heinrich Rickert carried out in organizing the general presuppositions of neo-Kantian philosophy in relation to "values," and we have seen that these presuppositions are understood as bases on which to identify the criteria for the validity of knowledge.[30] Values provide the criterion (or normative prescription) on which basis to establish that validity: It is "value which grounds experience" (M. Ferrari 1997, 79; my translation), and in value therefore lies the basic element of judgment. In this sense, an essential role is played by the distinction between

> the plane of that which *is*, or which is otherwise qualified as belonging to the sphere of the factual, the empirical, the contingent, and the historical, and that which, by contrast, normatively *ought to* be, or which otherwise counts as a worthwhile aim or value. (Ibid., 75; my translation)

Knowledge—or that which we come at by searching for and respecting the "conditions ensuring the validity and universality of synthetic a priori judgments in relation to different contents" (ibid., 77; my translation)—arises out of the distinction between the is (the factual, the empirical) and the ought (value). Kelsen's is and ought replicate this distinction and thus reflect the difference between fact/s and value/s, accordingly expressing the different ways in which events may be considered.[31] In directly engaging with Rickert's theory, Kelsen underscores the existence of two different "directions in which we can turn our gaze": On the one hand we have "the is of that which happens as a matter of fact, namely, reality"; on the other "we have the ought—which may be ethical, legal, aesthetic, or otherwise conceived—and by this is meant ideality" (Kelsen 2010, 552ff.; my translation). From this perspective, "the world—

[29] For this analysis, see Paulson 2002b, 226ff. Kelsen develops the distinction in his own way and gives it a variety of inflections, on which see Paulson 2002a, 13.

[30] In this sense, on Windelband's approach, "the object of philosophy lies not in the particular objects which make up the empirical material of thought and of willing and feeling, but only in the norms with which our thought, willing, and feeling must comport in order to be valid and to embody the value they aspire to" (Abbagnano 1999, 557; my translation). In this framework, philosophy is understood to concern itself not with judgments of fact but with value judgments and their universal validity. As is known (see M. Ferrari 1997, 74–5), Windelband's account of validity and value develops themes found in the work of Hermann Lotze and Kuno Fischer.

[31] As is known, this is the point of departure from which the Baden school proceeds in setting out the distinction between nomothetic and ideographic sciences, arguing that "empirical reality can […] be construed in two different ways" (M. Ferrari 1997, 151–9, 154; my translation).

understood as the outcome of our knowledge—splits into two realms between which there can be no communication," in such a way that "the contrast between is and ought winds up corresponding to an opposition between reality and value, nature and purpose" (ibid.; my translation). Kelsen can in this sense be said to endorse a *Zwei-Welten-Lehre*, or two-worlds doctrine (Paulson 2002b, 226ff.; 2005b, 279ff.), a conception analogous to that of the Baden school. In Rickert's view, what it means "to know is to judge"—an activity concretized into our "recognizing a value"[32] (an ideal necessity, an ought)—and this view translated into a clear distinction between the world of reality and that of value: "Values are not reality, but they are valid, and their realm lies beyond the subject and the object alike" (Abbagnano 1999, 560; my translation, commenting Rickert 1910). This distinction between different worlds can also be found in Georg Simmel, another thinker explicitly mentioned by Kelsen (1960a, 4, 12): "Addressing the concerns of the Baden school," Simmel conceived the ought as an "original category of thought," recognizing it as having a "status independent of historical situations" and locating it in a specific "realm" of its own (Abbagnano 1999, 589–90; my translation, commenting Simmel 1910).[33]

This construction, giving rise to the problem of the relation between the world of the is and that of the ought, has a twofold dimension to it. Indeed, the *Sollen* is at the same time an element in the world of ideality and the transcendental category that operates in judgment and determines its objectivity. As has been observed, "the 'ought' belongs to the normative region of morals (or practical reason)," but "it also functions as an a priori category for the legal comprehension" (Gustafsson 2007, 87). The distinction between *Sein* and *Sollen*, in other words, is at once ontological and transcendental, and these two dimensions suggest different ways to understand its meaning.[34] This ambivalence can be appreciated, for example, in the question of what Kelsen's theory takes to be its object: On the ontological understanding legal science is a human science aimed at comprehending law as a posited ideal object, whereas

[32] In this sense, judgment always presupposes some value, whose "function […] it is to make evaluation possible," and on which rests the truth or validity of judgment itself (M. Ferrari 1997, 85; my translation).

[33] The realm in question (the fourth one in Simmel's system) is the one containing ideal needs and the ought. Kelsen refers explicitly to the distinction found in Simmel 1892, and he also mentions Kitz 1864. According to Losano (1981, 70), Kelsen borrows from Simmel the idea of the indefinability of the *Sollen*, and from A. Kitz the idea of its indivisibility. Kelsen (1960a, 24–5) also draws on Kant in making the case for the separation between *Sein* and *Sollen* and for the autonomy of the latter from the former (the argument is that of the validity of the moral law regardless of whether it is being actually observed).

[34] On the different shapes the ontological dimension of the relation between *Sein* and *Sollen* assumes in Kelsen, see Heidemann 1997, 57–61. This involves not only the distinction between facts and values (nature and spirit) but also those between nature and society (the latter understood as a normative system and as an expression of freedom) and between reality and ideology.

on the transcendental understanding the object (law) is not given, or posited, but is constituted proceeding from the categories (Heidemann 1997, 43ff.).[35] This double layer also characterizes the Baden school (especially with Rickert), where the transcendental investigation is centred on the complex relationship among "reality, validity, and value" and so implies a distinction between the realm of "knowledge in an objective sense," i.e., validity, and "a plane prior even to knowing and its truth value," i.e., values (Centi 1997, 410, 417; my translation). Kelsen's framing of the distinction between *Sein* and *Sollen* can be understood in both of those senses, and he doesn't do much to specifically distinguish between the two (perhaps seeing them as complementary).[36]

The main problem with such a doctrine, envisaging two separate worlds, and with the dual function this doctrine can have, lies in the tension "between fact and value" (Friedman 2000, 33, 35)[37] and the relation that can hold between facts and values. As has been observed, this tension is distinctive to the so-called "Southwest school," which "affirms an explicitly dualistic conception according to which the realm of pure thought stands over and against a not yet synthesized manifold of sensation (a not yet formed 'matter')," leading to "particularly vexing problems […] in attempting to explain the application of the categories to objects of experience" (ibid., 29, 31, 33). This is a foundation for which "the gulf between pure logic and 'reality'"—and between the other distinctions, such as those "between the 'ideal' forms of judgement and the 'preconceptual' manifold of sensation, between thought and 'reality', between 'validity' and 'being'"—"becomes, in the end, the gulf between value and fact" (ibid., 33, 34–5). The most immediate problem is that of their relation: Even if we take it that the separation between *Sein* and *Sollen* entails a commitment to the view that the latter cannot be reduced to the former—both in the sense of Hume's law (that no *Sollen* can be derived from any *Sein*) and in the idealistic sense that what is real is rational—we will still have to figure out how these two realms can find any points of contact.[38] Kelsen solves this problem tak-

[35] On the ontological understanding, the investigation will be aimed at describing the necessary structure of law such as it exists, whereas on the transcendental understanding, the object law is constituted by concepts on the basis of the distinction between alogical material and transcendental logic. For Heidemann (1997, 43ff.), this second way of conceiving the object of knowledge (on the basis of an identity between judgment and norm) is what distinguishes neo-Kantian philosophy from Kantianism at large. For a critique of this approach, see Paulson 1999, 355ff.

[36] This amenability to a twofold reading can suggest an ambiguity in Kelsen's thought, or even an antinomy. The ambiguities/antinomies in the pure theory often take centre stage in the critical literature. For an overview, see Papaefthymiou 2004, discussing the antinomies deriving from (*a*) the co-presence of "Kantian and positivistic ingredients," (*b*) "the Is-Ought separation and the fact-value connection," and (*c*) "the coexistence of a dynamic and a static system."

[37] For Friedman (2000, 28), this separation flows directly from a rejection of the "idea of an independent faculty of pure intuition" while claiming that there exists "an 'ideal' realm of timeless, formal-logical structures."

[38] One way in which the complexity of the problem of the relation between *Sein* and *Sollen*

ing his cue from Rickert: The nexus lies in the *meaning* ascribed to acts and events, and so in an intermediate "realm" between facts and values. "In the act of judging something we express the sense of value": This act "is located in a *third* realm, between that of reality and that of values, and that is the realm of *meaning*" (Abbagnano 1999, 560; my translation). This idea is fleshed out in neo-Kantianism and by Kelsen on the basis of two distinctions: that between the psychological sphere and logical sense, and that between subjective and objective meaning.[39] Objective meaning, located in the sphere of normativity and the ought, is explained on the basis of Cohen's and Cassirer's logicism (and in particular by separating psychology from the logic of the origin of relations). In Kelsen's view, the objective ought is predicated on the "specific existence of the norm" (Kelsen 2001, 12), an existence in turn dependent on the norm's validity. This complex web of mutually referring concepts (meaning, objective ought, specific existence, validity) and the framing of the problem of the relation between fact and value are to be viewed in light of Kelsen's neo-Kantian approach, where the existence of positive law and the legal system figure as background assumptions and are conceived as givens (somewhat in parallel to the "fact of science": Paulson 2002a, 19). The ought as a category is in this sense a device by which to guarantee the "objectivity" of our scientific knowledge of existing law (Paulson 2005b, 282; 2012a, 109–11).[40]

The decisive moment in Kelsen's theoretical development lies in his singling out the characteristics distinctive to two modes of knowledge and in the consequent distinction between sciences of the is and sciences of the ought. This singling out and these characteristics issue from a set of general assumptions (those that, as has been indicated, are distinctive to neo-Kantianism), which are then specified into the fundamental distinctions pertaining to the relations and modalities by which the world of the is and that of the ought are marked. In

can be appreciated is by considering the role of lawmaking. Kelsen sees the lawmaking process as a social function (and so as belonging to the world of the is), but at the same time he highlights how this process acts as the "pipeline through which customs, morality, economic interests, and religious concerns turn into legal propositions," and he comments that in this passage lies "the great mystery of law and the state" (Kelsen 1960a, 410–1).

[39] In Kelsen 1960a, the subjective dimension is that which depends on someone's will, while the objective dimension is given by the norm underpinning a judgment. On these distinctions, see Heidemann 1997, 29–30.

[40] The relation between *Sein* and *Sollen* and the role of the neo-Kantian categories (Paulson 2005a, 193ff; 2007b, 149ff.; 2012a, 109ff.) can be read in light of Rickert's (1904) distinction between categories of reality (which are transcendental) and methodological forms (which are specific to each type of science). This thesis (Paulson 2012a, 109) is based in part on the fact that Kelsen's transcendental argumentation appears inconclusive (whether read in a regressive-analytical sense or in a synthetic-constructive sense). On top of this analysis we can add Kelsen's (2001, 24) view of the *Sollen* as a "relative a priori category," that is, a category the law necessarily depends on if it is to be viewed as a system of objective propositions (see Paulson 2002a, 18; Alexy 2002b; Heidemann 1997, 56–7).

distinguishing the two approaches (and the two worlds of the *Sein* and the *Sollen*), Kelsen proceeds in three stages. His starting point is judgment as a model of knowledge,[41] where primacy is accorded to hypothetical judgments as a basis on which to identify the object of investigation (having superseded intuition as an aspect of the transcendental foundation of law). From the centrality of hypothetical judgment flows the theory's formal nature as a theory framed by the *relations* it sets up among events/phenomena (then, too, as we have seen, it is a fundamental role that Kelsen ascribes to the distinction between form and content).[42] And, in the third place, these two directions of knowledge are built on the basis of the relation between universal and particular, in that judgment forges a unity out of the multiplicity of phenomena (a principle understood to hold in scientific and normative law alike). As we will see, this is something that Kelsen underscores by arguing that the legal proposition is grounded in juridical law, and hence in the principle of unity posited by that law. Kelsen thus distinguishes two modes of knowledge depending on the different kinds of relations among phenomena we are dealing with: In the sciences of being we are concerned with causal relations; in the normative sciences, with imputative relations.[43] The distinction between causality and imputation lies in the different modality of hypothetical judgment: Where causality is concerned, judgment establishes a necessary relation between phenomena (a relation of cause and effect); where imputation is concerned, the relation established by judgment is only contingent and possible (and hence not necessary). The distinction between these two modes of knowledge is thus predicated on the different kinds of relations taken as an object of knowledge (causal relations on the one hand, imputative ones on the other), as well as on the different modality by which those relations are characterized.[44] This distinction enables Kelsen to do away with teleological criteria as a basis on which to identify normative disciplines, in that purposes are a function of the will and so belong to the sphere of the *Sein* (Kelsen 1960a, 57ff.; on these questions, see Heidemann 1997, 26). The distinction between causality and imputation makes it possible to distinguish explanatory and normative sciences and to specify their distinctive traits: The normative sciences are necessarily tied to the ought.[45]

[41] On the central role of judgment in Rickert's and Kelsen's thought, see Heidemann 2002, 215.

[42] The relational approach is one on which, from Rickert's perspective, "scientific concepts are […] concepts set in relation to one another" (M. Ferrari 1997, 153; my translation).

[43] In Kelsen's 1911 *Hauptprobleme* (Kelsen 1960a) we do not yet find the distinction between central and peripheral imputation, the former ascribing something to someone (a subject), the latter setting out a connection among phenomena. Only in the 1920s does Kelsen (1920; 1925a, 65) distinguish these two types of imputation, all the while recognizing a central role for peripheral imputation in the process of knowledge. On these questions, see Paulson 2012a, 103ff.

[44] For Kelsen (1960a, 4) are normative: juridical laws, moral and customary laws (those arising in custom, or *Sitten*), the rules of logic, grammar, and aesthetic.

[45] Kelsen (2010, 552ff., 562) proceeds on this basis to criticize Rickert's distinction, where the explanatory sciences are set in opposition not to normative ones but to cultural ones. Kelsen's

These distinctions are geared toward achieving methodological purity, a standard centred on the need to eliminate all manner of syncretism. Kelsen's analysis can in this sense be characterized as metatheoretical, inasmuch as it applies across the board to all sciences. When we turn to law as an object of analysis, the point (as we just saw) is to keep the causal mode of consideration out of the way and not confuse it with the normative mode.[46] This principle reflects as well the rule (classically formulated in the effort to avoid the naturalistic fallacy) under which assertions about facts must be separated from assertions about duty: This is a fundamental through line in Kelsen's methodological construction.[47] On this purist approach, scientificity is thus identified with unitarity (and oneness), that is, with the need to identify a unifying relational nexus structuring the phenomena being investigated. And of course, as we saw, this rules out any recourse to postulates extraneous to the construction, and in particular it keeps out all ethico-political postulates. Methodological purity is thus to be understood as a criterion on which basis to say what it is for scientific knowledge to be valid. Here scientific knowledge is primarily concerned with dogmatic legal science,[48] which in turn is exclusively concerned with positive law (without bringing in any moral considerations grounded in natural law).

In several important respects, Kelsen's conception breaks new ground on the question of the concept of law. In the first place, law is identified in light of the distinctive relation found to hold among phenomena, a relation based on the ought (*Sollen*). As was previously discussed, it is only by belonging to the ought that a legal sentence can have any meaning, where meaning is the proposition expressed by that sentence: A legal proposition (*Rechtssatz*) expresses the basic structure of a legal sentence. Legal sentences (the norms of positive law) are hypothetical judgments based on an imputative relation. Kelsen's positivism thus frames the concept of law around that of a norm, describing its basic form as an element of the *Sollen*. This basic form lies in the idea of a norm as a "hypothetical judgment," which accordingly becomes the core element of legal science, and whose distinctive trait lies in its excluding all aspects involv-

distinction is meant to point up the incoherencies in Rickert's concepts of culture and value. Value, in particular, is seen as a twofold notion, for on the one hand it picks out the "human evaluations such as they appear in history," while on the other hand it figures as a fundamental aspect of the transcendental dimension. This ambiguity is liable to cast in an objectively valid light that which is no more than the outcome of actual, and hence subjective, evaluations. Kelsen regards all historical values as relative, and so as falling outside the realm of scientific inquiry, which only concerns itself with formal nexuses.

[46] In this framework, as we will see, Kelsen (1960a; 1922b) resolutely rejects Jellinek's theory of the "normative force" of facts.

[47] These methodological distinctions, as mentioned, entail a commitment to the view that no ought can be derived from any is.

[48] The role of legal dogmatics, as we saw at footnote 22, lies at the centre of the polemic between Kelsen and Sander.

ing causal relations (as well as all fictitious entities). Having located law in the ought—and in particular in the concept of a norm as an ought judgment—Kelsen proceeds to identify the specificities of this legal ought. This he does principally in two ways: by distinguishing the legal ought from morality and by setting out the role that sanctions play in defining the legal ought. In the *Hauptprobleme*, the relation between moral and legal norms (*Sittengesetz und Rechtsnorm*) is analyzed by Kelsen by denying that there can be any analogy between law and morality and by setting out the criteria by which to distinguish the two: Whereas morality presupposes "the principle of individual autonomy, or moral self-determination," law is conceived in heteronomy (Kelsen 1960a, 34). In fact, the legal ought is not just heteronomous: It is also marked by its coerciveness or enforceability (the fact that compliance with it can be exacted by force). Law can thus be identified by looking at whether a sanction (or punishment) is provided as a consequence of noncompliance and whether it is coercive. As we will see, these are the two bases on which the law can be characterized as a legal hypothetical judgment. This formal framework entails the thesis that a norm's existence (as well as its validity) is independent of its content: Kelsen thinks that law cannot be defined by any specific content, and in particular by any moral content. The reality and validity of norms are therefore not contingent on their embodying any substantive ideas.

From this account of the concept of law flows a decisive consequence as concerns the problem of the obligatoriness of law. As has been noted (Paulson 1998, XXX–XXXV), Kelsen's conception moves away from both the natural law tradition and the 19th century positivist tradition: Neither any content of natural law nor any social fact or mode of behaviour needs to be reflected in a legal norm in order for it to qualify as binding. Kelsen's solution to this problem charts a middle course relative to previous approaches, by identifying a norm's bindingness with its existence and validity. Kelsen, in other words, is looking for a specifically *legal* foundation by avoiding recourse to any foundations outside law itself (Alexy 2002a, 95ff.). His reliance on the neo-Kantian approach is also a way for him to show the inadequacy of those two legal traditions (legal positivism and natural law theory), all the while supporting the twofold thesis that positive law is (*a*) separate from morality and (*b*) endowed with a distinctive normativity of its own.

8.3. Kelsen's Theory of Norms: Between Nature and Morality

The most direct embodiment of this analysis of law lies in Kelsen's theory of legal norms. In firming up the view of legal norms as analogous to the law-like statements of science, in that both share the form of the hypothetical judgment,[49]

[49] As is known, the idea of a legal norm as a conditional statement was first put forward by Zitelman (1879).

Kelsen specified the exact nature of legal norms by arguing, as we saw, that the hypothetical judgment in question is an imputative one providing a sanction as an essential element of the ought relation. Kelsen proceeded along two parallel paths in this endeavour to explain the features of the legal norm, on the one hand identifying the features distinctive to the legal ought relation—where the point is made that legal norms are neither natural phenomena (set in the world of the is) nor moral ones—while at the same time setting out a typology of norms and their validity. His analysis of the basic elements of the ought judgment in the legal sphere has an important application when it comes to laying out the structure of norms. The typology of norms (and the problem of their validity) is worked out on the basis of the dynamic conception of norms: It is within the framework of the relationship among norms that he describes the relations of authorization and delegation involved in the passage from a higher norm to a lower one (in the lawmaking process).[50]

In specifying the features of the legal ought, Kelsen starts out by rejecting the role traditionally ascribed to the processes by which norms are formed and to the will as an element on which basis to understand the normative phenomenon itself. These processes belong to the world of the is, and it would be a mistake to conflate them with legal norms: For Kelsen, the empirical formation of law should play no part in defining the concept of law. All those approaches that look to empirical processes to arrive at an understanding of law mistake the is for the ought. The need to distinguish the *Sein* from the *Sollen* is highlighted by Kelsen in his criticism of those theories that equate norms with the processes by which they are formed, and that more generally fail to distinguish norms from facts and the will (both being empirical). The targets of Kelsen's criticism are Jellinek's (1905, 329–36) theory of the *normativen Kraft des Faktischen* (the normative force of the factual), the historical school of law and the role it ascribes to customary law, and the theories that identify legislation with normativity. Kelsen shows that the idea that normativity arises out of empirical processes stems from a failure to distinguish normativity from psychological processes, a failure that leads one to misunderstand the essential features of normativity. As far as Jellinek's theory is concerned, Kelsen (1960a, 9; 1922b, 114–20) argues that the so-called normative force of facts can only explain the way duty comes about or is extinguished on a psychological level, but it can neither account for the origin of normativity (a *Sollen* can only derive from another *Sollen*) nor describe its structure. Similar considerations are made in regard to customary law: In rejecting the historical school's view of customary law as a sort of self-legislation embodying a set of ethico-political values, Kelsen (ibid., 33ff.) notes that to make this argument is to disregard the heteronomous nature of law (among other problems the view suffers from). And

[50] According to Paulson (2012a, 83–5) the specificity of Kelsen's theory lies precisely in his conception of the norm as a form of "empowerment."

the same also holds for legislation: As much as legislation may be a condition for there to be law, it cannot be taken to be the same thing as normativity itself. Kelsen (ibid., 405–12) targets the German tradition in the theory of public law for its view of law as the will of the state,[51] and he criticizes this view by showing both that the production of law is a *social* process and that normativity lies in the binding force sealed into a rule and cannot be located in the creation of law (that is, in a causal relation). Kelsen argues that the *Sollen* and law are autonomous from the phenomena that call for a causal explanation: In this sense, norms are to be understood as "rules that bring imputative relations into being" (Heidemann 1997, 36ff.).

In making this argument, Kelsen draws an essential distinction between norms and the will, arguing that if the will is to have any role in an understanding of the law, it must be conceived in an exclusively normative sense. The legal will—set in contrast to psychological will, which is causal—is identified by Kelsen (1960a, 182–8) with the normative relation: The legal will is none other than the relation of imputability, whereby the normative consequence flowing from an illicit behaviour is imputed to the state. So when Kelsen, in the *Hauptprobleme*, defines law as the will of the state, he is referring not to a psychological will (in the world of the is)[52] but to the (juridical) will constituted by norms. The relation between norms and the will is turned on its head: Rather than *instituting* norms, the will—understood as the imputation through which the reaction to an offence is ascribed to the state—is *instituted by* them (Heidemann 1997, 35).[53]

Norms must therefore be understood in light of the distinction between acts and the meaning ascribed to them (a distinction parallel to that between *Sein* and *Sollen*): As an ought, a norm consists of content, or meaning; as the meaning ascribable to an act, a norm (in parallel to nonlegal norms) sets up an ought relation between a premise and a consequence (the imputation); as an aspect of the *Sollen*, a norm therefore consists of an ideal content, or meaning.[54]

This assumption is made explicit by Kelsen in his characterization of law in the realm of the ought, that is, in specifying the features that distinguish

[51] Kelsen points out Jellinek 1905 and Anschütz 1891, among other works in which this view is espoused.

[52] Nor, consequently, should the state be understood to have any unitary will (Kelsen 1960a, 162ff.)

[53] In the *Hauptprobleme*, Kelsen (1960a, 71–2) distinguishes two elements of a norm: the subject (the person who owes a duty) and the object (that which is owed), both constituted by the normative relation. In later writings (Kelsen 2001, 48) this terminology changes (see Heidemann 1997, 71), and the subject (or person) is reframed as the "personification of a subsystem" of rights and obligations. But even in the first formulation the subject recognized by law is distinguished from humans understood as natural persons.

[54] A norm can in this sense also be understood as a *Deutungsschema*, that is, a scheme on which basis to interpret facts.

legal norms from other kinds of norms, and moral ones in particular.[55] Kelsen, as we have seen, resorts to the idea of the coerciveness of law (an idea he arrives at by working from the distinction between autonomy and heteronomy). In line with the "tradition of nineteenth-century positivist legal theory," Kelsen characterizes a legal norm as a "coercive norm," such that "the consequence attached in the reconstructed legal norm to a certain condition is the coercive act of the state—comprising punishment and the civil or administrative use of coercion" (Kelsen 2001, 26). The legal norm consists in the relation between "the conditioning material fact […] qualified as an unlawful act and […] the conditioned material fact […] qualified as the consequence of the unlawful act" (ibid.).[56] Reasoning from the premise that "the law is never individual or autonomous," Kelsen (1960a, 35; my translation) shows that what makes legal norms unique lies in their making certain actions sanctionable (subject to penalty) and in the possibility of applying the same norms coercively: "This possibility of [coercive] application forms part of the essence of law. There is no law without the courts!" (ibid.). The law is in this sense heteronomous, a distinguishing feature of it that goes hand in hand with the institutional possibility of setting forth sanctions: That is where we must locate the difference between the legal ought and the moral ought.[57]

The structure of norms is defined by Kelsen through a critical contrast with the mainstream view of norms in 19th century jurisprudence: the idea of norms as imperatives.[58] The imperativist view is criticized for ascribing an inconclusive role to coercion and for presupposing a psychological relation of super- and subordination. Kelsen (1960a, 222ff.) exemplifies imperativism by reference to Jellinek's (1905, 325ff.) theory of norms as *garantierte Normen* (guaranteed standards). The problem is that of coercion (*Zwangsmittel*) in framing the concept of a norm: A contrast is set up by Kelsen between "theorists of imperativism who exclude the so-called coercive moment in framing the idea of a legal norm" and theorists who, by contrast, understand this to be an essential trait (Kelsen 1960a, 221–4; my translation). Jellinek thought that coercion is too restrictive as an element on which basis to define norms, and that it must therefore be replaced with the broader concept of a "guarantee."

[55] Kelsen holds that "the formal category of norm—the category designated by 'ought'—yields only the genus, not the *differentia specifica*, of the law." (Kelsen 2001, 26).

[56] Kelsen specifies that "what makes certain human behaviour illegal—a delict (in the broadest sense of the word)—is neither some sort of immanent quality nor some sort of connection to a metalegal norm, to a moral value, a value transcending the positive law" (Kelsen 2001, 26).

[57] According to Heidemann (1997, 37–8) the separation between law and morality (between the legal and the moral) is defended by Kelsen on other grounds, too. More to the point, Kelsen argues that a connection would (*a*) make it impossible to have an autonomous legal science, (*b*) present moral norms as objective, (*c*) make difficult the idea of certainty in the law, and (*d*) run contrary to legal practice.

[58] The structure of norms is a problem that Kelsen (1960a, 237) frames in terms of their "ideal linguistic form." See Paulson 2012a, 78.

On this theory, norms owe their existence to a "recognized external authority": A norm, in other words, is said to exist insofar as it "can act as a motive for action," and hence insofar as "its psychological effectiveness is guaranteed" (Jellinek 1905, 325–6; my translation). A norm, on the imperativist view, is an "imperative requiring compliant behaviour by those subject to it": Its essential trait lies in its "motivational force." This motivational force, stemming from an "authority […] that in the representations of individuals acts as a motive of behaviour" (Kelsen 1960a, 222-223; my translation), presupposes a power relation, that is, a relation of super- and subordination. A norm is in this sense the command issued by an authority that on the basis of a power relation can prompt others to action. On the German imperativist view, this authority is the state. This means that a command qualifies as such by virtue of its "coming from the state," on the principle "that one must do that which is willed [*verlangt*] by the state" (ibid., 224; my translation). As Kelsen underscores, this means that "the relation between the state and its subjects" is understood as "a relation of super- and subordination based on the state's de facto power: On its physical and psychological force" (ibid., 225; my translation).[59]

Kelsen's point is that this conception does not reflect a normative stance, and that it grows out of a confusion between is and ought. For Kelsen, "every relation of super- or subordination—of dominion, power, or command—is by nature exclusively factual" (ibid., 226; my translation) and bears no relevance to any juridical consideration. Law cannot be viewed naturalistically as a "duty of obedience or disobedience" in response to a command issued by a higher power, for that is tantamount to reducing the bindingness of law to the factual relations it sets up. On the normative approach, the idea of law as a hypothetical judgment entails, by contrast, that the relations among those subject to the law depend neither on the de facto power relations (*faktischen Machtverhältnisse*) nor on the psychological motivations that make for compliance. Legal norms must instead be viewed in light of the bindingness arising out of the imputative relation:[60] A legal norm is thus a hypothetical judgment (*hypothetische Urteil*). In the law, as discussed, this judgment is captured in a scheme as follows: If certain illegal behaviours take place, the state will react with certain other behaviours understood as consequences of those offences, that is, the state will punish the offender or enforce a judgment (Heidemann 1997, 66–7).[61]

[59] From this perspective, the "guarantee" built into a norm (its guaranteed compliance) may also be rooted in "moral or religious motives" (Kelsen 1960a, 222; my translation).

[60] As was noted earlier at footnote 43, Kelsen draws no distinction in the *Hauptprobleme* between peripheral and central imputation, the former attaching a consequence to a premise, the latter setting up a relation between a possible fact and a subject (or person).

[61] This relation is described by Kelsen (1925a, 49) through the formula "Wenn M^h + E (oder M^u + E), so Z → M," which can be written out as follows: When certain acts or omissions to act give rise to certain facts (*Ereignisse*), there will follow a coercive reaction by the competent authorities targeting the authors of those same acts or omissions.

The legal hypothetical judgment (setting up the imputative relation) is thus made up of an antecedent (protasis) and a legal consequence (apodosis) that consists of a sanction (a punishment or the enforcement of a judgment). As has been pointed out (Celano 1999, 216–7; Paulson 2012a, 78–85), this structure of the norm reveals that the ought refers not so much to the behaviour of those bound by the law as to that of the state carrying out a sanction, since "what all legal norms state is that under certain conditions there 'must' follow just one behaviour, namely, the exercise of coercive power (the enforcement of coercive measures)" (Celano 1999, 214; my translation). If what must be is the sanction, it follows that "a legal norm, in setting forth a sanction, *authorizes* a given individual or group of individuals to carry out that sanction; in other words, a legal norm *empowers* them to apply the norm itself" (ibid., 216–7). This is to say that "the 'ought' whose object is the sanction […] entails the notion of authorization, signifying a conferral of normative power" (ibid., 217).[62]

In keeping with this analysis, Kelsen worked out a typology of norms upending the relation that jurisprudence had previously found to hold between primary and secondary norms, all the while proceeding on a distinction between general and individual norms. In Kelsen, primary norms (norms proper) are no longer those that set out rules of conduct but those that impute (or attach) a sanction to certain behaviours.[63] This inversion needs to be read in light of Kelsen's investigation of the structure of norms, for on the one hand law is no longer seen as a model of conduct (as an obligation) but as an imputative relation attaching a sanction to a given behaviour (a desubstantializing conception of law), and on the other hand law presents itself as a set of prescriptions mainly addressed to the enforcers (prescriptions authorizing those who are to apply the given sanction).[64]

[62] According to Bobbio, this means that the law is understood by Kelsen as "a set of norms regulating the use of force," or as a technique for governing the use of force (Bobbio 2012, 102; my translation; English translation Bobbio 1965b). On this view, norms can thus be described as prescriptions mainly addressed at the judges (Barberis 2008a, 126).

[63] In previous jurisprudential thought, primary norms were those that set forth rules of conduct (like those that prohibit theft), whereas secondary norms were those that provide a sanction for the prohibited conduct (in the example, the norms that punish theft). On these distinctions, see Gavazzi 1967.

[64] This conception corresponds to the notion of a norm in a strict sense found in the 1911 *Hauptprobleme* (Kelsen 1960a, 189ff.), where the basic breakdown is between these norms and norms in a broad sense: In this latter sense, norms establish that which the state *wills* as concerns its own behaviour (the state may will its own enforcement of a sanction or its own provision of a service, so that we have a negative duty in the first case and a positive one in the second); in a strict sense, norms establish the way the state will *react* to the behaviour of citizens (by enforcing the appropriate sanctions). Norms in a strict sense thus describe a specifically qualified and conditioned behaviour of the state, where the condition is given by a citizen's behaviour and the consequence by the corresponding sanction. This means that, given certain circumstances, the state will behave in a certain way: If citizens do *x*, then the state will do *y* (Heidemann 1997, 38–40; Paulson 2012a, 82). The idea of a norm in a broad sense would later be abandoned by Kelsen.

The distinction between general and individual norms is present throughout the Kelsenian oeuvre, but it takes on a new meaning with Kelsen's adoption of the dynamic conception, where it is reworked within the framework of the hierarchical view of the legal system: The relationship between a general norm (higher and abstract) and an individual norm (lower and concrete) is now seen as a relationship of authorization or delegation. The lower norm is made possible by an "authorization" provided by the higher norm. The passage from a general norm to an individual one therefore requires a delegation mechanism (through which powers are conferred on competent authorities on the basis of specific procedures), which in turn presupposes a multilayered legal system (Celano 1999, 304–12).

As we will see, the adoption of a dynamic perspective will lead Kelsen to rethink as well the way he understands both the validity and the interpretation of norms. Indeed, in the 1911 *Hauptprobleme* Kelsen takes the view that once you have specified the features of a legal norm, you have somehow already accounted for their validity and interpretation. For this reason, he does not frontally address the validity of norms in that work, except to underscore its distinction from the efficacy of norms (on the basis of the distinction between *Sein* and *Sollen*), while denying that efficacy plays any role as a pertinent legal question (Kelsen 1960a, 352–3). Similar considerations are made with regard to the problem of how norms are interpreted and applied: A norm is concretized simply by virtue of applying the higher general norm, in which the contours of the lower norm are already contained; in this sense, all secondary legislation can be said to be contained in the relative primary legislation (a regulation, for example, or even an executive order, is contained in the act conferring the powers to issue it). Interpretation is not for legal science to be concerned with but is something metalegal that finds its place only where a norm cannot be clear. It is in any event a problem that does not affect the life of the law in any significant way.

8.4. The Vienna School's Theory of the Legal System: The Law as a *Stufenbau* and the *Grundnorm*

Kelsen's theory took an important turn in the 1920s, when, as noted, he embraced the dynamic perspective in the analysis of law and consequently also took up the *Stufenbaulehre* (or doctrine of hierarchical structure in the law) and the *Grundnorm* (or basic norm), the former describing the structure of the legal system and the latter providing its unifying principle. These new elements, introduced by drawing on the work of Adolf J. Merkl (1968a, 1968b, 1968c), innovate the *reine Rechtslehre* (or pure theory of law) in important ways. In the preface to the second edition of the *Hauptprobleme*, Kelsen underscores that the passage from the static to the dynamic conception of law marks "a significant change in the system of the pure theory of law as against the original conception of the system in *Main Problems*" (Kelsen 1998, 11).

In introducing these innovations, systematically laid out in the 1925 *Allgemeine Staatslehre* (General theory of the state: Kelsen 1925a) and the 1934 *Reine Rechtslehre* (translated in English as Kelsen 2001), Kelsen points out that the reason for them is to make up for some important shortcomings in his earlier conception. This holds in particular for the relation between general norms and the (individual) norms that apply them, as well as for the ensuing problem of the unity of legal norms, which are produced by different subjects and can take different contents. It is in working to solve these problems that Kelsen introduces the dynamic conception of law, which sits next to the static one. The law is now defined not only by the ought relation captured in each legal norm but also by the relation among norms (the law as a system). This shift makes it necessary to broaden the scope of the analysis: The law is no longer considered only in its "idle state," by "abstracting from the process by which it is brought into being […] and from the processes through which the law changes over time" but is investigated by also taking into account this very "process of formation and transformation" (Celano 1999, 107–8; my translation, referring to Kelsen 2006). This means that a whole series of problems hitherto regarded by Kelsen (1960a, 353) as "legally" irrelevant now become central. This concerns in particular the problem of the validity of norms (the fact that norms "must be observed and applied") and that of the foundation of their validity, that is, the "complex of reasons […] justifying the conclusion that we ought to behave as prescribed by the norm" (Celano 1999, 278; my translation).[65]

Indeed, as Kelsen points out, that is the main shortcoming of his own previous work: Even though, as he says,

> I am thoroughly aware in *Main Problems* that the abstract legal norm is significantly different in content from the concrete state act enforcing it, that the latter contains not only the elements established in the abstract norm, but also many others (Kelsen 1998, 11–2)

he does not draw from this premise the consequence that the "the concrete acts of so-called enforcement […] must be understood […] as acts of law, as legal acts" (ibid.). For this reason,

> if the general legal norm, like the individual state act, must be comprehended in terms of unity within the legal system, then this postulated unity […] cannot be established in such a way that one thinks […] that the individual norm is essentially contained […] in the general norm, [since] the content of the individual norm goes far beyond the content of the general norm. (Ibid.)

[65] In the 1911 *Hauptprobleme*, Kelsen argues that "inherent in the concept of a legal norm from the outset […] is the idea that it must be observed and applied. This qualification—that each norm must be observed and applied—is contained *ab initio* in the description of a legal proposition as a legal norm" (Kelsen 1960a, 352–3; my translation). It is not for the jurist to inquire into the foundation of validity: The jurist is tasked with "ascertaining the how, not the why," and can only investigate the "logical form" of legal propositions. On these aspects, see Paulson 2013, 45–9.

The problem, then, is to account for the validity of lower norms, whose content cannot be derived from the higher norms, "as if the validated norm were 'already contained' in the validating norm" (Celano 1999, 300; my translation).

In working to solve this problem, Kelsen takes as given the distinction between *Sein* and *Sollen*: From this premise he draws the necessary conclusion that "the foundation of a norm's validity lies in a norm,"[66] and from here he arrives at the solution that, more to the point, validity depends on "the processes by which the law is produced" (Celano 1999, 285, 291; my translation). If "the only way a norm can be validated (the only way a judgment about its validity can be grounded) is to assume the validity of another norm," this relation cannot be analogized to that between a "particular concept" and a "general" one (ibid., 297, 301; my translation) but must rather be conceived as involving the act of a competent authority (an act from which alone can come the validity of any lower norm). Kelsen takes up Merkl's work on the general theory of law (see Merkl 1968b, 1091ff., 1903), drawing in particular on his thesis that it is necessary to find "an element of normative mediation" (Abignente 1984, 15; my translation) acting as a liaison between a norm (general and abstract) and the act through which it is applied.[67] This "intermediate element," through which "the abstract hypothesis expressed in a norm is translated into a concrete command or is reduced to such a command" (ibid.), is achieved by "combining a subjective factor with an objective one" (Merkl 1968b, 1096). It is to this element that the law owes its dynamic nature, by which is meant its regulating its own production by authorizing other organs to issue norms that both produce and apply higher norms:[68] This is achieved by "delegating power" (Celano 1999, 311; my translation), in which consists Merkl's mediating element, namely, the act by which a lower source is authorized by a higher, validating source (which in this way grounds the validity of the lower source). So by way of delegation and authorization, a norm confers on lower organs the "competence" to create new legal rules.[69] Which means that the higher norm, as we have seen, is an "authorizing norm, that is, a norm that sets up an authority" (ibid., 304–5; my translation). In this sense, the "power conferred by the authorizing norm is

[66] This foundation, as we have seen, cannot be reduced to any acts of will or to a norm's efficacy (Celano 1999, 284–5).

[67] On Merkl see also Section 2.4.1 in Tome 1 of this volume.

[68] According to Merkl, if "the production or application of law takes place […] by virtue of an organ concretizing or individualizing the given legal matter to a greater or lesser extent" (Merkl 1968b, 1096) the law acquires a twofold structure where a norm represents two acts: one by which law is *produced* and another by which it is *applied*.

[69] For Kelsen, the norms through which power is delegated to an organ (which is thus authorized to use the same power) do not constitute a class of their own: Power-conferring norms (like those found in a constitution) are "not independent complete norms. They are intrinsic parts of all the legal norms which the courts and other organs have to apply" (Kelsen 2006, 143–4). As is known, the distinction between rules of conduct and power-conferring rules was later developed by Hart (1961). On these questions, see Barberis 2008a, 126–9.

[…] a normative power, in the twofold sense of being […] a power conferred by norms and a power to produce norms" (ibid., 305; my translation).

Law is seen as a system at once dynamic and formal, in which "a norm is valid qua legal norm […] because it was […] created according to a certain rule, issued or set according to a specific method" (Kelsen 2001, 56). The system is hierarchically structured (ibid., 63ff.): "A conditioned norm (*bedingte Norm*) owes its validity to its conditioning norm (*bedingende Norm*)" (Abignente 1984, 18). The law presents itself as a dynamic order, as a process of progressive concretization, a process imparting to it a hierarchical stepwise structure termed *Stufenbau*, in that the lower norm is created by delegation of powers conferred by a higher norm, however much the modes of creation may vary across different areas and levels of the law. But three basic levels may be distinguished in the hierarchical structure, corresponding to three successive stages in the law-creating process: We have the constitutional level, the legislative one, and the applicative one, this last one comprising adjudication, administration, and "private" normative production (all equally ranked in the hierarchy). The legal order is thus depicted as a hierarchy of planes: a system for the production and application of norms, general and individual alike, that find their place within the same normative pyramid.

The *Stufenbaulehre*—marking the shift from the solely normative conception of law to its conception as a dynamic order—brings a series of innovations to the architecture of the pure theory, while firming up its basic features.

In the first place, to qualify the law as a dynamic order is to identify a criterion by which to tell what makes for a valid norm and what the distinction is between law and morality, in that both questions are answered by looking at whether a norm belongs to the order and the way it fits into that order. So the validity of a norm is specified in relation to the structure of the legal order and the relationships that obtain within that order, and the distinction between law and morality is drawn on the basis of the different characteristics peculiar to the two orders (the legal one and the moral one). As discussed, the validity of a norm is determined on the basis of its belonging to the legal system: An individual norm is valid if its production is delegated by a higher norm (this is what Kelsen describes as an "objective ought"). It is on the basis of these norm-producing criteria that the validity of norms is determined: A norm is said to be valid if its production can be traced to a higher (validating) norm. And on this basis Kelsen comes to equate the existence of a norm with its validity: From the dynamic perspective, a legal norm exists insofar as it is valid (and is thus binding), that is, if it has been issued in accordance with the appropriate delegation and authorization criteria. This characteristic of the legal system marks its distinction from morality: The latter consists of a set of norms linked up only on the basis of their content. Morality is understood by Kelsen as a static set of norms where the derivation of lower norms from higher ones can only be based on content, that is, it must be deductive. The distinction

between static and dynamic orders maps onto that between morality and law: Moral systems are content-dependent, whereas "any content whatever can be law" (Kelsen 2001, 56). Although this should not be understood as an absolute statement,[70] it does provide one of the bases of Kelsen's legal relativism: If law is a system that governs its own creation, then it can have any range of contents. Unlike systems of natural law, for example, which identify law with morality and thus posit universal principles as their foundation, Kelsen's legal positivism does not set any content-specific criteria in order for something to count as law. The distinction between law and morality thus turns on their different techniques: The law fixes criteria by which to produce norms (with the exception that this must be in keeping with the substantive constraints set forth in the constitution), whereas morality is concerned with questions of substance (i.e., content) and nothing else besides.[71]

In the second place, Kelsen expands the notion of normative production (*Rechtssetzung*), which is no longer limited to statutory enactment (as was the case in the *Hauptprobleme*)[72] but also includes the constitution and so-called individual norms (court rulings, administrative actions, and legal transactions between private parties). From the dynamic perspective, the legal order includes both supra-legislative law and the legal activity of state organs and private entities. With the introduction of the hierarchical-structure of law, the constitution is recognized as a higher source of law having a direct normative bearing as a norm setting out the different functions of the state. The lawmaking process is conceived as the process of applying higher norms, and that entails the need to bring that activity under judicial review to determine whether the norms so produced are compliant with those higher norms as to both form and content (Kelsen 1928a). From this perspective, even the series of acts by which law is applied takes on a different meaning. In the *Hauptprobleme*, as we saw, these acts represent only one moment in the "implementation" (*Ausführung*) of the obligation contained in the norm: No legal norms are directly brought into being in that moment, and in this sense the processes in question are confined to enforcing the *consequence* deriving from a breach or offence or to pursuing the social aims entrusted to the state. The dynamic conception revisits this notion of enforcement by claiming that even administrative regulations, court rulings, and legal transactions between private parties contain legal norms, and these norms cannot be found simply by looking them up (*Rechtsfindung*).[73]

[70] One need only consider here what Kelsen (1944, 87–8) said about individual liability for the violation of international law.

[71] On Kelsen's view of natural law theory, see in particular Kelsen 1927–1928a, 1968b.

[72] On the approach taken in the *Hauptprobleme*, the features of normativity are such that they only apply to statutory law.

[73] In laying out the import of the *Stufenbaulehre*, Kelsen and Merkl underscore how this construction entails (among other things) a need to revise the traditional account of the functions of the state, or the theory of the three powers of government. As Merkl points out, "the

In the third place, the *Stufenbaulehre* changes the criterion on which basis to theorize the unity of law. In a hierarchical system the legal order can be understood as unitary if there can be presumed to exist at its apex a higher law-creating norm (the *Grundnorm*), which is to be identified with the constitution in a logico-juridical sense (Kelsen 1922b, 94), and which is stipulated as a meta-alegal hypothesis by which to close the system.[74] For Kelsen, "the sought-after unity can only be the unity of a rule of creation; law creation itself, as a legally relevant material fact, must be understood as the content of a reconstructed legal norm" (Kelsen 1998, 12). Unlike Kelsen's previous thought—where the problem of unity is solved by looking to the law of noncontradiction among the norms (or statutes) present in the system, a law deriving from the application of the principle *Lex posterior derogat legi priori* (More recent law trumps an earlier law)[75]—in the hierarchical construction unity is made to depend on a norm by which to make the system self-enclosed, a norm that in the first place fixes the criteria for delegating the authority to make norms.[76] A hierarchical

hierarchical-structure affects the entire theory of the functions of law and the state, because from the standpoint of that construction, these functions are entirely determined by other functions" (Merkl 1968d, 135; my translation). As a "new way of understanding of the functions of the state," the hierarchical-structure frames the "uses of each state power […] as a hierarchical series of acts" (ibid.; my translation) carried out by authority of a higher law contained in the constitution. In this framework, lawmaking and public administration are both understood as functions by which law is produced and applied, in a process of incremental legal concretization that takes the constitution as its point of departure. This construction supersedes the view of the legislative process as an activity not subject to judicial validation, and in so doing it also introduces the possibility of judicial review for constitutional compliance. Indeed, as the highest norm, the constitution makes it possible to view lawmaking as an entirely juridical function, and hence as subject to judicial review. As is known, judicial review for constitutionality was written into the Austrian constitution of 1920 through the efforts of Kelsen himself. On constitutional judicial review in Kelsen, see Bongiovanni 2007.

[74] The idea of the "basic norm" as a criterion on which basis to find the unity of the system is attributed by Kelsen (1998, 13) to Verdross (1968). On Verdross see Section 2.4.2 in Tome 1 of this volume.

[75] In the *Hauptprobleme*, the problem of the unity of law is solved by identifying a single source for all norms. The unity of law, in other words, is predicated on the notion that there can be no law outside statutory law and is accordingly understood to entail the need for general norms not to contradict one another. Where norms or their sources lie on the same level, this noncontradiction is secured by the chronological *lex posterior* principle, but when we are dealing with the relationship between laws and their administrative implementations, noncontradiction is secured by the principle whereby a specific norm is included in a general one that covers the same subject matter: While the chronological principle serves as a criterion by which to repeal earlier norms that stand in a relation of antinomy with later ones, on the inclusion principle, the act of implementing a general norm is understood to be contained in that norm from the start. The conception of the activity of the state in terms of implementation—that is, as a simple carrying out of duties—leads to a view of the state's administrative activity as a "concretization" of the norms contained in its abstract contours, namely, in the laws.

[76] According to Paulson (2012a, 85ff.), this is the main role of the *Grundnorm*. See also Celano 1999, 322ff.

system can be understood to be unitary to the extent that, on a neo-Kantian approach, it can be said to rest on a principle capable of generating the entire series.[77] In law, this function is served by the *Grundnorm*, which makes it possible to conceptualize the system's dynamic unity. This norm is not enacted but is presupposed, in the sense that it must be understood to exist if we are to explain in what sense the system is legal, binding, and unitary and what makes its individual norms valid. The *Grundnorm* can in this sense be viewed as serving a plurality of functions.

Most crucially, the *Grundnorm* comes into play as the necessary hypothesis by which to ensure that the system's legality is not reduced to its social dimension, that is, to the efficacy of norms. By endowing the constitution with its own legal validity, the *Grundnorm* makes it possible to avoid reducing that validity to the social fact of compliance, for that would amount to deriving an ought from an is.[78] The *Grundnorm* thus offers a criterion on which basis the legal system and its norms can be recognized as having a specific validity different from social validity and irreducible to it. This is essential when it comes to spelling out why the "constitution" is "valid" (Alexy 2002a, 96) or why the norms making up a given legal order "ought to be obeyed" (Kelsen 1960b, 218). In Kelsen's view, as we saw, the problem of what makes the law binding or the constitution valid cannot simply be solved by pointing to the enactment and efficaciousness of law but also requires a normative foundation. Reflected in the basic norm is a need not to collapse the ought into the is: The basic norm tells us "which facts are to be regarded as law-creating facts," thus making it possible to move "into the realm of the law" (Alexy 2002a, 106, 105). The *Grundnorm* is the tool "for rejecting […] empirico-positivist legal theories" (Paulson 2000, 291),[79] that is, for explaining the bindingness of law

[77] This idea is informed by the transcendentalism of the Marburg school and its approach to the problem of the relationship between "the particularity of the single entity vis-à-vis the universality of concepts or of law" (Lamanna 1967, 16; my translation). This relationship is worked out by Cassirer—*Substanzbegriff und Funktionsbegriff* (Cassirer 1910, translated in 1923 as *Substance and Function*)—on the basis of what he called the serial principle, offering an answer to Hermann Cohen's search for "the *origin* of the objects of science" (Abbagnano 1999, 570–1; my translation): What enables multiple terms to be connected into unity as a system is a "basic productive relation" in virtue of which those elements can be ordered and understood when "they issue from an initial given element through a necessary succession […] in accordance with a rule of progression under which the single terms can each be produced from one another. Each member in the series is particular, while the universal lies in the principle from which springs the series itself" (Lamanna 1967, 17; my translation).

[78] In the second edition of the *Reine Rechtslehre*, Kelsen sets out the "basic norm syllogism": In order for it to be "legally prescribed that one behave in accordance with the constitution" (conclusion) if the constitution "has in fact been issued and is socially efficacious" (minor premise), there needs to be a major premise stating that "if a constitution has in fact been issued and is socially efficacious, then it is legally prescribed that one behave in accordance with this constitution" (Kelsen 1960b, 219). See Alexy 2002a, 96–8.

[79] Paulson (2000, 292) observes that although the *Grundnorm* "is telling against fact-based

without resorting to law's social dimension, and so for arguing that, contrary to the view espoused by 19th-century legal positivism, law cannot be reduced to facts. The basic norm is entrusted with transforming facts into law (or power into law) and with framing the dynamics by which norms are produced.[80] This transformative function sets up a complex relationship between facts, on the one hand, and validity and bindingness, on the other: In Kelsen's view, the basic norm qualifies a legal system as being in some way efficacious,[81] and in these systems the relation between efficaciousness and validity cannot fall below a minimum level.[82] The relationship between efficaciousness and validity is one of the problems that also calls into play the parallel relationship between facts and values: Even the *Grundnorm* can be described as a device by which to qualify law as objective. Indeed, because the *Grundnorm* is presupposed, it is to be understood not as a fact but as a hypothesis (Celano 1999, 374): This means that the *Grundnorm* is necessary if we are to "conceptualize" existing law as valid and binding.[83]

The *Grundnorm* makes it possible to fix the unity of the legal order and set out the criteria for inclusion in the system. By singling out the persons and the facts deemed to be productive of law, the *Grundnorm* on the one hand offers a criterion on which basis to define the system's identity and unity and, on the other, makes it possible to say which norms belong to the system: Just as the system finds its unity in the basic norm (and in its content),[84] norms

legal theories," it fails to offer an "argument for rejecting […] the morality thesis" as a basis on which to ground the bindingness of law.

[80] According to Alexy (2002a, 105) this role ascribed to the *Grundnorm* springs from the need to find a "category" for "transforming" an is into a legal ought. Indeed, without the "additional" premise of the basic norm, it would be a violation of Hume's law to attempt to move from the plain *fact* of the constitution to its *bindingness*, that is, from the fact that a constitution has been enacted which people comply with to the conclusion that such compliance is *owed*. On the function of the *Grundnorm* as a device for effecting a categorial transformation, see R. Dreier 1972.

[81] Efficaciousness is conceived by Kelsen (1922b, 93, 94; 2006, 119) as a necessary but insufficient condition of validity (a *condicio sine qua non* but not a *condicio per quam*). This is apparent in his analysis of revolutions, where we have to say which of the two competing orders is valid—the new one or the old one—and Kelsen (2001, 59–60) attacks this problem by directly invoking efficacy: We have to see which of the two orders elicits greater compliance. For some critics, such as Celano, the dynamic conception frames the relationship between efficaciousness and validity in such a way that the law "ultimately winds up being determined by the efficaciousness of coercive power," thus contradicting Kelsen's intent not to enable "power to […] determine law" (Celano 1999, 382–3).

[82] This only applies to the system *as a whole*: Its individual norms will still be valid even if they are inefficacious (i.e., disregarded).

[83] As has been noted, "the notion that the basic norm is 'presupposed' […] lends itself to two interpretations: It can be taken to mean that the jurist proceeds from either (1) a hypothesis—namely, '*If* N (the basic norm) is valid, then […]'—or (2) an assumption, namely, 'N (the basic norm) *is* valid; therefore […].'" (Celano 1999, 374; my translation). On the *Grundnorm* as a presupposition, see Bindreiter 2001.

[84] This content is mostly concerned with the form of government fixed by the constitution.

can be said to belong to the system only if valid, that is, only if they can be traced to the basic norm through a cascading process of normative production, meaning that they have been "authoritatively issued," or enacted "in the duly prescribed way by a duly authorized organ," and they do "not violate higher-ranking law" (Alexy 2002a, 95).[85]

The dynamic conception marks the point that Kelsen works up to in the period after World War I. On this basis he makes deep changes to a series of traditional concepts, all the while developing a definite theory of legal interpretation: The changes he introduces concern in particular a series of dualisms that characterized legal thought before Kelsen, while the theory of interpretation leads to an outcome that can be described as "sceptical," albeit only moderately so. It was Kelsen's view that earlier legal dogmatics had set out a series of dualisms deliberately loaded with ideological meaning, in that they were aimed at supporting specific agendas or positions of power. He was referring in particular to the distinction between *subjektives Recht* and *objektives Recht* ("subjective right" and "objective law," a distinction reflecting that between the individual and the community) and to the distinction between private and public law. Special attention was devoted by Kelsen to this latter distinction, since by rejecting it he could frame in a new way the relationship between law and the state (between which he sees no distinction) and between national and international law (giving primacy to the latter). The need to criticize this distinction also provided the initial spark for the school that was closest to Kelsen, the so-called *Brünner rechtstheoretische Schule* founded by Frantisek Weyr.[86] Indeed, in three articles written in the early 20th century, Weyr (1908, 1914a; 1914b) argues for the need to transcend this dichotomy by creating a unitary legal system grounded in a "normative" consideration, over against an ideological one.

Like the distinction between the individual and the community, the one between *subjektives Recht* and *objektives Recht* is regarded by Kelsen as ideologically laden, rather than as driven by a theoretical interest, since it tends to uphold the primacy of the subjective sphere with the specific aim of protecting private property: What underpins this primacy is really the idea "that the subjective right, which really means private property, is a category transcending the objective law" (Kelsen 2001, 40). Kelsen argues, by contrast, that

[85] The dynamic conception of law does not just address concerns of *theoretical* import but should also be seen as a response to the transformations the state was going through at the time. As Sordi has highlighted, the dynamic conception "prefigures a descriptive unit of a 'systemic' type […], giving birth to a view of the legal order where an increasingly complex public can find its place. In this sense, the unity the order finds in its dynamic coming-to-be turns out to be solely normative, in such a way that we can envisage a state open to private citizens and can identify a unifying platform that reaches beyond the traditional *Träger der Staatsgewalt* [bearers of state power]" (Sordi 1987, 248; my translation).

[86] On the *Brünner Schule*, see Kubes and Weinberger 1980. On Weyr see also Section 2.1 in Tome 1 of this volume.

> the subjective right is not different from objective law; it is itself objective law. For there is a subjective right (*qua* legal right) only in so far as the objective law is at the disposal of a concrete subject. Similarly, the legal obligation (the other form of law in the subjective sense) is itself objective law, for there is a legal obligation only in so far as the objective law aims—with the consequence it establishes for an unlawful act—at a concrete subject. (Ibid.)

This makes it possible to guard against any "ideological misuse" and to move away from the "historically conditioned formation of law in a capitalist system" (ibid., 44, 45). The contraposition between private and public law is instead linked to the central place the dogma of sovereignty and of the state's power occupies in German legal dogmatics. Kelsen underscores how this distinction, which grew out of the reception of Roman law,[87] is intended to set up two different sorts of relations among subjects,

> with private law representing a relation between coordinate subjects of equal standing legally, and public law representing a relation between a superordinate and a subordinate subject—between two subjects, […] one of which is of higher standing legally than the other. (Ibid., 92)

The relations set up by public law would thus be "power relations," based on the "higher standing" ascribed to the state: The state, by reason of its sovereignty and superiority, would be entitled to a right that brings into being legal relations different from the ordinary of relations obtaining in private law. The distinction between *jus privatum* and *jus publicum* entails a contraposition between law and the state, that is, "between law and non-law" and "between law and power." This framework, built on the idea of sovereignty, is superseded by virtue of the way the "pure theory of law […] relativizes the opposition between private and public law, transforming it into an intra-systemic opposition" based on the different "methods of creating law" (ibid., 94, 93). By doing away with these distinctions, Kelsen can argue for an identity between the state and the legal order, the former being "nothing other than the personification" of the latter. And by so identifying the state with the legal order, Kelsen can in turn affirm the primacy of international law: If there is no special sovereignty that can be recognized for certain subjects (the states), then international law, as an all-encompassing order, must "logically" be regarded as superior to all partial orders (ibid., 101, 107ff.).

Finally, the dynamic construction entails, in Kelsen's own words, "significant consequences for the problem of interpretation" (ibid., 77). There is wide latitude in the implementation of a higher norm by way of a lower one: Even if the former can determine the "content" of the latter, "this determination," as Kelsen sees the matter, "is never complete." This consideration—in which, as we have

[87] In criticizing Laband's analysis, Kelsen links that reception to "the development of the absolute state" and to "the desire of the German Kaiser and the German princes to gain the status of the Roman sovereign: that of *legibus solutus*," meaning that the sovereign is not bound by the laws (Kelsen 1913b, 60; my translation; see also Kelsen 1913a).

seen, lies the basic reason that drove Kelsen to introduce the dynamic conception—translates into a moderate sceptical view of the process by which laws are interpreted, in that "the norm to be applied is simply a frame within which various possibilities for application are given." These possibilities are not, however, boundless: The statement of "the meaning of the norm" means, "within this frame, the cognition of various possibilities for application" (ibid., 78, 80).

8.5. Law and the State in France: Carré de Malberg, French Legicentrism, and "Organistic Tiering"

Kelsen's pure theory of law had a direct impact on the European debate and became one of its main reference points. Even French legal thinkers engaged with the pure theory. A case in point is Raymond Carré de Malberg (1861–1935), the most significant exponent of French *positivisme juridique*.[88] His engagement with the pure theory was direct, and it took place in the second phase of his thought, where the point of departure was not the paradigm of the rule of law—as it had been in his 1920 *Contribution* (Carré de Malberg 1920)—but the sovereignty of law and of the general will.[89] Carré de Malberg's legal positivism draws directly on the German school of public law:[90] It is built on a method aimed at separating nonlegal elements (natural law, morality, history, politics, and suchlike: see Galizia 1973) from the sphere of legal knowledge,[91] and its general reference point lies in the concept of the *État de droit*, or rule of law (Mineur 2012, 1). It is here that Carré de Malberg develops his best-known theses, from that of national sovereignty to that of a self-limiting government (see Fioravanti 2001, 594–6; Laquièze 2007). His engagement with Kelsen takes place thirteen years after the 1920 *Contribution* and is developed in light of the ideas expounded in his 1931 *La loi expression de la volonté générale* (Law as an expression of the general will: Carré de Malberg 1931), where he argues for a monist theory of the parliamentary regime (Calamo Specchia 2008, XXXIX–XL),[92] placing popular sovereignty at the foundation of the system.

Carré de Malberg proceeds on this basis to develop two main criticisms of Kelsen's theory: The first is a methodological criticism, while the second

[88] For an overall analysis of Carré de Malberg's work, see Section 12.4 in Tome 2 of this volume.

[89] Whether there actually exist two phases in Carré de Malberg's thought is a matter of debate: Schönberger 1996 and Mineur 2012 say they do exist, while Calamo Specchia (2008, LI) rejects that interpretation.

[90] Mineur sees Carré de Malberg as "the one who more than anyone else has contributed to bringing German legal thought into France" (Mineur 2012, 1; my translation).

[91] On this approach, the law is understood to be made up of "commands" (*commandements*) backed by "the state's coercive force" (*la force coercitive de l'État*). See Galizia 1973, 364.

[92] On the distinction between the monist and the dualist theory of the parliamentary regime, see Calamo Specchia 2008, XXXIXff.).

is aimed at highlighting the role of the different organs through which law is made (this is the sense of his "organistic tiering,"—"*gradation des organes*"—on which see Carré de Malberg 1933, par. 104). His methodological criticism builds on a broad, widely shared theme in the European debate, taking issue with the abstractness of Kelsen's construction, its substantial "unrealism" (*irréalisme*: Amselek 2007, 9), and its "abstract logicism" (Chimenti 2003, XVI). These features are brought to light by showing how Kelsen's analysis of the legal system does not hold up in light of positive law: As has been underscored, for Carré de Malberg "every legal theory needs to be held up to scrutiny in light of the live experience of a posited legal system, and each theoretical element is good only to the extent that it corresponds to a posited datum" (ibid.; my translation).[93] The second criticism is developed with a view to advancing beyond a "purely normative conception" (ibid., XVII; my translation), arguing that the system's hierarchy describes not its norms but its organs: What matters is where the norms come from. In his view

> the shortcomings of the *Stufentheorie* (hierarchical-structure theory), or rather, the excesses that make it liable to criticism, are owed to the fact that the theory rests on arguments based exclusively on norms, without first taking into account the organs or authorities from which those norms are issued. (Carré de Malberg 1933, par. 104; my translation)

In this sense, the hierarchy

> of norms, such as that of the functions and acts, derives not from the degree of quality inherent in each type of norm considered in itself, but from the degree of power exercised by the organs or authorities from which the norm has been issued, from the function performed by those organs or authorities, or from the act carried out. (ibid., par. 16; my translation)

So, according to Carré de Malberg, "the tiering of norms is to be understood as having its actual cause in the organistic considerations to which the formation of law is subjected in the positive legal system" (ibid.; my translation). It follows that "a ranking proper cannot be established except among powers, acts or norms of the same kind and nature" (ibid., par. 44; my translation). This means that the decisive role is played "by the system and by the organization of legal phenomena insofar as they are connected with the problem of sovereignty" (Chimenti 2003, XII; my translation), and so the hierarchy of norms depends on "the 'quality of the powers' exercised by the public organs" (Amselek 2007, 24). Carré de Malberg's criticism is clear: Kelsen's hierarchical-structure theory fails to take sovereignty and power relations into account, and

[93] This analysis was criticized by Weyr, commenting that "a legal system is not tasked with positing theories, and it cannot be invoked either for or against a given scientific conception. In his book, Carré de Malberg attempts a comparison between incomparable things, namely, a system of norms, on the one hand, and a scientific theory, on the other" (Weyr 1934, 236; my translation, quoted in Amselek 2007, 9).

for this reason it cannot express the "'radical distinction' separating acts that express sovereignty from those that do not" (Chimenti 2003, XVII; my translation). On Carré de Malberg's organistic approach, if we are to clarify a system's hierarchy, we will have to identify sovereignty, which, as the power to make law, lies at the system's foundation.

This role is entrusted to the parliament, having a "sovereign quality" owed to its "representative character."[94] From the sovereignty of the parliament comes that of the law. It follows that "all expressions of will coming from organs other than the parliament, and so from nonsovereign organs, must be subordinated to the law" (ibid., XIX; my translation). The same goes for the constitution: The law cannot be seen as the application of the constitution, because law "comes into being by virtue of an autonomous power, a power whose material object or purview the constitution does not even try to define"(ibid.; my translation).[95] The law comes from the power of the parliament, which is "an original or inborn power, not a conferred one" (Carré de Malberg 1933, par. 39; my translation): It therefore cannot "be defined as an application of the constitution," for it is "the product or manifestation of the general will" (ibid., par. 41; my translation). The legislative power can thus be said to be stronger than the constitution, for it is "an inceptive power the parliament is vested with from the outset qua representative of the nation and of its sovereign will" (ibid., par. 43; my translation).

On Carré de Malberg's conception, then, "the hierarchical structure of norms of the Vienna school is displaced by a sort of *organistic* tiering (Chimenti 2003, XXII; my translation, italics added):[96] The basic problem is that of the foundation of power, which is argued to rest with the parliament as the basic expression of popular sovereignty. This question of the foundation of power and of sovereignty (a question almost invariably treated by taking Kelsen as a polemical target) is one that finds itself at the centre of the European debate, especially in the Weimar Republic.

8.6. The Weimar Debate between Law and Politics: Rudolf Smend, Carl Schmitt, and Hermann Heller

In Weimar Germany the debate in legal philosophy revolved around two main problems within a broader set of issues arising out of the need to interpret the

[94] Carré de Malberg 1933, arguing that this does not apply to executive power, for this is "the power of a simple authority devoid of representative power" (par. 44; my translation).

[95] For Carré de Malberg, "the laws cannot be argued to derive from the constitution in the same way that, for example, regulations derive from the laws by which they are authorized" (1933, par. 38; my translation).

[96] Chimenti points out as well that "also essential to Carré de Malberg's theory is the relation between normative production and popular representation, and the exercise of popular sovereignty trumps other considerations" (2003, XXII; my translation).

new politico-constitutional situation: On the one hand there was the problem of the method of legal science (the "*Methodenstreit*," or "quarrel over method": see Stolleis 2004, 139ff.; Bauer 1968, 15ff.); on the other, the problem of the foundation of law and of the relation between law and the state. The debate unfolded for the most part within the *Staatslehre* (the theory of the state): It is within its boundaries that the main positions were staked out, aligned on the one hand with legal positivism (Stolleis 2004, 146ff.) and on the other with anti-positivism (ibid., 161ff.).[97] The positions in this latter camp were mainly aimed at criticizing Kelsen's doctrine, which was found to be deeply at fault on account of its method (regarded as overly formalistic), as well as for identifying law with the state and presupposing a *Grundnorm* (or basic norm) as the foundation of the makeup of the legal system. Of course, legal positivism was not just championed by the Vienna school but was a strong current throughout the German-speaking world.[98] It was nonetheless Kelsen's doctrine that became the main focus of criticism (see Caldwell and Scheuerman 2000, 10–1). As was just remarked, this criticism was mainly concerned with the question of method and with that of the foundation of law: A number of common traits can be highlighted in the criticism offered in treating the first question, whereas the criticism centred on the second question came in from a variety of angles. This holds true for the authors who can be singled out as the main proponents of the anti-positivist response, namely, Rudolf Smend, Carl Schmitt, and Hermann Heller.[99]

From the methodological point of view, the common theme unifying the anti-positivist stance can be captured in its opposition to the neo-Kantian method and in the consequent distinction between *Sein* and *Sollen*.[100] This opposition can be appreciated in the effort to reprise the Hegelian tradition (Korb 2010, 24ff.; Stolleis 2004, 68, 167; Caldwell 1997, 54, 128–9; Bauer

[97] The anti-positivist positions were advanced proceeding from a variety of philosophical and political approaches (Korb 2010, 63ff.).

[98] In commenting on Laband, Caldwell characterizes German legal positivism as "statutory positivism," that is, as "a school founded on a specific method of interpreting statutes, understood as the highest expression of the state's will, through concepts such as 'dominion' (*Herrschaft*) and 'contract'"—pointing to Richard Thoma and Gerhard Anschutz as "representatives of statutory positivism in the Republic" (Caldwell 1997, 3ff.). On positivism in the Weimar Republic, see Stolleis 2004, 146ff.; Caldwell and Scheuerman 2000, 8ff.

[99] Others in the anti-positivist camp are Heinrich Triepel and Erich Kaufmann (Stolleis 2004, 162–3, 166–7).

[100] Seitzer and Thornill point out, in the Weimar period, the "decline of neo-Kantianism," the development of an "increasingly intense aversion to neo-Kantianism," and the fact that "the major neo-Kantian whose influence survived into the Weimar era was Hans Kelsen" (Seitzer and Thornill 2008, 3, 5–6). McCormick sees the Weimar debate as a contraposition "between forms of neo-Kantianism and strands of what can be identified for heuristic purposes as kinds of neo-Nietzschean *Lebensphilosophie*. There was the abstract concern with normative formalism, on the one hand, and with existential substance as such—that is, positivism versus existentialism—on the other" (McCormick 1997, 9).

1968, 146ff.), and even more so in the need to reopen legal research "to the social sciences and the humanities, especially ethics, politics and history" (Stolleis 2004, 142).[101] Reprising these themes meant that it was no longer possible to maintain the distinction between the factual and the normative (between *Sein* and *Sollen*) or to investigate law by proceeding from a purported form of methodological purity.[102] What instead comes into the foreground is an effort to reconstruct the legal theory of the state by proceeding from nonlegal ideas and through a cross-fertilization with the methods of the other sciences.

From a more strictly legal point of view, the anti-positivist positions denied, in the *Staatslehre*, the possibility of equating law with the state—as Kelsen's normativism, by contrast, tried to do[103]—and they argued that there needs to be an independent investigation into the foundations of the state. The point of departure lay in the view that power cannot be reduced to law:[104] This impossibility forms the basis on which to call for an independent reflection on the state. From this perspective, the legitimacy of law cannot be reduced to legality, and that makes it necessary to understand the reality and the features of the state.[105] The effort, in other words, was to single out the foundations on which rests the legitimacy of the state (and so of law) and to evaluate its functioning. This need forms the basis on which to analyze the concept of a constitution, which was prevalently being conceived in a "material" sense (however much

[101] At work here is an assumption opposite to the neo-Kantian one: On the latter conception, it was felt necessary "to make state law theory into a field that was 'scientific' in the strict sense of the word, by freeing it once and for all from all extra-legal elements and concentrating on the normative level" (Stolleis 2004, 142ff.).

[102] As Korb observes, the criticism aimed at neo-Kantianism, on the one hand, and at the Kelsenian theory, on the other, both entail the need to "transcend the distinction between *Sein* and *Sollen*" (Korb 2010, 61–2; my translation).

[103] For Kelsen and normativism, "the distinction between state and law was no longer meaningful" (Stolleis 2004, 142). Vinx (2007, 16–7) shows that the reason why Kelsen rejects "dualist theories of the law-state relationship" is that in his view these theories lay "scientifically unjustifiable ideological obstacles in the path of the full realization of the rule of law," all the while denying the possibility of "subjecting the state as fully as possible to constraints against uncontrollable exercise of power". Somek sees the identification between law and the state as growing out of a need for a "deontologization" and "demystification of the state" (Somek 2006, 754–5).

[104] Stolleis notes that "to all others the duality of power and law was as indissoluble as the duality of 'is' and 'ought' was to the normativists" (Stolleis 2004, 142).

[105] The two concepts of legality and legitimacy, as is known, form the title of a work by Carl Schmitt (2004b). Seitzer and Thornill (2008, 9) summarize this contrastive pair by underscoring that, for Schmitt (unlike what is the case for the neo-Kantian positivist view that "legality is the constitutional determinant and precondition of all legitimacy"), legality is no more than "a formal condition that must be given meaning and content by a prior structure of legitimacy: legitimacy is obtained only through the representation of the united will or the historical experience of the people, and this must be presupposed as the origin of the constitution, and indeed of all law." This means that "law […] cannot constitute legitimacy on its own," and so that "politics is before the law." On the evolution and meaning of this contraposition in Schmitt, see Hofmann 1992.

with various inflections), and on this basis, that is, as an expression of social and ethico-normative phenomena, the constitution was analyzed as a possible foundation of the unity of the state.[106] On these approaches, the state is not just an entity independent of law but is instead seen as its foundation. In this way, legal analysis must start out from the question of the foundation of law, and that in turn makes it necessary to analyze the state and the constitution.

So, proceeding from the premise that law cannot be identified with the state, the anti-positivist *Staatslehre* offered different solutions to the problem of the nature of law and the state. In the theory of law, the debate can be said to have centred around the question of the foundation of the validity of legal norms: Kelsen's basic norm (regarded as a formalistic expedient by which to reduce power to law) was replaced with other bases on which to explain the state's power (these bases ranged from the idea of sovereignty as an expression of the people's unity to the people's capacity to form into an integrated whole).[107] As previously noted, these solutions can all be viewed as standing in opposition to the reduction of legitimacy to legality, and so to an understanding of law as a simple normative order. The different anti-positivist conceptions were put forward within a discussion of very broad scope, to be sure, but they can be grouped under two main orientations: The first of these underscored the political dimension and the idea of the state's sovereignty, whereas the second focused on the role of the social and cultural process the state goes through as a "value-bearing (*werthaftig*) structure of meaning that could be experienced subjectively" (Stolleis 2004, 142–3). The conceptions centred on the state's sovereignty can be distinguished from one another by looking at the way they understood not only the foundation of that sovereignty but also the limits the law can impose on sovereign power. In other words, there were conceptions on which the state is a "legally ordered sovereign power" (ibid.) and others on which the political dimension must prevail over the legal one. Depending on which of these two themes were stressed, different aspects of the state's reality would come into focus: This in turn might result, for example, in greater emphasis being placed on the problem of lawmaking and of popular sovereignty than on that of the acceptance of norms, or it might mean that the problem of the unity of the system would push that of pluralism in the background (ibid.), or vice versa.

Rudolf Smend's reflection starts out from the need to base the *Stasstsrechtslehre* no longer on the legal method but on that of the human sciences: The analysis of public law was thought to need a "foundation in a theory of the

[106] Caldwell notes that precisely this question engaged the two key figures in the debate that unfolded under the Weimar Republic, namely, Kelsen and Schmitt, who "dealt with the theoretical issue of how to conceive of the constitution as foundation of the state" (Caldwell 1997, 9).

[107] As Caldwell points out, high on the list of concerns for the Weimar authors was "the theoretical problem of what the 'foundation' or 'source' of the system was" (Caldwell 1997, 2).

state and of the constitution conceived as a human science," with a view to constructing a "material theory of the state" (Gozzi 1987, 131; my translation).[108] Smend accordingly saw the state as a "living reality" (Stolleis 2004, 165), that is, as a "complex of lived experiences, the object of a sense relation, or even as the human social form" (Gozzi 1987, 132; my translation). From this perspective, and working from the conception expounded by Theodor Litt in *Individuum und Gesellschaft* (The individual and the community: Litt 1924),[109] the state is viewed as a "geschlossener Kreis" (Smend 1994, 131), that is, as a self-enclosed circle, meaning a "structure of connections whose parts are all interconnected" (Gozzi 1987, 135; my translation) on the basis of a specific sense relation.[110] The sense relation the state consists in "is the way in which values are realized"; in other words, "the sense (or meaning) of the acts carried out by those who belong to the state arises out of their making reference to values, that is, to cultural norms forming the bedrock of the political community" (ibid., 136; my translation). Smend thought that this dimension lies at the foundation of the state: The state's life depends on an assertion and realization of values (Smend 1994, 160–1). This dimension of the state is dynamic: It is a "process of constant renewal" (ibid., 136; my translation) aimed at achieving a "lasting union of men" (Gozzi 1987, 145; my translation); it is the process that Smend (1994, 136ff.) calls integration. It is on this basis, he argues, that the normative dimension (positive law) can be said to consist in no more than

[108] Smend (1994, 121ff., 124) describes this need as arising out of the "crisis of the theory of the state," a crisis that in turn, in his view, grew out of the shortcomings of the "legal formalism" propounded in the line extending from Jellinek to Kelsen. Smend not only argued that it was necessary to move away from this brand of legal positivism but also showed an "aversion that became idiosyncratic in his antipathy toward the Vienna school" (Stolleis 2004, 164). Kelsen would reply to Smend's criticisms in *Der Staat als Integration*, in which Smend's work is defined as "aphorismatic" and marked by a "complete lack of systematic closure, a certain insecurity in the conception, avoiding any commitment to clear and unambiguous positions, preferring to ramble on through vague allusions, and saddling with cautious caveats any position that might have some degree of intelligibility; then, too, his writing is obscure and overworked, interlarded with loanwords that cannot be understood in full" (Kelsen 1930, 8; my translation). But Kelsen was not the only target of Smend's criticism, which also takes on the theories of Max Weber, Ernst Troeltsch, and Freidrich Meinecke (La Torre 2006, 143). On Smend see also Section 6.4 in Tome 1 of this volume.

[109] As has been observed by La Torre (2006, 140), Litt is the author most quoted or cited in Smend's *Verfassung und Verfassungsrecht* (Smend 1994). Bartlsperger (1964, 4ff.) sees Litt's phenomenologically oriented conception as the "foundation" of Smend's work. It should also be noted, however, as Gozzi (1987, 136) points out, that unlike Litt, Smend "equates […] the sphere of sense, or meaning, with that of value."

[110] Smend (1994, 128) held that "the life of the group is not causally deducible from the lives of its individual members" and, in the same vein, he argued that society "should not be understood as a substance simply structured on a supra-individual level; rather, it should be understood as supported by individuals, and as living only in them." On these aspects, see La Torre 2006, 141–2. Gozzi points out that this approach is geared toward superseding the "distinction between personal reality and the social bond," as well as that "between part and whole," but without reducing the state to a "supraindividual person" (Gozzi 1987, 135).

the concretization of integrative processes, in which lies the true object of any analysis of the state.[111]

On the conception developed by Smend (ibid.), the integrative processes unfold on three levels (with three corresponding types): There is the level of personal integration, that of functional integration, and that of material integration. These three levels and processes involve different dynamics: The first of these revolves around the role and figure of the political leader;[112] the second, around the processes through which the political will is formed (as well as around the interpretation of representation);[113] the third, around material contents, meaning values, on which rests the life of the state. On this third level is found the most important form of integration, which is mainly realized in the constitution, where the community's material contents find their full expression. The constitution can in turn be analyzed under a number of headings (Gozzi 1987, 158ff.), but what matters is its role in expressing the community's (dynamic) values. On this conception, the constitution and the state exist as a synthesis that precedes and grounds law: a synthesis between the acts carried out by different subjects (institutional and otherwise) and the values condensed in the constitution itself. These values are expressed in the fundamental rights enshrined in the constitution: They provide the foundation of material integration and define the conditions for this possibility.[114] So, as much as Smend's reflections may unfold within an occasionally contradictory framework,[115] they do clearly develop with a view to showing that law cannot be analyzed independently of the material contents, or values, expressed in the constitution governing a given society—the values espoused by the subjects who can realize that constitution.

[111] Smend (1994, 139; my translation) underscores the "dual nature of the state's life," which is concretized in "the spirit's activity of legislating on value" (*Wertgesetzlichkeit des Geistes*) and in the "state's positive law." The latter is no more than "a positivization of the possibilities and tasks that derive from the laws of the spirit, and so it is only in light of these laws that the state can be understood." From this perspective, "the values espoused by the political community function as the condition of the normative system's validity," and so "the law does not belong to the processes through which the state achieves its integration": We are looking as "two independent dimensions" (Gozzi 1987, 154, 163; my translation).

[112] For Smend (1994, 142–148), the political leader can be personified in any number of figures (such as ministers, parliamentarians, party officials, and administrative functionaries), but it does not entail any specific form of government.

[113] Of course, this aspect relates to the problem of parliamentarianism: Unlike Schmitt, Smend saw this as "an institution that is still viable, but only if based on shared material values" (Gozzi 1987, 153).

[114] The role that rights play as the decisive moment in the process of material integration is underscored by Gozzi (1987, 168ff.); Caldwell (1997, 9), notes that "Smend's theory was important for the interpretation of basic rights" insofar as "a hierarchy of rights […] could be derived from the basic values of the community in relation to other values"; Bauer 1968, 310ff.

[115] Caldwell underscores the "political ambiguity" of Smend's theses, which may also be seen as simultaneously "asserting the primacy of the community and the duty of individual to conform" (Caldwell 1997, 122).

The role of sovereignty and the state was a subject of interest to both Carl Schmitt (1888–1985) and Hermann Heller (1891–1933).[116] Their analyses proceed from entirely different political perspectives, to be sure, but they share a conception of law (and of the constitution) as phenomena that cannot be understood without analyzing the political reality and that of the state.

In his *Constitutional Theory* (*Verfassungslehre*),[117] Schmitt underscores the inadequacy of those conceptions that view the constitution as an exclusively legal construct, without taking into account its political dimension.[118] According to Schmitt, neither an "absolute" nor a "relative" concept of constitution is tenable.[119] By absolute constitution he means the constitution as an "integrated whole," and he criticizes the legal-normative understanding of that idea, on which the constitution is a self-enclosed system of norms,[120] with the constitution figuring as the "norm of norms," for it serves as the basis of the system's unity and guarantees the validity of the lower norms (Schmitt 2008, 62ff.). As Schmitt (ibid., 64) argues, what makes this understanding inadequate is that it forces us to ground the justification (and validity) of norms on "a principle of justice (as natural law theory does)"; otherwise validity must be shown to derive from "the sovereign's concretely existing will, and that amounts to grounding validity in the constituent power" (Pietropaoli 2012a, 71; my translation). Also untenable is the "relative" understanding of the constitution, so called because relative to the individual constitutional laws and not to the constitution as a whole.[121]

[116] On Schmitt and Heller see also, respectively, Chapter 8 and Section 7.4 in Tome 1 of this volume.

[117] Unlike other works by Schmitt, his *Constitutional Theory* seeks to be systematic (see Schmitt 2008, 53). As Kennedy (2008, XVI) notes, "Schmitt offers […] a system that demonstrates the relationship of law and politics to each other, not just in this one German constitution, but in all constitutional states of the 'liberal rule of law' type." Similarly, she notes, "the *Verfassungslehre* was intended as neither 'a commentary nor series of monographic studies' but aimed to found a new science of constitutions, their law and politics" (Kennedy 2004, 122). On the systematic nature of Schmitt's work, see Hofmann 1992, 124–5; Pietropaoli 2012a, 71.

[118] Staff (1981, 390) argues that this understanding of the constitution, not as a norm, but as a guiding idea is something that Schmitt drew from Hauriou's 1925 theory of institutions (Hauriou 1933).

[119] Schmitt (2008, 57ff.) identifies four main concepts of constitution: absolute, relative, positive, and ideal. The only adequate one, in his view, is the positive one. On this question, see Dyzenhaus 1997, 52; Hofmann 1992, 124ff.

[120] The legal understanding of the absolute constitution—described by Schmitt (2008, 59ff.) as a "condition of political unity and order"—is only one of four such understandings. The other three are those of the constitution as a "concrete, collective condition" of unity; as a "state form"; and as a "principle of emergence of dynamic unity."

[121] Through this concept, Schmitt (2008, 67ff.) introduces the distinction between the constitution (*Verfassung*) and constitutional laws (*Verfassunggesetze*): "Rendering relative the concept of constitution means that instead of a unified constitution in its entirety, there is only the individual constitutional law." Constitutional law is such in virtue of "formal characteristics that are external and peripheral." Hofmann (1992, 126) remarks that this distinction seems entirely obvious to us today, as it was not in Schmitt's day. On this distinction, see Caldwell 1997, 100ff.

Here, too, what matter are a norm's formal properties—such as its being written and rigid, an aspect that Schmitt (2008, 72–3) develops in discussing the "amendment procedure"—and his argument is that the *converse* relation actually holds: The constitution is a value-bearing norm and as such is protected, rather than bearing value as a result of being protected (Pietropaoli 2012a, 72; my translation). If we are to understand the constitution, Schmitt (2008, 75) argues, we have to bring into play the notion of a "constitution-making power,"[122] and through that decision-making power (held by the constitution-makers) we ought to accordingly understand the constitution itself: This is the "positive" concept of "the constitution as the complete decision over the type and form of the political unity" (ibid.). This decision determines the "form" of "a political unity that is assumed to exist" (Pietropaoli 2012a, 72; my translation). It can thus be claimed that "the state's political unity preexists the constitution,"[123] serving as its foundation: The constitution is the outcome of a decision and so cannot be reduced to a norm (ibid.; my translation). Or, otherwise stated, the constitution fundamentally expresses the will of the constituent power and its underlying political unity. This power, as Schmitt conceives of it, is permanent and inexhaustible: It stands above the constitution and can always express itself.[124] Since the French Revolution, the subject of the constituent power has always been the people.[125] Schmitt held that there are two ways in which the people can achieve political unity (of which the constitution is the basic expression): This could be done through identity or through representation. Political unity, in other words, could be the expression of a homogeneous identity, or it could be achieved through the mediation of "some specific individuals" (Pietropaoli 2012a, 76; my translation). Depending on which of these two principles prevails, one form of state will emerge rather than another (for example, democracy as against monarchy or aristocracy), though Schmitt does stress that neither principle is ever realized in an absolute way (that is, fully excluding the other). This dynamic can be observed in particular in the model serving as a blueprint for the constitutions of the 19th and 20th centuries: This is the "bourgeois Rechtsstaat"

[122] Dyzenhaus (1997, 69) comments that Schmitt's project is "to provide a theory of the politics of constitutional power."

[123] On Schmitt's conception, the fundamental political decision—the one through which the constituent power creates the constitution—could not even be contemplated without considering its relation to the state's institutional instruments, and so the instruments through which power is concentrated in the state. Only the state "can transform a political decision into a decision capable of founding an order" (Bisogni 2005, 161; my translation). An adequate understanding of the constitution, Schmitt (2008, 59) argues, requires "that the meaning of the term 'constitution' be limited of the constitution of the state." It follows that on this conception, on which the political sphere is equated with that of the state, there can be no constitution without a state.

[124] The constituent power is conceived by Schmitt (2008, 125ff.) as a permanent, unitary, and unlimited will.

[125] Kennedy (2004, 126) points out that the people are conceived by Schmitt as "a subject capable of decision" and of producing "political unity."

based on the rule of law and informed by two liberal principles providing for (*a*) rights existing *prior to* the state and (*b*) the separation of powers, the first a "principle of distribution" ("the individual's sphere of freedom is presupposed as something prior to the state"), the latter an "organizational principle," for it organizes the exercise of powers (Schmitt 2008, 169ff.). As Schmitt (ibid.) sees it, however, this sort of organization does not bring about any specific "form" of state but only offers itself as an intermediate solution between the sovereignty of the monarch (representation) and that of the people (identity). The "bourgeois Rechtsstaat" effects a "commixture between the principle of identity and that of representation within the parliamentary system, all the while relativizing both principles" (Pietropaoli 2012a, 76; my translation). On a juridical level, this translates into the idea of the rule of law, where law is no longer regarded as the expression of a sovereign will but as the outcome of a set of procedures governed by norms. These procedures, as is known, are regarded by Schmitt as unfit to achieve a true political unity within democratic societies: Parliamentarianism is regarded inadequate and as an obstacle to the formation of a people's political unity, while the rule of law is reduced by him to a simple "myth."[126] Schmitt proposes to solve this problem by moving beyond the parliamentary democratic system and looking to a subject capable of "representing" the unity of the people.[127] Schmitt's reflection is thus aimed at underscoring that law cannot be reduced to its normativity alone and that there needs to be a sovereign and political element in the constitution (Fioravanti 1999, 149; Scheuerman 1999, 69–70; Kennedy 2004, 6).

[126] Kennedy observes that liberal institutions, in Schmitt's view, are no longer adequate for a pluralist society, in that "the organizational principles of liberalism are shown to conflict in specific instances with democratic equality" (Kennedy 2004, 123). The literature on Schmitt's criticism of parliamentarianism is virtually boundless: an introduction to this question and a summary list of sources can be found in Kennedy 2000; Staff 1981, 382ff.

[127] It should be noted here that in suggesting two ways for a people to achieve political unity—through identity and through representation—Schmitt holds up the latter as being better suited to that end. His logic in making that judgment is Hobbesian: The people, understood as a "substantial homogeneity" and as the holder of the constituent power, come into being "only through the representation provided by the subject historically […] entrusted with harnessing the political energy carried by the people and channelling that energy toward the fundamental decision that will create the constitution" (Bisogni 2005, 150; my translation). On this conception, "the people are not anything specific" (Preterossi, 1996, 13; my translation): They are an "unreal ideality," one that for this reason "must be shaped into form, which for Schmitt means that it must become an object of 'decision' and 'representation'" (Bisogni 2005, 149; my translation). It is fair to say that only this principle makes it possible to "body forth the people's political unity": The people "cannot be said to exist unless they are represented," and without representation they "cannot decide on their own to be brought into existence" (ibid. 158; my translation). This view carries immediate implications as concerns the institutional makeup, for it makes it necessary to identify the "organ" capable of acting as the subject that will represent the people and express their unity. It is therefore necessary to figure out who, within the state, will assume "the ruling position" and will have "the last say": In Schmitt's view, the true command and law are those that issue from "the organ designated by the constitution as the one that will represent the peoples' political unity" (ibid, 193; my translation).

The need to criticize the attempt to reduce the *Staastslehre* to a normative consideration of law forms the point of departure for Hermann Heller, too. Like Smend, Heller took critical aim at Hans Kelsen's doctrine, with its collapsing of the state into law and the consequent depoliticization of the theory of the state.[128] Heller criticized both the method of Kelsen's normativism and its account of the role played by the state.[129] In *Die Krisis der Staatslehre* (The crisis of the theory of the state: Heller 1971a), Heller argued that Kelsen's pure theory—regarded as "the late heir of logico-legal positivism, as the coherent fulfilment of the sociological and value-neutral programme set out by Laband" (ibid., 15–6; my translation), as well as by Gerber—leads to a "stateless doctrine of the state," a conception in which the general theory of the state is reduced to a "universal theory of law" (ibid., 18; my translation). This, he argued, is an outcome that flows from Kelsen's method, by virtue of its "tending to radically eliminate all substantive elements from legal concepts," a method predicated on the lack of "any mediation between is and ought" and exclusively devoted to a quest for "pure [legal] forms" (ibid., 16; my translation).[130] The "purity of method" translates into an impossibility to work through the "substantive" issues and concerns in the theory of the state, that is, "the problem of the nature, reality, and unity of the state and that of its aim and justification, as well as the analysis of the relation between law and power and the problem of the state as such vis-à-vis society" (ibid., 10; my translation). By collapsing the state into the law, Kelsen's method turns these aspects into "metalegal" concerns and reveals his pure normative science to be useless in any attempt to construct a theory of the state.

Heller stressed the need to transcend the distinction between *Sein* and *Sollen* and a reliance on a single method: The state, he argued, needs to be analyzed by drawing on the methods developed in different disciplines.[131] This

[128] Caldwell (1997, 128, 130) notes that in this respect Heller aligns himself with Smend and Schmitt, but that from 1928 onward Heller's criticism shifts focus by turning to Fascism (on this aspect, see also La Torre 2009, 68ff.). Dyzenhaus points out that on the one hand Heller is close to Smend and Schmitt—in virtue of the idea that "all conceptions of law are fundamentally political and tied to particular historical and social contexts"—but at the same time he is in sympathy with Kelsen for the high regard in which he holds "respect of law" and "legality" (Dyzenhaus 1997, 162–3).

[129] The debate between Kelsen and Heller flared up at a meeting that in 1928 the Association of German Professors of Constitutional Law held under the title "The Concept of the Statute in the Reich's Constitution": Heller gave a speech critical of Kelsen, who in his reply confessed his "astonishment" at this criticism. An account of the episode can be found in Dyzenhaus 1997, 161–2. See also C. Müller 1985 on the dispute and the relationship between the two thinkers.

[130] Heller contended, in this connection, that Kelsen's method forecloses the possibility of "any psychology or sociology that might be worked out in the human sciences" (Heller 1971a, 16; my translation).

[131] The "preference for methodological syncretism" in Heller 1971c is discussed in Bisogni 2005, 97. Bauer (1968, 364) observes that Heller's new method draws on Freyer 1930 and on Freyer's analysis of the dual nature of spiritual reality (*geistige Wirklichkeit*) as an effective context of sense (*Sinn- und Wirkungszusammenhang*).

approach should make it possible to solve the most important question in the analysis of the life of the state, namely, how the state can express a "unity within the multiplicity" (Bisogni 2005, 95; my translation; cf. Pasquino 1987, 6). The problem, in other words, is to figure out how the state can embody a multiplicity, all the while being "capable of operating in a unitary way" (Heller 1970, 229). Heller started out from a "conflictual" view of social life and saw the state's and the political unity as the form through which this diversity is structured (Pasquino 1987, 6).[132] But two conditions are necessary for this to happen: On a societal level, there needs to be some form of homogeneity, one that (without blotting out all plurality) is expressed by "the group that makes up the state's strong core" (Bisogni 2005, 108; my translation),[133] while on an institutional level there needs to be a "juridical" capacity to keep that social power in check. In Heller's view, it is not enough for there to be a group "imposing […] on its adversaries a shared core of values and aims creating a bond among its adherents and enabling them to stand united" (Heller 1970, 240; my translation): It is also necessary for such a power to be legitimate, and therein lies the specific task of law. For the law, according to Heller, is not just the expression of mainstream values: It also embodies "the community's ethico-legal principles" (Bisogni 2005, 113; my translation).[134] On Heller's conception, social homogeneity needs to be expressed through legal principles informed by values shared by the whole of society. In a nutshell, Heller can be said to assign two parallel tasks to the theory of the state, for it must recognize, on the one hand, the social groups that assert themselves in the political exchange and, on the other, the need for these groups to express legitimate values and principles as participants in the state's organization, where the criterion of legitimacy lies in the ability of those values and principles to be generalized.[135] On Heller's conception, the state acts as a sort of coalescent and coordinator, thus

[132] Dyzenhaus (1997, 191–2) points out that homogeneity—a condition where the parties forming the political unity all recognize one another as part of that unity—should not be taken to mean that there will no longer be any conflict.

[133] Caldwell notes that "the sense of being in a collective (*Wirbewusstsein*) was the substantive prerequisite for the legitimacy of the rules governing state activity," and that in Heller's view, "all political systems require a 'certain degree' of social homogeneity" (Caldwell 1997, 130).

[134] According to Dyzenhaus (1997, 165), "the key legal distinction in Heller's work is between positive law and fundamental principles of law." These principles (as mentioned in Heller 1971c, 251) can be described as "suprapositive, logical and ethical, fundamental principles of law" (ibid.). Staff (1981, 404, 407) underscores the dialectical relation between the actual decision-making unity and the normative system: The latter is an ideal construct, limiting the state's power through the constraints of justice. In a discussion of Heller (1971b, 70, 107–8; 1970, 221–6), Caldwell comments that "at the point where will and norm came into contact, Heller introduced a 'Smendian' moment. The will of the organ […] was limited not only formally […] but also by extralegal, ethical, and sociological considerations. The ethical considerations in particular […] served as basic, unwritten norms shared by a community" (Caldwell 1997, 131–2).

[135] As Dyzenhaus (1997, 198–200) points out, the law so understood acts as a constraint on sovereign power, and that makes it possible to bring about a "substantive legality."

serving an organizing function (Bisogni 2005, 104)[136] that makes it possible to achieve some sort of social homogeneity by holding up shared and general values that can limit the action of the subjects through which that homogeneity is expressed.[137]

8.7. Legal Institutionalism: Santi Romano and the "Illegitimate" Rendition of Carl Schmitt

Highly influential among the currents of the first half of the 20th century was institutionalism. The approach was conceived in France by Maurice Hauriou (1856–1929) and in Italy by Santi Romano (1875–1947) and was then taken up in Germany by Schmitt, who developed it within a different theoretical and ideological framework.[138] Institutionalism is sometimes understood as a critical reaction to legal positivism. That, however, can only be said of positivism in its "normativist" version. To see this, one need only look at the institutionalism expounded by Romano, who clearly avowed his adherence to legal positivism.[139] So, too, Romano worked directly in legal theory:[140] This is unlike what in some respects can be said of Hauriou,[141] but it also means that Romano would seek

[136] Caldwell (1997, 131) argues that, contrary to Smend and Schmitt, Heller viewed the state and the nation as "dialectically related through a complicated process of organization." This is "an 'ordered structure for acting' (*geordnetes Handlungsgefüge*) that allowed cooperation […] and coordination of individuals and groups involved in the whole." Staff (1981, 403–4) points out that order in the state's ordinary life has a sociological dimension to it that lies in an explicit or implicit union of wills (*Willensvereinigung*) and in a political and state unity that take shape through the action of decision-making organs. The state can in this sense be understood as an effective unity (*Wirkungseinheit*) of state and citizen organs. Bauer (1968, 379, 383ff., 390ff., 400ff.) argues that organization means a self-determination (*Selbstbestimmung*) aimed at realizing the common good (*Gemeinwohlverwirklichung*). This is achieved through the state's central decision-making organization (*zentrale Entscheidungsorganisation*). In this framework, the constitution acts as an *Entscheidungsordnung*: It is the order that fixes the criteria for the state organs' decision-making.

[137] For a critical analysis of the shortcomings of Heller's construction, see Bisogni 2005, 114ff., pointing out, on the one hand, the missing link between the state, sovereignty, and general ethico-legal principles and, on the other, the high abstraction of many of the concepts he deploys, starting from that of social homogeneity.

[138] As we will see, the argument that Schmitt cannot properly be listed as an institutionalist along the lines of Romano (whence the idea of an "illegitimate" rendition of Schmitt) is set out in La Torre 2009. On Romano see also, respectively, Sections 12.2 and 11.4 in Tome 1 of this volume. On Hauriou see Section 1.1.4.2 in this tome and Section 12.2 in Tome 1 of this volume.

[139] Romano held that the jurist "must start out" from "positive law" and stated that he himself proceeded "within the framework of a positive conception of law," rejecting "all manner of natural law" (Romano 1946, 21, 79; my translation).

[140] Indeed, in Romano 1946, 1, he presents his work as falling within the "general theory of law," that is, as an effort to conceptualize "the reality of all law and of all experience, on the premise that the theory of the legal order is meta-temporal and not historically determined" (Tarello 1988b, 184; my translation).

[141] As we will see, these two authors not only had two different understandings of what an

to develop a positivist "conception of law as it is in reality, and not as it ought to be according to certain principles," and that the same conception would be based on "a clear distinction between the spheres of law and of morals" (La Torre 2010, 98).[142] This is an objective that Romano would pursue by underscoring the limits of normativism and by fleshing out the idea of a legal order as an institution, an idea on which basis he would outline an account of law.

Romano started out in this enterprise by highlighting what he took to be the legal-theoretical "inadequacy" of the "concept and definition of law" as "a set of norms" (Tarello 1988b, 184; my translation): This view of law shuts out the possibility of developing "any other aspect of law, one that is more fundamental and, even more importantly, antecedent, not only in view what is logically required by the *concept* of law but also in view of an accurate assessment of *reality*" (Romano 1946, 4–5; my translation, italics added). Romano's critical investigation closes in on a series of key assumptions of normativism, in such a way as to highlight both its various shortcomings and its fundamental limit. He thus observes that by analyzing law on the sole basis of norms, we end up with a concept that filters out anything that is not a norm, thereby limiting our field of vision to the law taken into account by the courts. What is more, the normative definition of law will be of "little or no use" to "specific legal disciplines," and in particular to international, constitutional, and ecclesiastic law (ibid., 6; my translation). Here Romano emphasizes that this normative definition may work for private law, but not "for some branches of public law." This is a major limit, considering that, in Romano's view, "law […] is mainly public law," and for this reason, "the elements of the concept of law […] ought to be extracted from public law more so than from private law" (ibid., 7–8; my translation).[143] On top of these criticisms, Romano adds the core substantive argument, which concerns the idea of law as an order (*ordinamento*): When law "is considered in light of an entity's overall legal order," the expedient is "to conceive each such order as a set or complex of norms" (ibid., 10; my translation). But this is only a fallback: As Romano argues, if we are to properly define a legal order, "we will have to […] strike the keynote, putting our finger on the nature of this complex or whole," from which it follows that the

institution is but also proceed from different starting points. As Millard (1995, 387ff.) has observed, among the sources Hauriou uses as bases on which to develop his theory is Émile Durkheim's sociological theory of institutions. Fassò accordingly notes that "in Hauriou's theory, the concept of an institution, or at least the name, […] had a manifestly sociological origin" that cannot be found in Romano (Fassò 2001, 285; my translation).

[142] Romano sees as "inexistent" the "dependence […] of positive law on morality" (Romano 1946, 101; my translation). Barberis underscores that Romano "belongs to the legal positivist tradition because of his evident acceptance of its two basic tenets: (1) the Separation Thesis, in which law and morals have no necessary connection, as well as (2) the Social Sources Thesis, where law is a man-made phenomenon" (2013, 27).

[143] On the role the study of public law played in the writing of Romano's *L'ordinamento giuridico* (The legal order: Romano 1946), see Cassese 1972; Catania 1996, 90, n. 6; La Torre 2009, 69.

legal order "is not the sum of its parts, regardless of whether these are simple norms, but is rather a unity in itself—a concrete and effective […] unit" (ibid.; my translation). So the attempt must be to consider law as a "global unit wherein norms figure as elements" (Tarello 1988b, 185; my translation): It is this unit that Romano identifies as the order (*ordinamento*), thus transcending the idea of the order as a system or as existing in "the fact that norms are coordinated": The order is rather "a complex, one whose norms are not simply accidental elements but function" (of the order itself); the order is "a complex consisting of 'norms,' 'organization,' 'force,' 'authority,' and 'power'" (ibid., 185–6; my translation).[144] In this way, "the legal order becomes […] the name for any organized complex of authority, power, and norms—an objective complex that transcends the individual (this is the impersonality of power) and is coercive (ibid., 186; my translation):[145] It is this ordered complex that Romano identifies as an institution.[146]

Romano proceeds from two basic presuppositions in defining law as an institution (La Torre 2010, 101–2): The first of these is that law exists only in relation to society; the second, that it exists as an organizational phenomenon. More to the point, the only way to make sense of law is in relation to society as "a concrete unity distinct from the individuals that make it up, an effectively constituted (effectively organized) unity." This means that "the concept of law […] must contain the idea of social order" and that Romano's entire conception is based on the "assertion of the social nature of the phenomenon of law and the conception of sociality as 'organization'" (ibid.). As La Torre puts it, "law, before being norm, is organization": This is what distinguishes a legal system and so an institution. Indeed, as was just noted, an institution (or order) is for Romano "any entity or social body" (Romano 1946, 34; my translation).[147]

[144] Tarello (1988, 186; my translation) comments that only "this complex would be both 'objective'—securing the 'impersonality of power' even absent any norms proper (in an order 'that had no place for the legislator but only for the judge')—and 'coercive,' this even if none of its norms were individually backed by the threat of punishment" (the words and phrases enclosed within single quotation marks are from Romano 1946, pars. 7, 8; my translation throughout). La Torre points out that on Romano's conception, "the legal order is not a mere sum of norms," nor is it "a sum of legal relationships" (La Torre 2010, 99).

[145] Romano (1983, 82) understands an institution to be "any stable and permanent social entity or body that forms a body in itself and has a life of its own."

[146] Romano holds that "the concept of an institution and that of a legal order, understood as a unitary whole, stand in a relation of complete identity to each other" (Romano 1946, 33–4; my translation)

[147] La Torre lists five properties that something must exhibit so as to be considered an institution (or order), quoting Romano 1946, par. 12, for each of the properties listed. "(a) it must be objectively and concretely existent: 'however immaterial it may be, its individuality must be exterior and visible.' (b) It must be a 'manifestation of the social, rather that reflecting the pure nature of man.' (c) It must be 'a closed entity that may be considered in and for itself, solely on account of its being an individuality in itself' […]. (d) It must be a 'a fixed, permanent unit […] even when its individual elements change.' (e) The concept of institution implies that of organiza-

On the basis of these premises five consequences are extracted which apply to the way law ought to be analyzed and which are all rooted in the understanding of law as a socially embedded phenomenon and in the idea of organization.

In the first place, we cannot derive the law as something willed or commanded by an institution. Romano can thus be said to espouse an anti-voluntarist, anti-imperativist conception of law (La Torre 2010, 101), from which follows the fundamental role he ascribes to the idea of a *ius involontarium*.[148] At the foundation of an institution we find "a sort of 'material constitution' or 'tacit law,' founded on the 'normative force of fact,'" thus making it so that an institution is based on "a sort of material necessity" (ibid., 105).[149]

In the second place, we cannot derive any central role of punishment in the life of the order, which as we have seen is instead centred on its organizational dimension (La Torre 2010, 122).[150] Indeed, Romano conceives an organiza-

tion. The institution is, in particular, organization of force […] for Romano […] the concept of force […] is […] more or less coinciding with that of 'social force'" (La Torre 2010, 102–3).

[148] As Catania points out, "Santi Romano repeatedly resorts to the so-called *ius involontarium* (customs and principles) in explaining the concept of an order or institution," and in this connection he notes that "the crux of his thought lies in the unbreakable bond between *ius involontarium* and *organization*." This is a conception on which "an organization […] looks more like the outcome of fulfilled intentions than the making of the organization itself by way of men expressing their intention or willingness to support that enterprise" (Catania 1996, 96, 97; my translation).

[149] Croce points out that Romano rejects the idea of the legal system as "a set of imperative norms equipped with corresponding punishments," in its place ushering in the idea of the legal order as the "*skeleton of a social body*, the organic context within which subjective relations take on a specific physiognomy." An order so conceived is a "'concrete and effective […] unity,' the tangible form of a preexisting social unity in which different people stably engage in specific types of relations and practices, making them concrete and protracting them over time." An order can in this sense be understood as "the complex of forces, values, convictions, and knowledge forming the basis of any stable and lasting social group," and "law, and specifically the legal order, coincides with the very phenomenon in virtue of which a social complex is materially organized." This means that, on Romano's institutionalist conception, "law is consubstantial with the phenomenon of the social order […]: The legal order does not guarantee order but is rather the expression of an order already at work within the social body." And so "law is a social meta-institution:" It is the "condition that makes possible the broader phenomenon of social organization" (M. Croce 2010, 85–7; my translation).

[150] On these premises Romano criticizes Hauriou's theory of institutions and his definition of an institution in corporative terms as an "objective social organization that in itself has realized the highest legal situation, in that it simultaneously embodies the sovereignty of power, the constitutional organization of power by statute, and the autonomy of law," making an institution "a certain way of being of social organization," where we find a "permanent systematization in which organs empowered to rule are set up to serve the purposes of the social group within which they exist" (Hauriou 1916, 111; my translation). La Torre summarizes under four headings the criticism that Romano levels at Hauriou: "(i) the limitation of the denotation of the concept of 'institution' solely to the organizations Hauriou calls 'corporative', that is, organizations that have reached a high degree of development, which is to say modern States, is injustified. (ii) b) it is even more incorrect to identify 'institution' with bodies organized according to the constitu-

tion as a "structure" that makes it possible to "rein in the social energy flowing from the aggregation of its individual members." In this sense, "what is organized […] is this force itself." So what we are looking at is not so much an "exclusively coercive or physical force" as a "*social* force; that is, what matters is not so much the aim of the institution as the energies it sparks and attracts" (Viola and Zaccaria 2003, 29; my translation, italics added).[151]

In the third place, once we do away with the idea that we need to single out the one original source of law, we will be able to bring into relief the existence of several legal institutions. Romano thus espouses the thesis of the plurality of legal orders, which exist both as "every element in the organization of an independent state and as […] every nonstate organized body" (Tarello 1988b, 187; my translation).[152]

In the fourth place, the conception makes institutions prior to norms: "Norms do not represent the central element in the phenomenon of law," and "they are no more than an externalization or manifestation of the *institution*, which is the primary and fundamental reality of law" (La Torre 2010, 106). However, institution and norm "are not mutually incompatible notions." They are rather "mutually integrated" phenomena: the institutional dimension of law "is always accompanied by a body of norms (even if not explicitly formulated)" (ibid., 107).[153]

Finally, law can be identified independently of specific "substantive conditions (specific normative contents or particular institutional configurations" (ibid., 109). This is because Romano does not understand law as having any functions or purposes to serve.[154]

tional/representative model. (iii) It is inaccurate to maintain that the institution is a source of law, or that one is the cause of the other, since there is 'perfect identity' between the two concepts and phenomena. (iv) […] Hauriou's conception that the 'institution' is a 'sorte de chose' is obscure" (La Torre 2010, 102). But Romano does credit Hauriou with "having put forward the idea of working into the legal world the concept of an institution broadly understood," and with "having freed that concept from that of legal personality, which may overlap with the former when certain conditions obtain, but which can just as well be absent" (Romano 1946, 26–7; my translation).

[151] La Torre (2010, 109) points out that "Romano's 'anti-sanctionism' is espressed in the denial that sanction is a distintive or central element of legal norm, or better, the legal experience as a whole."

[152] Tarello notes that in "Italian institutionalist pluralism" the concept of an order was developed "in addressing two theoretical problems: That of finding and identifying *an* objective legal order, and that of working out the relations among *several* objective legal orders" (Tarello 1988b, 179–80; my translation).

[153] La Torre points out that "Romano […] recognizes two concepts of law": The first is the fundamental one as a complex of institutions; "the other (subordinate to the former) is that of law as a set of precepts or norms." And corresponding to them are "two different concepts of legal validity: Law as an institution, or as an 'order,' is valid only insofar as it is effective […]. Law as a norm […] is instead valid insofar as it is in some way […] connected with law as an 'order'" (2010, 105).

[154] In commenting the analysis offered in Gavazzi 1977, La Torre lists six features that can

In the early 1930s, Carl Schmitt (2004a) embraced institutionalism in the form of his theory of concrete-order thinking (*konkretes Ordnungsdenken*). This is a change in Schmitt's thought that marks the passage from his previous decisionism to a conception of law that draws on the work of Hauriou and Romano.[155] This passage can be said to have been prompted, from a legal-theoretical perspective, by Schmitt's realization that his previous decisionist way of understanding law was inadequate, or at least that it needed to be integrated (see Schwab 1970, 115; Pietropaoli 2012b, 2; Croce and Salvatore 2013, 1).[156] At the root of his institutionalist turn lay not only the difficulties that decisionism came up against in bridging "the abyss which was created by Kelsen's antithesis between jurisprudence and politics" (Schwab 1970, 115), but also the theory's specifically legal problems, and in particular its inability, on the one hand, to set out "the conditions of existence of a stable and effective legal order" (Croce and Salvatore 2013, 3) and, on the other, to "construct a theory of the international legal order" (Pietropaoli 2012b, 2; my translation). Decisionism, in other words, reveals itself to be a limited theory in two respects, for it can neither explain the stability of legal-political systems nor offer an understanding of the different branches of law.[157]

On the new conception embraced by Schmitt (2004a, 54–7), law is understood as that which ensures "the production of stable and common standards of correctness in a given collectivity" (Croce and Salvatore 2013, 3). It is therefore a conception that, unlike the previous one—on which law exclusively "depends on the *arbitrary* and *unquestionable* decision of a sovereign" (M. Croce 2011, 48)—underscores the need for stable structures as conditions absent which there could be no law. Law, on this conception, is understood to "arise from previous social practices which the concrete order must preserve and promote" (ibid.), and "institutions are *social* products emerging from the stable reiteration of specific behaviours so that they become part of

sum up Romano's theory of law. This theory "is (*a*) positivist (anti-natural law), (*b*) realist, (*c*) moderately anti-normativist, (*d*) anti-statist but not imperativist (pluralist and pan-juridicist), (*e*) formalist, and (*f*) non-sanctionist" (La Torre 2010, 106).

[155] This passage was prefigured as early as in Schmitt 2005 in relation to Hauriou: "I now distinguish not two but *three* types of legal thinking; in addition to the normativist and the decisionist types there is the institutional one. I have come to this conclusion as a result of discussions of my notion of 'institutional guarantees' in German jurisprudence and my own studies of the profound and meaningful theory of institutions formulated by Maurice Hauriou" (Schmitt 2005, 2–3).

[156] It should be mentioned, however, that this shift from a decisionist stance to an institutionalist one in Schmitt's legal perspective has been read from a prevalently political angle and in connection with his adherence to Nazism. See also, in this regard, Chapter 8 in Tome 1 of this volume.

[157] Pietropaoli (2012a, 112–5) argues that Schmitt's new analysis of law needs to be viewed in relation to the "crisis of the state" and the attempt to understand the reality that will develop "after" and "beyond" the state.

a common cultural background" (ibid., 50). These are "sedimented customs which deserve to be protected since they are the *ethical and ethnical matrix* of a collectivity" (ibid.). On Schmitt's analysis, then, law is derived from "social formations […]: the concrete *legal* order is meant to reflect and preserve the concrete *social* order, the latter representing the very grounds of the former" (ibid.).[158] Law and norms are a tool for ensuring the continuity of these social orders (institutions): They serve as "custodians" of the concrete order and as tools making its reproduction possible. It is thus fair to say that "law is both the custodian of social reality and a condition of possibility for institutions to subsist and flourish" (Croce and Salvatore 2013, 4). In Schmitt (2004a, 90ff.), this latter role of law (to enable institutions to subsist and flourish) is tied to the possibility of offering a unitary interpretation of law (and in particular of its general clauses). This can be done "only if there is a sole legitimate interpreter." In Schmitt's view, this is the Führer (M. Croce 2011, 52), who is empowered to decide what these clauses mean and what they don't mean. This is a strong decisionist element that Schmitt's idea of the concrete legal order does not do away with but rather situates and concretizes: Law, for Schmitt, is *both* the concrete legal order and the making of decisions—only secondarily is it also a norm.[159]

However, as La Torre argues, Schmitt's institutionalism can be characterized as an illegitimate (unorthodox) rendition for "its specific use of 'institution' as a basic concept is idiosyncratic and contested" (La Torre 2009, 68). Even if Schmitt's analysis does resemble institutionalism in several respects, the differences outweigh the similarities, especially if we compare it with the institutionalism expounded by Romano.[160] Indeed, as much as the common

[158] Schmitt (2004a, 75ff.) lists as examples of institutions marriage, the family, the guild, the church, and the army.

[159] Pietropaoli similarly observes that "law, for Schmitt, can be a norm, a decision, or a concrete order. But in any historical phase, one of the three elements is bound to prevail over the others" (Pietropaoli 2012b, 9; my translation). Likewise, Croce and Salvatore (2007, 5) explain Schmitt as follows: "*Every* juristic system (and, *a fortiori*, every juristic thought) is composed of norms, a decision, and a specific legal order: the hierarchical, logical order between them is structurally decisive to such an extent that whichever is considered to be the leading element comes to determine the type of juristic system." And they also comment that "the decisionist contribution reflects the genuine particularity of Schmittian institutionalism: by means of it we can identify the social subject who is called upon to uncover among the whole set of interactions those which are juridically relevant, so as to leave aside the interactions which are to be considered to be inessential or dangerous owing to the fact that they are extraneous to the customs of a specific community. Here, this subject is the sovereign to whom is definitively reserved the faculty of deciding, namely of restricting social reality in such a way that normality is defined by excluding those social interactions which are at odds with the aimed homogenisation. Such a normal situation is the condition of possibility for any juristic regulation" (ibid.).

[160] Schmitt draws directly on Romano (1946, 13) in clarifying the relation between norms and the legal order: "'The legal order is a uniform essence, an entity that moves to some extent according to rules, but most of all itself moves the rules like figures on a gameboard; the rules

elements may be significant—witness their objection to both sociologism and normativism,[161] as well as their idea of an "overlap or correspondence between social organization and the legal order" (Pietropaoli 2012b, 3; my translation)— the differences seem to prevail.

The reasons why "Schmitt's institutionalism, or better *Konkretes Ordnungsdenken*, is […] quite different from Romano's doctrine" (La Torre 2010, 101) can be summarized in three main aspects. The first of these is that Schmitt's decisionism cannot be reconciled with Romano's anti-voluntarism: "Behind Schmitt's institutionalism one can fairly clearly discern the sinister shadow of decisionism, a conception that clashes with Romano's decisive anti-voluntarism and anti-imperativism" (ibid.). As was noted, what is central to Romano's institutionalism is the link between "*ius involontarium* and organization" (Catania, 1996, 97), a link contradicted by the strong decisionism present in Schmitt's vision. In the second place, it must be underscored that Schmitt does not embrace Romano's legal pluralism: "The most striking difference between Romano and Schmitt lies […] in the latter's fierce antipluralism" (La Torre 2010, 101). Schmitt's concrete order—which, as was noted, is modelled on the ancient guilds and on institutions such as marriage and the army (Catania 1996, 105)—invokes "a communitarian and essentialist version of the institutional model" (Croce and Salvatore 2007, 4). This is a difference that emerges in Schmitt's view of social relations, "which are judged to be relevant in juridical analysis": On the institutionalist view, "*every durable interaction is a juridical relationship*; in Schmitt's opinion, on the contrary, we should consider as juridical practices only the social practices contemplated by a preceding communitarian identity which has been taken for granted and presupposed in some way since the birth of a community" (ibid.). Schmitt's analysis presents a "monistic logic" that favours the vertical dimension over the horizontal one of social relations: "In this perspective, the whole set of single interactions does not shape but is shaped by a previous social identity, which gives it sense and social relevance" (ibid., 5). According to this monistic logic, "the political unity […] is the condition of possibility for and, at the same time, the real aim of the communitarian identification with *one* concrete legal order" (ibid.).[162] On this basis it can be shown, in the third place, that

represent, therefore, mostly the object or the instrument of the legal order and not so much an element of its structure.' He added correctly that a change in the norm is more the consequence than the source of a change in the order" (Schmitt 2004a, 57).

[161] According to Catania, Schmitt's opposition to normativism is "much more emphatic than Santi Romano's," and "on occasion it turns paradoxical," as when he criticizes normativism for offering a "normativist" interpretation of Pindar's *nomos basileus* fragment (Catania 1996, 89, n. 5; my translation).

[162] Catania notes that, in any event, the question "How does order arise in organizations and institutions?" is answered by Romano and Schmitt alike on the basis of an idea they both share, namely, that the legal order "concretely and historically exists only insofar as it is made up of

in Schmitt the distinction between law and morals melts away: "Schmitt is attracted by a vital, moralistic *Weltanschauung* that tends to confuse and combine the sphere of ethics and of law, which, on the contrary, remain quite distinct in Romano's doctrine" (La Torre 2010, 101).

So, in summary, as much as the idea of a concrete legal order acts in Schmitt as a device with which to arrive at what Pietropaoli (2012b, 9) describes as a "suprapersonal" conception of law, that conception is in many respects "at odds with the basic tenets of legal institutionalism" (M. Croce 2011, 42).

8.8. Legal Positivism and Totalitarian Regimes: Italian Corporativism

With the rise of totalitarian regimes in Italy and Germany came an effort to develop theories of law capable of justifying those regimes and expressing their ideology.[163] In Italy, this task was taken up in particular by the circle of jurists belonging to the school headed by Giovanni Gentile (1875–1944), a school that formed "around the minister Giuseppe Bottai at the Pisa University Faculty of Corporative Sciences" (Bobbio 1973, 229; my translation). This group was significant because, "even though it was philosophically lame," it sought to develop "a Fascist doctrine of the totalitarian state" (Ferrajoli 1999, 39; my translation). This they did by developing "a specific institutional model: that of the corporative state, based on a notion of organic solidarity among classes, as well as among interests and productive forces, and on their subordination to, and unification within, the state, which, contrary to what the liberal model called for, was no longer considered separate from society" (ibid., 40; my translation). The theoretical and legal framework for this model was developed in particular by Arnaldo Volpicelli (1892–1968), precisely in an effort to move beyond the distinction between society and the state (along with that between public and private law) and the liberal tradition (Costa 1986, 118–9).[164]

Volpicelli's work was part of a wider effort to renew a line of legal investigation based on transcending a series of theoretical antitheses distinctive to the liberal legal tradition. What Volpicelli (1932) sought in particular to supersede was the view that sets society against the individual, on the one hand, and the state, on the other: These contrapositions, he thought, needed to become correspondences: "The law is an institution; institutions are society itself, for

organizations that in the end are pre-given, preestablished orders" (Catania (1996, 105, 107; my translation).

[163] On the legal thought developed in connection with Nazism see Chapter 9 in Tome 1 of this volume.

[164] Here we find one of the main questions with which research on the history of Fascism is concerned, namely, the relation between Fascism and liberalism, with a "close scrutiny of the differences and continuities that mark the relation between the liberal and the Fascist side of Italy" as concerns both their institutional makeup and the theories espoused (Costa 1990, 125; my translation).

they represent its normative pre-ordination; society is the state; the state is the individual" (Costa 1986, 115–6; my translation).[165] The identification between society and the state leads to what is "perhaps the most striking thesis: that of the 'homogeneity between public and private law'" (ibid.; my translation). The construction of corporativism thus unfolds within a theoretical framework in which the state is not external to society, and from this thesis a series of traits derive that the corporative state must embody. These can be summarized in Volpicelli's view of the corporative state/society as a "homogeneous social organism" based exclusively on the corporations (in which there is no room for trade unions, and the party don't takes on the role of mediating between different interests), an organism governed by hierarchical relationships and in which there no longer emerge problems of representation or of conflict between the governed and the governors or between freedom and dominion (ibid., 202–4, 333, 343).

The idea of the corporative state as an element of legal Fascism thus brought to the centre of the debate a series of new theoretical questions that had previously been neglected in legal reflection in general. These include "the relation between law and the economy," a question brought into focus by the state's intervention "in economic life"; "the relation between statism and pluralism"; and "the public-private dialectic" (Grossi 2000, 183–4; my translation), a problem solved by "re-mythicizing the state" (Costa 1990, 134; my translation). Corporativism ("a ragged and complicated patchwork") depicts the (corporative) state as a "concretion and ultimate guarantor of the unity of the political, as a pivotal force in the process by which to achieve the unification of multiplicity (or social groups and organs)" (ibid., 134–5; my translation). Corporativism turns out to be no more than a "reframing" of the relation between society and the state and an attempt to fashion that relation in a dynamic way under the "political ideology of Fascism": On the one hand is the state, which turns "toward a corporately organized society"; on the other is the "surfacing of interests corporately represented by the state." Corporativism can thus be seen as an "apology for a political formula" (ibid., 132–8; my translation).[166]

In an attempt to install corporativism as the "general political principle permeating the whole of Fascist society" (Losano 2012, 35; my translation),

[165] Costa (1986, 32) points out that the criticism addressed at the contraposition between society and the individual took aim at the "liberal" view of humans as immediate subjects of needs, a view that, as Volpicelli argued, needs to be replaced with the idea of a "social" subject.

[166] It bears pointing out that a few theoretical advancements come not so much from corporativism itself (which does not innovate on legal thought in any significant way) as from the attempt to work out the issues involving the role of the "executive" and of the "party," which issues emerge as "an indirect consequence of the deep changes the 1920s and 1930s wrought both within legal theory and beyond it" (Costa 1990, 138; my translation). On these aspects, see also Fioravanti 1990).

Volpicelli turned to Kelsen.[167] This recourse to Kelsen plays a twofold role for Volpicelli: On the one hand, he uses Kelsen as a sort of prop in advancing certain theses in the general theory of law, and in particular in revising the framing of legal relations; on the other hand, he criticizes Kelsen's defence of parliamentarianism (and democracy) and his denial of the theoretical and institutional significance of corporativism. From the first point of view, Volpicelli tends to align himself with Kelsen, especially as concerns the effort to move beyond the distinction between public and private law: The idea is that the two thinkers are fighting "the same adversaries from opposite angles," even though Kelsen would be doing so working from the wrong side (ibid., 43–4; my translation). From the second point of view, as was just mentioned, Kelsen is heavily criticized for his support of democracy and parliamentarianism, and especially for rejecting corporativism.[168]

Volpicelli would later cease to engage with Kelsen, and his conception would not be taken up as the official doctrine of Fascist corporativism: He would continue to exert influence, to be sure, but for the problems he framed rather than for the solutions he offered.

[167] In the *Nuova rivista di diritto, economia e politica* (New review of law, economics, and politics), a journal edited by Volpicelli and Ugo Spirito, a series of articles came out translating different theoretical and political essays that Kelsen had written in the Twenties. These and other essays are published, edited by Volpicelli, in Kelsen 1932.

[168] Corporativism was criticized by Kelsen in *Das Problem des Parlamentarismus* (Kelsen 1925b). Costa (1986, 290, 203) makes explicit the premises behind the corporativist view, and in particular its being based on an understanding of society predicated on consent, to such an unrealistic degree that there no longer emerges the problem of the consent of the governed in their relation to those who govern.

Chapter 9

LEGAL POSITIVISM IN THE POSTWAR DEBATE

by Mauro Barberis and Giorgio Bongiovanni[*]

As was noted earlier, the central theme in the legal-philosophical debate after World War II was the relation between law and morals. This drew into a discussion two research traditions, natural law and legal positivism, that had hitherto tended to ignore each other: Exemplary in this respect is Kelsen's gesture in stating that no *reine Rechtslehre* could ever concern itself with justice. The discussion originated from those Continental countries that had known forms of totalitarianism or dictatorship, and it unfolded following these countries' return to democracy. This first happened in Germany and Italy, in the immediate postwar period; then in Spain, only after the demise of Francoism; then in Argentina, especially with the fall of the military dictatorship; and finally in the Eastern European countries, after the fall of the Berlin Wall.

The discussion often played itself out in terms of Hartian opposition between the separability and connection theses—an opposition set up by an author, Hart, who unlike many of his epigones at Oxbridge and in the United States, read the Continental scholars, too. In fact, we will see that every Continental country involved in this debate had developed important traditions in legal philosophy and also in legal theory. However, rarely had the natural-law investigation of justice and the legal positivist investigation of norms and the legal system engaged each other, except at the outset of books, where natural lawyers opt for a *normative* inquiry, and legal positivists for a *cognitive* one.

At the heart of the debate was so-called ethical legalism, which Bobbio renamed ideological positivism—the very old view, in truth rooted more in the natural-law tradition than in legal positivism, whereby the law must be obeyed or applied as such. This view finds itself more at home in the natural-law tradition, where law can be considered such only insofar as it is right, which justifies a presumption in favour of its binding force. Much more problematic, though, is law's obligatoriness in the legal positivist tradition, where Hume's law, coupled with the Separability thesis and a *Wertfrei* attitude, meant that no attempt could be made to infer law's obligatoriness from its mere existence. In any event, after Auschwitz and the criticisms that legal realists and natural lawyers[1] alike levelled at the German motto *Gesetz ist Gesetz*, a trend could be observed from ideological to methodological legal positivism.

[*] Sections 9.1 and 9.2 were written by Giorgio Bongiovanni; Sections 9.3, 9.4, and 9.5 were written by Mauro Barberis.

[1] Starting from 1945, the criticism of legal positivism would grow more robust, expanding as well to other topics (such as legal interpretation and argumentation) and taking new directions.

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9.1. Law and Justice: Radbruch's Intolerable Injustice Argument

A major figure in the debate that unfolded in the wake of World War II was Gustav Radbruch (1878–1949), who as Paulson (2002a, 12) has commented is perhaps the "most important German legal philosopher" of the 20th century.[2] His 1946 article "Statutory Lawlessness and Supra-Statutory Law" (Radbruch 2006b) is among the "most frequently" cited writings in legal philosophy since the end of the war.[3] What makes Radbruch's analysis significant is that it emphatically brought back into the conversation the problem of the relation between law and justice (in this way contributing to the rebirth of natural law theory),[4] all the while offering a solution at once specific and comprehensive through which to address the problem of the conflict between law and justice. This last aspect would become universally known as Radbruch's formula, making his analysis an inevitable reference point for any investigation dealing with that conflict.[5]

This formula was Radbruch's attempt to address the legal problems that came to the fore at the end of the Nazi regime: In providing a tool with which to solve those problems, the formula also offers itself as a theoretical basis on which to work out the relation between law and morality (as well as justice). Indeed, there are two components to the formula. This can be appreciated in Radbruch's twofold statement of the formula:

> The conflict between justice and legal certainty may well be resolved in this way: The positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people, [1] unless the conflict between statute and justice reaches such an intolerable degree that the statute, as "flawed law," must yield to justice. It is impossible to draw a sharper line between cases of statutory lawlessness and statutes that are valid despite their flaws. One line of distinction, however, can be drawn with utmost clarity: [2] Where there is not even

Here we will point out the Scandinavian school, whose main thrust in reacting to legal positivism came from Alf Ross (see Chapter 16 in this tome); the rebirth of institutionalism, which came through the work done not only by Neil MacCormick but also by Ota Weinberger (see Sections 10.3.3 and 18.3.2 in Tome 1 of this volume) and Eerik Lagerspetz (see Section 24.3 in Tome 1 of this volume); the theory of legal argumentation, with Aulis Aarnio (see Section 25.5 in this tome) and Alexander Peczenik (see Section 25.6 in this tome and Section 21.4.2.2 in Tome 1 of this volume); the analysis of Kelsenian legal positivism by Kazimierz Opałek (see Section 16.3.1 in Tome 1 of this volume); and the work on legal reasoning done by Jerzy Wroblewsky (see Section 16.3.3 in Tome 1 of this volume).

[2] On Radbruch see also Sections 1.1.3.2 and 2.4.1 in this tome and Sections 1.8 and 10.2.2 in Tome 1 of this volume.

[3] On the standing of Radbruch's essay in that regard, see Paulson 2006, 17–8, speculating as well that the essay would actually rank at the very top in a study aimed at determining the most cited article in legal philosophy from the postwar period until today.

[4] On the rebirth of natural law theory in Germany and on Radbruch's role in that development, see Section 10.2.2 in Tome 1 of this volume.

[5] Saliger (2004, 69) points out the use of the formula by the Federal Court of Justice (*Bundesgerichtshof*) and the Federal Constitutional Court (*Bundesverfassungsgericht*) in Germany, while also highlighting the problems the formula can give rise to in criminal law.

an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law, then the statute is not merely "flawed law," it lacks completely the very nature of law. For law, including positive law, cannot be otherwise defined than as a system and an institution whose very meaning is to serve justice. (Radbruch 2006b, 7)

As we can see, in the first part of the formula, Radbruch addresses the "question of legal validity, addressing 'flawed law' ('*unrichtiges Recht*') and calling for a judicial holding of invalidity" (Paulson 2006, 26), whereas in the second part the problem is that "of the very concept of law," and here the idea is put forward that if positive law should be completely devoid of justice (described as revolving around the core criterion of equality), it will not even qualify as law.[6] So Radbruch's formula can be analyzed as having two components: The first of these is the "*Unerträglichkeitsthese* ('intolerability thesis')" and the second the "*Verleugnungsthese* ('disavowal thesis')" (Saliger 2004, 68).[7]

Radbruch's thought and his formula, which as noted can be characterized as having had a major role in the rebirth of contemporary natural law theory, have been given different readings in the effort to apply them to certain branches of law (such as international criminal law) and to work out their implications for legal theory. From the first point of view, the formula has been widely used in national case law (especially in Germany) in addressing the question of fundamental rights,[8] whereas its use in international criminal law has met with some reluctance.[9] From the second point of view, Radbruch's analysis has given rise to two main questions: The first one (mainly historical) is whether, and if so how, he can be said to have forsaken legal positivism for natural law theory after World War II; the second is concerned with reconstructing and assessing his criticism of legal positivism and his use of the formula in grounding the thesis of an ontological connection between law and morals.

The thesis of Radbruch's "conversion" to natural law was advanced by H. L. A. Hart but has been denied by other scholars who point out the neo-Kantian foundation underlying Radbruch's theory from the start (the latter ar-

[6] Paulson (2006, 26) comments that in this latter case we would be looking at "a judicial holding of nullity."

[7] Saliger highlights that the first part of the formula in turn contains three theses: "First of all that the conflict of justice and legal certainty (*Rechtssicherheit*) could not be solved absolutely, thus allowing only a conditional priority. Secondly, that this conditional priority operates in favor of legal certainty; thirdly, that the primacy of legal certainty is revoked, when injustice becomes intolerable" (Saliger 2004, 68).

[8] As mentioned, the formula was directly invoked in Germany by the Federal Court of Justice and the Federal Constitutional Court (*BGHSt* 39, 1–1992; *BVerfGE* 95, 96–1996) in the so-called *Mauerschützen* cases, involving "border guards at the former border of the German Democratic Republic accused of shooting and killing East German refugees" (Saliger 2004, 69). On the *Mauerschützen* cases and the role that Radbruch's formula played in them, see Alexy 1993, R. Dreier 1995, A. Kaufmann 1995, Saliger 1995, H. Dreier 1997, Vassalli 2001.

[9] On the role that Radbruch's formula has had in international criminal law, see Bassiouni 2011, 72.

gument is set out in particular in Paulson 2006; cf. Klein 2007, 126ff.). In a well-known passage, Hart claimed that "Gustav Radbruch, had himself shared the 'positivist' doctrine until the Nazi tyranny, but he was converted by this experience and so his appeal to other men to discard the doctrine of the separation of law and morals has the special poignancy of a recantation" (Hart 1983b, 72). Working against that argument is the claim that "it is difficult to regard Radbruch as a straightforward legal positivist given the articulated position in his pre-war *Philosophy of Law* according to which 'justice' is an integral part of the 'idea of law'" (Mertens 2002, 187). It is difficult to settle on any definitive solution to this question. That is because Radbruch's theory offers elements supporting both sides in the debate. The theory contains in particular three main elements that support different interpretations of it depending on how they are weighed relative to one another. Radbruch draws on the value theory of the neo-Kantian Baden school so as to arrive at "the 'idea of law'" (Paulson, 2006, 31). This idea is built around a "triadic scheme" whose three components are "justice qua absolute value," "purposiveness (*Zweckmäßigkeit*)," and "legal certainty" (ibid.). As was just noted, these three elements can be balanced in different ways, and depending on the angle from which they are viewed, we will get a picture of Radbruch's pre-World War I thought as being either positivist or nonpositivist.[10]

In legal theory, Radbruch's conception touches two main issues: The first, concerning the relation between legal positivism and Nazism, is whether the positivist emphasis on obedience to the law favoured the advent of totalitarian regimes; the second, concerning the concept of law, is whether this concept can be defined independently of moral content. Radbruch takes a clear stand on both of these issues, arguing that the Nazi regime "contrived to bind its followers to itself," exploiting the "two maxims 'An order is an order' and 'a law is a law'" to enlist "soldiers and jurists respectively"; the latter of the two maxims, he argued, "knew no restriction whatever" and "expressed the positivistic legal thinking that, almost unchallenged, held sway over German jurists for

[10] In commenting Radbruch 1950, pars. 4, 7, 10, Paulson (2006, 29ff.) notes that these three elements making up the idea of law play different roles answering different needs: The element of justice as an "absolute value" is meant to capture the very essence of law; "purposiveness" answers the need to specify justice, offering a "standard of application for the principle of justice" as a basis on which to decide what is to be deemed equal or unequal (this element thus "reflects a political decision on ultimate values, on a *Weltanschauung*" and is thus "clearly and inevitably relativistic"); the element of "legal certainty" requires the judge to apply the law even if it should fail to conform to justice. As noted, different weighings of these three elements will lead to different interpretations of Radbruch's thought. The interpretation that makes him out to be a legal positivist keys in on the relativism emerging from the requisite of the purposiveness of law but lays even greater emphasis on the element of legal certainty, from which is extracted the requirement that the judge apply the law regardless of its justness. Radbruch (2006b, 6–7) invokes both of these elements in constructing the idea of law, and as indicated he points out that the main contrast is that between legal certainty and justice. On these aspects, see Leawoods 2000, 492ff.

many decades"; on the positivist approach, he claims, "'statutory lawlessness' was, accordingly, a contradiction in terms, just as 'supra-statutory law' was" (Radbruch 2006b, 1). In this sense, "Positivism, with its principle that 'a law is a law,' has in fact rendered the German legal profession defenceless against statutes that are arbitrary and criminal" (ibid, 6).

Similarly, in regard to the second question, Radbruch argues as follows:

> Positivism is, moreover, in and of itself wholly incapable of establishing the validity of statutes. It claims to have proved the validity of a statute simply by showing that the statute had sufficient power behind it to prevail. But while power may indeed serve as a basis for the "must" of compulsion, it never serves as a basis for the "ought" of obligation or for legal validity. Obligation and legal validity must be based, rather, on a value inherent in the statute. (Radbruch 2006b, 1)[11]

Radbruch thus held legal positivism in part responsible for the rise of the Nazi regime,[12] while also arguing that there is no way to establish the validity of law without invoking values (such as legal certainty and justice).

Radbruch's positions have found themselves at the centre of a wide and continuing debate. Specifically, the first question addressed in his theory (and the problem of obedience to unjust law) "was the focus of the 1958 controversy between H. L. A. Hart and Lon L. Fuller,"[13] while the intolerability thesis played an important role in the thesis of the connection between law and morals put forward by Alexy (1999a; 2002a; cf. Bix 2006).[14]

9.2. The Later Kelsen: From Transcendentalism to the "Sceptical Phase"[15]

The latter part of Kelsen's intellectual development—which can be said to stretch roughly from the second edition of his *Reine Rechtslehre* (Kelsen 2005)[16]

[11] Haldemann (2005, 163) comments that "this unequivocal statement was directed, in particular, at Kelsen's legal philosophy, one of the most influential theories of the 1920s." But it must be mentioned in this regard that if Radbruch was in fact taking aim at Kelsen here, he must have done so disregarding that Kelsen (a) has always recognized the constitution as a source of law superior to the statutes and (b) conceived the Austrian system of judicial review.

[12] Haldemann observes that this thesis "contains two elements—the 'causal thesis' (= the claim that the theory of legal positivism played a role in paving the way for the Nazi takeover) and the 'exoneration thesis' (= the claim that legal positivism, in virtue of ostensibly binding the judges in Nazi courts, might serve to exonerate them)" (Haldemann 2005, 163).

[13] On this debate, which takes its cue from the "grudge informer" case, see Paulson 1994 and Mertens 2002. According to Mertens (2003, 281), what compels Radbruch to reject legal positivism is his belief in "a difference between statute and law."

[14] In Alexy 2002a, 40ff., Radbruch's formula figures among the main normative arguments (next to the argument "from principles") for the view that law makes a claim to correctness and that this claim has a moral content. On Alexy, see Sections 10.3 and 25.4 in this tome, as well as Sections 10.3.2.2 and 10.4.3.1 in Tome 1 of this volume.

[15] This is a label suggested in Paulson 1998, XVII, XLIII.

[16] With the advent of Nazism and the passage of the anti-Semitic laws, Kelsen was removed from his post in Cologne and emigrated first to Switzerland and then, in 1940, after the outbreak

until his death in 1973—overlaps with the previous period at some places while going in new directions at others. In his later phase, "after a long period of work on the *Pure Theory of Law* […] Kelsen turned his attention to the theory of norms" (Paulson 1992, 266). This is a development that started out with his work on the applicability of logic to norms (Kelsen 1973a, 1973b, 1973c)[17] and came to a close with his *Allgemeine Theorie der Normen* (General theory of norms: Kelsen 1991).[18] In this process, Kelsen rethought some basic assumptions of his theory, so much so that the outcome has been described as a "dramatic change," for he abandons some core parts of that theory,[19] moving away from "logicism toward irrationalism,"[20] a view Beyleveld (1993) terms "normative irrationalism," and by changing the conception of the basic norm in his later writings, Kelsen dismantled the framework of his theory (Stewart 1990, 297).[21]

As Wiederin (2009, 352–6) suggests, just by looking at the *Allgemeine Theorie der Normen*,[22] we can identify three main innovations that Kelsen in-

of World War II, to the United States. After the first edition of the *Reine Rechtslehre* came out, in 1934, Kelsen continued to investigate the general theory of law. And after the 1920 work on sovereignty (Kelsen 1920), he returned to the question of international law, an area in which he advocates a legal pacifism, and in *Peace through Law* (Kelsen 1944) he calls for the foundation of both an international tribunal for deciding controversies among nations and an international criminal tribunal for individual war crimes.

[17] According to Wiederin (2009, 351), the Kelsen's second phase can be said to have begun in 1959 (after the second edition of the *Reine Rechtslehre*) with a March 6 letter he sent to the German legal logician Ulrich Klug asking for some clarifications on the applicability of logic to law.

[18] The book was posthumously published in 1979 in the German edition (edited by K. Ringhofer and R. Walter). Beyleveld comments that "the book reads like a set of preparatory notes under a number of headings: it is very much a 'work in progress' rather than a finished piece" (Beyleveld 1993, 104).

[19] See Paulson 1992, 273, 266, arguing that Kelsen's posthumous work "marks truly extraordinary changes in Kelsen's theory."

[20] Losano 1985, XVII, XXX, quoting Weinberger 1981.

[21] How much emphasis ought to be laid on the elements that introduce change in his theory depends in part on how one decides to interpret and periodize his oeuvre as a whole. On the question of periodizing his work, see Chapter 8 in this tome, footnote 17.

[22] Paulson singles out three main "units" of the *General Theory of Norms*: "First, there is a unit comprising the general part, as it were, of a theory of legal norms (chs. 1–27, and 59 at par. ii A). Kelsen gives a good bit of attention here […] to the act of will, to validity and efficacy, and to various interpretations of the distinction between 'is' and 'ought.' A second unit comprises related themes, with special attention to the distinction between legal norm and legal proposition or statement (chs. 28, 30–49, and 59 at par. i B–F). In addition, Kelsen […] examines rights, duties, and entitlements, the spheres of legal validity, the concept of sanction and the principle of retribution, positivity (*Positivität*), thinking *versus* willing, […] and the basic norm. Finally, bringing together from unit one the theory of the legal norm *qua* meaning of an act of will, and from unit two the detailed discussions of the distinction between legal norm and legal proposition, Kelsen in a third unit considers the role of logic in the law (chs. 29, 50–8, 59 at par. ii B, and 60–1). In this last unit, directed primarily to the question of the applicability of principles of logic to legal norms, Kelsen defends what has appeared to some writers in the field to be an utterly sceptical, even 'irrationalist' conclusion: logic has *no* application to legal norms" (Paulson 1992, 267).

troduced in his theory, and on this basis we can assess the changes made to the *reine Rechtslehre*. The first innovation lies in the "foundation" on which the opposition between *Sein* and *Sollen* is made to rest; the second lies in his conception of norms as a "given object of knowledge"; and the third lies in his attempt to work out a general theory of norms (a theory purporting to explain norms in general, and not just legal ones). Accordingly, the theory can be said to change under three main headings: the relation between norm and will ("the concept and function of norms" change); the basic norm and that the relation among norms; and the problem of the applicability of logic to law and to "conflicts among norms" (ibid., 356–60).[23]

The relation between *Sein* and *Sollen* came to be interpreted by Kelsen in light of the philosophy of language (Heidemann 1997, 163). At least until the first edition of the *Pure Theory of law*, of 1934 (see Chapter 8, Sections 8.2–8.4), the *Sein* and the *Sollen* were understood by him as transcendental categories, but subsequently he rested the distinction on a linguistic basis (Wiederin 2009, 352–3; Heidemann 1997, 163ff.). This linguistic account came at the end of a period in which he had been relativizing the same distinction in several respects. There is a deliberate way in which that can be said to have happened and a more contingent way. In the former sense, the relativization can be seen as bound up with a specific phase in Kelsen's thought, his realist phase;[24] in the latter sense, it can be seen simply as the outcome of his calling into question the transcendental basis of the distinction, a process as a result of which he wound up toning down the same distinction.[25] In the *General Theory of Norms* (Kelsen 1991, 58–61), the *Sein* and the *Sollen* are "no longer exclusively presented as basic primitive concepts" (Wiederin 2009, 353): They also figure as two linguistic "modes," or meanings. Which is to say that Kelsen embraces a "semantic conception" of them on which "statements" and "norms" are understood as "different senses or meanings" of a sentence (ibid., 353–4; Heidemann 1997, 164):[26] The *Sein* is expressed in "statements" that describe the

[23] Losano (1985, LVI ff.) singles out seven changes marking the transition from the early to the later Kelsen, who (*i*) "rejected Kant as the basis on which to interpret the underlying dichotomy of the pure theory of law, that between *Sein* and *Sollen*"; (*ii*) took "into account the empirical content of norms" in working out the relation among legal systems; (*iii*) embraced a voluntarist view and came to the conclusion that "the rules of logic do not also apply to the judge's activity"; (*iv*) came to think that legal thought "cannot be known simply on the basis of a logico-rational analysis"; (*v*) developed "a view of the basic norm as a fictitious norm"; (*vi*) highlighted the contradictions that emerge when the idea of the basic norm is applied to the system of moral norms; and (*vii*) took a nuanced approach in rejecting the applicability of logic to law (in fact there are places—such as Kelsen 1991, 264, 268ff., 271—where he seems to be holding the contrary view, namely, that logic does apply to law).

[24] Heidemann (1997, 103ff.) who distinguishes four phases in Kelsen's thought, identifies the third phase as *cognitive* realism.

[25] See Weiterin 2009, 353, commenting on Kelsen 1941 and 1973d.

[26] Heidemann (1997, 167) argues in this regard that the most likely interpretation of the later

way reality *is*, while the *Sollen* is expressed in norms that state the way reality *should* be. The sense or meaning of sentences can thus be either "descriptive" or "prescriptive," that is, it may be addressed at our "knowing" or at our "willing" (Kelsen 1991, 163–4). What in Kelsen's view makes a sentence descriptive or prescriptive does not depend on its content, which Kelsen accordingly characterizes as its "modally indifferent substrate" (ibid., 58). What makes a difference is instead the linguistic specification made by the *Sein* and the *Sollen*: These are markers of sense—making a sentence either prescriptive or descriptive—and they impart that sense as "distinct mental functions" (ibid., 164), thus "presupposing an intentional psychic act of one type or another" (Heidemann 1997, 167): In a declarative statement, this will be an "act of thought"; in a normative statement, it will be an "act of will" (Kelsen 1991, 164, 233).[27] There can be no declarations or norms without intentional acts that make them so. In other words, there can be "no norm without a norm-positing act of will" (ibid., 3).

From this perspective, a norm is qualified as an "ideal content of sense" (Heidemann 1997, 174; my translation), and in this way norms are put on the same footing as the "facts" referred to in declarations. Norms are thus understood as belonging in the "objectual" dimension (the world of the *Sollen*) and no longer as a creation of the method of knowledge: As Wiederin (2009, 355) has observed, "there is no specifically normative method but only assertions about normative entities, which assertions can be true or false." Two consequences flow from this conception, the first being that the *Sollen* winds up ontologically depending on there being an act of will (addressed at the behaviour of others), and so on a *Sein*,[28] and the other that a distinction needs to be drawn between norms and propositions about norms, that is, between the existence (i.e., validity) of norms and their scientific description, or the knowledge we can have of them (ibid.).[29] On this conception, a "legal norm emerges as the meaning of an act of will, and the validity of the legal norm is 'conditional upon the act of will of which it is the meaning'" (Paulson 1992, 266).[30] Finally, whereas Kelsen had so far been concerned with *distinguishing* legal norms from moral ones, now in the *General Theory of Norms* he was instead looking for the trait they have in common (Wiederin 2009, 356).

Kelsen is that the semantic account of norms prevailed over the pragmatic one. But Wiederin (2009, 353–4) finds that Kelsen's theory simply "lacks clarity" on this point and is thus amenable to different interpretations.

[27] Heidemann (1999, 162–3) points out that Kelsen (1991, 344 n.106) draws on Husserl's *Experience and Judgment* (Husserl 1973) in distinguishing different types of intentional psychical acts.

[28] In Bulygin 1998, 297ff., these awkward outcomes and shifting positions are set down to an unresolved tension between the two basic "ingredients" of Kelsen's pure theory of law: the "Kantian one" and the "positivist one".

[29] This is a distinction first introduced in the *General Theory of Law and State* (Kelsen 2006) and then fully exploited in *Pure Theory of Law* (Kelsen 2005). See Losano 1966, XLVI–XLVII.

[30] This can be an example of what Alchourrón and Bulygin (1981, 95ff.) call "the expressive conception of norms."

As noted, these innovations entail three important theoretical changes. In the first place, they change Kelsen's conception of norms, which are now understood as dependent on acts of will, and so (on an imperativist model) as commands. Whereas in previous works, especially the *General Theory of Law and State* (Kelsen 2006, but see also Kelsen 1960a), Kelsen "is engaged in a running battle with *fin de siècle* representatives of the volitional or 'will' theory," he now "joins forces with the very 'will' theorists" and abandons his previous positions (Paulson 1992, 266). Kelsen (1991, 3) adopts Dubislav's (1937) motto: "No imperative without an imperator, no command without a commander."[31] Accordingly, in the *General Theory of Norms*, the general form of norms—previously the form of the hypothetical judgment—becomes that of the command or imperative (Kelsen 1991, 2, 32, 96ff.). This general command-form is understood to describe legal and moral norms alike (Wiederin 2009, 358), despite the fact that the latter not carry any penalty for noncompliance (Kelsen 1991, 97–8).[32]

In the second place, Kelsen's new conception affects his construction of the legal system. The most conspicuous change concerns the *Grundnorm*, which is now qualified as a "fiction" (Kelsen 1991, 255–6): "After years of referring to the basic norm as a *hypothesis*, Kelsen changed his mind in the beginning of the 1960s, suggesting instead that we think of it as a *fiction*" (Spaak 2005, 405). The basic norm, as we saw in Section 8.4 of this tome, was initially conceived as the ultimate condition on which depended the system's validity and the "objective" existence of norms: In that role it was considered "the meaning of an act of thinking," but now it is conceived in light of the relation between norms and act of will (ibid.). On this basis, Kelsen "explains that presupposing the basic norm involves presupposing an imaginary authority, over and above the 'fathers' of the historically first constitution, whose act of will has the basic norm as its meaning." But this all "means that the notion of the basic norm *contains a contradiction within itself*, as it involves presupposing the existence of an authority that *could not possibly exist*" (ibid.).[33] The basic norm thus becomes a simple fiction in the sense of the As-If (*Als-Ob*) of Vaihinger's (1935) philosophy; that is, it becomes "an *aid to thought* (*ein Denkbehelf*) to be used when one cannot reach one's aim of thought (*Denkzweck*) with the materi-

[31] This motto is set by Kelsen (1991, 29) next to the converse one, namely, "'no imperative without an *imperatus*,' i.e., a person (or persons) to whom the imperative is addressed."

[32] Kelsen (1991, 96ff.) does, however, distinguish four "functions of norms: commanding, permitting, empowering, derogating."

[33] Writes Kelsen: "For the assumption of a Basic Norm—for instance, the Basic Norm of a religious moral order 'Everyone is to obey God's commands,' or the Basic Norm of a legal order 'Everyone is to behave as the historically first constitution specifies'—not only contradicts reality, since there exists no such norm as the meaning of an actual act of will, but is also self-contradictory, since it represents the empowering of an ultimate moral or legal authority and so emanates from an authority—admittedly, a fictitious authority—even higher than this one" (Kelsen 1991, 256).

als available" (Spaak 2005, 405–6): The basic norm is in this sense a fiction aimed at founding the normativity of the legal system.[34] This conception not only gives rise to the problem of how norms can be derived from one another and how conflicts among norms can be solved, but also brings up the broader question of whether Kelsen's overall vision holds up. In this shift, in other words, Kelsen seems to be driving the logic of positivism to such an extreme as to enact its "swan song."[35]

And finally, in the third place, we have what is perhaps the most recognizable aspect of Kelsen's later thought, namely, his thesis that logic does not apply to law, and in particular that it cannot be applied in working out the problem of conflict among norms. This thesis, too, stands in contrast to Kelsen's earlier positions (Wiederin 2009, 356–7). In fact it represents a "sharp break" with his previous thinking on this question, for it says that "there can be no recourse to the principle of noncontradiction in law" (Losano 1985, XXX; my translation). Starting from *Derogation* (Kelsen 1973e), Kelsen denies that this principle "can be applied even indirectly by way of propositions that *describe* norms in conflict" (Losano 1985, XXV; my translation), and he instead points to another principle, that of the *lex posterior* (subsequent law, whether statutory or constructed), a principle whose application is entrusted to the judge's decision. In *Law and Logic* (Kelsen 1973a) he goes even further, arguing that the logic one cannot apply to law includes not only the principle of noncontradiction but also "the rules of inference" (Losano 1985, XXX; my translation). The argument boils down to the claim that while the rules of inference apply to propositions, including propositions about norms, they cannot apply to norms themselves, because (as we saw) these are essentially acts of will (in the later Kelsen), and as such they can neither be true nor false: Unlike the theoretical syllogism, the "normative one" therefore "rests on an act of will" (ibid., XXXI; my translation).[36] The very possibility of a specifically legal logic tied to the use of analogy or of the argument a fortiori is denied by Kelsen insofar as this is an act of will of the judge and not of a "logical deduction" (ibid., XXXI; my translation).

[34] Writes Kelsen (ibid.) in this regard: "The cognitive goal of the Basic Norm is to ground the validity of the norms forming a positive moral or legal order, that is, to interpret the subjective meaning of the norm-positing acts as their objective meaning (i.e., as valid norms) and to interpret the relevant acts as norm-positing acts. This goal can be attained only by means of a fiction. It should be noted that the Basic Norm is not a hypothesis in the sense of Vaihinger's philosophy of As-If—as I myself have sometimes characterized it—but a fiction. A fiction differs from a hypothesis in that it is accompanied—or ought to be accompanied—by the awareness that reality does not agree with it."

[35] But see Spaak (2005, 406), noting that for many commentators, such as Tur (1986) and Walter (1990), "the change [in Kelsen's understanding of the basic norm] is of little consequence."

[36] On these aspects, see the discussion that Kelsen (1973a, 229ff.; 1991, 194ff.) devotes to Jörgensen's dilemma (Jörgensen 1937–1938), denying that this dilemma can be solved. On Jörgensen's dilemma, see Section 26.4 in this tome.

The last phase in Kelsen's thought has given rise to many questions and has prompted many in-depth analyses (Wiederin 2009, 360–3). The main question, however, remains that of who the "real Kelsen" is (Losano 1985, LVI): the neo-Kantian, anti-voluntarist one or the voluntarist one that comes through in his later works.

9.3. The Italian Contribution: Legal Positivism Analyzed

As a country torn between a strong Catholic and natural-law tradition, on the one hand, and an Enlightenment and legal positivist tradition, on the other, Italy too became a stage where the legal-philosophical discussion thrust into the foreground the question of the relation between law and morals. The position developed by natural-law theory in Italy is covered as usual in the dedicated section; so in this section we will be considering the legal positivist position, which was closely associated with the Italian school of analytic legal theory—a systematic engraftment of Kelsen's *reine Rechtslehre* onto English analytic philosophy.[37] The leading figures of the Italian school, which influenced the discussion in the other "Latin" countries, were its founders, namely, Norberto Bobbio and Uberto Scarpelli. But as we will see shortly, a thriving legal-realist current flourished in their wake.

9.3.1. Bobbio and Methodological Legal Positivism

The work of Norberto Bobbio (1909–2004) exemplifies the increasing receptiveness of Italian culture to Anglo-American influences, after centuries of French and German hegemony.[38] Bobbio, a legal theorist with a background in phenomenology, was among the first scholars to apply philosophical analysis to law. In the seminal essay Bobbio 1950, he went back to a typical Continental question, much debated in Germany and also in Italy in the 1930s—the question of the scientificity of legal dogmatics—but this was only the start of his investigation of legal science (cf. Bobbio 1967). More importantly, maybe, this essay was considered the founding act of the Italian school of analytical legal theory.

The courses Bobbio taught at university in the 1950s, on the other hand, were devoted to the two most investigated topics in the legal positivist tradition, theory of norms and legal system (see Bobbio 1993). He reframed in strictly linguistic terms the Kelsenian theory of norms, by redefining *norm* (not as ideal entities, but) as prescriptions, that is, sentences used for prescribing. Bobbio also expanded Kelsen's theory of the legal system in two directions: On the one hand, he adopted Romano's institutionalist theory of the plurality

[37] For a selection of texts representing the Italian analytic school, see at least the two collections Jori and Pintore 1997 (in English), and Comanducci 2004 (in Castilian).

[38] On Bobbio, see also Section 11.4 in Tome 1 of this volume.

of legal orders (see Section 8.7 in this tome and Section 11.4 in Tome 1 of this volume), and on the other he recast Kelsen's normativism by bringing to bear Hart's concept of power-conferring rules.

But perhaps the main contribution Bobbio made to the (meta-)theory of law, before giving up it and taking up political philosophy, regards legal positivism. He distinguished three meanings of the expression *legal positivism*, in order to point out a still defensible form of legal positivism. Hart (1973) had already listed a number of meanings, and Ross (1961) similarly distinguished positivism from quasi-positivism, ascribing the latter stance to Kelsen. In the same period, Bobbio 1996 and 1965a introduced a distinction among legal positivism as a method, as a theory, and as an ideology—three meanings understood as logically distinct, without the first entailing the second or the third, but with the third presupposing the second and the second the first (Bobbio 1996, 246–7).

By *legal positivism as a method*—or *methodological* legal positivism—Bobbio meant a *scientific*, or value-neutral, approach to the study of law. This definition draws no distinction between legal theory, on the one hand, and legal dogmatics, on the other, both of them encompassed within the broad term *study*: an otherwise usual conflation in common-law culture, and maybe in Hart's Separability thesis itself. For several decades Hart's view was that law must to be known from an internal or hermeneutical point of view, but he lastly characterized his own jurisprudence as descriptive (Hart 1994b), reiterating Bobbio's methodological positivsm thirty years later.

By *legal positivism as a theory*—or *theoretical* legal positivism—Bobbio meant the views historically upheld by the 19th-century legal authors commonly ascribed to technical or theoretical legal positivism. These authors adopted a conception of law emphasizing 1) its factual, positive nature; 2) the direction of conduct by way of imperatives; 3) the sanctioned character of them; 4) production of them by the state; 5) deductive application by the judges; 6) unity, consistency and completess of legal normative systems; 7) the autonomy and scientific charachter of legal dogmatics. These are the same theses the antiformalist movements of the late 1800s and early 1900s attacked as formalist. To be sure, Bobbio himself regarded many of these theses as no longer viable, but this should not be taken to mean that *methodological* positivism had been surpassed.[39]

By *legal positivism as an ideology*—or *ideological* legal positivism—Bobbio meant the assumption, common until Auschwitz, that citizens and judges respectively have an obligation to obey the law and to apply it. He distinguished

[39] This last point, about the logical interrelation between theoretical and methodological positivism, is one that has not always been appreciated by later scholars, especially among nonpositivists and neoconstitutionalists. But that does not make the interrelation any less important: Theoretical legal positivism maybe *presupposes* but of course does not *imply* methodological positivism, whose effort to know the law can result in better theses than those of 19th century legal positivism.

a strong version of that thesis, ethical legalism, and a weak one, legalism without further qualification. Ethical legalism is the view, found in Thomas Hobbes as well as in Hegel, that positive law is *by definition* right, and that it must therefore always be obeyed. Contrary to Bobbio's apparent view, however, the late version of this third thesis does not *presuppose* the first one—i.e., methodological positivism and the Separability thesis—but rather seems to *contradict* it, by setting up a necessary connection between law and a morals that align themselves with law, rather than the other way around.

Legalism without qualification, for its part, states that law must be obeyed so long as it at least ensures social order. This weak version of ideological legal positivism was judged by Bobbio to be compatible with the rule of law and the *Rechtsstaat*, these being ideals he consistently defended, whereas the strong version became simply unpresentable after Auschwitz (Bobbio 1965a, 114–7; cf. Section 9.3.2 below). Here, too, Bobbio seems to have moved independently of Hart but in parallel to him, at least as far as concerns reinterpretation of legal positivism in Hart 1994b. Both authors, in other words, recognized that the attacks directed at legal positivism in the 20th century, especially after World War II, were clearly on the mark—but while various theses of *theoretical* legal positivism and the strong version of *ideological* legal positivism were thus undermined, no damage was done to *methodological* legal positivism, which in Hart's and Bobbio's assessment alike could still be defended as such.

9.3.2. Scarpelli and Ideological Positivism

Uberto Scarpelli (1924–1993), Bobbio's pupil and friend, in much the same way can be reckoned among those who pioneered the linguistic analysis of law, not just in Italy.[40] He always paid much closer attention than his friend to the specifically English sources of philosophical analysis, and in particular to the contemporary analysis of ordinary language, following the lead of Hart and Richard M. Hare (see Scarpelli 1959). With this philosophical background, Scarpelli developed an important account of normative language, thereafter extending his analysis to metaethics and normative ethics, too, taking part in the promotion of a laic bioethics. In the tradition of theoretical legal positivism, though, Scarpelli occupied himself in the first place with the theory of norms and legal system.

As to the theory of norms, Scarpelli picked up where his friend had left off: Bobbio had recast Kelsen's normativism in strictly linguistic terms, and Scarpelli integrated the outcome into a more general theory of normative language, as well as into an account of legal method. Among the most original theses to come out of this research is that the sentences formulated by legal dogmatics in order to construe the legislator's precepts are no more than *reiterated* pre-

[40] On Scarpelli see also Section 11.5 in Tome 1 of this volume.

cepts. The theory of the legal system, for its part, did not occupy Scarpelli as much as the theory of norms, for his interest in the legal system lay in its highest reaches, where law meets morals and politics.

Indeed, Scarpelli's most important contribution perhaps consisted in reviving ideological legal positivism. A weak version of it had already been defended by Bobbio, to be sure, but Scarpelli prefigured its present avatars, such as ethical legal positivism (Campbell 1996, Waldron 2001). His essential work in this regard (Scarpelli 1965) enters on the moral and political presuppositions of methodological legal positivism itself: an approach that Bobbio had only thematized (Jori 1997). Scarpelli argued that a decision to adopt the legal positivist method—a method purporting to be scientific and value-neutral—is in fact dependent on the prior political and evaluative choice consisting in accepting some positive system of law. More to the point, methodological legal positivism presupposes an ideological choice in favour of the positive law typical of the modern state.

This vindication of a weak ideological positivism yielded a unitary, explicative, and critical definition of *legal positivism* itself (Scarpelli 1965, chaps. 11, 12). Such a locution had been analyzed by previous scholars in terms of a set of scarcely related theses; Scarpelli shaped up legal positivism as that moral conception of law whereby law should be divorced from morals and be known in a nonevaluative way. In Scarpelli, then, legal positivism is concerned at its core with the relationship between law and morals and with legality understood as the fundamental value of law. Those who read Scarpelli in the 1960s, however, were not especially struck by the way he openly acknowledged the political character of law.

It is often remarked (Pattaro 1976, Jori 1987) that the effect of the criticism Scarpelli levied at methodological legal positivism was to precipitate the crisis of Italian analytical school, which split into Scarpelli's ideological positivism and methodological legal positivism advocated by a new and vivacious legal-realist movement (the subject of the next section). But Scarpelli's criticism did no more than register the double-faced vocation of the Italian school: On the one hand, a genuine cognitive concern with *knowledge* of law, working in favour of *Wertfrei* study of law and drawing Bobbio himself towards a sort of sociology of law; and on the other hand a *normative* calling, favouring a critical legal positivism more likely to develop itself into ethical positivism or neoconstitutionalism.

The affinity to ethical legal positivism can be found in Scarpelli's most direct pupil, Mario Jori (1946–), who configured legal positivism as a theory of law having two mutually conditioning aspects, a political and a scientific one. The political aspect lies in the conception's choice in favour of positive law (whether at large or with reference to a specific system of law), understood as a set of norms designed to introduce order into human conduct. The scientific aspect lies in the theory's acknowledgment that a positive law likely to achieve

its end must be al least *knowable*, even if only from an internal point of view, à la Hart, and only once the law has gained political acceptance, à la Scarpelli (cf. Jori 1992). On the affinity that weak ideological legal positivism has to neoconstitutionalism we must instead refer to an indirect pupil of Scarpelli, Luigi Ferrajoli (see Section 10.5 in this tome).

9.3.3. Italian Legal Realism

There developed within the Italian analytical school of law a line of inquiry that drew on the legacy of legal realism, this with an emphasis on American legal realism in the work of Giovanni Tarello (1934–1987), the founder of the Genoa School, and on Scandinavian legal realism in that of Enrico Pattaro (1941–).[41] Tarello worked out a theory of norms based on Ross's distinction between legal sentences or provisions, produced by legislators, and legal meanings or norms, produced by judicial interpretation and even by legal dogmatics (Tarello 1974a). From this Continental legal-realist perspective, Tarello worked out a theory of interpretation comparable to that which Hart calls interpretive scepticism, but of course more centered on statutory interpretation (Tarello 1980).

Tarello argued that every legal sentence or provision can always be given more than one meaning: more than one norm can be ascribed to it. Stated otherwise, the legal positivist or formalist doctrine of the sources of law which became dominant with the codification of law conceals a gradual shift in the power to produce the law from the legislators to the judges and even to legal scholars. This view could be viewed as more sceptical than all common law accounts of adjudication, and closer to the American legal realists, who were sceptical not about facts—those on which basis judicial decisions can be predicted—but about norms. On this radical sceptical reading, comparable only to the famous dictum by John Gray, legislators actually exhaust their function in the *writing* of laws, since the *meaning* of their statutes is then entrusted to the interpreters' creative work.

It fell to Riccardo Guastini (1946–) to reformulate the Genoa School's theory of interpretation providing a more moderate reading of Tarello's views. To this end he drew on Kelsen's *Rahmenslehre*, under which legislators produce texts not devoid meaning but having a frame of meanings within which the interpreter would normally choose: Only where this choice is made outside the frame is there any creation of law. Guastini then developed an influential account of constitutionalization processes, through which the entire legal system comes to be impregnated with constitutional principles. This account, however, is consistently realist and *Wertfrei*—very much unlike the neoconstitutionalist ones. Legal principles, for example, are understood by Guastini as positive legal norms, and not at all as moral values.

[41] On Italian legal realism see also Section 11.6 in Tome 1 of this volume.

The other major author who can be ascribed to Italian legal realism is Enrico Pattaro, whose work develops in three phases. In the first, in the wake of Scandinavian legal realism, he takes especially into account Ross's criticism of Kelsen's quasi-positivism; in the second phase, he went back to Hart, comparing him to Ross, and putting forward a theory of law he called normativist legal realism; in the third phase, he proposed a theory of law where the basic contraposition is no longer between *Sein* and *Sollen*, as in Kelsen, but between "the reality that is" and "the reality that ought to be" (Pattaro 2005). Terms like *reality* and *realism* recur in all three phases: This element of continuity in Pattaro's work may amount to a sort of naturalization of law in the sense explained in Leiter 2007.

9.4. The French Contribution: Michel Troper

In France, as in Germany, the philosophy and theory of law have rarely been taught as subjects in their own right but have instead developed as part of either a philosophical or a juristic study—for important examples of the second type of study, see Carré de Malberg's and Maurice Hauriou's contributions.[42] Oftentimes law would thus be studied by philosophers or historians of natural law, as in the case of Michel Villey (1914–1988) and Georges (Jerzy) Kalinowski (1916–2000).[43] By contrast, the principal French contribution to the strictly legal discussion in the legal positivist camp has come from a theorist of constitutional law whose work places him close to Italian legal realism, namely, Michel Troper (1938–), a pupil of Charles Eisenmann (1903–1980), a constitutional scholar and Kelsen's French translator.[44]

Troper's theoretical work, especially early on, bespeaks the influence of Bobbio and Kelsen: Where the theory of norms is concerned, we find Kelsen's normativism recast in linguistic terms; and as to the theory of the legal system, Kelsen's nomodynamic analysis of law is revisited underscoring the role of the judge's discretion. Given these premises, it only seems natural for Troper's work to have segued into the theory of legal and in particular *constitutional* interpretation, with his sceptical theory specifically accounting for France's highest judicial organs. The *Conseil d'État*, the *Cour de Cassation*, and the *Conseil Constitutionnel* do not just create law, as do all judges: They often also forge anew their own constitutional competence, sometimes even venturing into that territory which Maurice Hauriou had previously described as the supralegal part of the constitution.

[42] On Carré de Malberg see Section 8.5 in this tome and Section 12.4 in Tome 1 of this volume. On Hauriou see Section 1.1.4.2 in this tome and Section 12.2 in Tome 1 of this volume.

[43] On Villey see Section 1.3.3.4 in this tome and Section 12.6 in Tome 1 of this volume. On Kalinowski see Section 1.3.2 in this tome

[44] On Troper see also Section 12.7 in Tome 1 of this volume.

Troper's theory of legal interpretation, close to that of Tarello (see Section 9.3.3 above), appears sufficiently radical to give place to a deliberate paradox: Why should judges hold themselves bound to a competence they can stretch out into any direction? And why should they apply laws they could rid themselves of? Troper tackles this paradox in his recent theory of legal constraints, preventing judges and officials from just acting as they will (Troper et al., 2005). It is likely that he is thinking here about something analogous to the 18th-century conception of the constitution as a machinery, which he contrasts with the 20th-century conception of the constitution as a norm (Troper 2001): Legal constraints are conceived by him as factual constraints, a product of institutional engineering or of the mechanics of the situation.

9.5. The Argentinian and Spanish Contribution

Analytic philosophy of law in the Castilian-speaking world saw an extraordinary development whose groundwork was laid in Buenos Aires, the cultural capital of Latin America. Buenos Aires School was, along with Italian one, among the first in the world to apply philosophical analysis to law. In the late 1950s, when Ambrosio Gioja (1912–1971) was directing the Buenos Aires University Institute of Legal Philosophy, there gathered around him a group of scholars—among whom Genaro R. Carrió (1922–1997), Roberto Vernengo (1926–), Carlos Alchourrón (1931–1996), and Eugenio Bulygin (1931–)—who formed the core of the School's first generation. This group built fruitful relationships with Hart from the outset, with Carrió translating his chief work into Castilian.[45]

It is in particular Hart's "mixed" theory of interpretation that they adopted. Carrió (1965) investigated the question of judicial creation of law, supporting Hart's thesis that judges make law only when working in its penumbral or borderline areas or filling its gaps. Bulygin (1991) analogously showed how judges do not make law by *applying* it, that is, by rendering concrete decisions, but by *interpreting* it, that is, by formulating the very general and abstract rules from which to deduce the decisions they render. In another important work, Carrió (1970) suggested the argumentative line that Hart and his pupils would follow in countering Dworkin's argument from principles: Principles do differ in several respects from rules, but that does not make them alien to a legal positivist rule of recognition.

The most widely known Argentinian contributions, however, come from Alchourrón and Bulygin, concerning, as usual in legal positivist camp, theory of norms and of legal system. Alchourrón and Bulygin distinguished two conceptions of norms: a *hyletic* or semantic one, having greater currency among

[45] On Argentinian analytical philosophy of law see also Section 26.2.1.3 in Tome 1 of this volume.

deontic logicians, where norms are understood as normative meanings analogous to the propositions expressed by cognitive sentences but devoid of truth value; and an *expressive* or pragmatic one, more common instead among realist theorists of law, where norms are merely understood as normative uses of sentences. On both conceptions norms have no truth value, either because they are not propositions or because they are fact-like entities, which do not enter into any logical relations; on either conception, then, deontic logic—the logic of norms—could at best be a logic of normative propositions (i.e., propositions about norms: Alchourrón and Bulygin 1981).

But the two Argentinian theorists' best-known and most influential work is concerned with the legal system: It came out in 1971 under the title *Normative Systems* (Alchourrón and Bulygin 1971), followed in 1975 by a second and revised edition in Spanish (Alchourrón and Bulygin 1975). The theory of the legal system had hitherto evolved from a static or logico-deductive conception to a dynamic one where higher and lower norms bear no connection outside the organ empowered by the former to produce the latter: a view paradigmatically endorsed by the last Kelsen, who denied the possibility of any deduction between norms. Alchourrón and Bulygin, applying Alfred Tarski's conception of logic, instead conceived the legal system as the set of deductive consequences arrived at by reasoning from an axiomatic base composed of any set of positive norms—a set that only in principle can comprise all the norms making up a domestic legal system.

In this way, the term *system* winds up designating the result of choosing an axiomatic base, deducing logical consequences from it, and ordering these consequences—all activities characteristic of legal dogmatics, typically in the civil-law world. But Alchourrón and Bulygin also account for the *dynamic* dimension of law. They did so in two ways: implicitly, by construing each legal system as merely momentary, i.e., identified by the norms that at any given moment happen to make up its axiomatic base; and explicitly, by using the locution *legal order* to designate a legal system that changes over time (Alchourrón and Bulygin 1991a). We cannot devote any more of this chapter to this theory of the legal system.[46] Its authors' clear choice in favour of legal positivism would be made fully explicit in Bulygin's later work (see Section 11.1 in this tome).

Another Argentinian scholar who worked on the theory of the legal system, helping to make the theory known in the civil-law world, is Ricardo Caracciolo of Córdoba. In his most unitary work (Caracciolo 1988), he examines the possible combinations between static and dynamic criteria, opting for a mixed, static/dynamic model. The bulk of his essays is instead devoted to the theory of norms and to metaethics. Thus, in Caracciolo 2009, 241–49, he argues, con-

[46] Also deserving mention among those works in Castilian which develop a theory of the legal system along the same lines are Moreso and Navarro 1993, Rodríguez 2002 (the last of which is briefly discussed here in Section 11.4 of this tome).

trary to a widely held opinion, that legal positivism is not incompatible with moral realism, despite the fact that the former is a theory he subscribes to and the latter a metaethics he rejects.

Alchourrón, Bulygin, Caracciolo, and a number of other Argentinian authors taught courses in Spain, especially at the Pompeu Fabra University, and in this way—also thanks to Atienza 1984, originally written as a doctoral dissertation devoted to the Argentinian school—they helped to bring up a generation of analytic and legal positivist theorists who emerged after the fall of the Franco regime (1939–1975). The fathers of the new Spanish philosophy of law, however, have not concerned themselves with theory of law[47]: Elías Diaz (1934–) worked on the ways law, politics, and culture are interrelated; Gregorio Peces-Barba (1938–2012) focused on the question theoretical and historical of rights (Peces-Barba et al. 1995, from a critical legal positivist standpoint (Peces-Barba 1999).[48]

A classical legal positivist stance can instead be found in the work of Francisco Laporta (1945–). As in natural-law theory, the relation between law and morals "is where the philosophy of law *lies*": But natural law's "attempt to comprehend law morally is welded with the necessity of accepting an incomprehensible morality" (Laporta 1993, 7, 121; my translation). As early as the 1990s, Laporta was indeed taking issue with the precursors of neoconstitutionalism—scholars like Ernesto Garzón Valdés and Carlos Santiago Nino—for what he perceived as an effort on their part to bring back natural-law theory; then, too, in a specific move against neoconstitutionalism itself, Laporta (2007) makes it apparent that he considers legislation, more than the constitution, the best tool for *directly* guaranteeing the certainty of law, and so also, *indirectly*, for guaranteeing the citizens' personal autonomy.

A significantly different set of conclusions can be found in the work of Manuel Atienza (1951–) and Juan Ruiz Manero (1951–), the editors of *Doxa*, the most important legal-philosophy journal in Castilian. They are developing a general theory of law, the first part of which, on the theory of norms, is set out in Atienza and Ruiz Manero 1996.[49] Like Dworkin and Alexy, Atienza and Ruiz Manero distinguish between rules and principles, conceiving them as conditional norms connecting conditions of application (if *x* happens) to acts to be carried out (then do *y*). On this conception, rules and principles are distinguished depending on whether *x* and *y* are configured as having a

[47] An exception must be made in this regard for Capella: His 1968 work draws on a Marxist foundation, to be sure, but from the very outset—in its title, namely, in translation, *Law as Language: A Logical Analysis*—it proposes to analyze legal language.

[48] On Diaz, Peces-Barba, and more generally the development of Spanish legal philosophy see also Chapter 13 in Tome 1 of this volume.

[49] The 1996 edition is in Spanish, followed by a second one in 1998 in English. On the differences between the two editions, see Moreso 1997b, which is also a good place to start for a deep discussion of the work.

closed form—"If larceny, then imprisonment," in which case we are looking at a *rule*—or as having an open form, as in "Whatever else may be the case, do protect human dignity": Here we instead have a *principle*, in a broad sense.

Atienza and Ruiz Manero, however, criticize Alexy's conception of principles as optimization commands (i.e., commands which can only be carried out to a greater or lesser extent), for that is to confound principles, in a strict sense, and policies. Policies configure in an open form both their conditions of application and the prescribed behaviour (a case in point being consumer protection). Principles likewise configure their conditions of application in an open form, but they configure the behaviour they prescribe, as the discrimination on basis of sex, race, religion, and suchlike, in closed form (Atienza and Ruiz Manero 1996, chap. 1).

The point of these and other like distinctions (drawn with respect to other types of norms, too, as well as with respect to values) is to render more rigorous the theses of authors like Dworkin and Alexy—an effort that takes Atienza and Ruiz Manero closer to neoconstitutionalism. And the same goes for their more recent positions on the question of law and morals: The Separability thesis is cast into doubt on the basis of an assumption that can also be found in the neoconstitutionalists, namely, that constitutionalized law can no longer be separated from morality (Atienza 2001, chap. 4; Aguiló Regla et al. 2007). Today, Atienza and Ruiz Manero (2006), as well as many other Spanish authors, seem to consider legal positivism not so much *confuted* by neoconstitutionalism as *incorporated* and *overcome* by it—or by a postpositivist (see Chapter 11 in this tome) or pragmatist version of it, focused on legal argumentation (Atienza 2013).

Chapter 10

NEOCONSTITUTIONALIST CHALLENGES TO LEGAL POSITIVISM

by Mauro Barberis and Giorgio Bongiovanni[*]

Neoconstitutionalism is a new name, proposed by scholars of the Genoa School in order to criticize the theses so labelled: But a name after accepted by many "Latin" scholars in order to label their theories. *Neoconstitutionalism* has so far entered the mainstream of academia only in certain quarters of "Latin" theory of law, in Latino-America, Spain, and Italy:[1] It designates a family of cognitive and normative theses labelled by its supporters as nonpositivism or constitutionalism without further qualification. Neoconstitutionalism, however, first emerged in the English-language debate—more evidence still of the pivotal role this debate has played at least since Hart. Dworkin, in particular, views law and morals as connected by way of constitutional rights and principles (Dworkin 1977, 1986, 2006). In fact, the two main ingredients of the Continental constitutional state, namely, rigid constitutions and judicial review, appeared in the US before being imported to Latin America and Europe.

In fact, the view that law and morals are connected by way of principles, generalized by Dworkin into a normative theory of law as integrity or interpretation, became a direct inspiration for the first analytical Argentinian critics of legal positivism, Ernesto Garzón Valdés and Nino, who likewise proceeded from a reading of Hart, first recasting and then rejecting his Separability thesis. Then, too, the same view, along with John Rawls's theory of justice, also directly inspired Jürgen Habermas, Robert Alexy, and the Continental theorists of constitutional state's law: a law distinguished by them from legislative state's law, the former being increasingly *constitutionalized*, i.e., imbued with constitutional principles, conceived by the neoconstitutionalists as moral principles.[2]

[*] Sections 10.1, 10.2, 10.5, and 10.6 were written by Mauro Barberis; Sections 10.3 and 10.4 were written by Giorgio Bongiovanni.

[1] It would take a chapter apart to illustrate this assertion. The main sources in this regard are Pozzolo 2001, Comanducci 2002, Mazzarese 2002, Carbonell 2003, Bongiovanni 2005, Barberis 2006, García Figueroa 2006, and Barberis 2008. Authors like Prieto Sanchís (1999) et many other Spanish legal philosophers, Bongiovanni (2005), and Zagrebelsky (2008) prefer the term *constitutionalism*, but that strikes us as too generic a name for such a specific stance.

[2] What is meant by *constitutionalization*, as defined by Guastini (2006, 239–67), is not constitutional codification but a process whereby constitutional principles, via constitutional and statutory interpretation, among other means, are absorbed into the entire legal system—a process that can be observed in many European countries in the latter half of the 20th century, transforming them from legislative to constitutional states. For Guastini, the process can involve at least seven stages, the first two being the most important: (1) a rigid constitution; (2) a constitutional review

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Civil-law neoconstitutionalism, however, cannot be reduced to an extension of Dworkin's constitutionalism: Its originary point was to know the law as it is in the constitutional state, an effort *in se* compatible with methodological legal positivism. According to the Separability thesis, on the other hand, to know the law as it is means to know it independently of how we should *want* it to be: But Continental neoconstitutionalism has gone so far as to upend that thesis, blurring the distinction between the law as it is and the law as it ought to be. It may be useful, in illustrating how that has come about, to distinguish three senses of neoconstitutionalism in parallel to the three senses of legal positivism distinguished by Bobbio (Comanducci 2004).

Theoretical neoconstitutionalism is a mere extension of theoretical legal positivism: Just as theoretical legal positivism was a set of theories about the law of the legislative state, so theoretical neoconstitutionalism is a set of theories about the law of the constitutional state. Hence, the only relevant difference here would lie in the different types of positive law the two sets of theories take as an object: a merely legislative law and a constitutionalized one, respectively. Which means that not only could there be there no contrast between the two theories, given their different objects, but the more recent theoretical neoconstitutionalism could be characterized as no more than a legal positivism for the 21st century.

Methodological neoconstitutionalism instead ends up adopting a different method from methodological positivism. Present-day positive law, the neoconstitutionalists argue, incorporates moral values in the form of constitutional principles, and our knowledge of positive law should accordingly be different, for it can no longer be nonevaluative. We will have to evaluate in our legal-dogmatic knowledge of particular domestic systems of constitutionalized law, for it won't be possible to interpret such law without relying on constitutional principles, and hence on moral values. But we will equally have to evaluate in framing a *general* theory applicable to constitutionalized systems at large, for such a theory will no longer be able to abstract from the moral ends by which such systems are guided.

Lastly, *ideological* neoconstitutionalism corresponds to ideological positivism in the sense, among others, that it seems to entail an upending of methodological positivism, the approach which called for an investigation of law as it is, rather than as it ought to be, and which formed the basis presupposed by theoretical legal positivism. Just as ideological legal positivism accepted the law of legislative state, so ideological neoconstitutionalism accepts the law of constitutional state—a seemingly more plausible stance, with reference to

of legislation; (3) the legal binding force of the constitution; (4) the constitutional text becoming the main object of interpretive battles; (5) constitutional principles directly applied by judges without waiting for their specification by ordinary legislation (*Drittwirkung*); (6) an interpretation of ordinary legislation conforming its meaning to that of the constitution (*Verfassungskonforme Auslegung*); and (7) the constitution exerting a real influence on supreme political powers.

moral values such as human rights. This position, however, may still seem actually plausible for Western constitutional states, but not for any formally constitutional states—that Nazi "values" become written principles enshrined in a rigid constitution is a real possibility, after all.[3]

Be that as it may, this shift from theoretical to methodological and ideological theses has caused neoconstitutionalism to increasingly become a view distinct from, and alternative to methodological legal positivism in particular. In fact, what marks out neoconstitutionalism is its rejection of the Separability thesis, and so its recognition of a connection between law and morals through constitutional values. It is not always clear, though, what the neoconstitutionalists take to be the logical status of this connection: Sometimes it appears to be merely *empirical*, for it could only be discovered within a constitutional state; other times it is presented as *analytical*, by definition of *law (in the constitutional state)*; still other times it shows itself to be a merely *normative* connection.[4]

However that may be, the first civil-law theorists who went the way of neoconstitutionalism took a path similar to that taken by Dworkin. We can see this with the Argentinian theorists Garzón Valdés and Nino: They started out from two theses forming the (dubious) core of Oxonian legal positivism—namely, Hart's internal point of view in the case of Garzón Valdés, and Raz's reasons for action in the case of Nino—only to turn them against legal positivism itself. Today's Continental neoconstitutionalism, instead, presents itself as an independent reflection on the constitutionalization processes, with Habermas and Alexy looking in particular at German constitutional state, and Ferrajoli and Zagrebelsky at Italian one.

10.1. Garzón Valdés and the Internal Point of View

Ernesto Garzón Valdés (1927–) may be located, along with Nino, within the first generation of the Buenos Aires School (on which see Section 9.5 in this tome and Section 26.2.1.3 in Tome 1 of this volume), but his personal story contributes to making his stance somewhat anomalous, by virtue of his particularly taking up the question of the relation among law, morality, and politics (Garzón Valdés 1993). He started out as a diplomat under the military dictatorship in Argentina, was then exiled to Spain, and was finally awarded a professorship in Germany—a background that enabled him to play a mediat-

[3] To be sure, neoconstitutionalism's main advocate, Dworkin (1986), rules out the possibility of providing the best interpretation of Nazi law, which was not strictly speaking a constitutionalized law.

[4] There is in fact a variety of ways in which the neoconstitutionalist connection thesis has been formulated. But in a strict sense, neoconstitutionalists seeking to rebut the legal positivist Separability thesis have to argue for a *necessary* connection, the legal positivists having always acknowledged, starting from Hart, countless *contingent* connections between law and morals, and even, in the case of Raz, many (spurious) *necessary* (definitional) connections between them.

ing role among Latin American, Spanish, and German philosophers of law, especially through a long series of translations from German into Castilian. As to the relation among law, morality, and politics, it is to morality that he ascribed the primary role, but a single critical morality (as distinguished from different positive moralities à la Austin) pretending to universal validity.

Indeed, this critical morality, with respect to which Garzón declares himself to be moderately objectivist, wound up monopolizing the ethical universe, on the basis of what Raz, Nino, and Alexy referred to as the unity of practical philosophy, the unity of practical reasoning, and *Sonderfallthese*, respectively. As these names suggest, this family of theses conceives legal reasoning as being, at best, a special case of moral or practical reasoning—maybe a version of the metaethical stance named value-monism as opposed to value pluralism (Raz 1986). Legal norms, far from enjoying the inherent binding force ascribed to them by ideological legal positivism, need to themselves be morally justified—at least lastly—if they are to justify the actions of citizens and the decisions of judges.

Ignoring the distinction between ideological and methodological legal positivism, Soper (1989) had already levied against legal positivism at large the charge of contradicting itself: it could not consider law a fact (as in truth only methodological legal positivism does) and at the same time consider law to be authoritative (as in fact only ideological legal positivism does). Garzón Valdés (1990) directed this same line of criticism at Hart's thesis of the internal point of view. Hart held that law can be applied and even known only by adopting an internal, or participant's, point of view. But, Garzón remarks, only on condition of considering this a *moral* point of view could it serve to justify actions and decisions. The Separability thesis would thus be refuted: There is at least one *necessary* connection between law and morals.

In reality, Hart always rejected this reduction of the internal point of view to a moral point of view: Witness Hart (1982, 160–1), where he clarifies that applying and knowing the law does not imply morally accepting it; and Hart 1994b, reiterating that a descriptive theory of law—a theory adopting an external, or observer's, point of view, as required by methodological legal positivism—would have no need to postulate a moral acceptance of the law. But for theorists who systematically ignore the distinction between ideological and methodological legal positivism (as is the case with Soper, Garzón Valdés and the neoconstitutionalists), Hart's internal point of view, interpreted as a moral point of view, entails what Goldsworthy (1990) has called the self-destruction of legal positivism.

10.2. Nino's Justificatory Connection

Moved in the same direction Carlos Santiago Nino (1943–1993): an exponent of the Buenos Aires School who, along with Garzón Valdés, distinguished himself for the attention devoted to moral and political issues (Blanco Migué-

lez 2002, Roca 2005).[5] There are two moments in Nino's work. In the first, the legal positivist definitional Separability thesis is coupled with the natural-law justificatory connection—a thesis named by Nino the Fundamental theorem of legal philosophy. This third position between natural law and legal positivism is still qualified by him as methodological or conceptual legal positivism, because of his rejection of ideological legal positivism, and despite his endorsing the unity of practical reasoning. In a second moment Nino moved beyond the Separability thesis and adopted a stance closer and closer to Dworkin's and Alexy's neoconstitutionalism.

In the *first* of these two phases, Nino seems to be following the lead of Raz and other Hartian scholars: Nino upheld the Separability thesis, along with a justificatory connection thesis not alien to Razian Authority of law argument. Indeed, the early Nino held that law is a mere fact, whereas morals is a value: the only value, indeed. In terms of Hume's law, consequently, no acknowledgment of the existence of law can be taken as the only ground for obeying and applying it: Existing law cannot make any claim to validity, understood as binding force. In fact, Nino's fundamental theorem overemphasizes the justificatory Connection thesis and underemphasizes the definitional Separability thesis (Nino 1980b, 1985, 1993).

There finally emerges that third position between legal positivism and natural-law theory called by Alexy nonpositivism, by others constitutionalism without any qualification and here neocostitutionalism. The early Nino was still presenting himself as a methodological or conceptual legal positivist: *methodological* because, like Bobbio, he understood the term *law* as designating no more than a fact, to be investigated as such; *conceptual* because, maybe like Hart, he upheld a definitional Separability thesis, ruling out any conceptual connection between law and morals. The Fundamental theorem, in other words, recognizes that Nazi law (the usual example from Radbruch to Alexy and Nino) can well be called law; but what really matters is not definition but justification: Nazi law was not worthy of obedience, not without any moral justification for it.

In the *second* phase, corresponding to his posthumous work, Nino abandoned the Separability thesis and moved beyond methodological or conceptual legal positivism. In his most important posthumous work (Nino 1994), he framed the relationship between law and morals on the basis of a threefold Connection thesis—definitional, justificatory, and interpretive—three dimensions that in Dworkin's (1986) theory of law as integrity are instead conflated. Even Raz has acknowledged many different conceptual connections between law and morals, by distinguishing them carefully, however, from identifying ones (Raz 2007)—as it will even happen in the next debate, but as was not the case in Nino's and even in Hart's work.

[5] On Nino see also Section 1.4.5.2 in this tome and Section 26.2.2.1 in Tome 1 of this volume.

In any event, as to the strictly *definitional* or conceptual connection, Nino moved beyond the Separability thesis by arguing that if we reject essentialism and adhere to linguistic or conceptual conventionalism, then we must grant many different concepts or definitions of law, some of them merely cognitive, configuring law as separable from morality or only contingently connected with it, others normative, configuring law as necessarily connected with morality (Nino 1994, chap. 1)—a very simple and sound dissolution, one could comment, of the old metaphysical riddle called the definition-of-law problem. Here, it all depends on the interests of the theorist framing the definition; and when, as with Nino, the interests in question are mainly practical or normative, then law can well be defined in terms of morality—a connection seemingly necessary only because established by definition.

As to the *justificatory* connection, concerning the binding force that law exerts on citizens and its applicability by judges, Nino reiterates that no law can be obligatory that is not backed by a moral justification (ibid., chap. 2). As Nino had already held in his first phase, in terms of Razian theory of reasons for action (Raz 1975, 1990), the law cannot provide citizens and public officials with *operative* and *complete* reasons for action but only with *auxiliary* ones: Reasons pointing out means by which to satisfy the ends set out by operational reasons (Nino 1984). The thesis of a necessary justificatory connection between law and morals, a thesis that Nino shares not only with the neoconstitutionalists but also with many post-Auschwitz legal positivists, has been the object of various criticisms since the early 1990s: Among them is the objection that it confuses true logical necessity with an alleged moral necessity.[6]

As to the *interpretive* problem, finally, Nino appears to marry a sceptical, and in any event nonformalist, conception of interpretation with the thesis of a necessary interpretive connection between law and morals. Every legal provision would lend itself to different interpretations, but the only reliable criterion on which to rest the choice among them would have to come from a reasonably objective critical morality (Nino 1994, chap. 3). The difficulty with this third thesis, as with the previous ones, lies above all in the necessary character of the connection between law and morals: In a constitutional state, that law ought be given a moral reading à la Dworkin could be normatively convincing, not necessary—unless, here too, a relation can become analytic rephrasing it by means of a stipulated definition.

[6] Moreso, Navarro, and Redondo (1992) have observed that a judicial decision proves logically justified even if derived from a law by mere deduction, without any moral justification (for a reply, see Nino 1993). Comanducci (1998, 9–10), for his part, argued that current legal systems ask judges to apply only the law, and not also morality. And Caracciolo (1999), finally, has objected that the auxiliary-reasons argument truly risks rendering the law practically or morally irrelevant—just as we will see Nino himself suspect.

In Nino's own assessment (1996) such a connection between law and morals risks making law superfluous: If legal systems can guide action only insofar as they are morally justified, then why not rely exclusively on morals? To this self-addressed objection Nino replies with the Deliberative democracy argument: When law is produced democratically, it is epistemically presumed to be morally obligatory—so goes the argument—and hence to enjoy a sort of autonomy within the practical sphere. This thesis, ironically enough, has been challenged as a form of ethical legalism (La Torre 1999): even granting that the presumption in question is only epistemic and theoretical, and not immediately practical, indeed, the democracy so supported is not simply procedural but deliberative in Habermas' sense—i.e., differing from a procedural one just by virtue of its justifying its own decisions.

Finally, the problem must be raised of the extent to which Nino may be labelled a neoconstitutionalist—say, a supporter of a third stance between natural law and legal positivism. On the one hand, he starts out from methodological legal positivism in search of such a third position. On the other hand, like the early Dworkin, he refers not to constitutional state but only to democratic state—i.e., to legislative state, as opposed to the constitutional one—not to mention that in Nino 1996 he expresses many reservations about judicial review, due to its old adoption and wicked application in Latin America in general and Argentina in particular. Perhaps the generic expression *nonpositivism*, which Alexy uses for his own theory, more aptly captures Nino's stance.

10.3. Robert Alexy's Nonpositivist Concept of Law

A fundamental aspect of Robert Alexy's thought lies in his effort to develop a nonpositivist conception of law (see Alexy 2002a, 2008, 2009, 2010, 2012): That can be considered the common denominator to his various works (which, incidentally, have made a decisive contribution to the theory of legal reasoning).[7] His nonpositivism is grounded in his thesis of a conceptual connection between law and morals,[8] a thesis he substantiates by proceeding from the pragmatic approach to language.[9] What in particular Alexy (1989a; 2002a, 34–9, 77–81)

[7] On Alexy see also Sections1.5.4.1 and 25.4 in this tome and Sections 10.3.2.2 and 10.4.3.1 in Tome 1 of this volume. See in particular Section 25.4 in this tome for his contribution to the theory of legal reasoning.

[8] See Alexy 2002a, 21; 2008, 285. What it means for the connection to be conceptual is that there is no way to define law (or identify what law is) without resorting to morals: The former task *necessarily* entails the latter.

[9] See Alexy 2002a, 35–9, and esp. 38; 1989a, 47ff., 104ff., drawing on Austin's *How to Do Things with Words* (Austin 1962) and on its interpretation offered in Habermas 1971 and 1979. As is known, this is an approach to language that takes into account not only its semantics but also its uses. Austin (1962, 108–9), for example, claims that a speech act can have three types of uses: "the locutionary, the illocutionary, and the perlocutionary" (Alexy 1989a, 54ff.). This accordingly brings into the foreground the rules on which basis language is used—these are called

develops on this approach is the idea of a claim to correctness (*Anspruch auf Richtigkeit*), understood as the general (and inescapable) presupposition of all practical discourse. This claim, he argues, is what practical discourse has in common with law—"the claim to correctness is indeed also raised in legal discourse" (Alexy 1989a, 220; 1999b)—and on this basis he can treat legal discourse as a "special case [*Sonderfall*] of general practical discourse" (Alexy 1989a, 15, 212ff., 289ff.).[10] As Alexy has underscored on several occasions, the thesis of a connection "between law and morality" can be argued to have its "source" in the claim to correctness (Alexy 2008, 294; 2010, 168).[11] This claim is analyzed by Alexy (2009, 152) in three stages, clarifying first its meaning and traits; then its necessity (in law); and finally its content, which consists in its moral import. The claim is advanced in law by lawmakers and judges, and "its meaning is that accompanying each of the *institutional* acts they perform—and so the laws they enact and the judicial decisions they issue—is a *noninstitutional* act that consists in asserting that the jural act is correct as to its content and procedure" (ibid.; my translation). So the claim to correctness means that whenever a norm or a ruling is issued, that issuance comes with the idea (whether implicit or explicit) that the norm or ruling itself is correct. An essential trait of the claim to correctness so understood, Alexy argues, is that it always entails an "assurance of justifiability," that is, it always keeps open the possibility of justifying the assertion: The claim to correctness always brings with it a claim to justifiability; in short, correctness entails justifiability (ibid.; Alexy 2002a, 78).

"pragmatic rules," and they include rules stating the presuppositions involved in performing illocutionary speech acts, an example being the claim to truth assumed to be at work in the use of assertions (ibid., 56)—while making it possible to bring out the contradictions that an incorrect use of the language will give rise to. The most important of these is the *performative* contradiction, which takes place when the speaker makes a speech act that contradicts its pragmatic presuppositions (Alexy 2002a, 38), a classic example being the assertion "The cat is on the mat but I do not believe it is" (Austin 1962, 15, 39ff.). Klatt (2012, 5) investigates the claim to correctness in light of Brandom's (1994) analysis of language.

[10] Legal discourse, however, is subject to constraints that do not also apply to practical discourse at large. This is because in practical discourse there "remains a wide range of discursive possibilities in which both a particular normative statement and its negation may be justified" (Alexy 1989a, 287–8). Practical discourse, in other words, is too open-ended: "It is only rational to introduce special forms and rules of legal argumentation" in order to narrow "the range of discursive possibilities in the area of uncertainty left by legal norms" (ibid., 288).This does not mean that "general practical reasoning is […] superseded by legal reasoning": The latter "remains dependent on general practical arguments" (ibid., 288, 289). Alexy also claims that there is a "structural correspondence between the rules and forms of legal discourse and those of general practical discourse" (ibid., 289ff.).

[11] This way of grounding the connection thesis has given rise to a broad debate that can be said to have gravitated around two main views (Alexy 2008, 294–5; Bertea 2009, 15–6). On one side of the debate are ranged those, like MacCormick (2007b), who doubt that law makes any claim to correctness to begin with; on the other we find those, like Raz (2007), who recognize that law does make such claims but that they are morally inconsequential. On these arguments, see Gardner 2012.

The next step consists in demonstrating that the claim is necessary. As hinted at, this is something Alexy attempts by seizing on the pragmatic dimension of language, which is accordingly understood as an activity through which a range of acts are performed (such as asserting, promising, and enacting), and which consists in giving and asking for reasons. Once language is viewed on the pragmatic approach just mentioned, we will be able to bring out the contradiction, and hence the error, inherent in an act done by a constituent assembly saying, for example, "X is a sovereign, federal and unjust republic," or an act done by a court saying "The accused is sentenced to life imprisonment, which is an incorrect interpretation of prevailing law" (Alexy 2009, 153; my translation; see also Alexy 2002a, 36, 38). Errors of this sort are neither conventional nor moral (Alexy 2002a, 37; 2009, 153), but rather arise out of a contradiction between what is said (the explicit aspect) and what one wants to do with the language (the implicit aspect). As Alexy points out, where the constitutional norm is concerned, "the contradiction lies in the fact that the act of adopting the constitution implicitly brings in an assertion that contradicts the content explicitly asserted through the constituent act itself" (Alexy 2009, 153; my translation); likewise, where the court ruling is concerned, the contradiction arises between the "implicit" understanding that "a ruling ought to apply the law correctly" and the "explicit description of the ruling as an incorrect application of law." The contradiction is thus between "the implicit and the explicit," and that explains the "absurdity" of the two examples (ibid., 154; my translation).

For Alexy (ibid.) there is no merit to the objections that the law essentially amounts to power relations: That is what Alexy (ibid.) argues, pointing out that the claim to correctness is based on a "practice essentially defined through the distinction between correct and incorrect, and so through normativity" (ibid.), and that to exclude these categories (of correct and incorrect) is to conceive "our speaking and acting" as "something essentially different from what in fact it is" (ibid.). That would be a grave error, for it would amount to stepping outside what might be called the "most general form of human life" and denying "our discursive possibilities" (ibid., 162; my translation). For this reason, "the foundation explaining why the claim to correctness is necessary" does not just "explain a settled practice" but also works as an "existential" account of the human being as a "discursive" creature (ibid., 154; my translation).

The third and final stage is devoted to the *content* of the claim to correctness, by which is meant the idea that this claim can entail a claim to *moral* correctness. The argument (Alexy 2002a, 74ff.; 2008, 295–6) is articulated in a twofold passage, laying out the view that law's claim to correctness (*a*) has a moral dimension and raises moral problems and that (*b*) these problems are amenable to an objective moral solution. These two arguments are complementary: If the argument that there are moral choices in law is to entail a necessary connection between law and morals, it must also show that these choic-

es can be objective. If that were not the case, in any situation involving different moral options (as when a judge is faced with competing interpretations of the law carrying different moral consequences), the choice among those options would simply turn on the judge's discretion (as legal positivism holds) and would thus amount to injecting moral content into the law by a lawmaking act (Bongiovanni 2005, 68ff.). So Alexy shows in the first place that many legal issues bring out the inadequacy of institutional arguments alone (whether based on statutory provisions or on judicial precedent) and thus make it necessary to resort to moral reasons. These stem from three types of cases, namely, hard cases, arising out of the "open texture" of legal language, that is, to its being amenable to different interpretations (Alexy 2002a, 68–9); cases involving "intolerable" violations of rights, or otherwise requiring the application of Radbruch's formula (ibid., 40ff.); and cases making it necessary to balance principles and choose a prevailing one (ibid., 69 ff.). In all these cases, there will be some recourse to moral reasons (or to some morality), lacking which it would not be possible to settle on a decision in solving the issue at hand. And, in the second place, Alexy argues that these cases can be given a rational, and hence objective, moral solution. In his view, the thesis of a necessary connection between law and morality is based on the possibility of resorting to a "correct morality as a justified morality" (ibid., 80) in satisfying the claim to correctness. This possibility—that there exists a "justifiable and therefore correct morality" (ibid., 78)—is demonstrated by Alexy by relying on the rules of practical discourse and on a procedural ethic. By identifying a set of rules enabling rational discussion among free and equal participants in an "ideal" argumentative situation, we can arrive at argumentatively correct outcomes, that is, outcomes the participants themselves can agree on. The criteria are those of discourse theory: The rules for constructing arguments and taking part in argumentation define the framework for a rational discussion and make it possible to arrive at a correct and shared outcome.[12] This possibility of an objective outcome (as opposed to a subjective one) grounds the connection thesis, and with it Alexy's nonpositivism.

10.4. Jürgen Habermas and the Complementarity of Law and Morality

Jürgen Habermas's analysis of law—which takes as its reference point the problem of "the opaque and perplexing reality of the constitutional state"

[12] Alexy (1989a, 177ff., 297ff.) has developed a system of rules of practical discourse comprising rules grouped under five categories ("basic rules," "rationality rules," rules "for allocating the burden of argument," "justification rules," and "transition rules") that, in combination with a single set of argumentative forms, yields a system of twenty-eight rules. These can in turn be regrouped under two broad classes: One comprising rationality rules, governing the structure of arguments, and the other justification rules, governing discursive procedure. Together they outline an "ideal speech situation" in which participants can arrive at objective judgment.

(Habermas 1996, 5)—puts forward the thesis of a "complementary relation between morality and law" (ibid., XL, 104ff.).[13] This analysis proceeds from two main premises, namely, that for an adequate understanding of law we need to (*a*) identify the function of law from a sociological perspective and the traits that distinguish it from morality,[14] and that, in parallel, we need to (*b*) consider the transformations of practical reason deriving from social evolution (Rehg 1996, XIIff.) enabling society to evolve. On the basis of these premises, Habermas puts forward a view of law as a tool with which to stabilize contemporary societies, and at the same time he analyzes the mechanisms for legitimizing law in such a way as to make sure that this task can be fulfilled. The analysis brings to light the limits of both legal positivism and the views purporting to show a connection between law and morality.[15]

The stabilizing function of law is understood to bear a connection to social evolution, described as a "process in which the lifeworlds of modern societies are rationalized under the pressure of systemic imperatives" (Habermas 1996, 5), and in which there emerge conflicting interests. According to Habermas, "the *problem* that emerges in modern societies" is "how the validity and acceptance of a social order can be stabilized once communicative actions become autonomous and clearly begin to differ, in the view of the actors themselves, from strategic interactions" (ibid., 25).[16] The integration a normative system can produce as a consequence of these processes of social evolution and differentiation must make it possible to fulfil three tasks (Rehg 1996, XIX): First, it must stabilize social expectations, which—as the lifeworld evolves and as authoritative systems break down—become increasingly unstable and exposed "to the risk of dissension." Second, it must guarantee the "unhindered play" of communication, that is, it must ensure the possibility of critical communicative action in the matter of norms and values.[17] And third, it must be capable of

[13] On Habermas see Section 25.3 in this tome and Sections 10.3.5 and 10.4.3.2 in Tome 1 of this volume.

[14] For an analysis of the relation between sociology and law in Habermas, see Deflem 1996, 2013; Baxter 2011, 148ff.

[15] Habermas (1996, 3) believes in this regard that we need to move beyond the kind of thinking that sees law through the lens of its "exclusive relationship to moral issues."

[16] Habermas (1996, 17, 25ff.) identifies two main modes of social action: The "communicative" mode, geared toward achieving agreement, and the "strategic" or instrumental mode, geared toward making an enterprise successful. Communicative action plays a central role by making it possible, in most interactive processes, to achieve *social integration*. Indeed, Habermas takes the view that if "complexes of interaction cannot be stabilized simply on the basis of the reciprocal influence that success-oriented actors exert on one another, then *in the final analysis* society must be integrated through communicative action" (ibid., 26). On the role that Habermas ascribes to action in his analysis of law, see Baxter 2011, 10ff.

[17] Here "a system of rules could be invented that both binds together and assigns different tasks to the two strategies for dealing with the risk of dissension found in communicative action, that is, the strategies of circumscribing communication and giving it unhindered play" (Habermas 1996, 17ff., 37).

relating communicative action to instrumental action, that is, it must provide for mechanisms with which to regulate systems, such as money and administrative power, that have become autonomized and are regulated under different codes.[18]

These three main tasks can be fulfilled through the positivization of law as a post-traditional method of integration (Habermas 1996, 31–3, 37; 1998, 89): The law stabilizes expectations through "the state's guarantee to enforce the law" (Habermas 1996, 37), that is, by replacing "convictions" with "sanctions"; the law enables us to suppose that its rules issue from the rational acceptance of those who make and subscribe to them (ibid., 38) because law is "completely […] enacted" (ibid.), that is, fully dependent on the will;[19] law can protect its "autonomy" against "legally uncontrolled social power" (ibid., 39) and against the imperatives coming from structurally differentiated systems, making sure that "markets and governmental bodies" subject to "private and public law" will develop "inside the forms of law" (ibid., 40).[20]

This reconstruction makes it possible to highlight the tensions deriving from the plural functions of law. Habermas (ibid., 28ff.) summarizes these tensions under the oppositional pair of "facticity and validity,"[21] pointing to the need to secure two conflicting interests inherent in law, namely, "coercion and freedom."[22] More to the point, law must ensure that norms made effective

[18] Habermas (1996, 39) underscores that "modern societies are integrated not only socially through values, norms, and mutual understanding, but also systemically through markets and the administrative use of power. Money and administrative power are systemic mechanisms of societal integration that do not necessarily coordinate actions via the intentions of participants, but objectively, 'behind the backs' of participants."

[19] This state of affairs can be achieved only on the assumption that norms are forged by agreement. In other words, the "members of a legal community must be able to assume that in a free process of political opinion- and will-formation they themselves would also authorize the rules to which they are subject as addressees" (Habermas 1996, 38). Habermas speaks of "law's peculiar mode of validity," where "we find the facticity of the state's enforcement and implementation of law intertwined with the legitimacy of the purportedly rational procedure of lawmaking," and he underscores that in regard to these "two moments" there emerges the question "How can we ground the legitimacy of rules that are always able to be changed by the political legislator?" (This is a question that emerges with regard to the constitution as well) (Habermas 1998, 88–9).

[20] See also Habermas (1996, 56), on "law's peculiar dual position and mediating function between, on the one hand, a lifeworld reproduced through communicative action and, on the other, code-specific subsystems that form environments for one another."

[21] This tension is claimed to originate in the connection between discourse and communicative action. Here Habermas comments thus: "With the use of language to coordinate action on the basis of mutual understanding, and thus at the level of communicative action, this tension enters the world of social facts" (1996, 35). On this connection, see Rehg 1996, XVff.; Bayer 1995, 204.

[22] "Legal norms must be so fashioned that they can be viewed simultaneously in two different ways, as laws that coerce and as laws of freedom. It must at least be possible to obey laws not because they are compulsory but because they are legitimate. The validity of a legal norm means that the state guarantees both legitimate lawmaking and de facto enforcement. The state must en-

through "the imposed force of external sanctions" can at the same time be recognized as legitimate on the basis of the "rationally motivated beliefs" held by those to whom they are addressed (ibid., 26). This tension can be appreciated in the concept of legal validity (Baxter 2011, 60ff.), for this concept is at once social and normative: It answers the needs of both acceptance and legitimacy, expressing both "de facto validity as measured by average acceptance" and the "legitimacy of the claim to normative recognition" (ibid., 30).[23] For this reason, Habermas (1998, 87) argues, law "requires more than mere acceptance," or "de facto recognition": It also "claims to *deserve* […] recognition" from "its addressees." The problem is thus to understand how law can acquire an "ideal validity," that is, how it can assert its "claim to legitimacy" (Habermas 1996, 69).[24]

This is a problem to solve which, Habermas (ibid., 107, 105) argues, we need to consider "postconventional" criteria of legitimacy and the distinction between law and morality: The criteria cannot be content-based but must instead rely on "impartiality in practical judgments," while the distinction between law and morality must be predicated on the different functional needs served by law and morals, that is, on whether the norms in question are issue-specific (law) or whether they aim for universality (morality).[25] The first

sure both of these: on the one hand, the legality of behavior in the sense of an average compliance that is, if necessary, enforced through penalties; on the other hand, a legitimacy of legal rules that always makes it possible to comply with a norm out of respect for the law" (Habermas 1998, 88).

[23] See Habermas (1996, 28ff., 38), arguing that if the validity of law were based solely on contingent and "arbitrary" decisions backed by the threat of sanction, then its "its capacity for social integration" would be at risk, undermining the ability of norms to be accepted not only as a matter of fact but also on the basis of their rational and communicative dimension: "Law," Habermas (ibid., 38–9) notes, "borrows its binding force […] from the alliance that the facticity of law forms with the claim to legitimacy." It can thus be claimed that "law […] comes under the *secular* pressure of the functional imperatives of social reproduction; however, it is simultaneously subject to what we might call the *idealistic* pressure to legitimate any regulations" (ibid., 40–1).

[24] The same problem is framed in Rasmussen 1996, 21ff., by asking "How is valid law possible?"

[25] Habermas (1996, 105, 108–9) argues that "at the postmetaphysical level of justification, legal and moral rules are *simultaneously* differentiated from traditional ethical life and appear *side by side* as two different but mutually complementary kinds of action norms." Law and morality are distinguished in three important ways. In the first place, "the moral principle" requires "norms that can be justified if and *only* if equal consideration is given to the interests of all those who are possibly involved," that is, moral norms need to be grounded in universal reasons. Legal norms, by contrast, "can be justified by calling on pragmatic, ethical-political, and moral reasons—here justification is not restricted to moral reasons alone." This is because, in the second place, in Habermas's view, "the required kinds of reasons result from the logic of the question at issue in each case": Whereas "moral questions," where the aim is to have "regulations that lie in the equal interest of all," take "humanity or a presupposed republic of world citizens" as their "reference point," the "reference point" in "ethical-political questions," where participants are engaged in "justifying decisions that are supposed to express an authentic, collective self-understanding," is given by "the form of life of the political community that is 'in each case our own'." That goes double for "oppositions between interests," that is, for pragmatic questions, which "require a rational balancing of competing value orientations and interest positions. Here the totality

concern is addressed by Habermas by recourse to the so-called discourse or D principle, under which validity can be ascribed only to those norms, be they legal or moral, "to which all possibly affected persons could agree as participants in rational discourses" (ibid., 107). In the positive law, this criterion takes the form of the democratic principle (ibid., 110, 108–9).[26] Under this principle,

> only those statutes may claim legitimacy that can meet with the assent (*Zustimmung*) of all citizens in a discursive process of legislation that in turn has been legally constituted. In other words, this principle explains the performative meaning of the practice of self-determination on the part of legal consociates who recognize one another as free and equal members of an association they have joined voluntarily. (ibid., 110)[27]

So this solution, crafted in keeping with the criteria of procedural rationality on which rests consent, takes the form of a conception of the democratic principle requiring that sovereignty and rights coexist. Post-conventional societies have to supersede the alternative "twofold answer" that political theory has offered in addressing the problem of legitimacy, requiring both "popular sovereignty and human rights" (Habermas 1998, 89). The tension between these two aspects, present in rationalistic natural law theories, can be worked out on the basis of the discursive foundations of the legitimacy of law. On this approach—based on cofoundation, that is, on the inherent link between democracy and rights—"human rights institutionalize the communicative conditions for a reasonable political will-formation" (ibid.). That holds not only for "political rights, that is, the rights of communication and participation," but also "for the classical human rights that guarantee the citizen's private autonomy," absent which rights, and "in particular the basic right to equal individual liberties, there also would not be any medium in which to legally institutionalize the conditions under which citizens could participate in the practice of self-determination" (ibid., 90–1). The legitimation of political systems, and so of law, rests on the connection between rights and democracy and thus requires that they be co-original.[28]

of social or subcultural groups that are directly involved constitute the reference system for negotiating compromises." And, in the third place, whereas moral norms are directly dependent on a specific argumentative rule, namely, the "universalization principle," legal norms, based on the democratic principle, come in as many varieties as are the problems they are designed to address. On these questions, see Thomassen 2010, 93ff.

[26] That, of course, entails a need to distinguish "between the discourse principle and the moral principle. The discourse principle is only intended to explain the point of view from which norms of action can be *impartially justified*." On the D principle, see Rehg 1996, XXVIff.

[27] "Thus the principle of democracy," notes Habermas (1996, 110), "lies at *another level* than the moral principle."

[28] As Habermas (1996, 95) comments, this requirement has its counterpart in the "modern ideas of *self-realization* and *self-determination*" asserted after the crisis of traditional ethicity: These are the ideas of public and private autonomy, respectively, and law is justified to the extent

That takes as to the second concern, relating to the distinction between law and morality, for it is on that basis that rests the complementary relation between law and morality: If law is to be legitimate, rights must extend universally to everyone and sovereignty must express the community's specific ethico-politcal contents. Habermas believes that for this reason "modern legal orders must find their legitimation, to an increasing degree, only in sources that do not bring the law into conflict with those post-traditional ideals of life and ideas of justice that first made their impact on persons and culture" (Habermas 1996, 99). Therefore,

> reasons that are convenient for the legitimation of law must […] harmonize with the moral principles of universal justice and solidarity. They must also harmonize with the ethical principles of a consciously 'projected' life conduct for which the subjects themselves, at both the individual and collective levels, take responsibility. (ibid.)

As noted, this analysis enables Habermas to criticize both legal positivism and the views that make law subordinate to morality. As Habermas says, one of the aims of the "discourse-theoretic concept of law" is to avoid "the twin pitfalls of legal positivism and natural law": While in legal positivism the validity of law and the complex process through which law is legitimized are reduced to a "blind *decisionism*," natural law theory denies an essential aspect of law by striving to remove law "from the vortex of temporality by a moral *containment*," failing to recognize the necessary distinction between law and morality (Habermas 1996, 453). Habermas notes in particular that on the legal positivist approach, "the validity of positive law appears as the sheer expression of a will," and that within "this voluntarism of pure enactment […] the validity of legal regulations is measured solely by the observance of legally stipulated procedures of lawmaking," failing to take into account "extralegal principles" and the "justification of a norm's content." Yet that amounts to "forfeiting" the law's "capacity for social integration" (ibid., 38).

10.5. Ferrajoli's Garantism

Luigi Ferrajoli (1940–) defends a position that styles itself as critical legal positivism, in opposition to traditional legal positivism, the difference consisting in the legal paradigm change brought about by constitutionalization. The argument is set out in two books: Ferrajoli 1989, offering a very broad theory of criminal garantism, and Ferrajoli 2007, an axiomatized theory of law and a more ambitious proposal of constitutional and social garantism too. Neither work devotes much attention to the relationship between law and morals, both limiting themselves to espousing two versions of the Separability thesis:

> that they can be seen to be embodied in its norms. The same two concepts map onto those of sovereignty (self-realization) and individual rights (self-determination).

a cognitive one and a normative one. The most appealing aspect of Ferrajoli's stance, however, is his understanding of his own stance—not as a neoconstitutionalist one, but—as an updated version of legal positivism: as a legal positivist theory extended to a new object, namely, the law of the constitutional state.

In terms of the preceding distinctions, Ferrajoli's stance is essentially a theoretical legal positivism extended to the law of constitutional state—a stance, however, that would make it necessary to abandon or at least supersede many theses of classical legal positivism, better suited to the legislative state. Indeed, unlike what we will find in Zagrebelsky, there is certainly in Ferrajoli an allegiance to the legal positivist research tradition, the point being to avoid sliding from positivist theories to neoconstitutionalist methodologies or ideologies. Notwithstanding Ferrajoli's intentions, as well as his recent explicit refusal of neoconstitutionalism (Ferrajoli 2011), such a double shift does seem to occur.

Both shifts, toward methodological and ideological neoconstitutionalism too, are exemplified by his distinction between the mere *being in force* of legal norms and their genuine *validity* (Ferrajoli 1989, 351–6). Legislative norms that comply with the constitution in a formal way only, i.e., statutes produced by the organs of state in keeping with the procedures set forth in the constitution itself, can only be said to be *in force*; by contrast, norms that comport not only formally but also materially with the constitutional principles are said to be *valid*. Statements in terms of validity are accordingly conceived by Ferrajoli as genuine value judgments, different from moral judgments only because referring to values internal and not external to the legal system. The law of the constitutional state, in turn, is presumed to incorporate moral and political values—thus becoming itself not a fact to be described by legal dogmatics, but a set of values to be adopted by lawyers and judges, if not by citizens. The constitutional state itself would be the solution to the natural-law problem of justice.

Nevertheless, Ferrajoli always confirmed his allegiance to the positivist tradition, and recently criticized neocostitutionalism, explicitly disavowing neoconstitutionalist interpretations of his own theory. On the one hand, as to allegiance to the positivist tradition, he thinks that the constitutionalization of law deprives of any practical significance the old dispute between natural law and legal positivism—but without undermining the Separability thesis, in both of the versions distinguished in his two main works. First, the cognitive Separability thesis recognizes the autonomy of validity judgments from moral and political ones (Ferrajoli 1989, 204–6). Second, the normative Separability thesis sets out a few lines of conduct for the legislator and the judge, especially in criminal law (ibid., 207–9). Both theses are reiterated in Ferrajoli 2008, vol. 2, 309–13, the last axiomatized version of his theory of law and democracy, where the originary criminal garantism is expanded into a full-fledged social garantism, in order to protect social rights no less than civil rights.

On the other hand, as to the criticism of neoconstitutionalism, the later Ferrajoli not only rejects once again the Connection thesis, insisting on the

(critical) positivist character of his stance, but also directly attacks two of the more distinctive neoconstitutionalist theories—the rules/principles dichotomy, and balancing, or ponderation, as a characteristic feature of constitutional interpretation. The rules/principles dichotomy is rejected not just because of its dichotomic nature—indeed the cognitive Achilles heel of the distinction—but because of the normative weakness attributed to principles, unfortunately a mere ideological flaw of the same distinction. Ponderation or balancing are analogously criticized not as false theories of constitutional interpretation but because they undermine legal certainty—another, somewhat paradoxical sign of methodological and ideological shifts toward neocostitutionalism in Ferrajoli's professed critical positivism.

10.6. Zagrebelsky's *Diritto Mite*

Gustavo Zagrebelsky (1943–) holds a theory of law that bears strong analogies to Alexy's; in fact, both teach constitutional law in countries with rigid constitutions and constitutional courts and both criticize legal positivism from a perspective internal to their discipline. Moreover, Zagrebelsky draws on his experience as a constitutional judge, having served in the past as president of the Italian Constitutional Court. Unlike Alexy, still, he does not attempt to build a general theory of law; his very criticism of legal positivism seems to ignore the distinction drawn by his own teacher Bobbio, among theoretical, methodological, and ideological legal positivism. Yet his criticism can be explained as a result of the same shift, just found in Ferrajoli, from a theoretical neocostitutionalism as an updated form of theoretical legal positivism, to a methodological and ideological neoconstitutionalism, both overtly in conflict with the corresponding positivist stances.

Zagrebelsky contends that theoretical legal positivism has been superseded by theoretical neoconstitutionalism: theories of legislative state and of constitutional state respectively. His argument, more to the point, is that present-day constitutionalized law, and *a fortiori* constitutional law itself, can no longer be qualified as *hard* positive law, e.g., ordinary or constitutional legislation: It must instead be qualified as a soft or "mild" positive law (*diritto mite*), subject to legal interpretation and rational argumentation as a condition for its application (Zagrebelsky 1992). We have to do here with a "principles-centred law", distinguished as much from the "rules-centred law" of legal positivism as from the "values-centred law" of natural-law theory, along the following lines. While rules are *conditional* norms, suited to being formulated in Kelsenian logical form, and values *absolute* norms claiming an overarching normative status, principles would be norms different from rules because unconditional, devoid of the premise "if *x*," and different from values too because always to be balanced against one another in order to produce rules in their turn suited to being applied (Zagrebelsky 2009, 85–116; 2008).

His theoretical neoconstitutionalism might stil be considered an extension of methodological legal positivism to the law of constitutional state; much more than Ferrajoli's dubious stance, however, it triggers two similar shifts: first to a methodological neoconstitutionalism, and then to an ideological one. Zagrebelsky's methodological neoconstitutionalism owes in particular a debt to the dualist theory advanced in Alexy 2008: in the manner of Radbruch, law and justice would indeed stand in a relation of potential conflict, but they nonetheless cannot be decoupled from each other; and in any event, this impossibility of decoupling the two is such that mild law, or law operating on principles, cannot be studied in any nonevaluative way.

This methodological neoconstitutionalism, however, is itself always at risk of sliding into a form of ideological neoconstitutionalism: "The constitutional state deserves our apology" (Zagrebelsky 2009, 146; my translation), needing a delicate equilibrium among constitutional principles, as well as between these principles and legislative rules. In reality, even the constitution can be viewed as positive law—a law, to be sure, made up above all of principles protecting rights, in such a way as to bring about an equitable compromise among the competing values having currency in society. There can be little doubt that these arguments are at least in part designed to defend the Italian constitution of 1948, which still ranks among the most advanced constitutions in place, but they could equally serve to justify *other* constitutions as well, if not *all* constitutions as such.

Chapter 11

LEGAL POSITIVISM'S ANSWERS TO THE NEOCONSTITUTIONALIST CHALLENGE

by Mauro Barberis

The rebirth of legal positivism we have seen over the last two decades in the theoretical debate among English-speaking scholars, or at least in the Oxbridge mainstream, can be considered an answer to the challenge that Dworkin aimed at Hartian positivism (Leiter 2003). In response to this challenge, the legal positivists have wound up multiplying their views, by refining and making more and more subtle their theses, and in any event putting out a growing amount of admittedly positivist literature, despite an increasing tendency to question whether the use of such traditional labels still makes sense. The common-law legal positivist replies to neoconstitutionalism have been of three sorts, namely, inclusive, exclusive, and normative legal positivism; and at least the first two bear comment, if only to clarify the way they have been received by Continental and Latin American legal positivism.[1]

The first of these replies is known as *soft* or *inclusive* legal positivism, but also as *incorporationism*.[2] On this view, the connections between law and morals invoked by Dworkin are certainly recognized but are held to be merely contingent, rather than necessary, and hence compatible with the Separability thesis (see Coleman 2001a, 2001b; Redondo 2003). Specifically, it is Hart 1994b, the posthumous reply to Dworkin's objections, that qualifies its own view as soft legal positivism—a move enabling Hart to consider Dworkin's theory as akin to his own view, on the one hand, and as incommensurable with it, on the other. Hart's soft positivism bears an affinity to Dworkin's stance by recognizing a contingent inclusion of morality in law by means of principles—a stance the later Dworkin considers as merging into his own (Dworkin 2006). But Hart's descriptive and general jurisprudence seems to Hart himself so different from Dworkin's normative and particular jurisprudence as to not even be susceptible of being contradicted by it (but see Raz 2007).

The second reply has been labelled *hard* or *exclusive* legal positivism, especially by supporters of the first one. Its main exponent, Joseph Raz, considers it

[1] Although Scarpelli 1965 can be considered an anticipation of normative positivism as paradigmatically set out in Campbell 1996 and Waldron 2001, this conception has not yet had any significant developments in continental Europe, except maybe for Hierro 2002, Pintore 2003, and Celano 2012.

[2] The qualifiers *inclusive* and *soft* are used in Waluchow 1994 and Hart 1994b, respectively. The label *inclusive (or soft) positivism* can in turn be considered synonymous with *incorporationism*—but see Kramer 2003 for a distinction.

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to be no more than legal positivism as such, without any qualification (Escudero 2004, Jimenez Cano 2008). Indeed, the conception looks like a reply to Dworkin as well as a criticism of inclusive legal positivism, the two having been assimilated, for different reasons, by Raz as well as by Dworkin himself. Inclusive legal positivism is held to be incoherent: Either constitutional principles are considered legal rules, or law will end up being identified on the basis of morals alone. In fact, the criterion Raz adopts for identifying legal positivism is more demanding than the Separability thesis: i.e., the Social sources thesis, by which law could be identified only on the basis of social facts, not by any recourse to morality.

If we now turn our focus from the jurisprudence of the common-law tradition to the general theory of the civil-law countries, we will find that legal positivism comes under fire from Continental nonpositivism or neoconstitutionalism *a fortiori*, as it were. In fact, the main legal systems on the Continent can be much more readily traced to the model of the constitutional state—a system where a rigid constitution coupled with judicial review wind up constitutionalizing the entire positive law, i.e., irradiating it with constitutional principles. On the Continent, then, neoconstitutionalism can present itself as the legal theory of the constitutional state—thus reducing legal positivism to the legal theory of the legislative state.

Civil-law general theory of law is thus analogous to Anglo-American jurisprudence in one respect and different from it in another. First the similarity: Continental and Latin American authors often take up themes from Hartian scholastics, the discussion still primarily revolving around the relationship between law and morals, occasionally taking up distinctions such as that between inclusive and exclusive legal positivism. Then the difference: Continental and Latin American authors autonomously theorize constitutionalization, internationalization, and integration processes referring to their own legal systems—and what these legal theorists do here is to carry forward the Continental theories of norms, of the legal system, and of legal interpretation.

In what follows, we will only be able to look at one main issue and a handful of authors. As to the *issue*, it is the relationship between law and morals that will continue to enjoy pride of place—other matters, like the distinction between rules and principles, the defeasibility of legal norms, and legal interpretation, including constitutional interpretation, will mainly be touched on in connection with that first issue. For the same reason, preference will be given to those legal positivists who address head-on the challenge posed by neoconstitutionalism as a theory connecting law and morals *via* constitutional principles.[3]

[3] The term *constitutionalism* can mean the *theory* of constitutions or the constitutions themselves, and it is only in the first of these two acceptations that the term will be used in this chapter, in its variant *neoconstitutionalism*. For the post-World War II constitutions, instead, sometimes the term *new constitutionalism* comes up in the literature. On this subject, see Comanducci 2007 and Barberis 2012.

And so, as concerns the *authors* taken into consideration, emphasis will be laid on those from the Spanish and Argentinian areas, who indeed have greater visibility today in the international debate.

With these premises in place, and the usual disclaimer on the difficulty involved in outlining the contours of an ever-evolving debate, the discussion can be described as having so far progressed as follows. Even civil-law legal positivists authors initially tended to take an approach that held itself out as purely methodological, or nonideological (see Bobbio 1996), or descriptive (see Hart 1994b). It is the Separability thesis that was at first defended, but its simplicity—which Hart (1973, 55) still alluded to—turned out to be illusory, eventually finding itself replaced in the debate with the Social sources thesis.[4] Even the latter, however, has often been understood not in Raz's more demanding sense but in a generic sense as a conception of law as a human product—in truth a conception that could well be accepted not only by exclusive legal positivists but also by inclusive ones and by neoconstitutionalists, if not by many modern supporters of natural law (see, e.g., Finnis 1992).

It is with an eye to these developments and their representatives that the authors considered below have been selected. Thus, the later Bulygin will represent traditional legal positivism's standard reply to Alexy's and Nino's neoconstitutionalist challenges; José Juan Moreso will illustrate the effort to work the neoconstitutionalist objections into a legal positivism sufficiently inclusive to itself result in a form of neoconstitutionalism; Juan Carlos Bayón will exemplify legal positivism's openness to neoconstitutionalist themes like defeasibility of legal norms; and Jorge Rodríguez, for his part, will show the effort to *resist* this receptiveness, by going back to arguments that make explicit some of legal positivism's deepest presuppositions.

11.1. Bulygin's "Simple" Positivism

As we saw in Section 9.5, Bulygin is especially known for his work on norms and normative systems: a work providing the logical toolkit for much of legal theory in the Castilian-speaking world. In the last article Bulygin wrote with his friend Alchourrón, before the latter's untimely passing (Alchourrón and Bulygin 1996), an effort is made to resist the tendency, fostered by Nino but originated with Raz, to replace the concept of a norm with that of a reason for action; in the same work, however, the authors seem to subscribe to the view

[4] The same happened in the Anglo-American debate: See at least Fußer 1996, Gardner 2001, Green 2003, Morauta 2004. But Social sources thesis is no less beset with problems than Separability thesis as a criterion by which to classify legal theories. On the one hand, in Raz's specific version, it rules out inclusive legal positivism, including Hart and his followers; on the other hand, it makes it even more necessary to confront the methodology problem, i.e., the *vexata quaestio* of the relation between knowledge and evaluation (see Dickson 2001, Burge-Hendrix 2008).

of norms as defeasible conditionals, namely, as conditionals subject to implicit exceptions, i.e., exceptions not explicitly stated in their premises. Defeasibility would subsequently be the subject on which Bulygin's pupil, Rodriguez, would engage with Bayón in the discussion treated later on in Sections 11.3 and 11.4.

As we have also remarked, all of Bulygin's work proceeds from a set of unmistakably legal positivist premises. His theory of the legal system as a systematization process, to take only one example, presupposes that the axiomatic basis of systematization can exclusively consist of positive legal norms. For the influence exerted by the ongoing discussion in the Anglo-American and Spanish context, Bulygin increasingly made explicit this originary legal positivist stance. Specifically, he staked out a position on the relation between law and morals in a series of essays later collected in Bulygin 2006, where he criticizes the neoconstitutionalist theses advanced by Garzón, Nino, and Alexy, insisting in particular that law and morals are not bound by any necessary (analytic, conceptual) connection.

Contra Garzón Valdés 1990, to begin with, Bulygin makes explicit the latent ambiguity inherent in the assertion "Every legal order must necessarily conform to morality." Depending on whether this proposition is made subject to universal or to existential quantification, it can be taken to mean two markedly different things: Every legal system must conform either to *some* morality (a positive one) or to a *single* morality (a critical morality). In the former case, the proposition would amount to a truism: There is no doubt that any legal order hoping to be effective must accord with prevailing positive morality or moralities. In the latter case, by contrast, the thesis sounds unconvincing, precisely because it would postulate a single objective morality, one that all the officials in a given legal order either *can* share or even *do* share (Bulygin 1996).

Contra Nino, Bulygin challenges the thesis that in order to fully or ultimately justify a judge's decision, you have to resort to a moral norm. Taking up the arguments found in Moreso, Navarro, and Redondo 1992, Bulygin 1996 observes that if what is meant by *justify* is to "*logically* justify" (by deduction), then legal rules can very well justify legal decisions, thus figuring into the judge's ruling as operating reasons rather than as merely auxiliary ones. Nino, as Bulygin reads him, rests his thesis on a stipulated definition of *justification* as a sound or ultimate justification—but a stipulated definition, as the objection goes, does not make for a good argument in favour of a necessary connection between law and morals.

Contra Alexy, finally, Bulygin criticizes the Rightness (*Richtigkeit*) argument, finding it to be undermined by a notion of performative contradiction lacking logical stringency, and he criticizes the Connection thesis (*Verbindungsthese*) itself. On this latter subject, the objection made by Bulygin (2000, 136) is that while necessary connections do exist in a logical, analytic, or conceptual sense, none exist in a normative sense—and in fact Alexy concedes that "something being normatively necessary means no more than its being obligatory," and that "normative necessity is only a necessity in a broader sense"

(Alexy 1989b, 169 n. 4; cf. also Alexy 2000). For Bulygin, by the same token, it is simply by virtue of a moral, contingent norm that law must respect morality, and this moral norm cannot be made into an analytic sentence just by virtue of a stipulated definition of *law*.

Bulygin's legal positivism has been hypothesized to be of a "simple" variety, meaning it is logically independent of the dispute between inclusive and exclusive legal positivism—his later positions, therefore, could be ascribed to inclusive or to exclusive legal positivism alike (Redondo 2007). Certainly, one can speak of his legal positivism as simple in the sense of its being classical, pure, or unqualified—classical, i.e., akin to Kelsens's and Hart's theoretical tradition; pure, i.e., having only a logical or semantical dimension, as opposed to a practical or pragmatic one; and finally unqualified, i.e., viewing the tedious debate between inclusive and exclusive legal positivism as an unnecessary and self-feeding detour from the straight path of the logical analysis of law.

11.2. Moreso from Soft Positivism to Neoconstitutionalism

In the past, José Juan Moreso (1959–) has cowritten works with pupils of Bulygin and Caracciolo like Pablo Navarro and Cristina Redondo—thus witnessing the deep influence exerted by these Argentinian scholars on the new Spanish jurisprudence. Subsequently, however, he developed a form of inclusive legal positivism described in his own words as "latitudinarian" enough to embrace Dworkin's stance itself and to ultimately wind up in a sort of neoconstitutionalism. The theory of law set out in Moreso 1997a uses Alchourrón's and Bulygin's logical toolkit—especially in the first three chapters, devoted to the theory of norms, to propositions about norms, and to the legal system, respectively. The last two chapters are instead devoted to the primacy of the constitution and to constitutional interpretation, these being typically neoconstitutionalist issues, further developed through the essays collected in Moreso 2009, representing a further step in his way out of legal positivism.

Moreso has contributed to clarifying the Oxonian discussion on the relationship between law and morals, especially by distinguishing in a rigorous way the three more common varieties of legal positivism and arguing in favour of inclusive legal positivism (2004). These three common varieties correspond to as many interpretations of the Identification thesis, a corollary of the Social sources thesis whereby "the determination as to what is law does not depend on moral criteria or arguments" (ibid., 47; my translation).[5] Even Moreso, in other terms, tends to replace the Separability thesis with the Social sources thesis, and the latter with the Identification thesis, as criteria by which to dis-

[5] Moreso himself refers us to Dyzenhaus 2000 and Kramer 2001 for the Identification thesis and for its three interpretations, respectively. But this has now become a standard reformulation of the Separability thesis itself. See, e.g., Marmor 2001, chap. 4.

tinguish legal positivism—which criteria, however, continue to be about the relationship between law and morals.

The three varieties of legal positivism are identified by giving three different interpretations of the ambiguous phrase "does not depend" in the passage just quoted. *Exclusive* legal positivism takes this phrase to mean "*cannot* depend" (i.e., the identification of law necessarily does not depend on morals); *inclusive* legal positivism takes the phrase to mean "does not necessarily depend" (i.e., the identification of law, in fact, does not *need* to depend on morality); and *ethical* legal positivism takes the phrase to mean "*ought* not to depend" (i.e., the identification of law ought not to depend on morals). Whereas in Moreso 2001 the choice for inclusive legal positivism was justified by criticizing the main arguments in support of *exclusive* legal positivism, in Moreso 2004 the justification is provided by criticizing *ethical* legal positivism.

Ethical legal positivism does presuppose the truth of inclusive legal positivism, but it pretends to convert exclusive legal positivism from a conceptually false theory into a normatively valid one. The sense in which ethical legal positivism is found to presuppose inclusive legal positivism is that if it were in fact conceptually impossible to include morality in law, as exclusive legal positivism claims, then it wouldn't make sense to even discuss whether such an inclusion is normatively acceptable. Ethical legal positivists argue that such an inclusion, though implicitly considered by them to be logically possible, is normatively unacceptable, because that would make law too uncertain—a thesis that Moreso rebuts by arguing that morality can sometimes be objective, at least when it relies on thick concepts (rather than on thin ones), as constitutions often do.

Inclusive legal positivism thus remains the only position in the running—a stance that Moreso 2009 further works into a form of neoconstitutionalism. To be sure, neither in this work nor elsewhere does he label himself a neoconstitutionalist, arguing, on the contrary, that labels such as "legal positivism," "nonpositivism," and the like are only labels loose enough to warrant our replacing them with the various theses so labelled (cf. Raz 2007). Yet he seems to accept the Separability thesis even in his latest book (Moreso 2009, 245), at least in the sense of denying, *contra* Alexy (and Raz too), that there can be any necessary connection between law and morals. Still, as much as these connections are reckoned to be contingent, their increasing number suggests to Moreso that therein lies the distinctive trait of the modern state: Of the legislative state at first, and *a fortiori* of the constitutional state.[6]

[6] "Constitutionalism is only a special case of the inclusion of morality into modern law" (Moreso 2009, 47, n. 47; my translation). The Spanish original: "El constitucionalísmo es unícamente un caso especial de la incorporación de la moralidad al derecho de la modernidad." Thus Moreso cannot be classified as an orthodox neoconstitutionalist, if such a stance exists: What sets the constitutional state apart from the legislative state is for him not a *qualitative* difference but a *quantitative* one.

The observation that the law of the constitutional state incorporates morals—an observation typical of theoretical neoconstitutionalism, but which could still be compatible with Hartian methodological legal positivism—gave start to the shift from theory to methodology found in other forms of neoconstitutionalism (see Chapter 10). The methodological status of legal theory changes in such a way that the theory was now thought to stand to legal dogmatics as normative ethics stands to applied ethics—a typical methodologically neoconstitutionalist view (see Moreso 2008). But a further shift took place, this time toward ideological neoconstitutionalism: Jurists and even legal theorists were to adhere to the constitutional state, even though an attitude of epistemic servility should still enable them to distinguish, within the constitution, the law as it is from the law as it ought to be (see Moreso 2009, 251–3).

11.3. Juan Carlos Bayón's Arguments for Defeasibility

Like Moreso, Juan Carlos Bayón (1957–) analyzes the relation between law and morals on both a theoretical and a metatheoretical level, extending such analysis to the question of the defeasibility of legal norms. He first concerned himself with the question of the normativity of law; then he systematically mapped out the meanings of the Separability thesis, which he, too, replaced with the Social sources thesis; next he criticized inclusive legal positivism by deploying a notion of deep conventionalism more apt to shed light on legal positivism's background assumptions (its metaphysics, in the well-known Peter Strawson's sense of the term); and, finally, he put forward a theory of the defeasibility of legal norms.

The first problem Bayón (1991) addressed is that of law's normativity (cf. Postema 1987, Delgado Pinto 1996). If we take up the standpoint of methodological legal positivism, we will come to know the law as a *fact*, at the risk of getting law to cast off all legal normativity. Bayon attempts to rectify this consequence by recourse to Raz's concept of reasons for action (Raz 1975, 1990), precisely as had earlier been attempted in Nino 1984—a move which consequently led to a stance similar to that of Nino's fundamental theorem. When it comes to *identifying* the law, in other words, Bayón adopts the Separability thesis such as it is understood by exclusive legal positivism; but when it comes to *justifying* the law, he instead espouses a version of the Connection thesis similar to that proposed by Nino and Alexy (and Raz too), arguing that law *claims* moral normativity without necessarily possessing it.

Just like Moreso, Bayón (2002a) subsequently laid out a map of the meanings assumed by the Separability thesis—a label that in the recent debate has come to cover nearly as wide a range of positions as those falling within the reach of the expression *legal positivism* analyzed by Hart and Bobbio in the 1950s. Of all these definitional, justificatory, and interpretive stances, there is at least one that Bayón singles out as peculiar: the Social sources thesis, more

broadly construed as conventionalism, which at once *entails* the Separability thesis and is *presupposed* by it. This point, where all the legal positivist theses intersect, is named by Bayón "the minimum content of legal positivism."

Conventionalism is taken up again in Bayón 2002b, where the term *law* is argued to designate a complex of social conventions, and *morality* the rational tribunal before which such conventions are judged. But what are *convention* and *conventionalism* supposed to mean? Like Dworkin,[7] and on the basis of M. Moore 1986–1987, Bayón distinguishes superficial conventionalism, typical of imperativist legal positivism, from deep conventionalism, this being the view that certain interpretive conventions exist which could regulate the identification and application of the law even by recourse to morality. Dworkin understands such conventionalism as no more than an underdeveloped form of his own interpretive theory—exactly the converse of what Bayón believes to be the case, for in his view it is instead Dworkin's interpretive theory that shows itself to be an underdeveloped form of conventionalism.

Finally, in a discussion with Rodríguez subsequently collected in Bayón and Rodríguez 2003, the same Bayón defended a theory of the defeasibility of legal norms, by attempting to drive into legal positivist territory a suggestion taken up from neoconstitutionalism. More to the point, he argued, at least at the outset, that in identifying the law, judges often recognize exceptions implicit, i.e., not explicitly stated in the premise of a norm. Now, in at least some of these situations, it would be useful to conceive of legal norms as defeasible conditionals, rather than as classic conditionals subject to the laws of *modus ponens* and reinforcement of the antecedent. Legal norms so conceived are defeasible conditionals, whose premises state necessary but not sufficient conditions for the consequences to be realized.

It has long been a contention among jurists that law is governed by a logic of its own. It is in particular in neoconstitutionalist theories of principles that such a nonclassic, defeasible, nonmonotonic logic is often invoked, arguing that principles cannot simply be applied deductively but only once they have been duly balanced against one another. Bayón holds that such defeasibility of norms is in some forms compatible with legal positivism, for it would bring about that partial, rather than total, legal indeterminacy that has always been acknowledged by legal positivists like Kelsen, Hart, and Raz. As we will see in the next section, however, Bayón wound up granting many of the objections raised by Rodríguez in the course of the debate between them, especially as

[7] Dworkin had distinguished two varieties of conventionalism, a strict one and a soft one, referring in the former case to overt *stated* conventions (such as they are understood in game theory, or otherwise in the form of commands à la Austin) and in the latter case to any *consequence* (including implicit ones) deriving from such explicit conventions. But he went on to conclude that soft conventionalism is only "a very abstract, underdeveloped form" of his own interpretive theory of law (Dworkin 1986, chap. 4).

concerns the central role played by classic, monotonic logic in a legal positivist theory of law and of the legal system.

11.4. Jorge Rodríguez's Arguments against Defeasibility

Jorge Rodríguez (1964–) was trained under Bulygin and expanded on his theory of the legal system by honing and defending its original deductivist and legal positivist premises. This happens formerly in Rodríguez 2002, which to this day stands as his major work, notwithstanding the more recent and updated Ferrer Beltrán and Rodríguez 2011. In the first part of the former book, Rodríguez sharpens and defends the nomostatic system worked out by the classical Alchourrón and Bulygin (1971), supplementing it with the nomodynamic theory the same two authors elaborated subsequently. In the second part of the same book, Rodríguez instead defends legal positivism from the related objections centred on principles and defeasibility, arguing in particular that the theory of the legal system has at its disposal all the tools it needs to rebut such criticisms, without needing to accept the Defeasibility thesis or abandon its legal positivist background assumptions.

Rodríguez occasionally claims that the theory of the legal system expounded in Alchourrón and Bulygin 1971 can incorporate and deal with such criticisms of legal positivism as Dworkin's principles-based objection. That is what would happen, to take just one example, if we further developed Alchourrón and Bulygin's distinction between prescriptive and descriptive relevance, or that between axiological and normative gaps (see Rodríguez 2002, 77–87; Atria et al. 2005). Rodríguez thus worked out in particular a notion of descriptive relevance that would make it possible to consider relevant for the legal system such properties as are not expressly stated in any norms but can only be identified by reference to the legal principles underlying those norms. This extension of Bulygin's theory, though accepted by him, is still open to debate (see Ratti 2009, chap. 4)—but in any event it certainly points out one direction in which the theory could be developed.

The greater part of Rodríguez's discussion, also in the essays collected in Bayón and Rodríguez 2003, is given over to showing how the positivist theory of legal system is immune from many familiar external and internal criticisms alike. We would count among the external criticisms Dworkin's principles argument, and among the internal ones that same argument if principles were understood to consist not of moral values at all but of the legal norms belonging to the system itself. And that happens as well with the theories of defeasibility that Rodríguez adversarially discusses with Bayón. To be sure, these theories—prefigured by the early Hart, fleshed out by the later Alchourrón, and then again defended by the same Bayón—are backed up by a respectable legal positivist pedigree, but they are nonetheless found by Rodríguez to be at odds with some core tenets of legal positivism.

In Bayón and Rodríguez 2003, chap. 3, as well as in Rodríguez 2002, chap. 4, Rodríguez distinguishes ten senses of *defeasibility*, thus breaking down the problem of defeasibility into a plurality of heterogeneous issues needing to be treated in different ways. But he makes the case that a good part of these issues—for example, those relative to the vagueness of legal language, to the applicability of norms, and to the changes they undergo by the hand of judges and lawmakers—can be solved by simply bringing to bear the distinctions adopted by Alchourrón and Bulygin. Three distinctions in particular would be worth mentioning: that among a norm, a normative proposition, and a norm's formulation; that between a norm's belonging to the legal system and its applicability; and that between legal system and legal order, the former static and the latter dynamic.

It is sometimes claimed that norms contain implicit exceptions, and are therefore defeasible, only when expressed in vague language, and in this case the problem can be solved ex post facto by *constructing* such language. Other times it is claimed instead that norms contain implicit exceptions, and are therefore defeasible, only *after* their language has been interpreted and it comes time for the courts to apply them, and in this case the problem can be solved ex post facto through the judge's discretion. Still other times it is claimed that norms contain implicit exceptions, and are therefore defeasible, only in the sense that their judicial interpretation and application changes over time, or in the sense that the language itself may change by legislative action—and in this case too the problem is solved through a dynamic theory of the legal order as a succession of momentary systems, in the Razian sense.

The only real problem for legal positivism, as the argument goes, comes when defeasibility is predicated of norms themselves, that is, when the claim is that you cannot apply basic deductive logic to them, or that the theory of the legal system cannot identify them without resorting to moral evaluation. In response to the first claim, Rodríguez invokes what Bayón (1991, 360ff.) has called the Trojan Horse defence, arguing that you cannot acknowledge the defeasibility of *some* norms without recognizing the same with respect to *all* norms. In response to the second claim, Rodríguez argues that the legal positivist theory must *by definition*, i.e., on pain of metamorphosizing into a *different* sort of theory, exclusively accept evaluations *internal* to the system, thus taking only legal principles into account, and not also moral values (cf. Nino 1985, 145–73). In such a theory, accordingly, we would only have room for a marginal defeasibility of beliefs about whether or not a norm belongs to the legal order.

In a nutshell, Rodríguez makes the point that if legal positivism is to fulfil its objective—which is to explain how law can guide human conduct through general norms, rather than just case by case—it must concede that though momentary legal systems are by definition always subject to change, they can at any time in principle identify nondefeasible legal norms: *nondefeasible*, on the

one hand, in the sense that they can be used to deduce the solution to specific cases, *legal*, on the other hand, in the sense of their being nonmoral, positive legal norms. Rodríguez thus makes explicit some of the conceptual assumptions on which legal positivism is built. And in doing so he shows how the theory could prove coherent, even if it would turn out to be less attractive than theories built on different kinds of assumptions, closer to the lawyers' common sense.[8]

11.5. Conclusion on Legal Positivism

As we have noticed, legal positivism has been on the defensive for the last few decades, albeit more so in the civil-law debate than in the common-law debate; and what accounts for this defensive stance is especially the criticism coming from the constellation of theoretical positions referred to in this chapter as neoconstitutionalism, but otherwise labelled constitutionalism, nonpositivism, antipositivism, and suchlike. There is also another name, however, a label that has begun to gain ground in the Anglo-Saxon world, too, and that captures an important aspect of neoconstitutionalism. Such a name is *postpositivism*,[9] and the important aspect it captures is that neoconstitutionalists say they in no way intend to go back to natural law: They rather seek to *supersede* legal positivism, absorbing and developing the theoretical ground it has gained.

Neoconstitutionalists, especially on the Continent, and postpositivists, in the Anglo-American world, often proceed from the claim that they are updating theoretical legal positivism to the developments of the constitutional state—a claim which *in se* would be perfectly in keeping with methodological legal positivism. Indeed, as has often been said, if *theoretical* neoconstitutionalism confined itself to that aim, it could not be regarded as anything more than the legal positivism of the 21st century. Yet, as we have seen, neoconstitutionalism does not stop here. Its pretence to update legal positivism triggers a long train of methodological and ideological shifts, which may or may not be justified in view of their premises, but which, regardless, produce a conflict between such a stance and methodological legal positivism, often also reintroducing forms of ideological legal positivism.

What comes out having to defend itself, oddly enough, is not so much the Social sources thesis—which neoconstitutionalists or postpositivist authors are usually happy to take on board, albeit in a much less demanding version than

[8] The same idea has been expressed by Jonathan Dancy in a remark that Bayón chose as an epigraph in Bayón and Rodríguez 2003, 154: "It is the job of a philosopher, so far as possible, to give an account of our practice rather than to tell us that we all ought to be doing something else. To the extent that this cannot be done, it is normally a fault in the philosophy rather than in the practice."

[9] The term was introduced by Villa (1997), and was then taken up by MacCormick (2007a, 278) to designate his own position.

in Raz's original statement of it. Indeed, this criterion by which to distinguish legal positivism from natural law is certainly at least as ambiguous as the old Hartian Separability thesis entailed by it. Yet, as often happens in the history of ideas, Separability thesis does not so much get refuted as it gets emptied and pushed aside: Neoconstitutionalist and postpositivist theorists simply find more interesting, here and now, the many connections between law and morals—the question of the necessity or contingency of such connections becoming less important or even irrelevant. At least from this point of view, neoconstitutionalism shows itself to be not a somewhat puzzling return to natural law but a form of postpositivism, superseding legal positivism by incorporating some of its premises.

Let us just take the three connection theses distinguished by Nino: the interpretive, the justificatory, and the identificatory one. The *interpretive* connection between law and morals is admittedly contingent—Nino and Moreso both argue it increasingly holds for *modern* law, a law distinguished from morality only in Western and modern culture, as opposed to non-Western and ancient and medieval cultures. At any rate, the process toward the moralization of law is a historical and a contingent one, as is the complementary process toward the legalization of morals (see Habermas 1992, chap. 3). The only way in which the interpretive connection thesis can appear necessary, i.e., true by definition, is if *interpretation* is defined in Dworkinian terms, with the ascription of meaning to legal texts collapsing into their moral justification—a very idiosyncratic definition of *interpretation* indeed.

The *justificatory* connection between law and morals, for its part, is something the legal positivists recognize: Law can make a *moral* claim such that citizens will obey it and judges will apply it only if it is morally just (cf. Raz 2004), or else if it is not intolerably unjust. Yet such a connection works itself out as an empty tautology (if something is morally binding, then it is morally binding), or as a mere truism (for who could deny that the law has to be morally just?), or still as a merely normative connection, necessary only in a broad, normative sense, as Alexy concedes to Bulygin (see Section 11.1 above). In fact, it is not only by virtue of a stipulated definition of *law* and *morality* that their justificatory connection can appear necessary, but also on the basis of the unity of practical reasoning, subordinating law to morals (cf. Raz 1990, 10–1; Marmor 2006)—the latter, however, proving to be only a naive form of value monism, a metaethical stance open to objections of value pluralism.[10]

[10] See Raz 1986, 395–7, and paradigmatically Berlin 1958. Oddly enough, the neoconstitutionalist theory seems to presuppose a form of value pluralism when it admits that constitutional values and principles are not arranged according to any stable hierarchy, a circumstance making necessary the constitutional argument called balancing or ponderation. Contrariwise, the neoconstitutionalist authors unproblematically adopt the Unity of practical reasoning, as most legal positivists do, too, except for Raz and, more recently, for Redondo (1996, 1998) and Barberis 2008b.

The *identificatory* connection between law and morals, finally, does not appear to be necessary, either, at least not in most of the senses in which the terms *law* and *morals* are commonly used in Western or developed societies today. Of course, and again, the two terms could by stipulation be defined in such a way as to render analytic the propositions entailed by such definitions—but a stipulated definition does not make for a solid basis on which to rest an argument aimed at demonstrating a necessary connection. And if, as is much more common today, we speak not of a definitional connection but of an identificatory one—a connection serving to identify the law in order to apply or study it—then this connection will appear *a fortiori* contingent: After all, the end of the constitutional state could well be that of extending the empire of law to a growing part of morals (Barberis 2012).

The foregoing connections may be contingent, to be sure, but that does not rule out for them a role important enough as to make it possible to build upon them an entire theory of law, be it neoconstitutionalist or postpositivist or even positivist. Especially in the civil-law tradition, constitutionalized law is often identified, justified, or interpreted by recourse to principles setting forth or deriving from moral values. But how to reconstruct these practices theoretically? How to define the relative concepts? What methodological rules to adopt? What ideological or moral assumptions to make, if any are to be made at all? Here the contemporary common-law discussion revolves around the so-called methodology problem, and in particular around the possibility of a morally neutral theory of law, but the broader discussion remains completely open-ended.[11]

The same facts—the multiple contingent connections between law and morals instituted by constitutional state—could be depicted in many ways, on the basis of different methodological and axiological premises. The legal positivist theorists, for example, could stay true to Weber's idea that a theory could remain *Wertfrei*, or value-*neutral*, even as it must inevitably be value-*oriented*, and depict these connections in terms of a *positivized morality* incorporated by constitutional principles. Conversely, the neoconstitutionalists theorists, having dismissed from the outset the idea that legal and moral theories can really be neutral and *Wertfrei*, could continue to consider such connections in terms of *moralized law*, in such a way as to make legal theory a province of the empire of morals. In these new, constitutional terms, perhaps, goes on the old, seemingly outdated, and in fact never-ending, debate between legal positivism and natural law: a debate where it would be time to get rid of its stereotypical positivist formulation, e.g., by rediscovering features of the natural law tradition misrepresented by Hart and his followers.

[11] To appreciate this fact, one need only think about the vaguely paradoxical solution offered in Raz 2004: The judges should always apply morals, and the alleged incorporations of morals into law—as through the constitution—would serve the peculiar function of modulating such application, expressly ruling out any and all possible exceptions.

Part Three

Legal Realism

Chapter 12

INTRODUCTION: CONTINENTAL LEGAL REALISM

by Edoardo Fittipaldi[*]

12.1. The Problem of Defining the Main Tenets of Continental Realism

In this introduction I shall attempt to sketch out the main tenets of Continental, or psychological, realism. To this end I shall chiefly refer to the positions of Axel Hägerström and Leon Petrażycki, who are the founders of Scandinavian and Polish-Russian legal realism, respectively.[1]

The convergence between the positions of these two authors has often been pointed out (see, for example, Banakar and Travers 2013, 16; Peczenik 2005a, 294; McCoubrey and White 1999, 179–81; Opałek 1973, 65).[2] This convergence between Petrażycki's and Hägerström's positions is all the more striking if we consider that neither knew the other's works and that they had completely different backgrounds: Petrażycki was a jurist trained in Germany during the last years of the *usus modernus pandectarum*; Hägerström was instead a general philosopher who took Boström's dogmatic idealistic philosophy as his point of departure (see Pattaro 2005, 335).

Their convergence, in my opinion, is not accidental, and it should be explained by noting that (1) the main tenets of Continental realism are closely connected to one another and that (2) Petrażycki and Hägerström were both consistent enough to drive these tenets to their *prima facie* most paradoxical consequences, without accepting compromises with the scientific or philosophical vogues of the day.

The same cannot be said of all their pupils. As regards those who studied under Petrażycki, Krzysztof Motyka commented that it "is difficult to remove the impression that almost all of Petrażycki's pupils, even Lande, sought to contain the radicalism and at the same time the amplitude of the conception of law [*prawo*] developed by the creator of the psychological theory of law" (Motyka 1993, 198; my translation). To some extent, this seems to hold also for Hägerström's followers, with the exception of Karl Olivecrona and A. Vilhelm Lundstedt.

[*] I wish to thank Corrado Roversi, Elena V. Timoshina, and Filippo Valente for their extremely valuable suggestions in critiquing an earlier version of this essay.

[1] On Hägerström see also Chapter 13 in this tome. On Petrażycki see also Chapter 18 in this tome and Section 16.2 in Tome 1 of this volume.

[2] Olivecrona's criticism of Petrażycki's theory (Olivecrona 1948) can be explained by the fact that Olivecrona did not have direct access to Petrażycki's writings. See, in this regard, Fittipaldi 2012a (12 n. 9). For a comparison between Petrażycki and Olivecrona, see Timoshina 2011.

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Therefore, I will not contend that *all* the authors presented in this section subscribe to *all* the tenets of Continental realism. I will sometimes point out some divergences, but my focus will be on convergences, so as to justify the concept of a *Continental, or psychological, legal realism*.[3]

To this end I will be referring not only to the positions of Petrażycki and Hägerström, but also to those of Jerzy Lande, on the one hand, and of Karl Olivecrona, A. Vilhelm Lundstedt, and Enrico Pattaro, on the other, since I consider all of them as consistent developers of these two different strands of Continental realism.[4]

These are the authors I will bear uppermost in mind in this attempt to characterize the *ideal type* of a Continental legal realist, thus introducing the present part of this Treatise.

12.2. *Realism*: A Term with Several Meanings

The term *realism* has many meanings in philosophy. In order to understand the sense in which it is used in the phrase *Continental*, or *psychological*, *realism*, we will first have to devote a few words to this possible range of meanings.

The broadest sense that can be given to *realism* is the following: *The assumption on the part of the Subject*[5] *that some objects*[6] *exist independently of the current experience he has of them* (cf. Külpe 1923, 186).

Different kinds of realism can be distinguished according to the kinds of objects the Subject assumes to exist independently of himself. These may be, among others,

1. physical objects;
2. psychic (or spiritual) objects;[7]

[3] The terms *Continental* and *psychological* are here understood as co-referential. A third option could have been to refer to these approaches by the term *Baltic legal realism*, but this term would have ruled out Enrico Pattaro's contribution.

[4] On the convergences between the conceptions of Leon Petrażycki and Enrico Pattaro, see Section 20.1.5 footnote 19 in this tome, and Timoshina 2011, 68–71.

[5] In this discussion the term *subject* will be uppercased when meaning "each of us as a solipsistic ego"; it will instead be lowercased when referring to the object of predication in a judgment.

[6] The term *object* or *object of thought* will be used here in the sense of "intentional object." The term *object* is to be understood as meaning "what is being experienced and/or represented by the Subject," regardless of whether the Subject believes that experience to be a perception—or an impression, in Hume's language (Hume 1985, sec. 1.1.1)—or a mere representation (what Hume would call an idea). The existence proper of some object lies in its being experienced by the Subject. This existence is to be kept apart from the independent existence being talked about in the text. Moreover, the term *independent existence* is not synonymous with *external existence*, considering that a psychic experience I have may be independent of me and yet not be external, as in the case of my sadness, my recollections, etc. As we will see below, Petrażycki and Hägerström both make use of some concept of object understood as an intentional object.

[7] Examples of philosophers for whom the whole of reality independent of the Subject is re-

3. historical events;
4. mathematical objects;
5. *langue* (as opposed to *parole*);[8]
6. universals;
7. moral values; or
8. norms, deontic objects (such as rights, obligations, and powers), or institutional objects (such as corporations, scriptural money, or Verdi's *Traviata*).[9]

Closely related to realism is the idea of *truth*, understood as *correspondence* between the representation of some object on the part of the Subject and its independent existence (Albert 1978, 39).

All legal realists, Continental or American, assume the *physical* existence of some objects (e.g., people, chairs, etc.).[10]

Continental legal realists also hypothesize the existence of *psychical* objects, but in so doing they claim that these objects should be ultimately explained in the terms of *physical* objects. According to them there is no *res cogitans* that cannot be explained in the terms of some *res extensa*. Some of them (like Petrażycki and Lande) also recognize the *historical* existence of physical and psychical entities. None of them, to my knowledge, addressed the issue of the independent existence of mathematical objects and language.[11] As for universals or moral values, virtually all of them rejected the view of their existence independent of the Subject. *Finally, and most importantly, all legal realists reject the view that there exists some realm, distinct from that of physical and psychical realities, where norms, deontic objects, and institutional objects exist*.

The rejection of this last view puts Continental realists at odds with the way jurists and most philosophers think about law. Hans Kelsen (1979, 90), for example, believed that norms belong to a special *Bereich der Normen* (domain of norms). Adolf Reinach (1989, 149; my translation) explicitly spoke of *Gegenstände einer außerphysischen und außerpsychischen Art*, meaning "objects of an extraphysical and extrapsychical kind."

ducible to psychical (or spiritual) realities are Leibniz (cf. Section 13.1.1 in this tome) and Berkeley (cf. Albert 1987, 47 n. 7).

[8] "In linguistics as in chess […] there are rules which survive all events. [These rules] are general principles *existing independently* [*existants independamment*] of concrete facts" (de Saussure 1916, 135; my translation, italics added). To be sure, this assumption that de Saussure (1916, sec. 1.1) makes can be understood as purely methodological, but a strict Continental legal realist will be suspicious of any careless use of terms such as *to exist*, let alone a phrase like *to exist independently*.

[9] On the possibility of analyzing musical works in much in the same way as institutional objects, see footnote 40 below.

[10] This is not to say that realists assume the physical existence of *any* object no matter what it may be. Thus, as far as I know, no legal realist has ever assumed that there exists an enormous cake, five kilometres across, floating on the Baltic Sea.

[11] But Petrażycki (1939, 62) seems to believe that objects of thought such as triangles do not exist outside the Subject.

The legal realist Enrico Pattaro (2005) has thoroughly described the *dualist ontology* of legal nonrealists in chaps. 1–4 of *The Law and the Right*, stressing that this ontology is typical of the civil-law tradition. But traces of this way of thinking can be found also in the common-law tradition. For instance, in a way that to a legal realist would sound utterly careless, Hohfeld speaks of operative facts that *call legal relations into being* (Hohfeld 1964, 27), or of *duties* that *continue to exist* (Hohfeld 1917, 743), or of *privileges* that *really exist* (Hohfeld 1964, 58), in this last case even making a double somersault, considering that in Hohfeld's construction privileges are supposed to be *inexistences* of duties.[12]

Continental legal realists could be also termed *legal reductionists*, but only so long as this term is properly understood. As will be shown below, Continental legal realists are far from erring on the side of a dismissive reductionism, by which term I mean the attitude where the philosophical or scientific problems raised by certain phenomena are dismissed simply by stating that they amount to "nothing other than" some other phenomenon. Continental legal realists are *careful reductionists*, not dismissive realists. This is why I prefer to use the phrase *to explain in the terms of* rather than the phrase *to reduce to* when speaking of the method used by Continental legal realists. By *explanation* continental realists understand *causal* explanation in a strict sense, be it deterministic or probabilistic.[13]

For Continental realists there is no other kind of explanation than causal explanation. In particular, no Continental realist would water down the concept of *causal explanation* to the ambiguous idea of *giving an account of something by pointing to its purported logical form*.[14] To a Continental realist, this talk of *accounts* and *logical forms* is simply nonsense if unrelated to causality.

[12] Indeed, it could be argued that the dualist ontology Pattaro refers to is a side effect of the development of legal formalism and is not necessarily restricted to Western societies (on the conditions for the development of legal formalism, see Weber 2010, 599ff.).

[13] The way Continental realists speak of causality seems to me to be compatible with a relaxed model of causation that, next to determinist causation, allows for *probabilistic causation*. According to the model of probabilistic causation adopted in social and biological sciences, in order for there to be a probabilistic causal connection, the following must hold: (α) $p(E|C) > p(E)$ or (β) $p(E|C) > p(E|\neg C)$. These formulations are reciprocally equivalent and can be read as follows: (α) the probability of effect-E if cause-C obtains is higher than E's general probability, and (β) the probability of effect-E if cause-C obtains is higher than its probability if cause-C does not obtain. For example, the probability of lung cancer is higher in smokers than in people in general, or in non-smokers in particular. This model can be used not only to predict future events but also to explain past ones. From this model it follows that deterministic causation is a limiting case of probabilistic causation where $p(E|C) = 1$. For an example of a Continental legal realist speaking in the terms of probabilistic causation, see Section 12.6 below.

[14] Here is an example of a such an "account": "In spite of the stunning variety of human forms of institutional social existence, I am convinced that there is a single logical principle that underlies all of the structures and a small set of ways in which the principle is implemented in actual institutions. The basic, and simple, idea is that all nonlinguistic institutional facts are created and maintained in their existence by speech acts that have the same logical form as Declarations" (Searle 2010, 122). I will be giving further reasons why John Searle's method can hardly be regarded as similar to that of Continental legal realists.

I said that to my knowledge no Continental legal realist ever claimed that language—understood as *langue*—exists independently of physical reality. A corollary of this contention is that language cannot be used to explain norms, deontic objects, or institutional objects. Since language is itself made up of norms, at least to some extent,[15] such an explanation would be circular.[16] What a legal realist can do with linguistic phenomena is compare them to legal phenomena (as in the case of Lande, see Section 19.5 in this tome). What instead *cannot* be expected of legal realists is that, in order to explain or reduce legal phenomena, they should make use of language as a sort of *deus ex machina* (this is a point I will come back to in Section 12.5).

12.3. Continental vs. American Legal Realists

As noted, Continental realists assume only the existence of physical objects. This is a feature they share with American realists, but that is where the similarities end.[17]

Continental realists assume that next to physical objects there also exist psychical ones. *These psychical objects exist exclusively within each individual's brain* and should ultimately be explained in terms of physical objects. This is not to deny, however, that psychical phenomena are organized according to their own *laws of organization* not immediately reducible to physical phenomena; or, stated otherwise, this should not be taken to mean that psychology is immediately reducible to neurology. In order to avoid misunderstandings, we should be clear that this contention is perfectly compatible with a monistic metaphysics that only recognizes the existence of physical objects. This holds even within the hard sciences. For example, to hold that chemistry is not immediately reducible to physics is not to deny that what exists *ultimately* comes down to atoms, quarks, and other such entities.[18]

Now, while according to Continental realists norms and deontic objects are in the first place *psychical* phenomena, according to American realists they can

[15] To the extent that language is not made up of norms, it is still made of psychical dispositions located within each individual's brain.

[16] Cf. Roversi 2007, 192ff., for a discussion of John Searle's claim that language is a special institution.

[17] On the alleged resemblance between Scandinavian and Americal legal realism, see Mindus 2009, 137 n. 9.

[18] In the same way, it can perfectly be argued that *the contention that sociology is not reducible to psychology is fully compatible with methodological individualism*. Hayek made that argument by drawing on the unintentional consequences of intentional actions and on the laws of organization of the former as against the latter: "If social phenomena showed no order except in so far as they were consciously designed, there would indeed be no room for theoretical sciences of society and there would be, as is often argued, only problems of psychology. It is only in so far as some sort of order arises as a result of individual action but without being designed by any individual that a problem is raised which demands a theoretical explanation" (Hayek 1955, 39).

be immediately reduced to *physical* phenomena. American realists do not contend that norms and deontic objects are located within each individual's brain: They rather contend that these entities are made up of the behaviours of qualified sets of individuals such as judges or officials.

For example, according to the founder of American realism, Oliver W. Holmes, to state the existence of a person's legal duty is tantamount to predicting that if this person does behave in a certain way, he or she "will be subjected to disagreeable consequences by way of imprisonment or compulsory payment of money" (Holmes 1897, 461). Holmes seems to make this point in order to distinguish law from morals, but the roots of his approach can be traced to the influence of Charles S. Peirce's pragmaticism, according to which, when considering objects in general, we are to "[c]onsider what effects, that might conceivably have practical bearings, we conceive the object of our conception to have," and "our conception of these effects is the whole of our conception of the object" (Peirce 1931–1935, 5.402). American realists do not ascribe any role to psychic phenomena when it comes the metaphysical question of the mode of existence of norms or deontic objects. Norms and deontic objects are made up exclusively of such physical phenomena as the taking of someone's goods or one's being locked up in a building for a while.

From a Continental realist's perspective, this approach contains two mistakes: (1) It fails to take the individual's *psychology* duly into account;[19] and (2) it reduces legal phenomena to the *activity of the courts* or of other officials.[20] As regards (2), I should anticipate that, as much as Petrażycki's and Hägerström's psychological conceptions of rights are quite different from each other, both contend that even though rights are illusions or fictions, they play a key role both in everyday life and in revolutions, and that they cannot in any way be reduced to the activity of some court. I will return on this point shortly.

12.4. Norms and Deontic Objects as Psychical Phenomena

If norms and deontic objects—such as rights, powers, and obligations—cannot be reduced to behaviours, what can they non-dismissively be reduced to?

Now, both Petrażycki and Hägerström held that a crucial role in the ontology of norms and deontic objects is played by emotions. But this is not to say that norms and deontic objects can be *directly* reduced to emotions.

[19] To be sure, Jerome Frank (1963) did take psychology into account, but not at a legal-metaphysical level.

[20] These two "mistakes" are not necessarily connected. Theodor Geiger, for example, made the first one without making the second (1964, 57ff.). On the other hand, Alf Ross, to take another example, made the second one without making the first (see Chapter 16 in this tome). An author who, at least to some extent, seems to have made neither of the "mistakes" mentioned in the text is Hart (1961). However, Hart cannot be viewed as a Continental realist *honoris causa*, and that is because of his "attitude of caution, and maybe even of suspicion, toward psychologism" (Pattaro 2005, 392).

As to Petrażycki, he holds that ethical emotions are a subclass of emotions. He defines norms as the contents of ethical judgments, and judgments for him are psychical acts (which as such are not necessarily linguistic). Ethical judgments have as their "minimal structure the representation of an action […] + an appulsive or repulsive […] emotion" (Petrażycki 1909–1910, 45; my translation; see Section 18.5 in this tome). As the *contents* of ethical judgments, norms cannot be identified with those judgments. I think that norms, in Petrażycki's conception, should be reconstructed as intentional objects.[21]

Hägerström's view is in many respects different from Petrażycki's. What Hägerström's conception has in common with Petrażycki's is that Hägerström also views norms as psychical phenomena. Hägerström identifies norms, not with feelings of duty, but with "states of consciousness of duty" (Pattaro 2005, 135). Moreover, according to Hägerström "the consciousness of an obligation […] results from a combination of *föreställning* ('representation') and a *viljeimpuls* ('conative impulse')" (ibid., 138). As for Hägerström's conception of *axiological acts*, they again resemble very much Petrażycki's *ethical judgments*, since Hägerström's axiological acts "appea[r] to be a combination between conceptions (*föreställningar*) and emotions (*känslor*)" (Mindus 2009, 99).[22]

Now, the similarities between Petrażycki and Hägerström are already striking enough to justify setting up a contrast between a psychological or Continental realism and a behaviourist or American one. And that is not where the similarities end.

First, even though Petrażycki and Hägerström both deny that norms can be reduced to commands, they both hold that the experience (or state of consciousness, in Hägerström's terminology) of the receiver of a command is akin to the experience of obligation (see Sections 18.3 and 13.3.4 in this tome). A difference between Petrażycki and Hägerström is that, while Petrażycki used this similarity as an *explicans* for other phenomena—and in particular the phenomenon of the folk belief that law is made up of commands (Petrażycki 1909–1910, 330; 1955, 158)—Hägerström viewed this very similarity as an *explicandum* (thus pointing to the mechanisms of primary and secondary socialization as possible explanations: see Section 13.5.1.2 in this tome).

Second, according to both thinkers, normative experiences are enshrouded in an aura of sacrality (see Sections 18.3 and 13.3.4 in this tome), with

[21] On the concept of an intentional object, see footnote 6 above. On the conception of norms as intentional objects, consider the following passage by Jerzy Lande (though he doesn't use a term like *intentional object*): "Norms do not belong to reality. […] They […] become an element of reality if they manifest [*się odbija*] themselves in the consciousness of the individual [*świadomość człowieka*]—if they are experienced by him. In this case a norm becomes the content [*treść*] of the individual's state of consciousness [*stan świadomości*], and this psychical state (psychical act, psychical experience) is a real phenomenon" (Lande 1959c, 913–4; my translation).

[22] See Mindus 2009, 35 n. 15, on why she prefers to translate *föreställning* with *conception* rather than with *representation*.

the minor difference that for Hägerström this is *often* the case, whereas for Petrażycki the mystic-authoritativeness of ethical emotions makes up their *differentia specifica* as against aesthetic emotions (ethical emotions and aesthetic emotions were both understood by him as normative emotions).

Third, and perhaps most important, both Petrażycki and Hägerström viewed legal phenomena as moral phenomena: In a Petrażyckian framework we could say that legal phenomena are a subclass of ethical phenomena (see Chapter 18 in this tome); in a Hägerströmian one we could say that the law in force is made up of norms and that the very idea of a right is a moral idea (see Sections 13.4.1 and 13.5.1.1).

For all these similarities, it bears mentioning here two slight differences between Petrażycki's legal realism and Hägerström's.

First, we saw that Hägerström talks of *viljeimpuls*. Now, Petrażycki would never have referred to ethical emotions by a term meaning anything like "will" (as does the Swedish *vilja*), for in his view ethical phenomena have nothing in common with volitional phenomena.

Second, according to Hägerström the idea of having a right conjures up feelings of moral empowerment and force (see Section 13.5.1 in this tome). From a Petrażyckian perspective, it could be argued that something close to the opposite is true. From this perspective, the experience of a right can be constructed as made up of the disposition of an individual (the so-called "right-holders") to react aggressively if some other individual (the so-called "duty-holder") behaves in a certain way (a behavior constructed as a "non-fullfillment" or "infringement").[23] In other words, while from a Hägerströmian perspective aggressive behaviour is a possible side effect of our experiences of rights, from a Petrażyckian one, it is our stable disposition to become aggressive under certain circumstances (i.e., when we construe those circumstances as a wrong done to us) that could be perhaps viewed as the very core of our experience of a right. For example, if a slave feels he has earned his right to freedom, the core of this phenomenon is not some belief in some supernatural power he earned but rather his novel disposition to behave aggressively toward his master in the case he claims his services.

At the end of the day, this difference is a minor one, as it did not prevent Lundstedt from investigating the conflict-producing nature of legal phenomena (see Chapter 15 in this tome) in a way that is quite compatible with Petrażycki's (see Section 18.8.6 in this tome).

Moreover, Petrażycki and Hägerström developed quite similar ideas regarding the way revolutions take place. For example, according to Hägerström, "American colonists were convinced that they had natural rights" (see Section 13.4.1 in this tome). According to Petrażycki (1909–1910, 498) the very same colonists were having intuitive legal experiences. But of course nei-

[23] See the longer discussion in Fittipaldi 2012a, 167ff., 176.

ther Hägerström nor Petrażycki held that rights as such exist in some reality external to, and independent of, the Subject.

12.5. From Projections, Objectifications, and Hypostatizations to the Epistemology of Continental Realists

If norms and deontic objects are psychical phenomena within the Subject, we may want to ask why they are experienced and linguistically referred to *as if they were something external to and independent of the Subject*. Petrażycki and Hägerström answer this question in more or less the same way as was done more than one and a half century earlier by David Hume (and subsequently by several other supporters of emotivism[24]). They contend that norms and deontic objects are experienced in this way because, in Hume's own words, "the mind has a great propensity to spread itself on external objects, and to conjoin with them any internal impressions, which they occasion, and which always make their appearance at the same time that these objects discover themselves to the senses" (Hume 1985, 217).

To my knowledge, David Hume did not use any specialized term to refer to this psychological phenomenon, while Petrażycki and Hägerström did: The former used *proekcija*, meaning "projection",[25] while the latter used *objektivering*, meaning "objectification" (see Sections 18.4 and 13.2.3 in this tome).[26] It is remarkable that Tore Strömberg uses the term *emotionell projection* (emotional projection: Strömberg 1980, 48; cf. Section 17.1 in this tome)—a term that perfectly coincides with Petrażycki's *ėmocional'naja proekcija*.

In this way most Continental realists attempted to explain the naive belief in the external existence of such deontic objects as obligations, rights, powers, etc.

Continental realism's explanation of deontic objects in terms of psychic processes should not be understood as a dismissive reduction as previously defined. To use Pattaro's words, "Hägerström is too careful a realist, in considering concepts that have no correspondence to effectual reality, to simply replace them with factual or empirical notions. He rather examines these concepts and develops their implications so as to come at the function they fulfil, however empirically unfounded these concepts may be" (Section 13.5.2 in this tome). This approach proved very fruitful from a heuristic point of view, as it enabled

[24] See Mindus 2009, 97 on the narrow sense in which Hägerström can be called an emotivist.

[25] In addition to the term *proekcija*, Petrażycki also used the *illjuzija* (illusion). See Fittipaldi 2012a, 18 n. 19.

[26] Hägerström would sometimes also use the term *fiktion* (see Section 13.5.1.2 in this tome), a term never used in this context by Petrażycki. Mindus (2009), in her discussion of Hägerström's ideas, uses the term *reification* (cf. 44 n. 59). As an original developer of Scandinavian realism, Enrico Pattaro uses the term *hypostatization* (Pattaro 2005). It is worth pointing out that the terms *hipostaza* (hypostasis) and *gipostatirovanie* (hypostatization) were used by Lande and Lazerson, respectively (see Sections 19.2 and 20.1.3 in this tome).

Scandinavian realists (first among them Hägerström and Olivecrona) to investigate the connections between legal thinking and magical thinking—a connection that had already been hinted at by that "Continental" legal realist that was David Hume, if Scotland can be considered as part of the Continent! (see, e.g., Hume 1985, sec. 3.2.4).

Unlike Hägerström, Petrażycki has a more resigned attitude to the non-scientific terminology of traditional legal science.[27] According to Petrażycki, there has been such a complete adjustment to the projective point of view that to start an examination of the problems of law and morals (i.e., ethics, in his terminology) from the teaching of scientific psychology would be to raise difficulties of thinking and of language and in substance to "talk in an incomprehensible language" (see Section 18.5 in this tome). Using the projective terminology, from a Petrażyckian perspective, seems to be a necessary evil.[28] But the fact that Petrażycki did not insist on getting rid of the projective terminology is perhaps closely related to the way he conceived the very process of thinking as something that takes place within the Subject and is detached from external reality. This might also explain why he does not seek to explain legal beliefs by recourse to the hypothesis of magical thinking among people.

Petrażycki sharply distinguishes the psychic reality internal to the Subject from the reality external to the Subject, be it psychical or physical. According to him, if the Subject represents Zeus to himself and attributes to Zeus the predicate of being king of Olympic gods, thus producing a judgment (in a philosophical sense), then *Zeus does exist somewhere*—namely, within the Subject's psyche—and Zeus's external existence or inexistence is totally irrelevant when it comes to assessing the meaningfulness of the statement expressing that judgment (Petrażycki 1908, sec. 2; 1955, sec. 2).[29]

Unlike Hägerström Petrażycki did not adopt a specific *terminology* to the goal of distinguishing the internal reality of an object of thought within the Subject from its external reality. Depending on the context, Petrażycki used the noun *dejstvitel'nost'* and the adjective *real'nyj* to refer to Hägerström's *Realität* and *Wirklichkeit* alike, the former denoting the internal reality of an object of thought, the latter its external existence (see Chapter 13 in this tome).[30]

[27] Still another attitude can be found in Lundstedt (see Section 15.1, footnote 18).

[28] On Znamierowski's criticism of Petrażycki's theory in this connection, see Section 18.4 in this tome.

[29] Petrażycki does not use any term meaning "meaningfulness." He refers exclusively to the sphere of existence of the subject of some judgment.

[30] I am following Pattaro. Contra Mindus 2009 (32 n. 6; 55–9). As for Petrażycki, consider the following passage: "следует избегать ошибки, состоящей в принятии за реальное того, что представляется существующим во внешнем по отношению к переживающим такие процессы мире, и иметь в виду, что соответственные реальные феномены имеются в психике того, кто переживает такие, вводящие в заблуждение, психические процессы и только в его психике" ("the mistake should avoided of taking for *real* [*real'nyj*] what is represented as existing in the world external in reference to the experiencer of cer-

Even so, when Petrażycki uses terms like *object of thought* (*przedmiot myśli*, *predmet mysli*) or simply *predstavljamoe* (i.e., the present passive participle of the verb *predstavliat'*, to represent), he means "intentional object" (see Timoshina 2012, Sec. 3.3).

Since a distinction like the one Hägerström draws between *Realität* and *Wirklichkeit* plays a central role in Petrażycki's thought, too, in order to better compare Petrażycki's thought with Hägerström's I will henceforth use the terminology Enrico Pattaro uses to render Hägerström's distinction in English: I will thus use *logical reality* (*Realität*) in contrast to *effectual reality* (*Wirklichkeit*). This is all the more justified because, when Petrażycki discusses the judgment expressed by the statement "Zeus is king of the Olympic gods," he repeatedly stresses that the issue is where the *logical* subject (*logičeskij sub"ekt*) of the judgment lies (*nahoditsja*).[31] Since Petrażycki ascribes some sort of reality to logical subjects—a reality that is not the reality external to the Subject—it is not too long a stretch to call this reality a *logical* reality.[32]

With that said, we can now go back to Petrażycki's example of Zeus as king of the Olympic gods.

According to Petrażycki, Zeus logically exists within the Subject's psyche.

Now, Petrażycki seems to conceive the Subject's projective fantasy as more powerful than Hägerström does, and that—it bears stressing—may be why he did not go the way of the hypothesis of magical thinking to explain deontic and institutional objects.[33]

In order for a merely logically real object to be experienced as effectually real by the Subject, it suffices that the Subject believe in its existence, even

tain processes; it should be borne in mind that the corresponding *real* [*real'nyj*] phenomena take place only in the psyche of him who experiences the psychical processes conducive to mistake, and only within his psyche": Petrażycki 1908, 24; my translation, italics added). Here, the first *real'nyj* means "external to the Subject," whereas the second one means "internal to *that* Subject" but external to Leon Petrażycki—understood as the Subject producing the corresponding judgement.

[31] He also distinguishes the logical subject of a judgment from the grammatical subject (*grammatičeskoe podležaščee*) of a statement through which that judgment may be expressed (e.g., Petrażycki 1908, 27).

[32] It should be recalled in this connection that Elena Timoshina has hypothesized a possible influence on Petrażycki by Brentano, Husserl, and Meinong (Timoshina 2012, sec. 3.3; see also Section 20.1 in this tome), while Enrico Pattaro has advanced the nearly perfectly parallel hypothesis of a possible influence on Hägerström by Meinong (Pattaro 1974b, 43; Mindus 2009, 50). Of course, neither Timoshina's hypothesis nor Pattaro's can be ruled out. But I think that neither is strictly necessary. Hägerström and Petrażycki might have arrived at the same conclusions independently of each other as well as independently of anyone's influence, considering that the reality of intentional objects is a problem every philosopher inevitably faces as soon as he or she gives serious (nondismissive) thought to the issues raised by negative judgments or by such nonexternally existing objects as norms, deontic objects, and institutional objects.

[33] See, for example, the way Petrażycki addresses the issue of juristic persons (Section 18.7 in this tome).

if that belief is mistaken.[34] This seems to imply that if the Subject realistically endows some objects of thought with certain properties, these *merely logically real* properties must be taken seriously even if they are not also *effectually* real. This is why among the many objections Petrażycki raises against the attempt to reduce obligations to volitional phenomena, there is the objection that "the will is a psychic transitory phenomenon, while obligations [are represented by the Subject] as something continuous that does not exist only when the obligated person is thinking about them" (Petrażycki 1909–1910, 358–9; my translation).[35]

The consequence is that, while from a Petrażyckian perspective legal illusions must be explained by drawing on the general laws concerning the functioning of the human psyche, from a Hägerströmian one, legal illusions must be explained by recourse to more specific laws concerning magical thinking or the role that legal illusions play in the functioning of society.[36]

These differences, relevant as they may seem at first glance, become suddenly negligible if we just recall the American realists' dismissive realism discussed in Section 12.3.

A different kind of dismissive realism that bears mentioning here is the linguistic reduction of analytic philosophy of law that Enrico Pattaro (2005, sec. 9.1) called *Analytical Emasculation*. To Hägerströmians and Petrażyckians alike, the very idea that legal phenomena can be "accounted for" in terms of prescriptive propositional contents, or at any rate as linguistic entities, is simply incomprehensible. Indeed, "[i]f legal norms were *merely* the propositional contents of enacted texts, that is, mere linguistic entities, they would not and could not be motives of human behaviour" (Pattaro 2005, 188–9).

Moreover, for Continental realists there are plenty of legal phenomena that are not expressed linguistically. Legal phenomena are not made up of linguistic phenomena.[37]

The linguistic conception of legal phenomena typical of analytic philosophy of law is probably the fallout of the *desperate quest* of logical positivism for something directly observable to which to dismissively reduce legal phenomena. The legal philosophers who did not adopt the behavioural approach con-

[34] This is what Petrażycki calls a *realistic representation*, as opposed to a fantastic one (see Section 18.6.1 in this tome).

[35] A different reconstruction of this passage can be found in Motyka 1993, 111.

[36] The difference between Petrażyckians and Hägerströmians as regards the possible connections between magical thinking, the functioning of the human psyche, and legal thinking may appear slighter if we adhere to Sigmund Freud's hypothesis that magical thinking stems from the child's omnipotence of thoughts (*Allmacht der Gedanken*) (Freud 1966, 85; Fittipaldi 2012a, 76 n. 29).

[37] This makes Continental realism more compatible with the methodology of comparative law developed by the Italian jurist Rodolfo Sacco (1991) than with analytic philosophy of law. In particular, Petrażycki's concept of a normative fact is similar to Sacco's concept of a legal formant.

sisting in reducing legal phenomena to behaviours accessible to direct observation decided to instead reduce them to linguistic phenomena. In this way, analytic philosophers often immunize the investigation of legal phenomena from potentially fruitful cross-contaminations with psychology, sociology, anthropology, ethology, etc. (on the origin of this attitude in analytic philosophy, see esp. Albert 1991: 146, 174). Closely related to this attitude is the anti-psychological bias of analytic philosophers: If legal phenomena must be reduced to something observable (such as spoken or written words), it goes without saying that they cannot be explained in terms of psychical phenomena, since these phenomena are not *directly* observable.

To such an objection a Continental realist could probably reply by asking whether anybody has ever been able to observe neutrons. For although neutrons are not *directly* observable, this does not prevent us from hypothesizing their existence in order to explain *other* phenomena, ones that do lend themselves to direct observation.

Now, if one does not accept logical positivism and its subsequent degeneration into the analysis of *Sprachspiele* (language games) Popper and Albert's critical rationalism provides an alternative under which to hypothesize entities not amenable to direct observation, provided that experiments are *looked for* by which to prove their hypothesization wrong: Albert (1991) calls this the *Prinzip der kritischen Prüfung* (the principle of critical testing). In the framework of critical rationalism, first come the hypotheses, then the search for ways to test them.

This is one of the many reasons why the epistemological ideas of Continental legal realism—despite their "home-made" nature—are definitely more compatible with Popper's and Albert's critical rationalism than with any other epistemology proposed in the 20th century.[38] American legal realism is instead more compatible with (and indeed stems from) American pragmatism/pragmaticism, while analytic legal philosophy is obviously more compatible with logical positivism and its subsequent linguistic turn.

Critical rationalism has nothing to object to the conjecturing of psychical entities, inaccessible to direct observation.[39] This epistemology only recommends that we *search for* ways to test conjectures, thus making them into full-fledged testable scientific hypotheses. But according to critical rationalism, that a way to test a conjecture has not yet been found does not imply that the conjecture is in any way unimportant, insignificant, or nonsensical (Popper 1969, 50ff.; Albert 1987, 107). If we are to find a way to test a theory, we have

[38] In this connection it is worth recalling that Hägerström and Petrażycki criticized induction with similar arguments. These arguments, in turn, are quite similar to Popper's (on Hägerström and Popper see Mindus 2009, 64; on Petrażycki and Popper see Timoshina 2013a, 87–8, in particular n. 31).

[39] On this matter, see also Fittipaldi 2012a, sec. 3.7.

to first be able to understand it. That is to say that before a way can be found to test whether a theory corresponds to any effectual reality, that theory must exist in the Subject's logical reality.

Moreover, hypotheses about phenomena external to the Subject (and possibly internal to some other Subject) should be capable, not of verification, but of falsification. This means that it suffices to state certain conditions under which those hypotheses would be proven false (conditions of falsehood). It is hardly necessary to stress why this epistemology is the only one that is compatible with the sometimes wildly adventurous way Continental legal realists address normativeness as a psychical phenomenon and refuse to dismiss the illusions resulting from such phenomena with some "nothing other than" formula.

12.6. Caution and Suspicion Toward Performatives

The Continental legal realists' quest for causal explanations makes them very cautious when it comes to performatives.[40] No Continental legal realist would ever subscribe to the statement that it is possible to do things with words. For example, according to the scientific view of the world—to which Continental legal realists adhere—no supersensible, spiritual bond between a man and a woman is really established through the utterance of a few words before an official (Olivecrona 1971, 238). As Pattaro writes in regard to Hägerström, "a realist like [him] cannot regard words capable of creating (or modifying or extinguishing) anything, much less any 'mystical powers' (such as rights) and constraints (such as duties)" (Section 13.5.2 in this tome; see also Pattaro 1981). This holds for whatever *legal effects*. According to Scandinavian legal realists, legal effects as such do not exist, so there is nothing that performatives can, as such, call into being. As Torben Spaak has pointed out, Olivecrona "maintains, in keeping with his belief that there is no such thing as binding force, that there is no legal effect to be found—there is only the psychological fact that people tend to *believe* that there is a legal effect, and, of course, the (sociological) fact that they tend to *act* accordingly" (see Section 14.2 in this

[40] Closely related to the issue of performatives is the phenomenon of constitutiveness. From a Continental-realist perspective, constitutiveness amounts to bringing about *types* by means of hypotheses (*Tatbestände*) of normative convictions, or norms (Pattaro 2005, 18; cf. Lande 1959c, 934 as regards the rules concerning the drafting of valid wills). Of course, there is no reason to restrict *types* to hypotheses of hypothetical norms. For instance, even Verdi's *Traviata* can be understood as a type capable of instantiation. See in this regard Pattaro (2005, 18ff.), who makes the example of Shakespeare's *Romeo and Juliet*, as well as Znamierowski (1922, 47ff.), who extensively likens musical pieces to legal objects (*przedmioty prawne*). As for Znamierowski, an issue that cannot be discussed here is whether he was successful in explaining the alleged continued existence of musical pieces and legal objects without betraying his realist metaphysics (cf. Section 20.2.1 in this tome).

tome). Very much in line with Hägerström, Olivecrona further connects this tendency to a belief in magic.

Petrażyckian legal realists never explicitly addressed the phenomenon of performativity, to be sure, but their attitude to these phenomena can easily be illustrated by reading what Petrażycki and Lande maintained in regard to the precise moment when a newly "promulgated" statute comes into force or when a "repealed" statute ceases to be in force. According to Petrażycki,

> [t]he usual pieces of information concerning the being in force of statutes—the moment when they come into force, their further continuation in force until the moment of their repeal […]—are […] nothing other than information about what is *prescribed* by the current legislation as *obligatory*, and the corresponding provisions are taken as theoretical truths. From a factual-theoretical point of view it is absolutely impossible to state that provisions duly enacted and published necessarily and everywhere begin to be binding from that precise moment, that they are binding everywhere until the moment of their repeal, etc. (Petrażycki 1909–1910, 539; my translation adapted from Petrażycki 1955, 257)

As Jerzy Lande would subsequently maintain, there is nothing to prevent some statute from not being experienced as binding by the whole of society or in certain milieus thereof despite its having been formally enacted in accordance with the constitution, or some other statute from being still experienced as binding by the whole of society or in certain milieus thereof despite its having been formally repealed in accordance with the constitution (cf. Lande 1959b, 865).[41]

The difference between the Hägerströmian and the Petrażyckian view of legal performatives can be summed up as follows. Hägerströmian legal realists emphasize the superstitious beliefs that make it possible for performatives to produce social effects. Petrażyckian legal realists instead emphasize that to claim performatives to produce social effects with infallible regularity is simply to confuse ought with is. "Promulgated" statutes do not unfailingly begin to be experienced as binding everywhere in society immediately upon being "promulgated." By the same token, "repealed" statutes do not unfailingly cease to be experienced as binding everywhere in society immediately upon being "repealed." To hold otherwise is simply to take an ought for an is.

The difference here lies in the scientific focus rather than in the conceptions being put forward. Hägerströmian realists stress that the valid enactment or repeal of a statute affects the *probability* of its being experienced as binding (cf. Pattaro 1974b, 101; 2005, 141),[42] while Petrażyckians stress that there can be plenty of cases where legal-dogmatic statements about a statute's being in force or its no longer being in force *diverge* from the scientific statements in this very regard.

[41] Of course, Lande is adopting Petrażycki's definition of *statute*, a definition that is independent of its possible *Verfassungsmässigkeit* (its having been passed in accordance with the constitution). See Section 18.10.1 in this tome.

[42] On probabilistic causation, see footnote 13 above.

These two approaches are perfectly compatible: The Hägerströmian approach enriches the Petrażyckian one by calling attention to the way that using certain formalities may affect the probability of certain psycho-sociological phenomena—an aspect that Petrażyckians tended to overlook; the Petrażyckian approach, for its part, enriches the Hägerströmian one by calling attention to the role of legal dogmatics as a science at the service of the principle of legality, a science aimed at providing cognitive tools with which to assess whether or not officials and people at large are complying with a certain constitution.[43]

To conclude this section, I think it is in order to recall Olivecrona's argument that "*from a modern point of view* it would seem absurd to assert that words could have the power of creating effects of any […] kind [other than] psychological effects" (1971, 238, italics added). Elsewhere Olivecrona remarked that "[i]n the ideal world of law, the effects take place according to the law with infallible regularity. In the empirical world of facts, the effects of legal rules, transactions between individuals, the attitudes of people in general, etc. are varied and more or less uncertain" (ibid., 253). Among these empirical-world effects there may also be the psychological coming into force (or repeal) of some statute in some individual's brain as a consequence of an act of promulgation by a head of state.

As for the perspective of Polish-Russian realism, to maintain that performatives can produce their effects immediately and everywhere (within a given country, or even all over the world) would amount to maintaining that it is possible to violate an important principle of physics—that of *locality*—, under which an externally existing entity is influenced directly only by its immediate surroundings. This principle excludes that a promulgation by a head of state can produce any effect anywhere any earlier than the time that light would take to get there. This kind of strict physicalist argument—if not fully explicit—is typical of both Petrażycki and Lande (see Section 19.4 in this tome).

Now, Continental legal realists are committed to the hard sciences.[44] This means that if the hard sciences rule out that such phenomena as "spooky actions at a distance" (*spukhafte Fernwirkungen*)[45] are at work when a head of state promulgates statutes, they will refuse to adopt such hypotheses.

[43] No need to stress that this different focus may have been owed to the different socio-legal situation in Russia and the Scandinavian countries in Petrażycki's and Hägerström's time. See in this regard Section 18.12 in this tome.

[44] In this connection it is worth recalling the different stances of Hägerström and Petrażycki towards Einstein's theory of relativity. Hägerström appreciated its importance but was critical of it (see Mindus 2009, 220 ff.). Petrażycki instead accepted it and discussed whether it provided arguments for Wundt's *generalisierende Abstraktion* and against his own theory of classes (Petrażycki 1939, 66).

[45] I am hinting at Einstein's scorn for the hypothesis of quantum entanglement, the phenomenon where a pair of particles interacts in such a way that one particle's quantum state (e.g., a clockwise spin) always correlates with that of the other (e.g., a counterclockwise spin), and vice versa—regardless of their distance. That is the case even when the measurements of these quantum states are taken more quickly than light can travel between the sites of measurement.

But since, as just noted, Continental legal realists are committed to the hard sciences, if phenomena of spooky actions at a distance were shown to occur even in realms *other than* quantum mechanics, a Continental realist would be ready to consider such spooky phenomena in order to *explain* the action of performatives.[46] In the meantime, however, Continental realists prefer to explain the action of performatives by recourse to the more conventional tools provided by psychology, anthropology, sociology, and the neurosciences.

12.7. Truth vs. Correctness

It was previously said that closely related to every sort of realism is the correspondence theory of truth. *A certain representation within the Subject is true if the external reality corresponds to it.* In other words a representation is true if it exists not only within the internal reality of the Subject but also in the reality external to him. This holds as well for the proponents of Continental realism.

As for Petrażycki, his adoption of the correspondence theory of truth is explicit. He explicitly defines truth and falsity as *zgodność* and *niezgodność z rzeczywistością* (accordance and nonaccordance with reality: Petrażycki 1939, 36). According to him truth and falsity can be predicated exclusively of *objective-cognitive judgments* (*sądy obiektywno-poznawcze*). That is how he calls judgments about what exists outside the Subject and how it exists, regardless of the Subject's attitude to it. This kind of judgment he set in contrast to the subjective-relational kind. *Subjective-relational judgments* (*sądy subjektywno-stosunkowe*) concern the Subject's attitude to something externally existing or imagined.[47]

According to Petrażycki both normative and legal-dogmatic judgments are subclasses of subjective-relational judgments and so are not capable of truth (ibid., 111). Moreover, according to Petrażycki, normative and legal-dogmatic judgments are often not just devoid *of truth-capability* but are also plainly *false*. That is the case when they are formulated as if they concerned the reality external to the Subject, thus conveying the erroneous information that they are about something existing outside the Subject himself.[48] Petrażycki is

[46] Another possibility would be to hypothesize a sort of *quantum legal theory* that, instead of hypothesizing *new kinds* of spooky actions at a distance, would *directly draw* on quantum entanglement to explain the effects of performatives, much as has been attempted in quantum biology in order to explain the ability of birds to navigate the planet's magnetic fields (magnetoreception). But there would still be a huge difference between performatives and birds. While it is true that birds have the ability to navigate the planet's magnetic fields, it is simply false that performatives produce their effects immediately and everywhere. Therefore, according to the Continental realist view, there is simply no phenomenon whatsoever requiring an explanation.

[47] On this distinction, see Sections 19.2 and 20.1.2 in this tome.

[48] "It should be observed that subjective-relational judgments and statements are often for-

thus close to the so-called error theory (cf. Mackie 1977b), but in making that comparison we have to be clear that in Petrażycki's view subjective-relational judgments themselves are not false: They are just incapable of truth (cf. Lande 1959a, 828 n. 11). What is false, according to Petrażycki, are those subjective-relational judgments formulated *as if* they were objective-cognitive ones.

Jerzy Lande, too, explicitly maintained that subjective-relational judgments and in particular legal-dogmatic ones are not capable of truth. But he showed that, despite their truth-incapability, they have conditions of foundation (*uzasadnienie*) or correctness (*słuszność*),[49] which conditions *indirectly* connect their being-founded or correctness to the reality external to the Subject (Lande, Sec. 4).

As for Hägerström, he seems to have espoused a conception of truth quite compatible with the correspondence theory of truth. Truth is where the content of a representation not only is logically real (i.e., existing within the Subject) but also belongs to that wider complex that is spatiotemporal reality (see Section 13.2.2 in this tome).[50] Unlike Petrażycki, however, Hägerström did not hold that normative judgments are incapable of truth or that they are false: He instead held that they are contradictory (see Section 13.2.3 in this tome).

More in general, Hägerström rejected any attempt to define judgments without taking effectual reality into account (see Section 13.2.1, footnote 12 in this tome). He would therefore have rejected Petrażycki's concept of a subjective-relational judgment.

The question of whether legal-dogmatic statements are capable of truth or correctness received careful analysis by Karl Olivecrona. As a legal realist he rejected their truth-capability, but then he asked what kind of information is conveyed by a statement such as *Mr. X is president of the republic Y* (Olivecrona 1971, 256).

mulated as if they were [*jakby to były*] objective-cognitive ones, such that […] errors [*błędy*] are possible" (Petrażycki 1939, 36; my translation).

[49] In Lande 1925a, 343, this term (*słuszność*) is used in more or less the same way as Olivecrona does. On that very page Lande also uses the adjective *słuszny* (correct), but within quotation marks. Even Petrażycki, in his posthumous notes on the foundation of logic, maintained that *subjective-relational statements and judgments* (which, it bears reiterating, include *legal-dogmatic* ones) are capable of *słuszność* (correctness) and *niesłuszność* (incorrectness), despite their truth incapability. But we do not know what Petrażycki meant by these terms. As for Lande, it should be observed that he was less consistent than Olivecrona in using the terms *słuszność* and *niesłuszność* (e.g., Lande 1925a, 342). Indeed, Lande preferred to use the general term *uzasadnienie* (foundation) and then point to different kinds of foundation. The contention that norms are not capable of truth or falsity, but are instead capable of *słuszność* and *niesłuszność*, was made explicitly by another pupil of Petrażycki, Jerzy Sztykgold (1936, quoted in Conte 1993, 108).

[50] Mindus (2009, 61) seems to contend that the question of whether Hägerström held a correspondence theory of truth "misses the point." Nonetheless, it seems to me that the way Hägerström understands truth is more compatible with the traditional correspondence theory of truth (*adaequatio rei et intellectus*) than with any other theory of truth that I know of, such as the coherence theory, the pragmaticist theory, the consensus theory, or the all too broad conception adopted by Hart (see Section 12.7 below).

As a typical Continental legal realist, Olivecrona rejects any kind of dismissive reductionism, and in that spirit he shows that the meaning of *Mr. X is president of the republic Y* cannot be reduced to the fact that Mr. X has been elected in accordance with certain procedures, nor can it be reduced to his having certain powers under the constitution. Since Olivecrona takes naive legal thinking seriously, it is easy for him to show that we can naively *believe* that (B) someone's being president is the *effect* of (A) his having been duly elected, and so that the former circumstance (being president) cannot be reduced to the latter (having been elected), for one thing is to believe that B is the effect of A, quite another is to believe that B *is nothing other than* A. By the same token, we can naively *believe* that (C) Mr. X has certain powers, because (B) he is the president. But, similarly, we cannot equate (B) the cause of something with (C) its effect, for one thing is to believe that B is the cause of C, quite another is to believe that B *is nothing other than* C. Olivecrona also observes that in these cases an important role is played by the "mediating idea that words signify super-sensible entities and qualities" (ibid., 258). This statement makes room for a conception on which, even though legal-dogmatic terms are devoid of extension (that is, they lack reference: ibid. 255), they are not thereby meaningless: They *do signify*, even though what they signify is incompatible with modern scientific knowledge. (It goes without saying that this is compatible with both the Scandinavian approach, which is to explain these beliefs in terms of magical creeds, and with the Petrażyckian approach, on which all these phenomena are normal denizens of the internal, or logical, reality of the Subject.)

Now, according to Olivecrona, as much as descriptive legal-dogmatic statements may be incapable of truth, they are capable of correctness.

> The correctness of [descriptive legal-dogmatic] statements cannot be empirically ascertained. It is no empirical fact that I own a certain house, that A owns a car, that M and W are married, that C is a judge, or that D is president of a country. All such statements are based on the assumption of a system of rules regulating among other things the mode of acquiring a right of property, concluding marriage, appointing judges, and electing a president. The statements can only be judged as correct or incorrect according to these rules. Without reference to the rules the question about correctness would be meaningless. (Ibid., 259)

According to Olivecrona, "*the distinction of truth and correctness is of vital importance*" (ibid., 265, italics added).[51] Indeed, this distinction pertains to the very core of Continental realism, be it Hägerströmian or Petrażyckian.

Now, explaining how different Subjects can have similar opinions about the correctness or incorrectness of the same legal-dogmatic statement is a serious challenge for a self-consistent Continental realist. Since this issue is crucial, I will go into some detail.

[51] But see Spaak 2011, sec. 9; 2014, chap. 13.

Consider descriptive legal-dogmatic statements like the following:

1. Madman$_1$ is emperor of China (ibid., 266).
2. Madman$_2$ is king of the moon (Lande's example, see Section 19.4 in this tome).
3. Barack Obama was president of the United States in 2010.

What does the correctness or incorrectness of these statements consist in? How is it possible to arrive at some *intersubjectivity* about their correctness or incorrectness? This is a serious question because these statements do not refer to anything existing outside the Subjects that—thanks to its *objectivity*—may bring about some convergence of opinion. That is the way we usually explain how (*pace* Feyerabend 1975) Copernicus eventually convinced the world that it is the earth that revolves around the sun, and not the other way around. But how are we to explain that some degree of social convergence obtains in regard to the correctness and incorrectness of (1), (2), and (3)?

To answer this question Olivecrona has recourse to the *deus ex machina* of the *regularized use of language*, in this respect coming close to John Searle (though without the latter's further disputable *deus ex machina* of collective intentionality). In other words, in Olivecrona the social phenomenon of convergence about the correctness or incorrectness of certain descriptive legal-dogmatic statements is explained through other social phenomena, prominent among which is the aforementioned regularized use of language.

Lande's answer (quite sketchy, to be sure) is instead based on the idea that the correctness of a truth-incapable statement, such as a legal dogmatic statement[52], depends on a combination (*konjunkcja*) of two truth-capable statements: A semantic one and a historical one (see Section 19.4 in this tome). Lande thus presupposes both (1) the *existence of linguistic regularities*[53] and (2) *historical realism* (i.e., the objective historical existence of past events).[54] This is to say that the social phenomenon of convergence in regard to the correctness or incorrectness of certain legal-dogmatic statements is explained by Lande not only through other social phenomena, such as linguistic regularities, but also through an extended realism inclusive of historical realism.

[52] To be sure—as previously noted in this section—from a Petrażyckian perspective legal dogmatic statements, if formulated in a "projective" language, are not simply truth-incapable but completely false. Nonetheless this does not deprive them of the capability of being founded in some way.

[53] To avoid misunderstandings it should be stressed that Olivecrona's *regularized use of language* seems to be something different from *linguistic regularities*. By this latter term I mean such basic phenomena as the ability of certain terms to bring about more or less similar representations in different Subjects. Such hypotheses can be empirically tested in several indirect ways (see, for example, Rosch 1975 as regards terms such as *vehicle*—a term the readers of Hart will be familiar with).

[54] The term *historical realism* is mine, but the concept can be found as early as in Külpe 1923, 187, where *Realismus* is characterized as resting on the assumption of a *reale Außenwelt* (a real external world), a *reale Innenwelt* (a real internal world), and *historische Begebenheiten* or *geschichtliche Ereignisse* (historical events).

Despite these differences between Olivecrona and Lande, Olivecrona's distinction between truth and correctness is vital to Continental legal realism, be it Scandinavian or Polish-Russian. This is one more reason why Hart cannot be considered close to Continental realism. In "Definition and Theory in Jurisprudence" Hart contended that what I call legal-dogmatic statements are capable of truth, *provided that the conditions are specified under which the statement is true* (Hart 1983a, 33 and passim)—and this contention was roundly criticized by Olivecrona (ibid., 262ff.).

Continental legal realists take reality seriously, and with it they also take seriously the concept of truth as correspondence. Reducing truth to the fulfilment of truth conditions is one of the main tenets of logical positivism, pragmatism, and instrumentalism, and so on.[55] But these tenets are hardly compatible with the epistemological conceptions of Continental realists. The concept of truth is independent of the conditions of truth, because without the former it would be impossible to set out the latter: We must first understand what the truth of a judgment is (where a judgment is understood as a process taking place within the Subject); only then can we devise ways to test whether that judgment is true or false (that is, whether it corresponds to some external or effectual reality).[56]

This is one more reason to argue that the homemade epistemology developed by Petrażycki and Hägerström is more compatible with Karl Popper and Hans Albert's than with any other 20th-century epistemology.

12.8. The Main Tenets of Continental Realism and How They Are Reciprocally Connected

We can sum up the foregoing by stating that an ideal-typical Continental legal realist supports the following tenets:

1. physicalist monist realism;
2. the distinction between internal (or logical) and external (or effectual) reality;
3. the correspondence theory of truth;
4. the distinction between the concept and the criteria of truth;
5. the stance against dismissive reductionism of normative phenomena, and in particular against

[55] Closely connected to, though not identical with, the reduction of truth to the fulfilment of conditions of truth is the contention that "to know the meaning of the descriptive expressions is to know under what objectively ascertainable conditions the statements which contain them are true or false" (Searle 1964, 53). From the perspective of critical rationalism, instead, to know the meaning of descriptive expressions is only a *preliminary step* to the goal of inventing ways to test the truth of the statements which contain them.

[56] See, e.g., Albert 2001, 59, where he sharply distinguishes the concept of truth (*Wahrheitsbegriff*) from the concept of *criterion of truth* (*Kriterium der Wahrheit*).

5.1. reducing normative phenomena to linguistic phenomena;
5.2. reducing normative phenomena to external behaviours;
6. the quest for detailed causal explanations based on empirical nomological regularities—a quest translating in particular into a suspicious attitude to
6.1. the use of performatives as explicative shortcuts,[57] and
6.2. the use of language as an explicative shortcut.
7. the explanation of legal phenomena, at least partially, in terms of moral phenomena;[58]
8. the explanation of moral phenomena in terms of psychical phenomena (ultimately to be reduced to physical phenomena);
9. the reconstruction of traditional legal thinking as naive;
10. the denial that normative statements and legal-dogmatic statements are capable of truth;
11. the contention that normative and legal-dogmatic statements may be capable of correctness;
12. a non-dismissive, but rather anthropologically oriented, investigation of traditional and naive legal thinking.

Which of these tenets the legal theorists discussed in this section espouse, and to what extent, is a question that I would gladly leave to the reader. I hope to have been able to illustrate in a compelling enough way the striking convergence that can be found between Petrażycki and Hägerström in regard to these tenets, so much so that, as noted, we can speak of a Continental, or psychological, legal realism.

But there is one last question that suggests itself: Are these tenets interconnected? In my opinion they are, and in this introduction an attempt was made to show how so. But let me summarize that interconnection simply by pointing out what I believe to be the two themes that run through all these tenets: the first is a *strict physicalist realism* and the second a rejection of *dismissive reductionism*, the latter simply amounting to a *sincere curiosity about the astonishingly rich and unpredictable multifacetedness of legal phenomena*.[59]

[57] On performatives in connection with constitutive "rules," see footnote 40 above.

[58] Petrażycki would call these *ethical* (not moral) phenomena.

[59] As can be seen, the historiographical conceptualization of Continental (or psychological) legal realism proposed in this introduction is completely different from the one proposed above, in Section 9.3.3 (see also Section 24.4.2 of this tome).

Chapter 13

AXEL HÄGERSTRÖM AT THE ORIGINS OF THE UPPSALA SCHOOL

by Enrico Pattaro[*]

13.1. Consciousness and the Reality of Things

13.1.1. A Five-Hundred-Year-Long Debate

The problem of consciousness became thorny from Descartes onward. His infamous interactionist dualism (Seager 2007, 9) between *res cogitans* (mind) and *res extensa* (matter) was at the origin of a host of philosophical problems and eventually gave rise to a number of different trends in epistemology and ontology, among which the two basic, all-embracing, and opposite kinds of monism, that is, philosophical idealism and philosophical realism.[1]

In answer to Descartes's dualism, Leibniz—with his metaphysical theory of monads—resolved the reality of things into atoms or elements having a spiritual nature. Berkeley and Hume traced the reality of things to their being perceived. Immanuel Kant gave back to the reality of things a crucial importance, but he could not found the grounds for their knowability on anything other than the transcendental consciousness of the "I think" (Kant 1913, B 136–9). In this way, he reinstated the primacy and all-inclusiveness of the consciousness, and at the same time he allowed his grand construction to incubate the germ that would eventually make for its own dissolution into German philosophical Idealism. Thus, in the 19th century, Hegel and his followers in various countries overcame the limitations of Kantianism by tracing external reality (the reality of things) to the productive activity of self-consciousness, thus shifting from a transcendental to an idealist and metaphysical conception of the Self.

[*] I'd like to thank Uta Bindreiter for providing me with some Swedish texts that cannot be easily got hold of, as well as for making some useful linguistic suggestions. It goes without saying that responsibility for any error or imperfection rests solely with me.

[1] Later, during the empire of analytic philosophy, the problem of consciousness like a karstic river went underground, and like such a river it has reemerged over the last three decades—in this case with the impetuousness of a spewing geyser, this owing to the rapid advances made in cognitive neurobiology and to their impact on the philosophy of mind (see Zelazo, Moscovitch, and Thompson 2007).

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13.1.2. The Revolt against German Idealism in Europe at the Beginning of the 20th Century

Against the backdrop of post-Kantian and idealist philosophies, which characterized much of philosophical thought in the 19th century, Bertrand Russell, in 1928, in his *Sceptical Essays*, described the philosophy of the early-20th-century by singling out in it three main orientations. The first of these is the philosophy of Kant's and Hegel's followers. The second is the philosophy of pragmatism and of Bergson. And the third one is the philosophy often described as "realism," which Russell credits with promoting the severely technical revolt against German idealism (see Russell 1960, 68–9).

13.1.3. The Escape from Subjectivism at Uppsala through Axel Hägerström

Especially relevant for the philosophy of law—and to be supplemented in the framework of the revolt against idealism as sketched out by Russell in 1928—was the escape from subjectivism that took place in Sweden at Uppsala, where around 1910 philosophy came at a realist stand following a long predominance of idealist philosophy. Axel Hägerström (1868–1939) was the initiator and most prestigious figure in the philosophical realism of Uppsala, as well as its leading exponent in practical philosophy.[2]

As a realist, Hägerström reaches the conclusion that the assumption that an object of consciousness can only be a determination of consciousness itself involves a contradiction because to be conscious is to be conscious of something, and since consciousness and the object of consciousness can be distinct, there must be something like a relationship between them. In answer to the question What does this relationship consist in? Subjectivism replies that it consists in consciousness itself. Here is where the contradiction lies: If the two terms of the relation are consciousness, on the one hand, and the object of consciousness, on the other, then the former term is paradoxically made into the relation itself (Hägerström 1929a, 114–5, 121–3; cf. Hägerström 1957, 117–18, 128–31).[3]

[2] Adolf Phalén (1884–1931), on the other hand, was perhaps its most representative exponent where theoretical philosophy was concerned. There is a sort of institutional academic continuity that links up the opposing camps of philosophy at Uppsala, a continuity which took roughly a century—from the first half of the 19th to the early decades of the 20th century—to make the transition from the idealism of Christopher Jacob Boström (1797–1866) to Axel Hägerström's realism, by way of four thinkers who in succession held the chair in practical philosophy: The first of these was Boström, who held this chair beginning in 1842; next came Carl Yngve Sahlin (1824–1917), in 1864; and he was succeeded in 1896 by Erik Olof Burman (1845–1928), an exponent of so-called critical Boströmianism, who introduced Hägerström to Kant; and so, finally, came Hägerström in 1911. On Hägerström's life and work, see Mindus 2009, a book that offers a rich overall picture of this topic.

[3] Hägerström's argument resembles the one Moore expounds in his essay *The Refutation of Idealism* (G. Moore 1903; cf. Marc-Wogau 1968, 16–7, 19–20) and it turns up as well in other re-

Hägerström's inaugural lecture, *Om moraliska föreställningars sanning* (On the truth of moral representations),[4] delivered on 18 March 1911 from the chair of practical philosophy, was memorable (Hägerström 1966, 35–57): It was the first time in the 20th century that a metaethical noncognitivist emotivist view about moral values and duties was clearly presented.[5]

The early-20th-century realist philosophies played a precursory role with respect to logical empiricism. The realism of Uppsala did not directly influence logical empiricism, but some of the epistemological theses developed at Uppsala can be said to represent the stage immediately preceeding that which the logical-empiricist philosophies reached. And other theses developed at Uppsala, as in metaethics, for example, anticipated what would later be upheld by analytical philosophy. On the relationship between the realism of the Uppsala School and logical empiricism, the following statements by the Danish logical empiricist Jörgen Jörgensen (1894–1969) are to be fully accepted:

> Although the reasoning and the views of the two movements are not identical, there is a far-reaching agreement between the Uppsala school and logical empiricism, in that they are both decidedly antimetaphysical and for both the main task of philosophy consists in the analysis of concepts. Further, both are opposed to epistemological idealism ("subjectivism," the nature and existence of that which is conceived depends on our conception thereof) and are adherents of the theory that statements of valuations are not true statements but merely expressions of certain feelings and, accordingly, have no factual meaning. Especially with regard to the two last points, the Uppsala school has performed a comprehensive and commendable piece of work which historically anticipates the work of logical empiricism without, however, having influenced it. (Jörgensen 1960, 58; cf. Pattaro 1974b, 58–76)

13.1.4. Hägerström against the Backdrop of Kant

At the basis of Hägerström's metaethics there were a realist epistemology and a realist ontology that Hägerström had worked on from 1904 to 1908, at once proceeding from Kant and extricating himself from Kant (Pattaro 1974b, 29–58). In 1908 Hägerström presented his escape from subjectivism in a work whose very title suggests, from the outset, an ambiguous wealth of Kantian themes

alist approaches that set out to refute the subjectivist philosophies' approach. Hägerström wrote: "Subjectivism I refuted by showing that in no consciousness can the same consciousness be given. What is apprehended (*das Aufgefaßte*, *det uppfattande*) is always something other than the apprehension (*die Auffassung*, *uppfattningen*). Hence it is impossible at all to consider consciousness as 'immediately' given to itself and therefore as ultimate ground of knowledge, as Descartes, Hume and Kant have done, to say nothing of the general trend of the modern theories of knowledge" (Hägerström 1929a, 116; my translation; cf. Hägerström 1957, 120–1).

[4] For the reasons specified in Pattaro 1974b, 52 n. 29, the German *Vorstellung* and the Swedish *föreställning* are translated throughout as *representation*.

[5] Hägerström's view anticipated by twelve years the emotivist conception of values which was later advanced in Anglophone countries by Ogden and Richards (1972; 1st ed. 1923), and which would then have also been maintained by Barnes 1933, Ayer 1952 (1st ed. 1936), and Stevenson 1944, among others.

coupled with realist outcomes. That title was *Das Prinzip der Wissenschaft. Eine logisch–erkenntnistheoretische Untersuchung.* I. *Die Realität* (The principle of science: A logical-epistemological inquiry. I. Reality: Hägerström 1908).[6]

If we are to understand Hägerström's epistemology and ontology, we will have to take him in earnest: He wrote that his theory of knowledge issued from Kant both in the positive and in the negative (*positivt och negativt utgå från Kant*: Hägerström 1951, 83). It is as if the pages where Hägerström sets out his realistic philosophy were watermarked: They must be held to the light, in our reading of them, and this way we will see in them the relevant Kantian ideas that Hägerström processed and transformed by fashioning them into a realist mould.[7]

Just as German idealism drew on Kant himself in working to overcome Kant's transcendental philosophy with an *idealist* ontology and theory of knowledge, so did Hägerström draw on Kant in working to overcome Kant's transcendental philosophy with a *realist* ontology and theory of knowledge. So much so that Hägerström explicitly, and indeed ambitiously, locates his thought in that mainstream of grand modern speculative philosophies that begins with Descartes and continues through Hume and Kant, ultimately to come at his *own* theory of knowledge and reality. Hägerström was neither a repeater nor a commentator. He was instead an original thinker: He took up the problem of the relation between consciousness and the reality of things where Kant had left it (after Descartes's dualism between *res cogitans* and *res extensa*, and with a view to overcoming Hume's subjectivist and sceptical empiricism) and worked out that problem by hatching a complicated, monist, realist, and materialist conception. More on Hägerström and Kant about reality in Section 13.7.

13.2. Judgments and the Reality of Things; Pseudojudgments and the *Unreality* of Value and the Ought

13.2.1. Logical Reality, Judgments, and Effectual Reality

A clear distinction should be introduced between *logical reality*, for the Swedish *realitet* and the German *Realität*, on the one hand, and *effectual reality*, for the Swedish *verklighet* and the German *Wirklichkeit*, on the other. This

[6] It has been a subject of debate whether Hägerström 1908 was innovated in Hägerström 1929a (see, for example, Marc-Wogau 1968, 53ff.). Hägerström himself (1929a, 115ff.; cf. Hägerström 1957, 119ff.) prefers to say in this regard that what he has done differently from Hägerström 1908 is simply to tweak his own terminology. There is no need, where we are concerned, to deepen the relation between Hägerström 1908 and Hägerström 1929a, and so I will mainly refer here to Hägerström 1929a (with parallel references throughout to the Swedish version subsequently published by Martin Fries: Hägerström 1957).

[7] In Section 13.7.1, I will comment on some passages from Kant 1913, B 189–91 and B 347–9 that it is useful to take into account for an adequate understanding of Hägerström.

distinction is being introduced so as to mirror a difference in linguistic usage which occurs in Hägerström's original texts, but which the English language cannot express with the single word *reality*, and which Hägerström's translators and commentators, even those who are native Scandinavian speakers, regularly ignore, thus posing serious obstacles to an understanding of his thought.[8] *Realitet* (or *Realität*) is the reality of possibility, and so is a logical reality. *Verklighet* (or *Wirklichkeit*) is the reality of an actualized possibility, and so, whatever be the actualized possibility, even that actualized in a fiction, this reality will be an effectual reality. More on these issues in Section 13.7.

According to Hägerström, through a judgment, the knowing subject (*a*) *attests* (*aussagt*, *utsäger*) the logical reality (determinateness, consistency, noncontradictoriness, *Realität*, *realitet*) of the content of a representation,[9] and (*b*) *judges* (*urteilt*, *omdöme fällas*) whether or not the logically real content of this representation also occurs as effectually real in a wider effectually real complex to which the knowing subject refers the content of the representation attested as logically real (Hägerström 1929a, 116, 120; cf. Hägerström 1957, 120, 126–7).

We may call first-order judgments those judgments that according to Hägerström are about *things*, and second-order judgments those that according to Hägerström are about *other judgments* (including pseudojudgments).[10]

The logically real content of a representation is the object which a first-order judgment is about.[11]

According to Hägerström, any first-order judgment must take into account the effectual reality (*verklighet*, *Wirklichkeit*) of the complex with respect to which the logically real content of a representation, namely, the object of the judgment, is judged as being or not being effectually real.[12]

Hence a first-order judgment unfolds as follows.

A knowing subject apprehends in his consciousness a representation whose content is, for instance, men-who-breathe-through-gills (Hägerström's example).

[8] That is the case, for instance, with Hägerström 1953a, a translation by C. D. Broad, and with Petersson 1973.

[9] Here we can recognize Kant in the background of Hägerström's thought because attesting the logical reality of the object of a judgment is equivalent to attesting the subsistence of what Kant calls the *conditio sine qua non* of any judgment, this condition being the absence of contradiction. More on this in Section 13.7.

[10] I will not enter into second order judgments here, but see Pattaro 2010, sec. 13.5. Bear in mind that *first-order judgment* and *second-order judgment* are my own terms, not Hägerström's.

[11] Hägerström does not use *object* to designate the subject matter of a judgment but prefers to speak of a logically real something. Therefore, when in referring to Hägerström's thought I speak of the "object of a judgment," the word *object* is to be understood as meaning any "logically real something."

[12] He rejects any attempt to define judgment without taking effectual reality into account: "das Urteil ohne Berücksichtigung der Wirklichkeit zu bestimmen" (Hägerström 1929a, 118; cf. Hägerström 1957, 123).

The knowing subject attests this content as logically real (as determinate, consistent, noncontradictory), and the same content (so attested) will be the object of an affirmative or negative judgment by the knowing subject.

If the knowing subject refers the content of the representation to a wider effectually real complex where men do *not* breathe through gills, then this judgment will be a negative one: The knowing subject judges that the content of his representation (the object of his judgment) occurs merely as represented, merely as logically real, and not as effectually real in the wider effectually real complex where men do *not* breathe through gills (Hägerström 1929a, 120; cf. Hägerström 1957, 126–7).

If instead the knowing subject refers the same representation (men-who-breathe-through-gills) to a wider effectually real complex where men do breathe through gills, then this judgment will be an affirmative one: The knowing subject judges that the content of his representation (the object of his judgment) occurs not merely as represented (not merely as logically real) but also as effectually real in the wider effectually real complex where men do breathe through gills, as in fictions, I would say (Hägerström 1929, 120; cf. Hägerström 1957, 126–7; more on this in Section 13.7).

Hence, with both judgments, the negative and the affirmative one, the object (men-who-breathe-through-gills) is the same. What changes is the effectually real complex with reference to which this object (which is logically real and is attested as logically real by both judgments) is *judged*: with the negative judgment the effectually real complex is one where men do not breathe through gills; with the affirmative judgment the effectually real complex is instead one where men do breathe through gills.

13.2.2. The Primacy of the External Spatiotemporal World

Hägerström (1908, 76–7) brought to completion a Copernican bouleversement (*kopernikanische Umwälzung*) of Kantianism with reference to the question of spatiotemporal experience. For Kant, spatiotemporal experience lies in the transcendental "I think." For Hägerström, by contrast, the thinking being, in its there-being, lies in the world of spatiotemporal experience: What distinguishes one conscious being (Descartes's *res cogitans*) from another is the position of each such being in the world of spatiotemporal experience. This is so, Hägerström maintains, because a conscious being (*bewußtes Wesen*, *medvetet väsen*) cannot conceive his own there-being (*Dasein*, *tillvaro*), along with its representations (*Vorstellungen*, *föreställningar*), as a mere representation present in himself or in other like beings (Hägerström 1929a, 131ff.; cf. Hägerström 1957, 143ff.).

The widest effectually real complex to which the content of any representation may be referred is the spatiotemporal world of experience. The effectual reality of the world of experience cannot be demonstrated, because any at-

tempt to demonstrate the truth of something (of a representation) *presupposes* the effectual reality of that world. We can, however, demonstrate that anyone attempting to define the world of spatiotemporal experience as a mere illusion will only produce a collection of senseless words (Hägerström 1929a, 131ff.; cf. Hägerström 1957, 143ff.).

Hägerström's presupposition of an external representation-independent spatiotemporal world is a transcendental presupposition similar to that on which Searle (1995) bases his well-defined ontological realism regarding the external world of brute facts. I should recall in this regard a few statements by Searle:

> It is now time […] to defend the idea that there is a reality totally independent of us. (Searle 1995, 149)

> The world (or alternatively reality or the universe) exists independently of our representations of it. This view I will call 'external realism.' (Ibid., 150)

> *Realism is the view that there is a way that things are that is logically independent of all human representations. Realism does not say how things are but only that there is a way that they are*. (Ibid., 155; italics in original)

> The only argument we could give for external realism would be a "transcendental" argument in one of Kant's many senses of that term: We assume that a certain condition holds, and then try to show the presuppositions of that condition. (Ibid., 183)[13]

13.2.3. Pseudojudgments in General

We may call pseudojudgments those sentences that according to Hägerström are apparent judgments whose subject matter is an *impossible thing*, and so is logically unreal, or contradictory, a non-object. Their subject matter is a non-entity, a non-thing (*intigt*: see Hägerström 1951, 84): It is indeterminate, and therefore cannot be represented, and cannot be a possible object of judgment. The sentences in which pseudojudgments are framed as judgments are only strings of words: Despite their misleading formulation as judgments, they do not express cognitive acts of consciousness.[14]

Among the pseudojudgments are not only the statements of metaphysics but also sentences framed in the form of value judgments and ought judgments, neither of which express authentic judgments but only hypostatizations (or *objektiveringen*, as Hägerström says: Hägerström 1917, 69) of feelings or of

[13] The question of realism, institutional facts, and brute facts with reference to Searle I treated in Pattaro 2005 under the heading of nature and culture, in sec. 15.2.4, devoted to the social construction of reality and the construction of social reality. I wish to thank Corrado Roversi, who in discussing this text with me spotted the just-mentioned consonance that can be found between Hägerström, as I reconstruct him, and Searle.

[14] It should be borne in mind that *pseudojudgment* is my own term, not Hägerström's.

conative impulses arising within us in a simultaneous association with representations of things or of behaviours (Hägerström 1917, 64 ff.).

We conceive value and duty as instances of objective determinateness (*objektiva bestämdheter*), that is, of logical reality, because a simultaneous association occurs in us between a feeling or a conative impulse and a representation of a thing or of a behaviour, and a sentence expressing such an association is framed in the form of a judgment (*omdömesform*). (Hägerström 1917, 69–70). And the associations between feelings or conative impulses and representations are expressed in sentences framed in the form of judgments because the representational element prevails in giving rise to a linguistic expression, and it draws the expression of feeling or of a conative impulse into the expression of the objective determinateness (logical reality) of that which is represented, be it a thing or a behaviour.

13.2.4. Ought Judgments as Pseudojudgments

We must not forget here that in Hägerström's conception, a judgment does not coincide with the linguistic formulation expressing it but is a knowing subject's act of consciousness, and even a representation is an event in the knowing subject's consciousness: As cognitive acts of consciousness, both first-order judgments and representations are *things*—they are not words—just as feelings and conative impulses, which are *non*cognitive contents of consciousness, are things and not words. By contrast, *words*, or linguistic formulations, merely *express*, appropriately or not, both cognitive acts of consciousness and noncognitive contents of consciousness.

Hägerström shows that ought judgments are pseudojudgments; he does so with arguments that are compelling if viewed in light of his ontology and his distinction between judgments (cognitive acts of consciousness) and pseudojudgments (or, in Hägerström's usage, impossible judgments): meaningless strings of words framed as judgments, expressing a simultaneous association between a conative impulse and the representation of a behaviour.

He shows that a sense of duty is not a duty. "It is a fact that I am experiencing a sense of duty" is a first-order judgment and does not mean "It is my duty." The latter sentence is instead a pseudojudgment by which we mean to say that a duty subsists, or that a certain behaviour is required by duty *irrespectively* of whether we *feel* bound to perform the behaviour at issue (Hägerström 1917, 65; see Pattaro 1974b, 144–6).

He further shows that a duty cannot be reduced to a sense of duty. It is a contradiction to maintain that a duty is reducible to a sense of duty. Since a sense of duty is a feeling *we* have, it cannot be a characteristic (*egenskap*) of anybody's behaviour, and much less anybody's behaviour *tout court*. In my own words, "This behaviour *has* the characteristic of being a sense of duty of mine" and "This behaviour *is* a sense of duty of mine" are pseudojudgments

because it is impossible to represent something like a behaviour-that-*has*-the-characteristic-of-being-a-feeling or like a behaviour-that-*is*-a-feeling (Hägerström 1917, 65–6; cf. Hägerström 1963, 6–8; Pattaro 1974b, 146–8).[15]

On the other hand, he shows as well that not even a modal ought is something that may be inherent in a behaviour. What we seemingly represent to ourselves through a modal ought judgment is "a certain modification (*modifikation*) of the very being of a behaviour as a real determination (*bestämning*) in the behaviour itself" (my translation). And a modification is not something a thing *has* but something a thing does *not* have, just as a limitation of black is something that black does not have: It is a nonblack (Hägerström 1917, 66–7).[16]

Hägerström finally shows that if we conceive duty as a nondescript something that we believe to be "out there," then what we represent to ourselves with the word *duty* lacks any perceptibility (*åskådlighet*): It is only a determinateness (a logical reality) in the abstract (*en bestämdhet in abstracto*). It is something which we assume (by hypostatization) is present in what is thought—in the behaviour we are thinking about—but which, despite the presence we assume, does not enable us to form a representation of what it is.[17]

[15] This flies in the face of those who, failing to understand Hägerström, maintain that he reduces duty to the sense of duty. Hägerström in reality does not collapse duty into the sense of duty, but rather maintains that duty is an objectification (hypostatization) of the sense of duty. It bears pointing out here what Hägerström means by *determination* (*bestämning*), so as distinguish this word from *determinateness* (*bestämdhet*). The concept of determination is used by Hägerström to avoid a multiplication of entities. Thus, for example, solubility in water is a determination of sugar (my example), but there is no independent effectual reality the word *solubility* can designate as an effectual reality existing apart from sugar and all other soluble substances; similarly, an inner experience (*upplevelse*), such as the experience of feeling a sense of duty, is a determination of a certain person or subject, but there is no independent effectual reality the expression *sense of duty* can designate as an effectual reality existing apart from someone feeling a sense of duty. Cf. Hägerström 1929a, 121ff.; cf. Hägerström 1957, 128ff.; Marc-Wogau 1968, 117–8. The examples of sentences equivalent to "This behaviour is my duty" are mine. Hägerström says that if ought judgments are conceived as expressions of the sense of duty, then duty (*plikt*) cannot be understood as a behaviour's determinateness or logical and effectual reality (Hägerström 1917, 66).

[16] Modal ought judgments, along the lines of "This behaviour ought to be (*bör*)," will have to mean either "This behaviour *has* for its determination something that is not a behaviour" or "This behaviour *is* something that is not a behaviour," but it is impossible to represent a behaviour which *has* for its determination something that is not a behaviour or a behaviour that *is* something which is not a behaviour. In both cases, the apparent modal-ought judgment takes a non-logically real, contradictory or inconsistent subject matter: an impossible subject matter. And for this reason the modal-ought judgment is in both cases a pseudojudgment (see Pattaro 1974b, 149–52).

[17] Hägerström 1917, 71–2. Hägerström maintains that *duty*, as this word may occur in a sentence expressed in the form of a judgment, only represents a visual image or sound image: It is an expression that we understand as caused by an indeterminate "something," by an indefinite logical reality. It is interesting to compare this point of Hägerström with what he maintains in general in regard to the fact that in a contradictory judgment we find a representation of *words*, not of things (cf. Pattaro 2010, 143ff., 147–8). To put this otherwise, we can say that the word *duty* does not connote: It lacks any intension. With the argument here considered, Hägerström maintains that

13.3. The Ought, the Right, and Norms Explained

13.3.1. Right versus Just: The World of Duty

Ought judgments are pseudojudgments, mere strings of senseless words, but in spite of this they unconditionally reflect a (noncognitive) state of consciousness, so that far from being idiosyncratic, or specific to this or that individual person, they are standardly used by everyone within a language community to express similar states of consciousness: They are supraindividual (*öfverindividuella*). As a consequence, from the pseudojudgment that a behaviour is a duty for all (as in "It is everyone's duty to refrain from stealing") we readily infer that the same behaviour is a duty in this or that case ("It is *my* duty not to steal the apples growing on my neighbour's apple tree"), just as from the authentic judgment that certain properties belong to certain things (as in "Apples contain sugar") we infer that the same properties must be predicated of any instance of the same thing (as in "The apples growing on my neighbour's apple tree contain sugar").[18] Using ought judgments leads us to conjure up a world of duty as existing in distinction to the world of facts but parallel to it.[19]

When we think of a behaviour as required by duty we conceive it as having a particular character (*karaktar*): We think that the behaviour at issue is, in the given circumstances, right (*rätt*). Here the word *right* is to be kept quite distinct from the word *just* if we are to have an adequate understanding of Hägerström's thought concerning the idea of duty: "Rightness" (*rättheт*) or "correctness" (*riktighet*) are not the same as "justice" (*rättvisa* or *rättfärdighet*). This question I will come back to in Section 13.6.

The word *right*, when used to qualify a behaviour one of whose properties is assumed to be its being required by duty, means none of the following: "in accordance with a given will," "in accordance with the agent's autonomy (*självständighet*)," "suited to avoiding punishment," "suited to gaining an interest," "suited to realizing a value," or "suited to maximizing pleasure." Indeed, Hägerström shows that none of these meanings provides a satisfactory account

duty (*plikt*) lacks intensional meaning, and that sentences about duty expressed in the form of judgments are pseudojudgments, since there is nothing that they say: In a strict sense, the sentence "This behaviour is my duty" is simply equivalent to "This behaviour is" (see Pattaro 1974b, 152–5).

[18] My examples.

[19] The way in which, through this hypostatization, we come to understand a behaviour as logically real and effectually real in the world of duty is, however, different from the way we do with any other representation of behaviour (in the world of facts). In the latter case, we understand a behaviour to be logically and effectually real insofar as it belongs to the complex of effectual reality (*verklighetssammanhang*), whose elements are concrete (*konkreta*) and perceptible (*åskådliga*), while in the former case, we understand a behaviour as logically and effectually real (*verkligt*) insofar as it possesses an essentially unperceptible determinateness (*bestämdhet*), which is duty. And in this way, we run into undeterminateness because an unperceptible determinateness is not an authentic determinateness. See Hägerström 1917, 70, 67–68, 71–72, 73–74; cf. Pattaro 1974b, 155–9.

of the idea of rightness and hence of the property of being required by duty. Therefore, he says, we need to take a different approach to the idea of rightness: We will have to look at the way the sense of duty is elicited in us. That different approach we will turn to in the next section.[20]

13.3.2. How the Idea of Right Develops within Us

Because commands and prohibitions accompany us from childhood, because they are frequently repeated, and because they are aimed at bringing forth some relatively uniform modes of behaviour—no matter what the source of such commands and prohibitions is: family, school, religious power, secular power, the social environment at large—our thinking about certain modes of behaviour, Hägerström argues, will bring with it an accompanying perception of an "ought to take place" (*skall ske!*) or a "must necessarily take place" (*måste ske!*).

Since these modes of behaviour have always been commanded or prohibited from a variety of sources—from different persons and authorities—and since we have regularly learned these modes of behaviour by way of commands and prohibitions, we no longer associate these behaviours with the command or the prohibition of this or that person or authority in particular. The sources of commands and prohibitions have lost their individual specificity: What appears before us is just the visual or sound image of an expression of command or prohibition. Still, even though such imperative expressions have been depersonalized, they do maintain, when connected with the behaviours they refer to, a suggestive force that elicits in us a conative impulse to have the required behaviour or avoid the prohibited one.[21]

All this happens not with a single person but with all those in the community one lives in. The association of behaviours and depersonalised imperative expressions—such as "This ought to take place!" (*skall ske!*) and "This ought not to take place!" (*får icke ske!*)—is produced in all or nearly all members of a community, and each member can and does see the association in the way others speak and behave. It is little wonder, then, that people come to make the hypostatization whereby "ought to take place!" and "ought not to take place!" become objective characters of certain behaviours: We come at the idea of a system of modes of behaviour at one with an imperative expression, a system of modes of behaviour that unconditionally "ought to" or "ought not to" take place. The idea of this system of modes of behaviour is the idea of a system of norms, and the idea of right is connected with the idea of such a system of norms.[22]

[20] Hägerström 1917, 74–8; Hägerström 1963, 9–14. See Pattaro 1974b, 159–65.

[21] It is interesting to compare this explanation by Hägerström with the theory of the generalized other developed by Gerth and Wright Mills (1961). Cf. Pattaro 2005, secs. 15.3 and 15.4.

[22] See Hägerström 1917, 82–4. In Hägerström 1953a, 154 (p. 83 in the Swedish text), Broad

Something along the same lines happens with custom.

Custom determines the behaviour of people in an almost mechanical way, in the sense that certain behaviours, Hägerström argues, are brought into being by force of custom, mostly without any psychical volition on the part of the acting subject. Yet, despite this way of functioning, there are several other respects in which custom can be viewed as functioning like a system of modes of behaviour which, through the effect of education and the other concurrent factors mentioned earlier, we are led to think of as an objectively subsisting system intrinsically connected with certain imperative expressions: as a system of norms. When we behave in disagreement with what custom requires we will perceive the behaviour we are straying from as the right way to behave. In primitive societies custom prevails. In advanced societies custom is instead gradually replaced with the system of modes of behaviour inculcated through political and religious powers and social forces.[23]

Right behaviour is the behaviour that ought to, or must, take place (*ske*): It is the way of acting that we understand to objectively subsist and by its own nature to be intrinsically linked to an imperative expression such as "ought to, or must, take place! (*ske*)."

13.3.3. What Is Right in the Abstract (Norms) and in the Concrete (Subjective Positions)

Saying that a behaviour ought to *take place* does not imply a reference to a concrete person who ought to *carry out* that behaviour. In the presumptive world of the ought, a right behaviour's subsistence consists in its having to *take place* even if the circumstances should never occur (in the world of the is) under which somebody ought to *carry out* the behaviour that ought to *take place* (in the world of the ought).

translates *skall ske!* to "shall be done!" This translation is misleading (Broad should have translated *ske* as "to happen" or "to take place"). Indeed, in Hägerström's analysis it is fundamental to characterize right behaviour as that which "ought to take place," while a person's duty to carry out a behaviour that "ought to take place" (the duty to have the behaviour that is right in the given circumstances) is not identical with an "ought to take place" of a behaviour—that is, with the behaviour's rightness—but is rather a *consequence* of such rightness: What ought to take place ought to be carried out by those referred to by "what ought to take place" (more on this in Section 13.3.3). Collected in *Inquiries into the Nature of Law and Morals* (Hägerström 1953a) is a series of essays by Hägerström translated into English by C. A. Broad and edited by Olivecrona. This work has been essential in spreading Hägerström's thought outside the Scandinavian countries. However, despite the authority commanded by both the translator and the editor, the work contains numerous mistranslations that have contributed to various misreadings of Hägerström, not only in non-Scandinavian countries but in Scandinavia itself, where scholars, apparently struck by some form of idleness, sometimes rely on the English translation rather than on Hägerström's original writings (for various examples of mistranslations of Hägerström 1953a, see the footnotes in Pattaro 1974b).

[23] See Hägerström 1917, 82, 84–5. Cf. Hägerström 1963, 9–12 and Pattaro 1974b, 165–70.

By contrast, saying that a behaviour ought to be *carried out* on the one hand does presuppose that the behaviour which ought to *be carried out* is the behaviour that ought to *take* place, on the other hand it does imply a reference to an actual person who ought to *carry out* that behaviour.

However involute Hägerström's thought may be as to its form of expression, it is clear, when it comes to comparing the idea of right behaviour (*idéen om det rätta handlandet*) with the idea of behaviour required by duty (*idéen om handlandet såsom plikt*), that the latter presupposes the former and that the former ultimately presupposes the idea—arrived at by hypostatization—of a system of modes of right behaviour whose objective reality is an "ought to take place! (*ske!*)." To state this conversely, the system of modes of behaviour sets forth what is right in the case at hand (*i föreliggande fall*) in that the system has preestablished in the abstract what is right in a case *like* the one at hand (*i ett sådant fall*); that is, in my own words: A mode of behaviour is a type of behaviour (an abstract type) that ought to take place (norm); the right behaviour in the concrete is an instance of the type that ought to take place and that is right in the abstract. An actual person's duty does not concern a behaviour in general (*öfverhufvud*) but a behaviour in particular (*särskildt*) which gets specified in accordance with the idea of what is objectively right *in abstracto* (Hägerström 1917, 93; Hägerström 1963, 9–12; Pattaro 1974b, 171–3).

In Hägerström's view as expressed in my words, a norm is a hypostatization we are induced to make by the powers that in society command and prohibit and by custom. Norms are the modes of behaviour that, under the influence exerted by these factors, we come to conceive of as objectively subsisting and as connected, by their nature, with an imperative expression like *ought to take place!* (*skall ske!*). The word *norm* thus designates these modes of behaviour so conceived.

13.3.4. Norms versus Commands

Norms are crucially different from commands, even if the state of consciousness experienced by someone receiving a command and the state of consciousness of someone experiencing a sense of duty (a sense caused by the idea of a norm) are akin: In both cases there is an unmotivated conative impulse associated with the agent's representation of a behaviour. Further, in either case the conative impulse is brought about by an imperative expression: One uttered by an actual person in the case of a command; one impersonally connected with a model of behaviour in the case of a sense of duty. However, the affinity between commands and norms ends here. The differences, by contrast, are such as to prevent us from reducing the idea of a command to that of a norm or, conversely, the idea of a norm to that of a command.

In the case of a command, the imperative expression that brings forth a conative impulse requires an appropriate relationship between the command-giv-

er and the command-receiver; in the case of norms, by contrast, the imperative expression works by its own force, that is, it works independently of any actual commanding person. This outward difference is a reflection of the crucial difference whereby commands, unlike norms, do not presuppose a hypostatization about there being any objectively subsisting modes of behaviour connected by their nature to an imperative expression: Commands imply no reference to an objectively right mode of behaviour.

Linguistically, this crucial difference is manifested in the fact that the state of consciousness experienced upon feeling a sense of duty (a sense elicited by the idea of a norm) is conveyed by way of sentences about duty which take the form of judgments, that is, by ought judgments (or, better yet, pseudojudgments). Not so with the state of consciousness experienced upon receiving a command. In this case, the relevant state of consciousness is conveyed by way of a sentence, such as "I *will* do that," which expresses a purpose and cannot be framed in the form of a judgment.

On the other hand, the idea of a norm carries along a number of psychological implications not entailed by commands.

The system of modes of behaviour that we conceive as objectively subsisting and intrinsically connected with imperative expressions is a system—a system of norms—that we conceive as having a general validity (*allmängiltighet*) on the members of the group the system refers to. We hold, therefore, that a behaviour that in certain circumstances is required of us by duty is also required by duty, under the same circumstances, of every other person. By contrast, we do not hold the same view when it comes to commands.

The moral indignation we feel for certain behaviours of others stems from our belief that these are not right behaviours, or that the persons who behaved thus failed to fulfil their duty, to comply with norms. By contrast, when we are given a command we do not care whether other people have been or will be given the same command, unless for some contingent reason we wish or not wish that such other people receive the same command.

Further, where norms are concerned, the idea of duty induces us to regard as right a penalty that may have been established for failing to behave as required (by duty), and so to regard it as a duty to submit to the same penalty (see Section 13.6 below). But where commands are concerned, any penalty threatened for noncompliance will be regarded as merely a factual consequence of such noncompliance, a consequence that we will not feel bound by duty to submit to, and that we will attempt to avoid whenever possible.

In fine, the idea of duty, however much it cannot be logically explained by recourse to the idea of personal autonomy, is nonetheless often associated with autonomy. In fact, the idea that certain behaviours are intrinsically proper to our true self (to our autonomy) means ultimately that such behaviours *must* unconditionally be carried out. Be that as it may, the idea of duty is in any event often enshrouded in an aura of sacrality: Respect and esteem are often

connected with the right way of behaving; disrespect and disesteem, with the wrong way of behaving. By contrast, none of these feelings accompany behaviour that simply conforms to a command (Hägerström 1917, 115–7, 85, 86, 89, 97ff.; Hägerström 1963, 13–4; cf. Pattaro 1974b, 173–8).

13.4. Law

13.4.1. The Law in Force Is Made up of Norms, and the Role of the Constitution

Norms have neither a logical reality nor an effectual reality. By contrast, our belief that they exist beyond ourselves and are objectively binding belongs to our psyche: It is a determination of our psyche (see footnote 15 above). Norms are a normative ideology, as Ross would later call it, more or less compact and coherent, operative and effective in maintaining human collectivities alive.[24] This means that a legal system rests on a normative attitude of those who are subject to the system rather than on the commands or on the declarations of will of those who are in power.[25]

According to Hägerström, without a constitution which the members of society regard as binding, and which is regularly observed by those in power, no lasting factual power would obtain in society: Power does not precede norms but instead is created and kept into being by norms. A clear-cut distinction exists between the decisions that sovereigns take in a private capacity and those which they take in their capacity as officials: Only in the latter case will a decision carry the force of law (*rättskraft*), and this is so because, unlike the decisions that sovereigns take in a private capacity, their *official* decisions rely on previously accepted constitutional norms. The expression *force of law* designates in Hägerström an effectively operating force capable of binding people concretely (psychologically), thereby determining their behaviour.[26]

[24] On Ross see Chapter 16 in this tome.

[25] Hägerström 1961, 70–72; cf. Hägerström 1963, 120ff., 147ff. The power of those who are in power rests on the normative attitude of those who are subject to the legal system. In this regard, Hägerström makes a sharp and many-faceted criticism of the voluntaristic theories of law (see Pattaro 1974b, chap. 2). On this and a number of other points, Hägerström anticipated views later upheld by Hart. See Pattaro 2005, 123–44, 172–85, where I argue that in regard to various topics Hart's *Concept of Law* (Hart 1961) is influenced by Hägerström and Olivecrona, so much so as to be realist (and non-conventionalist). Those who make out Hart to be conventionalist even before the *Postscript* (among them is Postema 2011, 297) take exception to the thesis I expound in Pattaro 2005, but they do not address the arguments I have laid out.

[26] The constitution is in turn observed by the bulk of the citizens out of historical, psychological, and social reasons, such as require historical, psychological, and sociological inquiry. In making the existence of power conditional on the prior existence of a norm, Hägerström is not looking to set up a formal legitimation; he is rather establishing a cause-effect connection between norms (the cause) and power (the effect). But even here, in this empirical framework, a violation of constitutional norms by the people placed through these norms in the highest powers remains

For insight into Hägerström's view of the constitution, we can consider a criticism he made of Salmond (1862–1924).

Salmond held that when the American colonies rebelled against England and needed to enact their own constitutions, they did not rely on any preexisting law, because the only law then in force was the English law they were violating: The colonies were enacting new constitutions "by way of popular consent, expressed directly or through representatives," that is, on a factual basis, and not on a legal or normative one.

Hägerström argues that Salmond cannot conceive of any law except the law produced by the state and that for this reason he holds that law which forms outside and in contrast to state-enacted law (as in the case of the American revolution) cannot be founded on law but can only be founded on nonlegal facts. To be sure, Hägerström notes, the revolting American colonists and the founding fathers did not ground their new constitutions in the English law they were violating, yet they did ground them in norms of some kind: As a people, the American colonists were convinced they had *natural* rights, and that the English crown, having violated these rights, had thereby lost its right to govern the colonies. The American colonists believed that, because of the crown's violation, the right to govern had reverted to its original holder, the people. On the basis of this believed natural law, the revolting American colonies gave themselves a constitution. This natural law they believed in held sway (*berhärskade*) over their minds and therefore acquired factual validity (*faktisk giltighet*); this natural law supplied rules for the use of power (*regler för maktutövning*); such rules possessed a factual ideal force (*faktisk ideell kraft*); and thanks to these believed rules the founding fathers were endowed with the factual power to enact a constitution; the same believed rules of natural law served as the basis of the new legal system; so there is no reason to deny them their status as legal rules in force (*gällande rättsregler*) logically prior to the constitutional provisions enacted by the founding fathers.[27]

A norm in force is one that in a given social group is believed to be in force and hence felt to be binding and is observed, especially by the persons whose job it is to administer justice. Even though legal norms so construed character-

a violation of law, with the consequences that this violation of law may give rise to depending on circumstance, which consequences range from a widespread popular uprising to a complete acquiescence in the violation until a new practice (a new constitutional norm) is in place, and there are of course the intermediate possibilities of disobedience of or alignment with the single provision found to be contrary to the constitutional norms. See Hägerström 1961, 72–3, 75–7. Cf. Hägerström, 1963, 127ff., 223ff.

[27] The terms *giltighet* and *gällande* I have translated to *validity* and *in force*, respectively, and suggest doing so in Hägerström's case: In Hägerström, as a rule, the former term carries a normative connotation (or better yet it records a normative attitude toward the law or toward a given rule of conduct); the latter term carries no normative connotation but simply records a fact (that the law or a given rule is in force).

ize themselves as a general psychological phenomenon that we can sociologically observe, they cannot be equated with the behaviour through which they are followed, because a cause cannot be equated with its effects. A legal norm in force is a cause, and the behaviour of the addressees who believe in it is its effect (cf. Pattaro 2005, chap. 6).

From the standpoint of the function of the law, namely, the function of having people do something, it makes no difference whether legal rules have actually been enacted or whether the citizens at large simply believe them to "exist" and be binding.

However, the way in which legal rules are issued, or the way they are believed to have been issued—that is, consistently with norms that are felt to be binding and to be the norms establishing who can issue norms by enactment—is a determining factor in bringing about the belief that these legal rules "exist" and are binding and, consequently, in having them complied with.[28]

13.4.2. Judge-Made Law

Hägerström shows that the law as interpreted and applied by the judge is not anybody's will (the will of legislator, the judge, the legal system, or the like). His analysis is laid out in this order: (*i*) The judge's judgment does not declare the content of the legislator's will; (*ii*) in settling a dispute, the judge considers several factors in addition to the text of the law; (*iii*) this is not to say that judges, when cases are brought before them, base their judgments on their own will; (*iv*) nor does it mean that the legislator's will has authorized judges to take extralegal factors into account; (*v*) the legislators' intention to formulate the text of the law in a certain way cannot be separated from their intention to regulate social relationships in a certain way; (*vi*) there is no such thing as a will of the legal system; (*vii*) the application of the law cannot be construed as the activity of actualizing a will which is always identical with itself and which commands or declares its own content.

I will not dwell on the arguments Hägerström uses to support these points. These arguments are intended in the first place to criticize the voluntaristic theories of the judge's activity (Hägerström 1917, 16–51).

[28] See Hägerström 1961, 70–7 (cf. Hägerström 1963, 120ff., 127ff., 147ff., 223ff., 244ff.). The quoted passages by Salmond are found in Salmond 1930, 154–6, 39; cf. Pattaro 1974b, 87–102. Olivecrona (1939, 57), in the lead of Hägerström, would describe the relation between the constitution and legislation by using the following metaphor: "The legislative machinery may be compared with a power-plant in a river. The common attitude towards the constitution corresponds to the water in the river. In the power-plant the energy of the current of water is transformed into electricity, which is distribute round the countryside to give light and heat and to set hammers and looms in motion. The power-lines are the particular laws, promulgated according to the constitution. The significance of the act of legislating is that a new power-line is attached to the power-plant."

In summary, Hägerström does not doubt that when judges settle disputes, they also take into account the textual provisions of the law, among other things, but he does deny that this amounts to actuating or declaring the legislator's will: "What for the judge is law in force [*för domaren gällande rätten*] cannot be identical with the legislator's will [*lagstifarens vilja*]." Law in force is, for Hägerström, the law that judges apply. This law, however, is not identical with the judges' decisions, either, because the judges themselves understand the law in force to consist of norms that precede and justify their decisions in concrete cases (ibid., 16–8; the quotation is from p. 17).

As Hägerström observes, in order to understand the judge's *modus operandi*, we have to take into account that the common legal consciousness (*allmän rättsåskådning*) includes the principle under which, whereas the legislator frames rules for social relations to come, the judge issues judgments on relationships existing *before* such judgments: The judge's judgment is understood as stating the truth (*pro veritate accipitur*), not only with regard to matters of fact but also with regard to matters of law and its correct application.

To appreciate how widespread this assumption is we need not confine our view to orthodox legal positivism, which obviously does share this assumption. We can also look elsewhere, to the praetor in ancient Rome, for example: The praetor did *make* law (*ius gentium* and *aequitas*), to be sure, but he was regarded (and regarded himself) as someone authorized to merely *declare* what the law in force (*gällande rätt*) was. We can also consider common law judges: Even if they have much more leeway than their civil law colleagues, they nevertheless feel constrained by precedent and custom, and in addition they view themselves as committed to declaring the legal situation which they believe to objectively (*objektivt*) exist between the parties to a lawsuit.

Not only when interpreting the law, but also when integrating it or passing judgment contrary to the law, do judges believe they are proceeding in accordance with objectively valid norms (*objektivt giltiga normer*). There is a powerful emotive drive in the need for judgments conforming to justice (*rättvisa*); that is, in the demand that the judgment declare rights and duties as they objectively subsist on the basis of a *super partes* norm. Our confidence that the judge will follow this norm is deeply rooted in the history of civilization and still constitutes a cornerstone in the edifice of social peace: Because the judge represents an external and inexorable power, our sense of law will react against any act of the judge that appears to amount to nothing more than the use of brute force.

If this is the typical attitude informing our common legal consciousness with respect to the judge's task—that is, if judges are, as it were, in the public eye of public legal opinion—it follows as a matter of fact that judges are constrained in their judgment, regardless of whether they identify with the role they are entrusted with, thus acting from a sense of duty (*pliktkänsla*), or whether they simply act out of fear of the way the public might react. It makes no sense to hold that judges freely determine (however much within the tex-

tual framework of the law) how to decide the cases brought before them, and so it makes no sense to assume that the law, which for such cases holds by virtue of the judges' judgments, is identical with their will (*vilja*). Judges typically want to declare only (what social conditioning leads them to believe is) the *objective* meaning of the law (*den objektiva rättens innebörd*) with regard to the concrete case at hand: They want the judgments they pronounce to be materially correct (*materiellt riktig*).

Judges are not computing machines (*räknemaskin*); but still, the realist Hägerström warns us, we should not exaggerate the subjectivity of their convictions. At least where the law is prevalently statutory law, objective factors (*objektiva faktorer*) exist that secure regularity (*regelbundenhet*) in carrying out the judicial function, in such a way that court judgments become predictable, thus supporting the certainty of law (*rättssäkerhet*). The rules of conduct that through these factors judges bring into effect (*till verkställighet*) constitute law in force (*gällande rätt*). These objective factors can be listed as follows: the text of the law (*laguttryck*), the generally accepted rules of interpretation and integration (*utläggnings- och ut-fyllningsregler*), and the dominant orientations in legal scholarship and practice (*inom rättsvetenskapen och rättspraxis*).[29]

Hägerström observes that judges sometimes resort to analogy even when the law prohibits its use, as happens in criminal law. For example, when judges in Austria punished intentional damage of the telephone network, they did so on the basis of a law (enacted before the telephone was introduced) that punished intentional damage of the telegraph network, and of course made no reference to telephones. The Austrian judges justified their judgments by arguing that the telephone is a kind of telegraph: In other words, they presented a clear analogical application of criminal law as merely an interpretation of it. Still, it in not unusual to find cases in which analogy has a converse use: A judge should in theory apply a law whose scope plainly covers the case in question,

[29] See Hägerström 1917, 25–31, cf. 1ff., 10ff. With regard to *justice* and *rightness* or *correctness*, on p. 85 Hägerström qualifies as follows the idea of a just judgment (*rättvis dom*): A just (*rättvis*) judgment is the exact statement of the behaviours that in a given case are right (*riktiga*) for the parties under a system of modes of behaviour conceived as having the objective characteristic whereby the system ought to (*böra*) be enforced. Hägerström's view is that we will keep within the bounds of a scientific conception of the law only so long as our investigation focuses on ascertaining the rules actually (*faktiskt*) applied in the life of the law (*i rättslifvet*); failing which we spill over into practical philosophy or into social theory, two disciplines that Hägerström considers to be prescriptive. And in Hägerström's opinion, this happens whether the basis on which to regulate social relationships should be found to lie in the lawmaker's "true" intention as ascertained through a historico-philological method, or whether this basis should be found to lie in the lawmaker's intention or in the common legal consciousness (*rättsmedvetandet*) as normatively understood and ascertained through a sociological method taking into account the interests of society. The "lawmaker's intention," the "ultimate aim of the law," and any other like criteria may be useful in formulating *de lege ferenda* statements (that is, statements of legal policy, as Ross would later put it), but not in formulating legal statements having scientific validity. Cf. Hägerström 1917, 38–42, and Hägerström 1961, 64ff.

but in practice it may happen that he or she will still resort to analogy and will apply a provision other than the one directly applicable to the case. In both cases the strict application of the law (the law directly applicable to the case) would stand in contrast to some widely accepted moral, economic, or social values, and the judge chooses to uphold these values rather than the law (see Hägerström 1917, 31–36, 22).

Hägerström holds that when interpreters resort to analogy, far from keeping to the lawmaker's intention (*afsikt*), they necessarily part from it, because such intention can only be confined to the cases the lawmaker was thinking about when enacting a law: By definition, all cases the lawmaker does not anticipate are foreign to his concrete intention. It might be said here that, by resorting to analogy, interpreters adhere not to the lawmaker's concrete intention (*konkret afsikt*) but to the purpose (*syfte*) or aim (*ändamål*) the lawmaker demonstrably pursued in regulating certain cases in certain ways. With this argument, however, we have already abandoned our claim that the law applied by recourse to analogy expresses the lawmakers' will, because the lawmakers, whatever the rationale behind the laws they make, cannot be found to have wanted what they have not represented to themselves as objects of their volition. We cannot argue that interpreters have the ability to reconstruct the true aim inspiring the lawmaker. Most often, the rationale used to justify recourse to analogy results from the interpreter's own value judgments as influenced by the objective factors mentioned above (see Hägerström 1917, 18–25; cf. 32–4 in the footnotes, 154–7).

13.5. Rights and Transactions

13.5.1. Rights

13.5.1.1. Rights versus Interests

When we think that someone has a right (*rätt, rättighet*), Hägerström observes, we understand this person to be determinative (*bestämmande*) for the rightness (*riktighet*) of the behaviour of one or more other persons.

If we consider a holder of a property right (*äganderätt*), we understand this person to be in a position relative to a thing in such a way that he is determinative for the rightness of the behaviour of every other person with respect to the same thing.

If we consider a right holder's right to obtain a duty holder's performance (*obligatorisk rätt*), we imagine the former in a relation to the latter such that the former is determinative for the rightness of the latter's behaviour in carrying out the performance in question.[30]

[30] Hägerström 1963, 15; cf. Hägerström 1917, 62, 86–7.

Needless to say, Hägerström does not understand these remarks as framing his own definition of a right: He is rather describing the meaning that the common legal consciousness ascribes to the term *a right*. According to Hägerström, the idea of a right (*rättsidé*) is a variant of the idea of duty: It is a moral idea framed as a duty (and not as a value), in the sense that we understand a right as the right to expect others to do their duty and not as the right to expect them to act in conformance with our own values or interests.

If the idea of a right were an idea referring to interests and values, that would mean that the right-holder's interests and values should rise to the status of a value norm (*värdenorm*) which the duty-holding counterpart has to follow. But if that were the case, the rightness of a duty-holder's behaviour would be determined by the right-holders' interests. Hence, there would be no reason to respect other people's property if such property had no value for its owner (such as the value some small change would have for a billionaire), and so much the more if the property at issue were potentially harmful to its owner (as would be the case of a loaded gun in the hands of someone not trained in the use of firearms). There would be no reason to fulfil an obligation due to a creditor who had no interest in being paid back, or who would incur damage as a result of such repayment. And, in fact, that is not how the idea of a right works: We think it right to do what a right-holder's right requires, even when this does not work to his advantage, and even when such a course of action should work to his *disadvantage*.

This peculiarity concerning the idea of a right comes across in a complementary manner in the fact that the duty-holder is not required to fulfil the right-holder's interest in full. For example, we believe a property owner entitled to have others respect his property, but not to have them help him enjoy it proficiently; likewise, we hold creditors entitled to the money they are owed, but not also entitled to be advised on the best use of that money; and so on.

So the idea of a right can be said to rest on the idea of a general rule that is in force independently of any value (*allmän regel, som gäller omutligt*), in such a way that the right-holder grounds in this norm the rightness of the duty-holders' behaviour, even if the right-holder does not value the behaviour at issue. A right is commonly held to determine an obligation (*förpliktelse*) for a duty-holder, and according to "the idea of duty (*pliktidé*) the rightness of certain behaviours depends on a fixed rule of conduct (*fix handlingsregel*); and this rule is blind to the real consequences a behaviour will have with respect to one value or another" (Hägerström 1963, 18; my translation).[31]

[31] See more in general Hägerström 1963, 15–8. The word *omutligt* (cf. ibid., p. 17) properly means "incorruptibly," which in this context suggests that the rule in question must not suffer from contamination with any value; Hägerström adds to this that the ancient Romans used the expression *strictum jus* to express the concept of an incorruptible rule. Cf. Hägerström 1917, 75–6.

This is the sense in which the idea of a right is conceived by Hägerström to be a moral idea framed as a duty and not as a moral idea framed as a value. Hägerström examines in this regard the question of damages with respect to the interests of the parties concerned and the idea that law consists in a balancing of different interests, showing that in neither case do we have a basis for concluding that a right is a moral idea framed as a value, for even in these cases it is instead a moral idea framed as a duty (Hägerström 1963, 19–20, 27–9, 33–5).

13.5.1.2. The Idea of a Right in Its Connection with That of Norms and Claims, and the Idea of a Right Understood as a Power

In Hägerström's view, if we think that a right-holder's position grounds the existence of certain duties—grounds the rightness of some behaviours by others—then rights can be substantially understood in two ways: These, however, cannot be severed from each other, except in the abstract, because both stem from the hypostatization involved in the idea of a norm, and from the psychological mechanisms that concur in shaping this idea.

According to the first way of understanding the idea of a right, the right-holder determines the rightness of other people's behaviour (the right-holder determines the duty-holder's duty), because we believe there exists a rule (*regel*) which is in force (*gäller*) for both right-holder and duty-holder, and which frames the duty-holder's duty by reference to the right-holder's right. Here it is a norm that, strictly speaking, determines a duty, and the norm does so by linking the duty-holder's duty to the right-holder's right, and so this right in turn appears indirectly determinative for the rightness of the duty-holder's behaviour.

According to the second way of understanding the idea of a right, the idea of a norm is kept pretty much in the background, because we understand the right-holder himself as directly determining—by way of a command issued to the duty-holder—the rightness of this person's behaviour. Here we are led to attribute the commanding will, so imagined, in the first place to the right-holder.[32]

However, it is only in the abstract that this second understanding of the idea of a right can be separated from the former; in fact the two get confused in the common legal consciousness, in that the first understanding really amounts to nothing more than a reflection of the phenomenon by which we are readily brought to imagine a commanding will (*befallande vilja*) backing a

[32] As was noticed in Sections 13.3.2 and 13.3.4, the idea of a norm cannot be equated with the concept of a command, and yet this idea takes shape through the psychological conditioning exerted by the commanding powers in society (and through custom), a circumstance that readily leads one to imagine a commanding will behind norms: For example, we can be led to regard moral norms as commands issued by the voice of our conscience, or by God, and we will similarly regard legal norms as commands issued by the state or by the so-called sovereign organs.

norm (or otherwise accompanying or replacing it). On both understandings of the idea of a right, Hägerström remarks, it is thought that the right-holder can (*kan*) make a request (*kraf*) or assert a claim (*anspråk*) against the duty-holder; and on the second understanding, it is thought that what is essential to a right is instead the claim, and that the claim itself is what determines a duty. The burden of Hägerström's remarks is as follows: Invariably entailed in the idea of a right is that a right-holder can make requests or assert claims against a duty-holder; and sometimes the same idea entails that a right essentially amounts to a claim, in such a way that the duty-holder's obligation to behave as requested springs directly from the right-holder's claim.[33]

This way of rendering the current idea of a right makes it necessary to clarify the sense in which we say that a right-holder can (*kan*) assert claims.

Hägerström remarks that if we understand a right-holder as someone who advances claims (*såsom krävande*), then we will ascribe to this person a power to advance claims (*en makt att kräva*). This point bears on the way in which we commonly say that a right-holder can (*kan*) advance claims, and so it takes us to the core of the problem as to the "nature" of a right.

It is a matter of fact, in Hägerström's view, that we have no power (*makt*) to make a claim to something unless we consider ourselves capable of influencing others by way of imperative utterances addressed at them, and unless we actually *can* exert such influence. A power to make claims does not flow simply from the possibility of speaking certain words, because the words so spoken will have to be backed by instruments of power (*maktmedel*), for otherwise we cannot hold ourselves capable of influencing other people's behaviour through a claim—at best we can hope a plea (*bön*) will do the job.

It follows from this that the idea of a right as a power is mere fiction (*ren fiktion*)—unless, that is, a functional legal system equips right-holders with those instruments of power that alone can secure the necessary firmness for these people's capacity to influence others (Hägerström 1963, 57–8).

A right understood as a power to assert a claim to something would not be a mere fiction if we conceived of this power as consisting in a de facto power issuing from the normal functioning of the legal system. Indeed, in a functional legal system, a right-holder's claims will largely be fulfilled without duty-holders challenging those claims—at worst the matter is referred to a court of law. The question now is whether this factual or empirical notion—whereby we have a good chance of enjoying certain advantages, failing which we can seek a remedy by recourse to a court proceeding that will make up for our loss—comports with the way we actually represent to ourselves the idea of a right understood as a power.

With plenty of examples to hand, Hägerström has no problem making a case for his view that no lasting power is possible without the backing of a

[33] Hägerström 1917, 86–7; Hägerström 1963, 54–6.

minimally functional legal structure—for otherwise each person would fall prey to the aggression of others—nor need he show that the power found by natural-law theorists to lie in rights is an ideal power, one foreign to this earthly world, because these theorists themselves somehow concede that a right has no factual or empirical nature (Hägerström 1963, 36–52; cf. 1927, 35ff., 236ff., 348ff.; 1941, 301ff., 64ff., 107ff.).

The conclusions that Hägerström draws from analysing the natural-law conception of rights throws light on his critique of the concept of a right as generally understood by legal practitioners and legal positivists. Indeed, this critique as we find it, that is, scattered about in different writings, can leave us wondering what Hägerström is driving at: If, on the one hand, he foils every attempt at reducing rights to de facto powers, on the other hand he brands as scientifically untenable the theory that presents rights as ideal powers.

In fact Hägerström is trying to make two points here: One is that the idea of a right cannot be reduced to a de facto power, and the other is that legal practitioners and jurists themselves cannot completely rid their discourse of this idea, with the consequence that their aspirations to scientific rigor are regularly thwarted.

Modern legal scholarship, Hägerström observes, cannot find common ground when it comes to framing the concept of a right, nor can it reach any such agreement, because it strives to reduce this concept to a factual or empirical notion—an impossible undertaking. In fact the (natural-law) idea of rights as ideal powers crops up abundantly in the language of jurists, lawmakers, judges, and private citizens having rights under the law: True enough, rights are no longer made to spring from natural rights, but the idea lingers of a "supernatural" power that logically precedes and justifies de facto power.

Hägerström is not just presenting the idea of a right as irreducible to an empirical concept: He is also arguing that legal dogmatics cannot offer an account of the law without embracing the idea of a right. As with Hägerström's concept of a norm, so also in regard to the idea of a right his realism comes out in full. For, on the one hand, Hägerström points out that certain legal concepts are not scientific, as some pretend them to be, and, on the other hand, he states that such concepts cannot be discarded despite their not being scientific.[34]

Hägerström shows in this regard that even the theory of rights as legally protected interests, a theory supported by Jhering and before him by Ahrens, cannot avoid using the notion of a right as an ideal power.[35]

A connection exists between ideal power so construed (the idea of a right) and the de facto power secured by a functional legal system, and that is an

[34] See Hägerström 1934b, *passim*; Hägerström 1927, 1ff. On the possibility of explaining the concept of a right solely on the basis of the idea of a norm, see Hägerström 1917, 133–6, and Hägerström 1963, 79–81.

[35] Hägerström 1963, 81ff.; Hägerström 1961, 120–31.

empirical connection. The idea of a right is not an idle entity in the realm of the law; quite the contrary, it plays a key role (as do the ideas of a norm and of duty with which it is closely linked): It carries out an important imperative or directive function, by affecting individual and collective attitudes, and so also the behaviour of law courts, whose task it is to protect the factual advantages people are "entitled" to.

Plus, the idea of having a right conjures up feelings of moral empowerment and force: If people know they are putting up a fight to secure their rights, they will be more disposed to undergo sacrifices and will also be more confident they will win out; depending on the circumstances, our sense of dignity, honour, and autonomy gets associated with the idea of a right, making this idea more effective and more charged with ideological and emotive import.

In sum, the idea of a right belongs to the complex of factors that operate in society and concur in keeping the legal system alive and well. But the converse is also true: When the same idea acts contrary to the ends the legal system is designed to achieve, it can ultimately undermine the system and contribute to making it fall apart. Hägerström devotes some discussion to the question of what feelings the idea of a right elicits, and does so looking to international relations as a paradigm of a context in which legal ideas exert a good deal of suggestive force. Lundstedt took up and elaborated on Hägerström's hypothesis that the idea of a right can undermine the stability of a legal system and contribute to its downfall when the contents of the ideal powers inherent in that idea act counter to the aims pursued by a legal system. The idea of a right as connected with its directive, technical, and emotive functions would be analyzed in great detail by Olivecrona.[36]

13.5.2. Transactions

Hägerström takes up the subject of transactions from the standpoint of the history of ideas no less than from a theoretical standpoint. In his historical studies he considers a number of transaction-like forms in ancient Roman law and the promise in natural-law theory. A theoretical account is set out in his 1935 *Begreppet viljeförklaring på privätrattens område* (The concept of a declaration of will in private law), now in Hägerström 1961, which is praiseworthy for laying out and bringing to fruition the results of his three fundamental lines of research on law: his critique of the voluntaristic theory of law, his critical analysis of the concepts of a right and of duty as referring to imaginary entities, and his investigation into the historical origins of the fictions and hypostases typical of legal positivism. This essay, combined with some points made

[36] Hägerström 1963, 58ff., 71ff. In this regard, see esp. Lundstedt 1925; cf. Lundstedt 1932c, 93ff., 119ff.; Hägerström 1966, 182–3, 193; Hägerström 1927, 16–7. Cf. Olivecrona 1939, 79ff. On Olivecrona and Lundstedt see Chapters 14 and 15 in this tome, respectively.

in other writings, can be regarded as setting out a theory of Hägerström's on the transaction, a theory whose overall cast turns out to be quite analytical and modern: Hägerström rejects the common opinion that a transaction consists in a declaration of will; he argues that it consists instead of imperative sentences, and he essentially frames the same problem posed by what J. L. Austin later termed "performative language."[37]

A transaction, Hägerström observes, involves our speaking or writing about rights and duties. But how exactly are these rights and duties spoken of or written about? We do not refer to them as things that already exist (or have already changed or ceased to exist), nor do we refer to them as things that will come to exist (or will change or cease to exist): We make a legal transaction not to *declare* that certain rights and duties already exist, since the transaction is made precisely to get rights and duties to exist; nor do we make a legal transaction to *declare* that those rights and duties will exist, for it is not by declaring that something will exist that we bring it into existence.

Hägerström further specifies this point by noting that a transaction is not a judgment (*omdöme*) about the present or future reality of certain rights and duties and that, even so, a transaction does express (*uttrycker*) a representation—an imaginational representation (*fantasiföreställning*)—of certain rights and duties. Here Hägerström is not using "imaginational representation" to refer to the metaempirical nature of rights and duties (as the word *fantasi* might suggest in connection with his overall understanding of rights and duties); rather (as *föreställning* suggests in connection with his theory of knowledge

[37] See Hägerström 1961, 100–1, 111ff. Cf. Hägerström 1927, 25ff., 35ff.; Hägerström 1934b, *passim*; and the 1935 essay in Hägerström 1961. Cf. Olivecrona's introduction to Hägerström 1961, 27–56. Hägerström does not use any Swedish expression equivalent to *legal transaction* (he will occasionally use the German term *Rechtsgeschäft*). Instead, he uses *viljeförklaring* and *förklaring av vilja* in *two* senses, referring to both a declaration of will and a transaction (and he continues to do so even after arguing that a transaction is not a declaration of will). Hägerström maintains that the theory of transactions as declarations of will is traceable to the natural-law idea of a *signum*, or *declaratio voluntatis*, to explain which he proceeds from an account of an absolute monarch's prerogative to rule as he likes. In an absolute monarchy, the imperative laid down by the law seems to serve the sole purpose of notifying the subjects of the sovereign's desires (*önskan*, *önskning*): What is essential is not the law (the way such desires are formulated), but the desires themselves. If we as subjects should learn of the sovereign's desires from a source other than the law (supposing we have come to know that the sovereign has changed his mind about a decree he has issued), we will then be bound to comply not with the law or the official order, but with the sovereign's real desires. A law creates obligations. The sovereign's desires are, strictly speaking, the law. It is the sovereign's desires that give rise to an obligation of the subjects: The sovereign need only desire to obligate his subjects, and the subjects are ipso facto obligated; the expression of a desire is entirely secondary and instrumental to the desire itself. From this standpoint, a sovereign's desire has the inherent power to fulfil itself, working in the same way as an act of will does with respect to ourselves, an example being my purpose (*föresats*) to move my arm, in which case all I will have to do is simply *want* to move my arm. From here Hägerström argues that the absolute sovereign's laws communicate not merely a desire but the sovereign's will: *Sic volo, sic iubeo*. It is in this sense that law is said to be the sovereign's will. Cf. Hägerström 1961, 113–4, 109.

and reality), he is referring to the existence of a descriptive element in the non-descriptive (or nondeclarative) language in which a transaction is expressed.

Hägerström put his finger here on what R. M. Hare would later call the *phrastic* of a sentence, namely, the part of a sentence that, in Hare's words, "points out or indicates" something, whether the sentence is descriptive or prescriptive. In fact, Hägerström observes that our imaginational representation of certain rights and duties does not by itself suffice to establish a transaction: An additional something will have to come into play, because similar representations also appear in what are only the drafts or plans for a transaction. But, as Hägerström comments with an analytic mind, if we are to understand what needs to be added to a mere representation of certain rights and duties, so that there may be a transaction, it becomes "absolutely necessary" to consider that language (*språk*) not only expresses (*uttryck*) and communicates (*meddelar*, "informs us about") representations, but also expresses and serves to elicit (*väcka till liv*) practical or emotive attitudes (*praktiska inställningar eller känslor*).[38]

Hägerström argues that transactions are formulated in a language having an imperative function, which language is one among various kinds of nondeclarative language. Language whose function is imperative is what must be added to the representation of certain rights and duties in order to have a transaction: A transaction "imperatively expresses [*i imperativisk form*] an imaginational representation about the coming into existence of rights and duties"; what is being said in carrying out a legal transaction is that certain "legal rights and duties […] must come into existence [*skola inträda*]" (Hägerström 1961, 106; my translation).[39]

Hägerström examines *ex professo* what, using Hare's terminology, I called the phrastic of a transactional imperative: He asks what it is that we represent to ourselves (what we refer to) when making a legal transaction. He finds that the parties to a legal transaction do have in mind certain effective advantages (for themselves or for others) as well as certain concrete behaviours (their own or those of others), and they always assume that these advantages and behav-

[38] Hägerström uses the interrogative "Who's there?" as an example of a sentence that neither expresses nor communicates representations but merely expresses the speaker's desire to know something unknown; he uses the optative "If only it were sunny" as an example of a sentence expressing a representation (of sunny weather) connected with a feeling of pleasure; and in imperative sentences generally he sees a type of language aimed at eliciting practical attitudes. See Hägerström 1961, 101–4. On Hägerström's research on interrogative language, see Marc-Wogau 1968, 181–94. On the phrastic, see Hare 1952, 18.

[39] I choose to translate *imperativisk form* to *imperatively* and *imperative function* because Hägerström's examples of transactional formulas (like "I offer" and "I accept") make it clear that when Hägerström describes such formulas as having an *imperativisk form*, he cannot be referring to their grammatical form, but to something else, and this something can only be their function. On this point—and on the assumption that imperative language serves to influence behaviour—see Hägerström 1961, 104–6.

iours ultimately constitute the content of rights and duties, more or less consciously understood as ideal powers and constraints that precede and justify the enjoyment of those advantages and the performance of those behaviours. These *ideas* of right and duty come into full view and reveal their imperative function when a controversy arises and a judge is called on to decide who is entitled (has a right) to a certain advantage and who is obligated (has a duty) to have the behaviour that will bring about or secure the advantage in question (Hägerström 1961, 120–9).

Hägerström is too careful a realist, in considering concepts that have no correspondence to effectual reality, to simply replace them with factual or empirical notions. He rather examines these concepts and develops their implications so as to come at the function they fulfil, however empirically unfounded the concepts may be. Hence, adducing examples of transactional formulas, he rephrases them from the indicative mood (in which they are commonly used) to the imperative mood (which more accurately reflects their real meaning), and he never translates them to commands aimed at having people behave one way or another but rather frames them as imperatives about the ought of rights and duties (their having to take place). Thus, the formula "I am transferring my property right" means [not "Have this thing!" but] "This thing ought to be (*skall vara*) yours"; likewise, the formula "I am offering this to you" means [not "Take what I'm offering to you!" but] "The rights and duties this offer refers to ought to come into existence (*skola inträda*)"; lastly, the formula "I accept" means [not "Give me what you're offering to me!" but] "The rights and duties the offer refers to ought to come into being (*skola gälla*)" (Hägerström 1961, 105; my translation).[40]

Further, Hägerström (1927 and 1941) examines some imperative formulas, similar to the ones just considered, occurring in ancient Roman law and in what we would now call transactions in ancient Roman law (examples being the formulas *familiam habeto, ius potestasque esto*, *ei ius esto*, *sacer esto*, *heres esto*, *liber esto*), and in so doing makes the claim that these imperatives were addressed not to people or gods but, strictly speaking, to the world of law itself (or, better yet, the world of the right itself: *an die Welt des Rechtes selbst*), and that if we are to understand them we must consider them as if they created certain rights (*Rechte*). In the 1935 essay (now in Hägerström 1961), which this discussion proceeds from, Hägerström equates transactional activity with legislative activity: The parties to a legal transaction behave as if they were enacting a law (*som stiftande lag*) between them; and laws "are not imperatives (*imperativer*) in the common meaning of this term: [They are not] commands (*befallningar*)."[41]

[40] The alternative formulas enclosed within square brackets are mine.

[41] My translation. See also Hägerström 1927, 586; Hägerström 1941, 22ff., 35–6; Hägerström 1961, 104, 112. Among the most important investigations carried out by Hägerström are

It is necessary to distinguish in this regard a legal transaction's legal effect (*rättslig effekt*) from its psychological effect or influence (*psikisk effekt* or *påverkan*).

The legal effect of a legal transaction derives not from the legal transaction itself but from the laws and customs establishing the conditions under which the transaction acquires legal relevance (*juridisk relevans*), these being the conditions under which the legal apparatus will use force to exact compliance with the commitments undertaken: Anyone making a legally relevant transaction "is backed by the power (*makt*) represented by the laws that regulate the effectiveness (*effektivitet*) of legal transactions." Clearly, Hägerström uses *legal effect* to refer not to the presumed coming into existence of rights and duties, but to what results from the activity of judicial bodies acting to enforce the transactional clauses. This he does despite listing the ideas of a right and of duty as factors that help make the legal apparatus work: These ideas are not the legal effects of legal transactions but the psychological causes of such effects.

A legal transaction's psychological effects or influence (as opposed to its legal effects) are owed instead, says Hägerström, to the use in transactions of language having an imperative function. No doubt, the psychological effect is reinforced by the parties' awareness that their transaction has legal relevance, and so that the apparatus of the law can bring force to bear in enforcing the transactional clauses; yet the psychological effects in question cannot be equated with the parties' fear that the state may so intervene, so much so that even some nonlegal promises (known by the parties to be nonlegal) nonetheless exert a psychological influence on those who make them and those they are made to (Hägerström 1961, 104–6).

It follows from the above that the questions How does the imperative function of a legal transaction work itself out? and Does a legal transaction create, change, or extinguish rights and duties? must be answered disregarding a legal transaction's legal effects and taking instead into account its psychological ones.

In fact, Hägerström proceeds in his analysis on the assumption that a legal transaction—and so a promise—is an imperative but not a command. Several things urge this conclusion: Hägerström's definition of legal transactions as imperatives regarding the coming into being of certain rights and duties; his framing transactional formulas, which commonly occur in the indicative

indeed the historico-anthropological ones, and specifically noteworthy among these are the ones he devoted to Roman law (see, among others, Hägerström 1927, 1929b, 1934, and 1941). There is no room to enter into these investigations here, but see Faralli 1987. Karl Olivecrona edited the posthumous edition of *Der Römische Obligationsbegriff*, vol. 2 (Hägerström 1941), and in his own turn conducted some historico-anthropological investigations following the trail blazed by Hägerström. Olivecrona's "Editor's Preface" to *Inquiries into the Nature of Law and Morals* (Olivecrona 1953), a little-read or mentioned preface, figures among the most perspicuous short introductions to Hägerström's philosophy of law, and in it Olivecrona briefly and masterfully presents as well Hägerström's investigations into Roman law.

mood, as imperatives stating that certain rights and duties ought to come into being; his observations on the imperative formulas in Roman law that prefigure today's transactional formulas; his equating transactional activities to legislative activity, this in connection with his thesis that even statutes are imperatives but not commands; his explicit unwillingness to accept that it makes any sense to address a command to oneself; and, finally, his considering the psychological function of transactional imperatives to be the same in legal and nonlegal transactions alike.[42]

Hägerström writes that "whoever declares that he *is binding himself* to another person, who thereby acquires a claim, is aiming at an imperative: I *must* perform this or that for you" (Hägerström 1961, 104–5; my translation; italics in the Swedish original).

Hägerström here is not stating, "the promisor aims to *say*," but "the promisor aims to *do* something, namely, to set up or create an imperative *I must*." And this *I must* is not so much the meaning as the product of the words "I am binding myself to another."

Hence, in a promise, the words *I am binding myself to another* mean "an imperative *I must* (i.e., a duty) ought to come into existence," and in the promisor's mind they effectively create the *I must*, or duty, under consideration. And that is so independently of whether the promise is legally recognized.

"If a promise is legally recognized," Hägerström points out, "this adds no more [with respect to a nonlegal promise] than a declaration that certain special legal rights and duties *must* come into existence [*skola inträda*]" (Hägerström 1961, 105; my translation). Hence, it is not by virtue of being legally recognized that a promise (its wording or the language it is expressed in) can be endowed with its presumed capacity to create duties. A promise (as commonly conceived) has this meaning in itself, and it produces powers and duties on its own; what happens when a promise is legally recognized is no more than that the powers and duties it creates acquire a "special" legal status whereby they become enforceable under the law.

A transaction does not really create (or modify or extinguish) rights and duties. A realist like Hägerström cannot regard words as capable of creating (or modifying or extinguishing) anything, much less any "mystical" powers (such as rights) and constraints (such as duties): You cannot do things with words, as I would put it (*pace* J. L. Austin). There is, however, a general belief that the use of certain sentences can have this ability: Hägerström's historical inquiries provide an account of the way this belief originated as concerns the theory of law. It is through this belief that a transactional sentence—understood in the first place as meaning that certain powers and constraints (certain

[42] Hägerström (1961, 63) states that a command directed at oneself makes no sense (it is *orimlig*); Hägerström (1917, 59 and 132) states that issuing commands to oneself is something that may, by self-suggestion, play a role in reinforcing a previously formed purpose.

rights and duties) must come into existence—acquires an imperative function, namely, a psychological efficacy mediated by the idea that the powers and constraints (the rights and duties) referred to in the transactional sentence effectively come to exist, and that they do so by virtue of the transaction itself.

When people make promises, Hägerström says, they aim to create an imperative *I must* that is in force in the first place with respect to the promisors themselves, who are influenced in a passive way (*i passiv riktning*); the effect (*effekt*) on the promisees is that these persons feel they have the power to demand (*känner sig äga makten at kräva*) the performance of the promised behaviour, and they do so on the basis of a "You *shall* be able to demand" (*du skall kunna avfordra*), which influences them in an active way (*i aktiv riktning*) (Hägerström 1961, 105; my translation).

A legal transaction is not a command: It does not directly prescribe behaviours and does not exert an immediate suggestion comparable to the suggestion exerted by one who authoritatively orders someone, "Do this!" A legal transaction functions through the idea of the rights and duties the transaction is believed to create (or modify or extinguish). The idea of our having rights or duties has a directive function and guides our behaviour.

Olivecrona, who was clearly drawing inspiration from Hägerström, would later say that sentences meant to create (or modify or extinguish) legal relationships or statutes are imperatives devoid of addressees, and that these imperatives belong to (and perhaps even count as prime examples of) that type of language that J. L. Austin said is used to "do things with words," and which he accordingly termed performative language.[43]

Rights and duties are ideas and hence are not legal but psychological effects flowing from a transaction and are elicited—by the use of a certain type of language—in individuals duly conditioned by the upbringing they have received and by the social environment around them.

Legal effects, by contrast, are factually determined situations that the legal apparatus ultimately imposes in accord with statutes (and with custom, case law, and so on) regulating transactional activity. A legal transaction's psychological influence is made more efficient by the parties' awareness of the trans-

[43] The example "Do this!" is mine. See Hägerström 1961, 104–5, 110ff.; cf. Hägerström 1934b, 617ff. The imperative function that here Hägerström attributes to transactional formulas takes effect through the idea of rights and duties, and for this reason this function seems clearly akin to the imperative function that Hägerström attributes to norms. It is Hägerström's view that norms, too, are *ideas* (of norms): They are ideas associated with imperative expressions (for example, with the sentences contained in a statute); that, however, does not make them the same thing as these imperative expressions, for norms spring instead from a psychological conditioning, as discussed in Sections 13.3.2 and 13.3.4. For this reason, Hägerström cannot be understood as saying that a transaction *is* a norm; rather, a transaction can *create* (better yet, can be *believed* to create) a norm (a legal norm when the transaction is legal and a nonlegal norm when the transaction is not legal).

action's legal effects: After all, these effects are mediated by the idea that a legal transaction, once completed, creates (or modifies or extinguishes) certain "real" rights and duties; the legal transaction's psychological effects (the ideas of a right and of a duty) thus act on the parties and on judges and contribute to bringing about the transaction's legal effects.[44]

13.6. How Rightness and Justice Figure into Coercion

A distinction is in order that Hägerström uses but fails to call attention to. On one side of this distinction is rightness or correctness (*rätthet, riktighet*) and on the other is justice (*rättvisa* or *rättfärdighet*). In Hägerström's view, coercion under the law (*tvång*) is founded on an idea of justice which in many ways is bound up with the idea of rightness, and so with the idea and the sense of duty, but which is also connected with other ideas: Among these is the primitive idea of justice originating from a feeling of vengeance (*hämndkänsla*), an idea under which suffering must be repaid with suffering. A punishment consists in inflicting suffering.

The idea of a behaviour's rightness is connected with the idea that it is just (*rättvis*) for someone who has failed to behave rightly (*rätt*) to be forced to perform an action equivalent (*ekvivalent prestation*) to the right behaviour not performed.

As we saw in Sections 13.3.2 and 13.3.3, right behaviour is the behaviour which must *take place* and which for this reason ought to be *carried out*. It is right, for example, that property owners should not be deprived of the property they own; consequently, we ought on our part to stifle every impulse that may prompt us to appropriate other people's property. If we fail to behave in this right way, we will have to perform a behaviour equivalent to the behaviour we have failed to have: If we take someone else's property (wrong behaviour), we will have to return it (performance equivalent to the omitted right behaviour). And if we do not spontaneously carry out this performance equivalent to the right behaviour we failed to have, then it will be just to exact such performance coercively. Thus, it will be just to force a thief to return the stolen property.

With this example, the idea of just coercion is grounded in the idea of right behaviour, this by way of the relation set up through the linking idea of an equivalent performance: The rightness (*rätthet*) of returning the property and the justice (*rättvisa*) of exacting such restitution coercively rests on the very norm setting out the right behaviour, which in the example considered is the behaviour consisting in not stealing other people's property. The linking idea is that of an equivalent performance: It is on the basis of this idea that coercion is made just. Coercion is just insofar as the behaviour forced by coercion

[44] See Hägerström 1961, 106–10.

is a right behaviour, this being the behaviour which ought to have been performed—here, our not stealing—or a behaviour equivalent to it—here, restitution of the stolen property (Hägerström 1917, 100–1; cf. the first two essays in Hägerström 1966).

I spoke of thieves but not of punishments: I simply referred to the (coerced) return of the stolen property. This is because the idea of the justice of a punishment (infliction of suffering) is only partly founded on the idea of the rightness of a behaviour: The idea of an equivalent performance—the liaison between the idea of behaving rightly and the idea of justly forcing people to have the behaviour equivalent to the right behaviour they failed to have—is not entirely equipped to account for the idea of the justice of a punishment.

For clarity I will draw another distinction that in Hägerström is not explicit, and this is the distinction between coercion and the content of coercion. The aim here is become aware of the (psychological or ideological) foundation underpinning the justice of coercion, which justice is normally taken for granted and used as a background assumption in common legal consciousness.

The idea of equivalent performance grounds the justice of coercion by making reference to the *content* of coercion: Coercion is just insofar as its content (a coercively imposed behaviour) consists in the right behaviour (in the behaviour that ought to be performed) or in a behaviour equivalent to it.

A punishment, however, is not equivalent to a right behaviour that was not performed. For example, locking up a thief is not the equivalent of not stealing: Locking someone up does not return the stolen property to its rightful owner. So, too, imprisoning a murderer is not equivalent to respecting other people's lives: It will not give the victims their life back. Only returning stolen property is equivalent to the right behaviour the thief ought to have had; and only bringing the murdered person back to life is equivalent to the right behaviour the murderer ought to have had.

And yet it is a commonly held belief that coercively inflicting a punishment for criminal acts constitutes justice.

The distinction just drawn between coercion and its content prompts the following question: What makes it just to inflict a punishment? Is it the fact of coercion or is it the fact that its content—the punishment inflicted—causes suffering? This question and the distinction it is based on expand our horizon. I have thus far identified only one possible reason for the justice of coercion; namely, the content of coercion insofar as such content is a behaviour equivalent to the right behaviour that ought to have been but was not performed. We will now have to consider two other possible reasons for the justice of coercion: The fact of coercion itself and the fact that the content of coercion consists in inflicting suffering (punishment).

In Hägerström's view, the idea that inflicting a punishment is just draws on both the idea that coercion is just as such (as coercion) and the idea that the content of coercion is just insofar as it consists in inflicting suffering (punish-

ment). This second reason is based on a primitive idea of justice, which originates in a feeling of vengeance (cf. Hägerström 1917, 104–8). The first reason—the idea that coercion is just as such—can be traced to a distorted idea of equivalent performance. So let us now take a closer look at this distorted idea.

To explain how, through a distortion, coercion itself (in spite of its content not being a performance equivalent to a right but omitted behaviour) traces to the idea of a performance equivalent to a right behaviour that ought to have taken place but did not, and so how the justice of coercion as such is founded on the idea of rightness, Hägerström takes up the case of the compensation due when someone's property is damaged through mere carelessness.

Here those who cause damage neither intend to inflict damage nor realize they are inflicting it: They simply fail to exercise due care in judging the consequences of their behaviour, and for this reason they cannot be said to depart in any strict sense from the model of right behaviour (duty) that consists in not damaging other people's property. But still, it is commonly believed that compensation in the event of damage through mere carelessness is owed here, too, as a performance equivalent to a right behaviour that was not performed, just as it is owed in the case of intentional damage (I will not consider the criminal consequences attached to the wilful infliction of damage).

This mistaken common opinion, Hägerström submits, can be explained as follows: There is a general or class interest (*allmänt eller klassintresse*) in protecting property from damage, regardless of how such damage may come about (whether wilfully or by mere negligence). This interest prompts us to regard a certain degree of care in avoiding damage as a property owner's right, and so to regard careful and diligent conduct as that conduct which ought to take place (*bör ske*). This way the diligent conduct becomes a norm: It becomes the right behaviour that ought to be performed. Strictly speaking, the equivalent of an unperformed diligent behaviour should consist not in compensating the damage caused but rather in undergoing some sort of training or education aimed at instilling the needed diligence. And yet, since the interest the norm originates from is an interest in protecting property, and not an abstract interest in diligent behaviour as such, we are led to believe that compensation is the performance equivalent to the diligence that should have been exercised but was not. The interest in protecting property acts as a liaison between the idea of right behaviour and the idea of equivalent performance: Once the assumption is accepted that compensation for damage, whatever the cause of the damage, is equivalent to a right but unperformed behaviour, in such a way that compensation becomes itself a right behaviour (one whose performance is a duty), we will find it just to enforce such compensation should it not come about spontaneously.

Something along the same lines happens with punishment as well. Punishment does not strictly speaking constitute an equivalent performance engaged in for the benefit of someone who has fallen victim to a criminal act: It is said

to be restoration for the damage incurred by some social interests—for example, the interest in law abidance or the interest in maintaining a general sense of security—and this can be so in view of the ability of punishment to set a strong example for others to ponder. Most often, however, criminal offenders intend to hurt only the victims they strike, and they do so without considering the harmful consequences they indirectly and unintentionally bring about in such a way as to undermine social interests at large. Here, too, since with reference to social interests, right behaviour would consist in inducing an attitude of special care not to undermine social interests (like that in law abidance or in a general sense of security) the performance equivalent to the right but unperformed behaviour should consist not in subjecting criminals to punishment but, for instance, in forcing them to take special courses on the social damage that criminal behaviours cause.[45]

However, our common legal consciousness rejects the view that taking a course on the harmful consequences indirectly and unintentionally caused by criminal acts in society counts as a performance equivalent to the right behaviour the criminal ought to have but did not perform: The reason is that the norm prohibiting criminal acts originates not from an abstract interest in citizens' being aware of the social damage caused by criminal acts, but from the interest in having a deterrent against antisocial tendencies—a deterrent working by virtue of the exemplary nature of punishment—and maybe also from a social sentiment of vengeance (*en social hämndkänsla*), a case in point being the idea of retaliation in kind (*vedergällningsidé*), whereby justice requires criminals to suffer in the same way as those they cause to suffer.

Unlike compulsory courses on the social damage that criminal behaviours indirectly cause, neither the exemplary nature of punishment nor retaliation in kind (the *lex talionis*: evil repaid with evil) can make punishment a performance equivalent to the omitted right behaviour. Even so, once a norm sets out a punishment in consequence of a failure to have the right behaviour, punishment comes to be perceived as equivalent to the right but unperformed behaviour, and on this account we come to think that punishment by coercion is just.

Where punishment is concerned, the justice of coercion only apparently has its foundation in the principle of equivalent performance, and this appearance is something we come to have in virtue of a psychological distortion.

The failure to carry out a right behaviour is linked by a norm to coercion whose content consists in satisfying certain general or class interests or a desire

[45] Hägerström is not making superficial or irresponsible remarks aimed at abolishing the criminal system. Rather, he is trying to explain the psychological mechanisms that prompt us to think coercion just; in particular, since the principle of a performance equivalent to the right but unperformed behaviour plays a prominent role in our way of understanding the justice of coercion—despite at the same time seeming not to find application in all forms of coercion when looked at more closely—Hägerström sets out to show by what intervening factors this principle gets distorted and yet continues to appear to us to be at work.

for vengeance; this connection makes it so that the satisfaction of these interests or desires appears as the equivalent of the right but unperformed behaviour, and for this reason any coercion that takes this content will seem just by virtue of that fact alone. This way, rather than a behaviour becoming an object of coercion because equivalent to a right but unperformed behaviour, a behaviour is believed to be equivalent to a right but unperformed behaviour because of its being made a content of coercion. And if coercion grounds equivalence, and equivalence grounds the justice of coercion, then coercion finds within itself the foundation of its own justice: Coercion is just as such.

The point of Hägerström's remarks here is not that there is a general inclination, especially in developed societies, to regard coercion as just regardless of its content, that is, regardless of whether this content is disproportionate to the deed it is matched to, for example, or if it is cruel. And yet, in Hägerström's view, even restrictions to the content of coercion (examples being limitations on the compensation payable for unintentional damage, or a certain moderation in punishment) are in point of fact determined by general or class interests or by sentiments contrary to those originally inspiring the various contents of coercion. Thus, acting contrary to the interest in protecting property, as a counterweight to this interest, is an interest in not bringing everyone's activity to a standstill—whence the restriction on repayment for unintentional damage. Likewise, the interest in law-abidance and in a general sense of security, both of which go along with the general sentiment of vengeance, are counterbalanced by an interest in limiting a person's suffering and by the sense of humanity—whence the possibility of moderation in punishment.

In any event, the interests and sentiments on either side of this balance—or rather, the results they lead to once they are made into the content of coercion under a norm—wind up being rationalized through the previously described distorted psychological process, a process through which we come to believe that the satisfaction of such interests and sentiments is a performance equivalent to a right but unperformed behaviour, and that for this reason such satisfaction is justly made into a content of coercion.[46]

[46] See Hägerström 1917, 101–4. The example of education and training as equivalent to a correct but unperformed behaviour is adduced by Hägerström only with respect to criminal acts: Its extension to unintentional damage is mine. Similarly, some concepts that Hägerström mentions only in passing and some arguments he does not carry through completely have been elaborated on and made explicit. Hägerström (1920, 334) takes up the question of the forces that keep the common legal conscience on a leash (*föra i ledband*) and identifies these forces in the social interests that in fact determine punishment. Hägerström (1966, 183, 192) argues that a certain behaviour comes to be regarded as *intrinsically* bad (*ont*) when coercion is regularly observed to follow as a consequence of its occurrence; by the same token, the unpleasant consequences that are made to follow appear to us as connected with such behaviour *intrinsically*. See what Olivecrona (1939, 120ff.) writes along a similar line of reasoning.

13.7. More on Logical Reality and Effectual Reality

13.7.1. Kant behind Hägerström's Thesis That No Judgment Is Possible without the Logical Reality of Its Object

13.7.1.1. Kant on Judgment and the Nothing

For an adequate understanding of what Hägerström tells us in regard to the logical reality of the content of a representation which any authentic judgment is about, we must bear in mind the pages that Kant devotes to (*a*) the crucial relevance of the principle of contradiction as a *conditio sine qua non* of any judgment, and (*b*) his fourfold distinction of the nothing (*Nichts*) as opposed to the something (*Etwas*).

Kant has this to say in regard to (*a*):

> [(a1)] The universal, though merely negative, condition of *all our judgments* in general, whatever be the content of our knowledge, and however it may relate to the object, is that they be *not self-contradictory*; for if self-contradictory, these judgments are in themselves, *even without reference to the object*, *null and void*.[47] […]
>
> [(a2)] *The principle of contradiction* must therefore be recognised as being the universal and completely sufficient *principle of all analytic knowledge*; […]. The fact that no knowledge can be contrary to it without self-nullification, makes this principle a *conditio sine qua non*, but not a determining ground, of the truth of our [non-analytic] knowledge. Now in our critical enquiry it is only with the synthetic portion of our knowledge that we are concerned; and in regard to the truth of this kind of knowledge we can never look to the above principle for any positive information, though, of course, since it is inviolable, we must always be careful to conform to it. (Kant 1965, B 189–91; italics added on first, second, and third occurrence; square brackets in original on last occurrence)[48]

[47] Kant also writes: "The proposition that no predicate contradictory of a thing can belong to it, is entitled the principle of contradiction, and is a universal, though merely negative, criterion of all truth. For this reason it belongs only to logic. It holds of knowledge, merely as knowledge in general, irrespective of content; and asserts that the contradiction completely cancels and invalidates it" (Kant 1965, B 190). Here is Kant's original: "Der Satz nun: Keinem Dinge kommt ein Prädicat zu, welches ihm widerspricht, heisst der Satz des Widerspruchs, und ist ein allgemeines, obzwar bloss negatives Kriterium aller Wahrheit, gehört aber auch darum bloss in die Logik, weil er von Erkenntnissen, bloss als Erkenntnissen überhaupt, unangesehen ihres Inhalts gilt und sagt: dass der Widerspruch sie gänzlich vernichte und aufhebe" (Kant 1913, B 190).

[48] Here is Kant's original: "[(*a*1)] Von welchem Inhalt auch unsere Erkenntniss sei und wie sie sich auf das Object beziehen mag, so ist doch die allgemeine, obzwar nur negative Bedingung *aller unserer Urtheile* überhaupt, dass sie sich *nicht* selbst *widersprechen*; widrigenfalls diese Urtheile an sich selbst (*auch ohne Rücksicht aufs Object*) *nichts* sind. […] [(*a*2)] Daher müssen wir auch den *Satz des Widerspruchs* als das allgemeine und völlig hinreichende *Principium aller analytischen Erkenntniss* gelten lassen […]. Denn dass ihm gar keine Erkenntniss zuwider sein könne, ohne sich selbst zu vernichten, das macht diesen Satz wohl zur *conditio sine qua non*, aber nicht zum Bestimmungsgrunde der Wahrheit unserer Erkenntniss. Da wir es nun eigentlich nur mit dem synthetischen Theile unserer Erkenntniss zu thun haben, so werden wir zwar jederzeit bedacht sein, diesem unverletzlichen Grundsatz niemals zuwider zu handeln […]" (Kant 1913, B 189–91; italics added on first, second, third, and fourth occurrence).

Further, where (*b*) is concerned, Kant (1913, B 347–9) distinguishes four types of nothing as opposed to the something. The two types of nothing that are relevant for us here are the first one and the fourth one, the former of which Kant calls *ens rationis*, or *Gedankending* (a thought-thing), and the latter of which *nihil negativum*, or *Unding* (non-thing). He writes this in regard to the first and the fourth type of nothing:

> We see that the *ens rationis* (1) is distinguished from the *nihil negativum* (4), in that the former is not to be counted among possibilities because it is mere fiction (although *not self-contradictory*), whereas *the latter is opposed to possibility* in that the concept cancels itself. (Kant 1965, B 348–9; italics added on second and third occurrences)[49]

Kant's first type of nothing (the type "thought-thing," *das Gedankending*, or *ens rationis*) is relevant with respect to Hägerström's notion of what is logically real (determinate, consistent, noncontradictory, or possible), and hence with respect to his notion of the content of the representation a judgment is about (see Sections 13.3, 13.4.2, 13.5 and 13.7).

Kant's fourth type of nothing (the type "non-thing," *das Unding*, or *nihil negativum*) is relevant with respect to Hägerström's notion of the nothing, namely, of what is non-logically real (nondeterminate, inconsistent, contradictory, or impossible), which includes impossible contents of representations (nonentities), the apparent subject matter of what Hägerström calls impossible judgments, and which I call pseudojudgments (see Section 13.2 above).

13.7.1.2. Hägerström on the Nothing, Logical Reality, and Effectual Reality

13.7.1.2.1. The Nothing

The nothing, in Hägerström, is what is contradictory, indeterminate, inconsistent: It is that which is logically nonreal and so is neither effectually real nor effectually unreal in any effectually real complex, nor *can* it be either of those two things. For this reason, Hägerström writes that the negative judgment applying the principle of contradiction attests what effectual reality in itself is; it attests that "determinateness or connectedness comprises effectual reality" (*Bestimmtheit oder Zusammenhang Wirklichkeit einschließt*: Hägerström 1929a, 128; cf. Hägerström 1957, 138; see Section 13.5). Since noncontradiction is the principle not only of knowledge but primarily of reality itself, what lacks logical reality also lacks effectual reality: It is neither effectually real nor effectually unreal; it *cannot* be either of those two things.

[49] Here is Kant's original: "Man sieht, dass das *Gedankending* (n. 1.) von dem Undinge (n. 4.) dadurch unterschieden werde, dass *jenes* nicht unter die Möglichkeiten gezählt werden darf, weil es bloss Erdichtung (obzwar *nicht widersprechende*) ist, *dieses* aber *der Möglichkeit entgegengesetzt ist*, indem der Begriff sogar sich selbst aufhebt" (Kant 1913, B 348–9; italics added).

Hägerström's notion of what *is* contradictory, namely, logically non-real, takes up Kant's fourth type of nothing (the type "empty object without a concept," *leerer Gegenstand ohne Begriff*: Kant 1913, B 348), or *nihil negativum*. In Kant's words, the "object of a concept which contradicts itself is nothing, because the concept is nothing, is *the impossible*, *e.g.* a two-sided rectilinear figure (*nihil negativum*)" (Kant 1965, B 348; italics added on first occurrence):[50] "it is opposed to possibility in that the concept cancels itself"; it is a "non-thing (*das Unding*)"—it is *intigt*, as Hägerström (1951, 84) writes.

13.7.1.2.2. Logical Reality

As we saw in Section 13.7.1.1 at item (*a*), Kant clearly makes the point that in not contravening the principle of contradiction lies the *conditio sine qua non* of any judgment (not only analytic but also synthetic judgments): This Latin phrase, as used by Kant, describes a condition absent which there can be *no* judgment because there is no object for any judgment. Now, with respect to the object of any judgment, that is, with respect to the content of a representation, which is the object of any judgment, Hägerström presents a notion of logical reality coinciding with the notion of what is *not* contradictory, which in Kant had been presented as the *conditio sine qua non* that every judgment must fulfil in order to be an authentic judgment.

Add to this that, as we saw in Section 13.7.1.1 at item (*b*), the notion of what is *merely* not contradictory coincides in Kant with his notion of *Gedankending* or *ens rationis*—namely, with what he identifies as the first type of nothing (the type "empty concept without an object," *leerer Begriff ohne Gegenstand*: Kant 1913, B 348)—and that this same notion becomes, in Hägerström, the notion of logical reality. In other words, what in Kant was the first type of *nothing* becomes in Hägerström the first type of *reality* (the most elementary type), namely, logical reality, or *ein bestimmter Gedankengegenstand*, a determinate object of thought: The *bestimmter Gedankengegenstand* that Hägerström speaks of is the *Gedankending* that Kant speaks of (Hägerström uses *Gedankengegenstand*, or *tankeföremål*, referring to the content of a representation of words in regard to the principle of contradiction: Hägerström 1929a, 121; cf. Hägerström 1957, 128).

13.7.1.2.3. Effectual Reality

As we saw in Section 13.2, the object of any judgment, that is, the content of a representation, is logically real, and any complex in relation to which this ob-

[50] Here is Kant's original: "Der Gegenstand eines Begriffs, der sich selbst widerspricht, ist Nichts, weil der Begriff Nichts ist, *das Unmögliche*, wie etwa die geradlinige Figur von zwei Seiten (*nihil negativum*)" (Kant 1913, B 348; italics added on first occurrence).

ject is judged is effectually real: According to Hägerström, a judgment is a cognitive act of consciousness through which a knowing subject—having apprehended, presupposed, and *attested* as logically real an object to be judged—judges this object as effectually nonreal or as effectually real with reference to a wider complex apprehended as effectually real *in toto* (Hägerström 1929a, 120–1, 131–2; cf. Hägerström 1957, 126–7, 143–4).

In my interpretation of Hägerström, what is effectually real is any complex that on the whole is determinate (consistent, noncontradictory), as well as anything not merely represented which is found in a complex that on the whole is determinate.

Hägerström mainly uses *complex* (*Komplex* in German and *komplex* in Swedish) to designate effectually real worlds to which the content of a representation is referred in making a judgment about the effectual reality or noneffectual reality of such content (Hägerström 1929a, 120; cf. Hägerström 1957, 127).

He mainly uses *world*, rather than *complex*, to designate two conflicting, or contradictory, effectually real complexes to which two judgments, the first of which denies what the other affirms, refer the content of the same representation, as is the case with the content "men-who-breathe-through-gills" when that content is referred to the effectually real complex where men do not breathe through gills, on the one hand, and the effectually real complex where men do breathe through gills, on the other hand.

Finally, Hägerström mainly uses the German *Zusammenhang* and the Swedish *sammanhang*, rather than *complex* and *world*, to designate (*i*) the connection between two effectually real complexes and (*ii*) the world of spatiotemporal experience (Hägerström 1929a, 128–31; cf. Hägerström 1957, 138–43). The German *Zusammenhang* and the Swedish *sammanhang* have frequently been translated as context, a term I have not adopted here. The primary sense of those two words is that of a connection understood as a relational unity. I have thus translated them as "connection" or "connectedness" for case (*i*), whereas for case (*ii*), I have preferred to use "spatiotemporal world."[51]

13.7.2. A Crucial Passage by Hägerström and a Number of Misinterpretations

In Section 13.2.1, a clear distinction was introduced between *logical reality*, for the Swedish *realitet* and the German *Realität*, on the one hand, and *effectual reality*, for the Swedish *verklighet* and the German *Wirklichkeit*, on the other. I introduced this distinction so as to mirror a difference in linguistic usage which occurs in Hägerström's original texts, but which the English language

[51] It may be interesting to note that both words, *Zusammenhang* and *sammanhang*, refer etymologically to what "hangs or stands together," and so to its *cum-sistere*, in Latin, or to its *consistency*, in English.

cannot express with the single word *reality*, and which Hägerström's translators and commentators, even those who are native Scandinavian speakers, regularly ignore, thus posing serious obstacles to a proper understanding of his thought.

Indeed, in Hägerström, *realitet* (or *Realität*) is the reality of possibility, and so is a logical reality, whereas *verklighet* (or *Wirklichkeit*) is the reality of an actualized possibility, and so, whatever the actualized possibility may be—even one actualized in a fiction, let us suppose—this reality will be an effectual reality. One must bear in mind that Hägerström was trained in the Kantian-Hegelian tradition and that *Realität* and *Wirklichkeit* are not synonymous in this tradition. It should also be mentioned, incidentally, that even Kant's and Hegel's English translators at times ignore the question, and so it happens, for instance, that Hegel's well-known statement "Was vernünftig ist, das ist wirklich; / und was wirklich ist, das ist vernünftig," is incorrectly translated as "What is rational is *real*; / and what is *real* is rational" in Hegel 2001, whereas it is perceptively translated as "What is rational is *actual*; / and what is *actual* is rational" in Hegel 2003 (italics added). The translation of *wirklich* as *actual* reveals that the translator is aware of the different meanings of *Realität* and *Wirklichkeit* in Hegel's usage.

Quoted below is Hägerström's most pertinent passage on logical reality (*Realität*) and effectual reality (*Wirklichkeit*). In this passage Hägerström intends to show that the principle of contradiction attests what effectual reality is in itself, and since under this principle, he maintains, two judgments, one of which denies what the other affirms, cannot both be true, he asks what in a negative judgment is denied and what in an affirmative one is affirmed:

> What does it mean that a judgment denies something; that it denies, for example, that men breathe through gills? The negation seems to concern logical reality (*Realität*) itself. But it appears to be impossible that a judgment—in which invariably the logical reality (*Realität*) of something is attested—should deny the logical reality (*Realität*) of that about which the judgment is made. Pure nothingness cannot be judged at all. But what is that thing whose logical reality (*Realität*) is attested in a negative judgment? Here what can come into play is only the representation of that thing whose logical reality (*Realität*) seems to be denied, for example, the representation of men who breathe through gills. In a negative judgment ["Men do not breathe through gills"], such a representation must necessarily be apprehended as present. One finds that the content [men-who-breathe-through-gills] of this representation is logically real (*real*) insofar as one distinguishes such content within that representation as within a whole; however, one also concomitantly finds that the complex to which the representation along with its content belongs [namely, the effectually real complex where men do not breathe through gills] has a character different from that content [men-who-breathe-through-gills]. This "effectually non-real" ("*nicht wirklich*") is only a negative expression expressing the positive character of the *in toto* effectually real (*des in toto Wirklichen*) [namely, of the effectually real complex where men do not breathe through gills]. Conversely, in a judgment, an assertion ["Men effectually breathe through gills"] means our consciousness of this: that the aforementioned representational content [men-who-breathe-through-gills] occurs in what is apprehended as *in toto* effectually real, not only in a representation but also in the [effectually real] complex to which that representation belongs. From this it follows that two judgments, the first of which ["Men do not breathe through gills"] denies what

the other ["Men breathe through gills"] asserts, must necessarily have as their contents different worlds having no mutual connection [these are the effectually real world where men do not breathe through gills and the effectually real world where men breathe through gills]. (Hägerström 1929a, 120; my translation; cf. Hägerström 1957, 126–7)[52]

In the original version of this passage (which you can see in the footnote), Hägerström patently uses the German *Realität*, or *real*, when speaking of the content of a representation, and he instead uses the German *Wirklichkeit*, or *wirklich*, when speaking of *any* complex to which a representation, along with its content, is referred (or to which it belongs, as he says), namely, not only when speaking of the effectually real complex in which men do not breathe through gills, but also when speaking of the effectually real complex in which men do breathe through gills, as in the case of a fiction, I would say. Through a first-order negative and a first-order affirmative judgment respectively, the *same logically real* content of a representation (the content "men-who-breathe-through-gills") is judged with reference to two *different* and conflicting effectually real complexes (which, disjunctively considered, are both effectually real).

The way we interpret the passage quoted above is crucial. The content of the representation is the same (men-who-breathe-through-gills) in the negative and the affirmative judgment alike: in "Men do not breathe through gills" and in "Men breathe through gills" alike. What changes in these two judgments, the negative and the affirmative one, is not the object men-who-breathe-through-gills but the effectually real complex we refer to when judging this object: the effectually real complex where men do not breathe through gills in the negative judgment and the effectually real complex where men do breathe through gills in the affirmative one.

[52] Here is the German original: "Was bedeutet: ein Urteil verneint etwas, z. B., daß Menschen mit Kiemen atmen? Die Verneinung scheint die Realität [logical reality] selbst zu betreffen. Aber daß ein Urteil, in dem stets die Realität [logical reality] von etwas ausgesagt wird, die Realität [logical reality] dessen, worüber geurteilt wird, verneinen sollte, erscheint unmöglich. Über das reine Nichts kann überhaupt nicht geurteilt werden. Aber was ist das, wovon in einem verneinenden Urteil Realität [logical reality] ausgesagt wird? Hier kann nichts anderes in Frage kommen als die Vorstellung von dem, dessen Realität [logical reality] scheinbar negiert wird, z. B. die Vorstellung von Menschen, die mit Kiemen atmen. Eine solche [Vorstellung] muß in dem verneinenden Urteil als vorhanden aufgefaßt werden. Man findet, daß der Inhalt dieser Vorstellung real [logically real] ist, indem man ihn in der Vorstellung als dem Ganzen unterscheidet, findet aber zugleich, daß der Komplex, zu dem die Vorstellung samt ihrem Inhalt gehört, einem [*sic*] von letzterem verschiedenen Charakter hat. Dieses "nicht wirklich" [effectually non real] ist nur ein negativer Ausdruck für den positiven Charakter des in toto Wirklichen [effectually real]. Umgekehrt bedeutet die Bejahung in einem Urteil das Bewußtsein davon, daß in dem in toto als wirklich [effectually real] Aufgefaßten der betreffende Vorstellunginhalt nicht nur in der Vorstellung vorkommt, sondern auch in dem Komplex, zu dem diese gehört. Hieraus folgt, daß zwei Urteile, von denen das eine verneint, was das andere bejaht, verschiedene Welten zum Inhalt haben müssen, die keinen Zusammenang miteinander haben" (Hägerström 1929a, 120; cf. Hägerström 1957, 126–7).

That this is the only reading which adequately explains the passage in question is usually not grasped, and so neither is the importance of the thesis advanced by Hägerström, who distinguishes two functions in first-order judgments, negative and affirmative alike: (*a*) to attest logical reality (*Realität*, or consistency) and (*b*) to judge the effectual reality (*Wirklichkeit*) of what has been attested as logically real.

Hägerström's commentators either overlook the passage last quoted or, when they do consider it, they interpret it extravagantly. Thus, for example, according to the most devout Hägerström scholar, Martin Fries (1944, 304), what Hägerström is considering in that passage is a negative and an affirmative judgment having two different objects (men-who-breathe-through-gills for the negative judgment and men-who-breathe-through-lungs for the affirmative one) and a single effectually real complex which both judgments refer to, this being the complex in which men breathe through lungs.

Even Bo Petersson (1973, 49ff.) fails to grasp that, in the same passage, the object of the negative judgment and the object of the affirmative one are the same (the same logically real content of a representation, namely, the content men-who-breathe-through-gills), and that what change are instead the effectually real complexes the two judgments refer to. Consequently, he ventures into an unlikely interpretation of Hägerström based on a distinction between *objektiv verklighet* (objective effectual reality) and *subjektiv verklighet* (subjective effectual reality), a distinction that Hägerström himself (1929, 127; cf. 1957, 136) disqualifies by branding as a *contradictio in adjecto* his own momentary use of the expression *subjektive Wirklichkeit* (subjective effectual reality).[53]

Hägerström's original texts are either in Swedish or in German. All of Hägerström's commentators I know of, including those who use his original texts, pass over his linguistic usage concerning *Realität* and *realitet* (which I am rendering as "logical reality") and *Wirklichkeit* and *verklighet* (which I am rendering as "effectual reality").[54] The above-mentioned Fries (1944), in his

[53] Bo Petersson (1973, 16) assumes that *realitet* (logical reality), *verklighet* (effectual reality), and *existens* (existence) are synonymous in Hägerström, observing that Hägerström uses the terms *subjektiv verklighet* and *objektiv verklighet* for two different modes of something's belonging to the spatiotemporal world, namely, an indirect belonging and a direct one (ibid., 22; cf. Marc-Wogau 1968, 113ff.). Hägerström writes: "'Subjective effectual reality' is strictly a *contradictio in adiecto* even if, naturally, the thing which is qualified as effectually real may belong to what is *in toto* effectually real only as merely represented; and, naturally, it is only in this last sense that, for the sake of brevity, we speak here of a 'subjective effectual reality' in opposition to an 'objective effectual reality'" (Hägerström 1929a, 127; my translation; cf. Hägerström 1957, 136).

[54] As remarked in the previous pages, that usage is routinely ignored by Hägerström's English translators as well, since they use *reality* for both of the terms used by Hägerström: For instance, in R. T. Sandin's translations (Hägerström 1964) a number of gross inaccuracies are to be found (and some criticism of them can be found in Pattaro 1974b, 29–30, 50–1, 120–1). In addition, Sandin has also contributed to proliferating in the world a mistake regarding the title of Hägerström 1917 (*Till frågan om den objektiva rättens begrepp. I. Viljeteorien*). This work is

subject index, under the entry *realitet*, refers the reader to the entry *verklighet* and lists the entry *verklighet* providing the term *realitet* as a synonym.

Moreover, among the Scandinavian students of Hägerström, Jes Bjarup (1982), writing in English, reasons not on Hägerström's original texts, as would be more useful for the reader, but on the dubious and sometimes misleading English translations of Hägerström in circulation. One may wonder whether Bjarup uses these translations because they facilitate his objective as concerns Hägerström, which, it seems, is to issue invectives. By the same token, Bjarup (1978, 28) manipulates Hägerström's German original text (1929a, 119) by spuriously injecting words that do not appear in the original: Hägerström writes "Was versteht man unter Realität?"; Bjarup quotes "Was versteht man unter *Wirklichkeit oder* Realität?" (italics mine), adding on his own accord the two words I have italicised. This is a serious interpolation implying a synonymy between *Wirklichkeit* and *Realität*, a synonymy that Hägerström is far from intent on establishing, since he only uses *Realität* in the previously quoted sentence.

The best commentator on Hägerström's ontology, among those I know of, remains in my opinion Marc-Wogau (1968).[55] He too, however, fails to hew to Hägerström's linguistic usage as concerns logical reality and effectual reality, choosing to instead adopt only one word, *verklig* (in my translation *effectually real*), and to ascribe to it three concepts of reality that he finds in Hägerström, which he calls $verklig_1$, $verklig_2$, and $verklig_3$.[56]

often quoted under the erroneous title *Till frågan om den gällande rättens begrepp* (where *gällande* means "in force," while *objektiva* means "objective"). This erroneous title is used in Sandin 1962, 510, and in his translations of Hägerström (Hägerström 1964, 11, 318). The origin of this erroneous title is in Hägerström 1953a, a translation (by C. D. Broad, under the editorship of Karl Olivecrona) of a number of Hägerström's essays: in Hägerström 1953a, at point III, page V, under the heading "Original titles of the essays included in this volume," we find the erroneous Swedish title of Hägerström 1917 instead of the right one. In Broad's case, in Hägerström 1953a, the mistake can be imputed to an oversight, so much so that Broad 1964, 26, in commenting Hägerström 1917, correctly cites the original Swedish title. What instead happens with Sandin and some other scholars (who give the erroneous Swedish title of Hägerström 1917, this being the title they found, erroneously cited, in Hägerström 1953a at point III, page V) is that they apparently want to show they have read Hägerström 1917 in the original Swedish even though they may never have had it in their hands and instead rely on its English translation in Hägerström 1953a. It must be noticed that Hägerström wrote not only Hägerström 1917 but also Hägerström 1931, which carries the title *Till frågan om begreppet gällande rät* (however this is a review that Hägerström did of Ross 1929 and has nothing to do with Hägerström 1917).

[55] Marc-Wogau 1968 is a collection of essays that Marc-Wogau published at different times in his life.

[56] In Pattaro 1974b, 41–58, I accepted Marc-Wogau's diagrammatical reconstruction of Hägerström's ontology (Marc-Wogau 1968, 116), and in my own turn strayed from the vocabulary by which Hägerström expresses the concepts of logical reality and effectual reality. As I now consider Marc-Wogau 1968 with respect to its influence on my own work (Pattaro 1974b), I see it as an example of the opportunities missed by those who do not respect Hägerström's terminological usage.

According to Marc-Wogau, "*verklig*$_1$ = determined," "*verklig*$_2$ = belonging to what is *verklig in toto*, not merely as the content of a consciousness, that is, not as merely represented," and "*verklig*$_3$ = directly belonging to (or being an independent element in) the complex of spatiotemporal experience" (Marc-Wogau 1968, 117; my translation; cf. ibid., 116). He also observes that it would have been possible to use three different expressions for the three concepts he names *verklif*$_1$, *verklif*$_2$, and *verklif*$_3$—expressions such as *real* (in my translation *logically real*), *verklig* (in my translation *effectually real*), and *existerande* (a term I have not considered here but which I would translate as *existent*)—and he complains that Hägerström did not do so.[57] But still, Hägerström does use these three terms, and not synonymically at that. And in any event, what in Hägerström is existent, that is, "directly belonging to […] the complex of spatiotemporal experience," is also effectually real, and what is effectually real is also logically real.

[57] Marc-Wogau claims (without actually showing) that it is easy to document that Hägerström uses both *real* (in my translation *logically real*) and *verklig* (in my translation *effectually real*) for *verklig*$_1$, and *existerande* (in my translation *existent*) and *verklig* for *verklig*$_2$. As to *verklig*$_1$ as something determinate, it will be noted that what is *effectually* real, according to Hägerström, is no less determinate than what is *logically* real. Marc-Wogau (1968, 117) expressly observes that Hägerström uses *existerande* (in my translation *existent*) for *verklig*$_2$. It seems to me, however, that his critical observation makes sense only if we take Marc-Wogau to say that Hägerström *also* uses *verklig* (in my translation *effectually real*) for *verklig*$_2$.

Chapter 14

KARL OLIVECRONA'S LEGAL PHILOSOPHY

by Torben Spaak[*]

14.1. Introduction

Karl Olivecrona (1897–1980) and Alf Ross (1899–1979) were the most prominent of the Scandinavian realists, who were active from the late 1920s into the 1970s.[1] While Ross was better known on the international arena,[2] Olivecrona was in my view a more interesting thinker than Ross. To give the reader a brief introduction to Olivecrona's legal philosophy, I am going to focus in this entry on Olivecrona's thoughts on the concept of law (Section 14.2), rights (Section 14.3), coercion (Section 14.4), and the relation between law and politics (Section 14.5).

14.2. The Concept of Law

Olivecrona begins the first edition of *Law as Fact* (Olivecrona 1939) with a consideration and rejection of the view that law has binding force. He introduces the topic to be discussed in the following way:

> The most general definition of law seems to be that law is a body of rules, *binding* on the members of the community. Vague as it is, we may take this as our starting point for our investigation into the true nature of the law. It contains at least one element which, beyond doubt, is common to practically all those who have treated the subject. This is the assumption that the law is *binding*. Leaving aside for the time being the question how a rule is to be defined, we will first ask what is meant by the binding force of the law and try to decide whether the binding force is a reality or not. (Ibid., 9)

While Olivecrona does not explain what, exactly, he takes the binding force of law to be, the core idea must surely be that a binding legal rule "binds" the subjects of law in the sense that it obligates them (see Olivecrona 1951, 125; 1971, 10).

Having rejected several attempts to explain the nature of the binding force by reference to social facts, such as our wish to avoid sanctions, Olivecrona concludes that the binding force has no place in the world of time and space, but must be located in some sort of supernatural realm: "The absolute binding

[*] This article reports research carried out under the auspices of the Bank of Sweden Tercentenary Foundation. I would like to thank Robert Carroll for checking my English.

[1] On Ross, see Chapter 16 in this tome.

[2] Olivecrona's most important publications in English are (Olivecrona 1939, 1951, 1962, 1963–1964, 1971) and Ross's are (Ross 1946, 1957a, 1959, 1968).

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force of the law eludes every attempt to give it a place in the social context. [...] This means in the last instance that the law does not belong to the world of time and space. It must have a realm of its own, outside the actual world" (Olivecrona 1939, 14–5). But, he objects, this is absurd. The law could not be located in a supernatural world beyond the world of time and space, because there could be no connection between such a world and the world of time and space:

> There is one very simple reason why a law outside the natural world is inconceivable. The law must necessarily be put in some relation to phenomena in this world. But nothing can be put in any relation to phenomena in the world of time and space without itself belonging to time and space. Therefore all the talk of a law, which in some mysterious way stands above the facts of life, is self-contradictory. It makes no sense at all. (Ibid., 15–6)

As Olivecrona sees it, we have here the dividing-line between realism and metaphysics, between scientific method and mysticism in legal philosophy. To believe that law has binding force and that therefore law belongs in a supernatural world is to give up any attempt at a scientific explanation of law and legal phenomena and to indulge in metaphysics: "The binding force of the law is a reality merely as an idea in human minds. There is nothing in the outside world which corresponds to this idea" (ibid., 17).

Olivecrona does not, however, explain *why* there can be no connection between the world of the ought and the world of time and space; he just asserts that there can be no such connection. But, even though he does not say so, his critique owes a lot to Axel Hägerström's critique of Hans Kelsen's theory of law, put forward in a 1928 review of Kelsen's *Hauptprobleme der Staatsrechtslehre* (Hägerström 1953b). Hägerström argued that the very idea of the world of the ought is absurd, because this world cannot be thought *of* as even existing alongside the world of time and space.[3] For, he reasoned, no knowledge of any reality is possible, except through relating its object to a systematically interconnected whole, and the fact that the two worlds—the world of the ought and the world of time and space—are different in kind means that they cannot be coordinated in a systematically interconnected whole. As he puts it, "so far as I contemplate the one [world], the other [world] does not exist for me" (ibid., 267).

Although Olivecrona does not say so in the first edition of *Law as Fact*, it is clear from his analysis in the second edition of *Law as Fact* that he takes the absence of binding force to imply, or to be equivalent to, the absence of legal entities and properties, that is, the absence of legal relations: Since legal rules do not and cannot have binding force, they cannot establish legal relations. As we shall see, Olivecrona introduces in the second edition of *Law as Fact* the con-

[3] On Hägerström, see also Chapter 13 in this tome.

cept of a performatory imperative, in order to account for those legal rules that do not immediately concern human behavior (1971, chaps. 5, 8). The introduction of this concept is of interest in this context, because Olivecrona adds to it a consideration of the nature of the legal effect that is commonly supposed to follow from the utterance of a performatory imperative (ibid., 221–6. But see also Olivecrona 1940a, 40–1). Such legal effects, he points out, are clearly supersensible. Having pointed out that already the Romans operated with legal effects of this type, he explains that the situation is the same today:

> Relatively uniform ideas of ownership, monetary claims, many other kinds of right, corresponding duties, and legal qualities are disseminated among the general public. These rights, duties, and legal qualities are supposed to be created, modified, transferred, and extinguished through operative facts by virtue of the law. They form a supersensible world: in the sensible, natural world there are no rights and duties, or legal qualities. (Olivecrona 1971, 223)

He adds that in the world of time and space, there is only the psychological fact that people tend to *believe* that there is a legal effect, and, of course, the (sociological) fact that they tend to act accordingly (ibid., 224–6).

It is not absolutely clear from his account whether Olivecrona (*i*) takes the claim that legal rules have no binding force to imply, or to be equivalent to, the claim that there are no legal relations, or whether he (*ii*) takes these two claims to be synonymous, to be two sides of the same coin, as it were. Although I do not think much depends on whether (*i*) or (*ii*) is the better interpretation, I am inclined to think that (*i*) is closer to the truth. I find it natural to assume that he means that it is the obligatory quality of rules that gives rise to legal relations – if the rules were not binding, there would be no legal relations.

In any case, Olivecrona turns to consider Kelsen's theory of law, because he believes that this theory illustrates the necessity for believers in the binding force of law to make a distinction between the 'world of the ought' and the world of time and space (1939, 17–8). He seizes on the fact that on Kelsen's analysis, there is a connection between operative facts and legal consequence in legal norms that is as unshakeable as the connection between cause and effect in nature. And this connection, he points out, is such that the legal consequence *ought* to ensue when the operative facts are at hand.[4] He writes:

> A legal rule, according to Kelsen, has a peculiar effect in that it puts together two facts, e.g. a crime and its punishment, in a connexion which is different from that of cause and effect. The connexion is so described that the one fact ought to follow upon the other though it does not necessarily do so in actual fact. The punishment ought to follow the crime, though it does not always follow. Now this "ought" is not, in Kelsen's theory, a mere expression in the law or jurisprudence. It signifies an objective connexion that has been established by the law. (Ibid., 18.)

But, Olivecrona objects, it is simply impossible to explain in a rational way how facts in the world of time and space, such as the activity of the legislature, can

[4] On Kelsen's conception of legal norms see Section 8.3 in this tome.

produce effects in the 'world of the ought.' As he puts it (ibid., 21), "[a]t one time Kelsen bluntly declared that this is 'the Great Mystery.' That is to state the matter plainly. A mystery it is and a mystery it will remain forever."[5]

Let us also note that although Olivecrona does not criticize the view that law has binding force in the second edition of *Law as Fact* (Olivecrona 1971),[6] it is clear from his discussion of various other topics in the second edition, such as the concept of a right and the purely psychological nature of so-called legal effects, that he still rejects this view.

As is clear from the very first quotation above, Olivecrona conceives of law as a body of legal rules. So, having rejected the view that legal rules have binding force, he turns to consider the nature of such rules conceived of as lacking binding force. The *content* of a legal rule, he explains, is an idea of an imaginary action by a judge in an imaginary situation (Olivecrona 1939, 28–9). The *form* of legal rules, he continues, is imperative, because the lawmakers do not aim to inform us about the existence of certain ideas in their minds, but to impress a certain behavior on us (ibid., 31). He is, however, careful to point out that he does not have the grammatical imperative form in mind when he maintains that legal rules have imperative form. Statutory provisions are often phrased in the indicative or the subjunctive mood, but they always express an imperative (Olivecrona 1942, 9).

On Olivecrona's analysis, what is important is that an utterance (or a gesture) functions as an imperative, and although he is not explicit about it, Olivecrona appears to believe that an utterance functions as an imperative if it is *intended* to be an imperative. But, he continues, to determine whether a particular utterance is intended to be an imperative, one needs to consider the whole situation in which the utterance takes place (ibid., 16–7).

Pointing out that the command is the prototype of the imperative, Olivecrona (1939, 33–4) explains that a command works directly on the will of the recipient of the command, and that this means that it must have a *suggestive character*. He maintains, more specifically, that if a command takes effect there arises in most cases in the addressee's mind a value-neutral intention to perform the commanded action, that is, an intention that is not motivated by

[5] Kelsen (1984, 411) had said that "[w]hat actually takes place in the act of legislation is the big mystery of law and state, and for that reason—or so one is inclined to think—it seems justifiable that descriptions of the nature of this act should turn out to be unsatisfactory" (my translation). The German original: "[e]s ist das große Mysterium von Recht und Staat, das sich in dem Gesetzgebungsakte vollzieht und darum mag es gerechtfertigt sein, daß nur in unzulänglichen Bildern das Wesen desselben veranschaulicht wird." I am not, however, convinced that Kelsen had in mind the question of how the activity of the legislature can produce effects in the 'world of the ought' when he spoke of the "great mystery." Instead I am inclined to think that he was concerned rather with the question of how the state can obligate itself.

[6] To be sure, he mentions the idea of the binding force of law at several places in the book—for example, when he considers classical natural law theory—but does not discuss it like he did in the first edition (see, e.g., Olivecrona 1971, 9–11, 17–8, 40, 112–4).

the addressee's own wishes, and he adds that in some cases a command may actually trigger an action without the addressee's having had any intervening value-neutral intention (Olivecrona 1942, 7, 10–1).

Olivecrona (1939, 35–40) proceeds to explain that legal rules are not commands. Pointing out that the imperative theory, or, as I would say, the command theory, presupposes that there is a commander, he objects that there simply is no one person or group of persons who could be the commander(s). He notes that it is often suggested that the state, or someone representing the state, is the commander, but points out that this is not so. For one thing, there is simply no one who commands anything in the process of law making. For, on closer inspection, we see that neither the members of the parliament or of the government, nor the head of state commands anything: What they do is push certain buttons (when voting) or sign certain documents (when promulgating the law). Olivecrona concludes that the imperative theory of law could work only if there were some kind of superhuman entity who functioned as commander, but points out that there can be no such entity.

But if legal rules are not commands, although they have imperative form, what are they? Olivecrona explains that in addition to commands, there is a class of imperatives that we may refer to as *independent imperatives*. And he maintains that legal rules are best conceived of as such independent imperatives (ibid., 42–9).

On Olivecrona's analysis, there are three important differences between commands and independent imperatives. First, whereas a command is always issued by a certain person, an independent imperative is not issued by anyone in particular (ibid., 32–41). Second, whereas a command is always addressed to a certain person or persons and concerns a certain action or actions, an independent imperative, although it concerns a kind of action, is not addressed to anyone in particular. Olivecrona's idea, then, is that an independent imperative concerns a class of persons (the norm-subjects) and a class of actions (the action-theme), not particular persons and actions.[7] Third, whereas a command is in no way equivalent to a judgment, an independent imperative can sometimes be replaced by a sentence that expresses a judgment.

Olivecrona believes that this last circumstance explains why people believe that they can have knowledge of what we ought to do (ibid., 45–6). He objects, however, to the view that an independent imperative can be replaced by a sentence that expresses a judgment, that there are no real judgments behind the sentences that (appear to) express such judgments, but only a *psychological connection*, viz. a connection in a person's mind between the imperative expression and the idea of an action. What is really going on in the process of legislation, he explains, is that the legislature attempts to influence human behavior by making use of the imperative form (ibid., 21–2).

[7] Of course, this is also a characteristic property of rules, including legal rules.

We should note here that the claim that imperatives are psychologically effective is of central importance to Olivecrona's naturalistic theory of law—if they weren't psychologically effective, the theory would be seriously incomplete, since, on Olivecrona's analysis, we have no reason to believe that there are legal relations the knowledge of which could somehow motivate the citizens to act accordingly.

Olivecrona identifies, in keeping with this, two general conditions for the efficacy of legislation in society. First and most important, the citizens must display an attitude of reverence toward the constitution: "Everywhere there exists a set of ideas concerning the government of the country, ideas which are conceived as 'binding' and are implicitly obeyed. According to them certain persons are appointed to wield supreme power as kings, ministers, or members of parliament etc. From this their actual power obtains" (ibid., 53). This attitude is not self-supporting, however, but must be sustained by means of an incessant psychological pressure on the citizens (ibid., 53–4). Hence a second condition for the efficacy of legislation in society must be satisfied, viz. that there be an organization that handles the application and enforcement of the law: "There must be a body of persons, ready to apply the laws, if necessary with force, since it would be clearly impossible to govern a community only by directly influencing the minds of the great masses through law-giving" (ibid., 55).

Olivecrona's view of the concept of a legal rule is essentially the same in the second edition of *Law as Fact* as it was in the first edition, except that he introduces the concept of a performatory imperative, in order to account for those legal rules that do not immediately concern human behavior (Olivecrona 1971, chaps. 5, 8). The introduction of this concept is of interest, inter alia, because it amounts to a connection with (then) contemporary philosophy of language. As J. L. Austin (1975, 4–7) explains, a performative utterance, such as "I promise to lend you $100" or "I hereby invite you to dinner on Saturday night", has its main verb in the first person present, indicative, active (singular or plural), or is equivalent to such an utterance. It differs from ordinary statements of fact in that he who utters it (*i*) does not describe or report anything, which means that it cannot be true or false, and (*ii*) is usually thought to *do* something rather than to (merely) say something. Olivecrona (1971, 133–4) explains, in keeping with this, that a performatory imperative is an imperative whose meaning is that something shall be the case or come to pass, and that the assumption among lawyers, judges, and legal scholars is that legal effects are brought about through such imperatives. He offers the example (drawn from Roman law) of a young man who has been sold three times by his father, and who therefore, according to the law of the twelve tables, "shall be free from the father." This, he explains, is clearly an imperative, though it is addressed neither to the father nor to the son or to anyone else, but "is directed toward a change in the status of the son" (ibid., 220).

Olivecrona's analysis of the concept of a performatory imperative includes a consideration of the nature of the legal effect that is supposed to follow from the utterance of such imperatives. Olivecrona maintains, in keeping with his belief that there is no such thing as binding force, that there is no legal effect to be found—there is only the psychological fact that people tend to *believe* that there is a legal effect, and, of course, the (sociological) fact that they tend to *act* accordingly. For example, when a clergyman has declared a man and a woman to be married, the citizens as well as judges and other legal officials tend to believe that a change of legal positions has occurred, and they tend to act accordingly. But, he points out (ibid., 225), we need not assume the existence of a special legal effect in order to explain these facts, because "[w]e are all conditioned to respond to the act in certain ways, and we do it."

Finally, Olivecrona points out that belief in performative imperatives is connected with a belief in magic—the idea in ancient Rome being that the effect in question could be commanded into being—and that we can gain a better understanding of the workings of performatory imperatives if we keep this connection in mind (ibid., 230–1). He adds that he is not suggesting that contemporary judges and lawyers believe in magic in the same way that people did in ancient Rome, only that there are important similarities (ibid., 230–1). The main difference between then and now, he explains, is that whereas the Romans imagined that words alone could bring about the relevant effects, we now believe that it is the acting person's will that brings about the effects (ibid.).

14.3. Rights

Olivecrona begins his analysis of the concept of a right in the first edition of *Law as Fact* by pointing out that since we have seen that the idea of the binding force of law is an illusion, we must conclude that the idea of duties is subjective: Duty, he explains, "has no place in the actual world, but only in the imagination of men" (Olivecrona 1971, 75). He then maintains that the situation is essentially the same with regard to the concept of a right (ibid., 76–7).

While Olivecrona intends his remarks about rights to be applicable to rights in general, his focus is clearly on *legal* rights (ibid., 77). Accordingly, he considers various ways in which a legal property right might correspond to facts, giving special consideration to (*i*) the view that the right is identical with the favorable position typically enjoyed by the right-holder in regard to the legal machinery, and (*ii*) the view that the right is identical with the right-holder's security in enjoying actual control over the thing to which he has the right. These two alternatives, he explains, "are the only facts which could, with any semblance of truth, be said to correspond to the notion of the right to property as we conceive it" (ibid., 83). He rejects both alternatives, however (ibid., 83–8). The problem with (*i*), he explains, is that whereas lawyers think of the right as being independent of circumstances in the real world, the favorable

position in regard to the legal machinery depends precisely on such circumstances. Hence the right and the favorable position cannot be identical. The problem with (*ii*) is that the right-holder's security is thought to *presuppose* the right and can therefore not be identical with it.

Having thus argued that the term "right" does not refer to anything real, he maintains that the essence of the concept of a right is a *supernatural power*:

> The essence of the notion of a right is that of *power*. The owner "can" do what he likes with the object; the creditor "can" claim a sum from the debtor—that is the way we paraphrase the notion of a right when we are trying to explain what we are thinking of. [...] This power, however, does not exist in the real world. We have seen that it is not identical with the actual control over the object generally exercised by the owner, nor with his actual ability to set the legal machinery in motion. It is a *fictitious* power, an ideal, or imaginary power. (Ibid., 89–90)

He does, however, point out that the concept of a right nevertheless fulfills an important function in legal thinking, in that it *guides people's behavior* (ibid., 95). He explains that "[...] it is essential that the idea of a pattern of conduct should be awakened in the minds of those concerned and that they should be incited to follow it. This may easily be done by means of such notions as that of a right" (ibid., 95). The term 'right,' he explains, can fulfill this function by expressing an *imperative*, according to which the right-holder may act in such and such a manner and to maintain control over that to which he has a right, whereas others may not act in the same manner or interfere with the object of the right (ibid., 96).

In his 1962 essay on legal language and reality, he repeats the claim put forward in the first edition of *Law as Fact* that the term "right" fulfills a *directive* function, in the sense that it functions as a permissive sign for the right-holder and as a prohibitive sign for other persons (Olivecrona 1962, 182).

In the same essay, he also identifies a secondary function of the term "right," viz. to *convey information* (ibid., 185–9). There is, he points out, no doubt that one conveys information when one asserts, say, that a certain person owns a certain house. The problem, on Olivecrona's analysis, is that there is no fact of the matter that corresponds to the term "ownership." How, then, can one convey information by asserting that the person in question owns the house? To clarify the issue, Olivecrona considers an imaginary case, in which *B* tells *C* that *A* is the owner of a certain house, and asks, what does *C* learn when told by *B* that *A* is the owner of the house? He answers that *C* learns that *A* has at some point *acquired* the house (and that he has not sold it since), and that is all (ibid., 86). But, he points out, although this piece of information is highly useful, it is not information about *A's ownership* of the house, because, as we have seen, there simply is no fact of the matter as to whether *A* owns the house or not (ibid., 187).

Finally, Olivecrona points out that the term "right" sometimes fulfills a *technical* function, in the sense that it ties together two sets of rules in a way

that facilitates our efforts to render the content of those rules. On this analysis, he explains, "right" plays the role of a railway junction. Having the concept of ownership in mind, he explains that "[...] the expression 'right of property' serves as a connecting link between two sets of rules: on the one hand the rules about the acquisition of property, on the other hand penal rules and rules about damages, etc., which refer to the situation where one person is the owner of an object and another person does something with regard to the object"(ibid., 189–90). As should be clear, Olivecrona is here proposing an analysis that is very similar to the well-known analysis proposed by Alf Ross (1957a; 1959, chap. 6).

One may, however, wonder whether there is really a significant difference between the informative and the technical function of rights statements. As I see it, the technical function is just a special case of the informative function, which consists in conveying the information that a person has a right the import of which is made up of the content of the two distinct sets of rules that are connected by the right concept.

In the second edition of *Law as Fact*, Olivecrona reiterates the claim put forward in the 1962 essay that the term "right" fulfills two main functions in legal language, viz. to direct behavior and to convey information (Olivecrona 1971, 252). He also reiterates the claim that the term "right" fulfils a technical, or, as he puts it here, a connecting, function (ibid., 199).

We see, then, that Olivecrona rejects the concept of a right as that concept is understood by most lawyers and legal scholars, on the ground that it does not refer to any natural entities, or does not refer at all, while identifying three distinct functions that the right concept does fulfill in our legal thinking, viz. (*i*) an action-guiding, (*ii*) an information-conveying, and (*iii*) a technical or connective function. We might say that in doing this, he has explained how the concept of a right can be so useful in legal thinking, even though it does not refer to natural entities, or does not refer at all.

14.4. Coercion

In the fourth and final chapter of the first edition of *Law as Fact*, Olivecrona observes that the reader will now have arrived at the conclusion that, on his (Olivecrona's) analysis, law is essentially a matter of organized force. For, he points out, the reader will have realized that if law is not binding in the traditional sense, if it is only a question of the psychological effects of some independent imperatives, then law must be essentially a matter of organized force (Olivecrona 1939, 123). And, he adds, the reader is right.

Olivecrona, who takes the term "force" to cover not only "actual violence," but also "the influence exercised by the concentration of superior strength" (ibid., 126), puts forward inter alia the following five distinct claims that are related to the idea that law is a matter of organized force. The first claim is that

organized force is necessary to the existence of the law, in the sense that the law depends necessarily on the use of force by state organs, inter alia, in the case of police measures against disturbances, the infliction of punishment, and the execution of civil judgments. The idea appears to be that the law could not fulfill its function—to secure peaceful coexistence among human beings—if it did not make use of force (ibid., 124–5).

The reason why Olivecrona believes that organized force is necessary to the existence of law is that he believes that human beings are such that disaster and ruin would follow if they were left to their own devices. He puts it as follows:

> This organized force is actually the backbone of our community as it stands. It is absolutely necessary for this purpose. We cannot conceive a community—at least not under modern conditions—which is not based on organized force. Without that there could be no real security, not even with regard to life and limb. The hidden reserves of hate, of lust for revenge, and of boundless egoism would break through in a destructive way if not held in check by the presence of force, immeasurably superior to that of any single individual or any private combination. Men need taming in order to live peacefully together. But taming on such a great scale as is required here presupposes unconquerable force. (Ibid., 136)

It is clear that his view of human nature, or at least the tendency of humans to behave in certain ways, echoes that of Thomas Hobbes (1651, chap. 13, par. 9), who said that life in the state of nature would be "solitary, poore, nasty, brutish, and short."

Olivecrona's (1939, 134) second claim is that *law necessarily consists of rules about the use of force*: "The real situation is that law—the body of rules summed up as law—consists chiefly of rules about force, rules which contain patterns of conduct for the exercise of force." Olivecrona does not explain in detail what he has in mind when he maintains that legal rules are rules about force, but it seems that he conceives of legal rules as being addressed to judges and other legal officials, requiring them to use force in certain circumstances. For example, he points out that the rules of criminal and private law are essentially rules about force, even though they are also rules for private individuals. He adds that the rules of administrative law, too, are essentially rules about force in the sense that they presuppose that there is organized force behind them (ibid., 135).

Olivecrona's third claim is that *the force of law exerts its influence on social life chiefly indirectly*. He maintains that we must look beyond the immediate effects on particular individuals and take into account the general effects on the community as a whole, if we want to assess the social significance of organized force (ibid., 141). The truth of the matter, he explains, is that organized and irresistible force that is consistently applied by the state organs is much more important to the influence of law on social life than the immediate effects, say, of punishing some criminals or transferring property from debtors

to creditors in a few cases (ibid., 141–2). He explains that we tend to overlook the indirect influence of the force of the law, because we do not like to think of fear of sanctions as what motivates us to obey the law. But, he points out, in reality fear is never far away when we are dealing with the law. He is, however, quick to point out that this does not mean that we live under an ever-present fear of being subjected to the force of the law. Since it is intolerable to live in constant fear, we adapt to the circumstances and do not even consider the possibility of committing a crime (ibid., 148).

Olivecrona's fourth claim is that *law causes us to internalize the moral values and standards* that make up the content of the legal rules (ibid., 151). The main reason why we internalize the independent imperatives so readily, he explains, is that the *suggestive effect* of imperatives is enormous, especially when the power of the state, surrounded by august ceremonies, is behind the imperatives (ibid., 155).

Olivecrona's fifth claim—the first part of which is a special case of the fourth claim—is that *law influences our moral values and standards, rather than the other way around, and that abolishing the force of law would, as time passes, likely result in important—and dangerous—changes in the moral values and standards that we accept* (ibid., 160–1).

In his later writings, Olivecrona (1971, 270–3) reiterates the first and the second of these claims, but does not have much to say about claims (*iii*)–(*v*). His fullest treatment of these issues is to be found in the Swedish version of the second edition of *Law as Fact*, viz. *Rättsordningen* (Olivecrona 1976, chap. 7). Here he points out that in discussing the nature of legal rules, rights, and duties, we keep coming back to the concept of the *state*, because the legal rules are in certain ways connected with the state, and that therefore we need to consider the relation between law and the state (ibid., 261). As Olivecrona sees it, law and the state are interdependent, in the sense that neither could exist without the other (ibid., 262–6). And since he views the possession of coercive power (= organized force) as characteristic of the state (ibid., 262), we may conclude that he also believes that organized force is necessary to the existence of law.

Olivecrona explains that in modern states the coercive power of the state is normally kept in the background, and that the citizens do not think of the state as possessing coercive power, but rather as possessing an ideal power to enact binding laws (ibid., 267). He adds that if this view is widespread among the citizens, the state will as a result possess *psychological* power, and he points out that these two types of power—coercive and psychological—presuppose one another (ibid., 267–8).

He also reiterates the claim that law consists of rules about force, though he qualifies this claim by saying that some sanction-imposing rules, especially those on the constitutional level, are not themselves sanctioned, and that in any case not all legal rules could be sanctioned (ibid., 276). He concludes that

we cannot guarantee impartial administration of justice by pointing to the existence of sanction-imposing rules, but must instead be careful when appointing judges (ibid., 278).

Olivecrona ends his analysis of the relation between law and the state with a few words about the foundations of legal certainty (ibid., 279–82). He reasons that since the coercive power of the state is handled by persons—politicians and high officials—who themselves are not subject to legal sanctions, it might seem that there can be no legal certainty. But, he explains, this need not be the case, because the use of state coercive power is subject to control by the courts, though he adds that this way of organizing things obviously presupposes that the courts are independent (ibid., 280). He concludes that only judicial independence and sound judicial ethics can guarantee legal certainty, and he points out that this means that we need to stay vigilant and nurse the legal certainty that we do have very carefully:

> Thus both the idea of the state's divine omnipotence and the idea of a will of the people as prevailing evaporate in a sober-minded consideration of the real state of things. It is because of the respect for an established system of rules that the always relative state authority exists; and it is in the immensely complex play of strength in society that legislation changes and develops the system of rules in connection with the ideas and desires that manifest themselves in society and acquire predominant influence. But it is not a matter of course that the legal certainty in this will be lasting. It can happen that its foundations will crumble away unobserved. Legal certainty must be tended with care if it is to be preserved. It is very important, not least for this reason, to see clearly what is really there when we speak of a legal system. (Ibid., 282; translation by Robert Carroll)

It is clear that Olivecrona's thoughts about the role of force in the machinery of law are an important part of what makes the legal philosophy espoused by Olivecrona so interesting. Unfortunately, I cannot treat his analysis in detail here. Suffice it to say that while his analysis is valuable, it is doubtful whether his claims about law and force really concern the nature of law, in the sense of what is part of the concept of law.

14.5. Law and Politics

Olivecrona does not have much to say on the topic of law and politics, but he does maintain in the second edition of *Law as Fact* that in deciding a case the court is necessarily creating law for the particular case, because there will necessarily be a margin to decide between two alternative interpretations of the pertinent legal rule. This indicates that he does not believe in a clear separation between law and politics. He puts it as follows:

> The actual role of the courts is that of being a lawgiver for particular cases. The legal rules, whether laid down through acts of legislation or evolved in some other way, cannot supply exact patterns of behaviour for every contingency. There is always a more or less wide margin for deciding which of two or more alternatives are to be deemed lawful. The margin is so small as to be (in general) negligible when you put your name on the back of a bill of exchange. If you have

> been involved in an accident when driving your car, the margin may be very wide. All of us have to apply the rules of civil law in our relations with our fellow-citizens. In a great many simple cases, for instance when we pay a tradesman's bill, we know what we have to do without asking anybody for advice. When difficulties arise, we have to consult a legal expert. But the experts may disagree. There must be some ultimate authority capable of giving a definite answer to the question of lawful behaviour in the situation. This task is entrusted to the courts. *They supplement abstract rules of law by laying down particular rules for individual cases*. (Olivecrona 1971, 211; italics added)

The reason why there will always be a margin, or, if you prefer, why the judge will always have discretion, he explains, is that the judge must *evaluate* the purported operative facts or legal texts in order to decide the case, and that evaluations are not objective (ibid., 212–5). He does not, however, discuss the status of evaluations in this context, but simply assumes that they are not objective; and this is in keeping with his non-cognitivist meta-ethics (on this, see Olivecrona 1939, 46; 1941; 1951, 129–30; 1971, 112, 183).

To illustrate the way in which the judge must evaluate a purported operative fact, Olivecrona considers a hypothetical case in which *P* requires payment from *D* for goods delivered in accordance with a contract of sale (ibid., 212–3). *P* maintains that *P* and *D* were involved in talks that resulted in a contract being concluded, whereas *D*, although he agrees that the talks took place roughly as described by *P*, objects that no deal was ever concluded. What should the court do? Pointing out that the law on sale of goods presupposes that there is a contract of sale to begin with, Olivecrona explains (*i*) that the court cannot simply compare the facts as described by the parties with a description in the law of how a contract is concluded, because there is no such description in the law. Moreover, he continues, (*ii*) although the law reports may include a number of cases that concern the question whether a contract has been concluded, the case at bar will always be different in some respects from the cases in the law reports. He adds (*iii*) that the textbooks will not contain sufficient information on this question. He concludes that for these reasons, the court itself will have to decide whether a contract has been concluded or not. And, he insists, such a decision necessarily presupposes an *evaluation* of the purported operative facts (ibid., 213).

One may, however, wonder whether a judge who determines that a contract has been concluded between *A* and *B* is necessarily evaluating the transaction, except in a trivial and derivative sense. For such an evaluation—if it is an evaluation—appears to depend completely on his prior determination of the facts. Consider in this regard the case of a school teacher who is correcting a multiple-choice exam, and in doing this finds that one of his students has managed to answer correctly each and every question on the exam. On the basis of this result, the teacher awards the student the highest grade there is. Does the teacher's awarding the student the highest grade mean that the teacher *must* have evaluated the student's answers? No, it does not. If, as in this case,

the teacher can determine, on the basis of factual considerations, whether the student has answered the questions correctly, then the circumstance that (pursuant to the relevant university rules and regulations) the teacher *also* must award the student a certain grade has no bearing on the question whether his awarding the student a certain grade necessarily involves an evaluation of the answers. Although one may well say that the teacher evaluates the exam that he grades, such an evaluation is trivial and derivative in that it depends completely on his prior determination of the facts, that is, the answers to the questions posed. And it seems to me that the judge's determination of the purported operative facts in a legal rule proceeds in the same way, even though this determination may sometimes be quite difficult to make.

If, then, Olivecrona really believes that the judge must evaluate the purported operative facts or, perhaps, the whole situation, in order to determine, say, whether *A* and *B* have entered into a legally valid contract, it seems that he must be using the term 'evaluation' in a broad enough sense to cover not only evaluations, including moral evaluations, but also considerations that are not evaluations at all. That is to say, Olivecrona's claim that judges have to evaluate the purported operative facts in order to decide a case appears to depend on a somewhat confused view about the nature of evaluations, including moral evaluations.

Chapter 15

ANDERS VILHELM LUNDSTEDT: IN QUEST OF REALITY

by Uta Bindreiter

15.1. Introduction

More often than not, it is asserted that Anders Vilhelm Lundstedt (1882–1955), a disciple and friend of Axel Hägerström who enthusiastically embraced the latter's philosophical theories, (*i*) went to great lengths to apply those theories in the central fields of law but (*ii*) actually deviated from Hägerström's teachings by introducing the complex notion of "social welfare" (or "social utility") as an objective—a *scientific*—principle for legislation and adjudication.[1] Lundstedt himself, while readily assenting to (*i*), vigorously disclaimed (*ii*) all his life: as late as 1955,[2] he protested that as far as he knew, he had "on the whole correctly interpreted Hägerström's views on matters of law" (Lundstedt 1956, 8).

Hägerström and Lundstedt had met at Uppsala in 1914.[3] For Lundstedt, this meeting was decisive in so far as his jurisprudential outlook thereby underwent a radical and lasting change.[4] Having gained insight into Hägerström's theories, he realized that traditional legal science frequently operated with assumptions the scientific quality of which he now judged as non-existent.[5] Determined to dedicate his life to the scheme of turning jurisprudence into a genuine science,[6] of thoroughly reshaping legal thinking[7] and, thereby, popularizing Hägerström's ideas,[8] Lundstedt launched a veritable crusade against

[1] On Hägerström see Chapter 13 in this tome.

[2] This was the year of Lundstedt's death. His last work was published posthumously (Lundstedt 1956).

[3] In 1914, Lundstedt was appointed professor of Civil Law and Roman Law at Uppsala University. On his biography, see Sundell 2005.

[4] Lundstedt's early writings, including his doctoral dissertation 1908, were influenced by conceptual jurisprudence (see Sundell 1991, 252).

[5] In Lundstedt's view, traditional jurisprudence was unworthy of being called a science (Lundstedt 1956, 5–6). Not surprisingly, one of his major works had the title *Die Unwissenschaftlichkeit der Rechtswissenschaft* (The non-scientific nature of legal science: Lundstedt 1932c, 1936).

[6] That is, a science such as the natural sciences. Lundstedt is aware, though, that legal science cannot be an exact science (see Section 15.2.6).

[7] Lundstedt was conscious of the importance of his work: "I feel that it was given to me to make some useful contribution to the enlargement of human knowledge and to the development of human thought" (Lundstedt 1956, 5).

[8] For this scheme, Lundstedt was eminently suitable. Not only was he professor at the Law Faculty (which Hägerström was not) and thus could influence the coming generation of Swedish

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the idealistic constructions of conceptual jurisprudence, the superstitious (in his view) foundations of traditional legal concepts and, most important, the so-called method of justice (which, in his opinion, had distorted the legal scholars' view of law and legal science for centuries).

In his epistemology, Lundstedt follows the naturalistic approach advanced by Hägerström.[9] This approach implies, *firstly*, the view that reality consists in things that can be identified in time and space; and, *secondly*, the (related) view that what exists in time and space, can be known by experience and, therefore, lends itself to scientific explanations in terms of causal connections between things and events.[10] Lundstedt's ambition was to cope empirically with questions of law, and the only way to achieve this was, he thought, an approach based on historical facts, logical criticism of legal ideology, and psychological experience.[11]

Lundstedt figures as the most radical member of the Uppsala school—radical not so much in a political sense but, rather, as regards legal language.[12] This position is explained by his non-cognitivist outlook,[13] which he likewise adopted from Hägerström. Hägerström had denied the existence of moral concepts: Lundstedt agrees, denying that there is an objective morality, since judgements on moral rights and duties cannot be grounded in reason but are dependant on (subjective) feelings (Lundstedt 1925, 23).

jurists: he had also been elected into the Swedish Parliament as a member of the Social Democratic Party and consequently had ample opportunities to get in touch with people.

[9] Hägerström himself had called his approach rational naturalism, thereby indicating the contrast between his position and that of the Swedish idealist philosopher C. J. Boström (1797–1866) which went under the label rational idealism (according to Boström, reality is spiritual but can nevertheless be known by reason). On Hägerström's revolt against idealism see also Section 13.1.3 in this tome.

[10] On the importance of the principle of causality to Hägerström's philosophy, see Bjarup 2000, 32f.

[11] There are three types of naturalism: (*i*) Ontological (or metaphysical) naturalism; (*ii*) methodological (or epistemological) naturalism; and (*iii*) semantic naturalism. While there is no doubt that Lundstedt embraces version (*i*), it is unclear to which extent he embraces versions (*ii*) and (*iii*).

[12] Lundstedt follows Hägerström in conceiving of the legal language not as an action language (*handlingsspråk*), providing reasons for action, but as a behaviour language (*beteendespråk*), using words as a cause in order to influence the behaviour of the officials (as effect). The behaviour of the officials, in turn, influences that of the individuals.

[13] Hägerström had stated his non-cognitivist (or emotivist) position—i.e., the view that moral utterances cannot be considered to possess truth-value—in his inaugural lecture 1911, where he said that it was "an unmeaning (*omening*)" to consider the idea of ought as true. The respective Swedish passage reads as follows: "Då vetenskapen endast har att framställa, vad som är sant, men det är en omening att betrakta en föreställning om ett böra såsom sann, kan ingen vetenskap ha till uppgift att framställa, huru vi bör handla" (As science only has to describe what is true, but as it is an unmeaning to consider the idea of an ought as true, no science can have as its purpose to describe how we shold act) (Hägerström 1987, 48). The translation of the Swedish word *omening* with "unmeaning" is Jes Bjarup's (2000, 13 n. 6). On Hägerström's non-cognitivism see Section 13.2 in this tome.

Continuing Hägerström's attacks on traditional legal concepts, Lundstedt finds that *in reality*, there are no such things as valid legal rules or legal rights and duties, and he proposes to overhaul the legal language in its entirety, cleansing it, as it were, from all words that only remotely have a "metaphysical" ring to them: "Legal rights and duties, obligations, legal claims and demands, legal relationships (*Rechtsverhältnisse*), fault, guilt, liability, rules of law, (natural) justice etc." (Lundstedt 1956, 16) are said to be "false notions" (ibid.) and the expressions "(natural) justice, wrong, wrongful, lawful, legal ought, fault and guilt, should be rejected […] and not be retained even as terms or labels of certain realities" (ibid.).[14] These expressions are grounded in value judgements, and since value judgements lack truth-value, they are by definition unscientific.[15]

As a legal scholar, Lundstedt was highly productive in the fields of criminal law, tort law (his primary area of interest) and contract law. Also, as a law professor, he formed an entire generation of Swedish jurists as regards their view on law and legal science.[16] Nevertheless, whilst the work of Axel Hägerström, Karl Olivecrona and Alf Ross attracted considerable interest during the last half century, that of Vilhelm Lundstedt seems to have fallen into oblivion. Two types of criticism, in particular, have been levelled against him: *Firstly*, that Lundstedt, in setting up the "principle" of social welfare as the basis of all law, deviated from the Hägerströmian path of value nihilism[17] without being much aware of it himself, and, *secondly*, that the major part of his production consisted in critical, not constructive, work.[18]

In the following, I shall focus on the second type of criticism mentioned above, namely, the alleged lack of originality in Lundstedt's production.[19] I

[14] However, since Lundstedt thinks that it is impossible to eradicate these expressions in practice (and, what is more, since he also thinks that it is practically expedient to use them), he suggests to put them between quotation marks, thereby indicating that the writer is conscious of using meaningless expressions (Lundstedt 1956, 17).

[15] Lundstedt's terminology is confusing. On the one hand, he differentiates between theoretical, genuine *judgements* regarding true facts (i.e., real states of things) and *judgements of value*, or *(e)valuations*, which are based upon emotions and state nothing whatever about reality. Thus, they cannot possess truth-value (Lundstedt 1956, 44–5). On the other hand, he speaks of people's evaluations as "*true facts*, and as such objects of one's observation, and consequently of empirical knowledge" (ibid. 48). On this issue, see Section 15.2.5 below.

[16] "It fell upon Lundstedt […] to formulate such methodological maxims for practical use as could be derived from the Uppsala philosophy […] for those generations of Swedish lawyers who were trained under Lundstedt's influence, his energetic accent on the practical functions of law is likely to have had some salutary effects on a very general level" (Strömholm 1994, 196).

[17] In Scandinavia, Hägerström's version of non-cognitivism goes under the label "value nihilism."

[18] Lundstedt's jurisprudential work was intended, in its entirety, as an attack on current theories of jurisprudence: "The purpose of my theories is to show that current conceptions of jurisprudence regarding the law are *completely and fundamentally* irrational and are characterized, above all, by […] the *confusion of cause and effect*" (Lundstedt 1925, 11).

[19] The first type of criticism (regarding Lundstedt's "soundness" as a follower of Hägerström's moral philosophy) will be taken up in Section 15.2.5.

mean to show that Lundstedt's critique of the "ideologizing" in traditional jurisprudence is definitely constructive, and that his findings may properly be called both new and worthy of attention (as indeed they were called by himself) (Lundstedt 1956, 15).

Taking my point of departure in what Lundstedt calls "legal machinery" (15.2.2), I shall describe four "cogs" in the same machinery, namely: The reality behind so-called situations of right (15.2.3); the theory of the social function of criminal law (15.2.4); the theory of "social welfare" (15.2.5) and, finally (and related to the conception of "social welfare"),[20] the idea of a *constructive* legal science, comprising both scientific and evaluating elements (15.2.6).

15.2. "The Law": Legal Machinery in Action

15.2.1. Introduction

Human behaviour is influenced by what is called, in traditional jurisprudence, "objective law" or "the legal order." According to Lundstedt, such a view is *scientifically* untenable, since the idea of "the law" as a system or body of rules lacks any real basis (Lundstedt 1956, 31). The very concept of "legal rule" is *un-real*, he declares, and all this talk about legal rules and their validity is nothing but a sign that the speaker does not move in the world of reality (Lundstedt 1932c, 259–60). Certainly, the idea of a genuine rule is perfectly natural as long as one believes in the binding force of law: Since there is no such thing in reality, however, genuine legal "rules" cannot exist either. Just as there are no "commands," issued by the legislator, there are no legal "rules." As detached from the legal mechanism, both written and unwritten "rules" are simply unthinkable (ibid., 252).

Instead of binding legal rules, Lundstedt explains, it is here a question of an accumulation of power (*kraftkomplex*), and the most suitable name for it is *not* "the law" (a highly misleading word, and apt to support unrealistic ideas) but, rather, "legal or social machinery" in the sense of "regular enforcement of coercive acts, following upon certain modes of behaviour. The effect is that there arises a certain factual order—a standard, as it were—in people's behaviour towards their fellow-creatures" (Lundstedt 1929, 51; my translation).[21]

What is commonly called "the law" is, in itself, nothing but a concatenation of words that has come into being in a special way. The words, however, possess a suggestive force in giving rise to *ideas* about legal rules, in the

[20] In my view, it is of the utmost importance to *jointly* consider the theory of "social welfare" and the suggestion of a *constructive* legal science.

[21] The Swedish original: "[*r*]*ätts- eller samhällsmaskineriet* i mening av genomförandet med en viss reguljaritet av vissa tvångsåtgärder på vissa handlingssätt, varigenom i sin tur en viss faktisk ordning, s.a.s. standard, uppstår i människornas […] handlingssätt".

minds of the officials (judges, prosecutors etc.); who, in turn, monopolize the use of force. Thus, the concept of legal machinery refers to social facts, namely, a complex of psychological forces operating towards the realization of the "rules" (which, thereby, acquire the character of *legal* rules). Therefore, the concept of legal machinery is a *scientific* concept.

It cannot be denied that the "rules" of law—or paragraphs, as Lundstedt sometimes calls them[22]—possess a certain psychological power over people's minds. This power, however, does not exclusively stem from the content of the paragraph alone, but presupposes a complex of factors "which are active, as it were, in the mechanism in which the paragraph has been inserted" (Lundstedt 1947, 482 n. 29). In Lundstedt's view, it is impossible to regard the paragraphs themselves otherwise than as "purely *formal* directions, the real significance of which rests in the functioning […] of the entire legal mechanism" (ibid.).

Thus, legal "rules" are significant in so far as they are influencing peoples' minds and actions psychologically, but they do not possess this significance on their own, that is, as an inherent quality. Isolated from the legal mechanism, the so-called rules of law are nothing but empty words: Their significance presupposes the functioning of *other* rules within legal machinery.

15.2.2. Legal Machinery in Action

From Lundstedt's descriptions of legal machinery, scattered throughout his work, it emerges, *firstly*, that "legal machinery" refers to an already established legal system, not to its pro-cess of creation (Lundstedt 1956, 18); *secondly*, that he puts equation marks between society (or community) and "legal or social

[22] Lundstedt's claim, frequently uttered, that there are no legal rules has caused much confusion. In his work on historical legal positivism, he says the following: "Just as there are no imperatives, there are no legal rules – that is to say, not in the sense in which we normally understand the word "rule." By "rule", we mean "written" or "unwritten" sentences which we believe to exist *in abstracto*, and which we believe to imply that the courts and other authorities have to obey them […] There are no such sentences, however. They are simply unthinkable […] Legal rules in terms of reality cannot be understood otherwise than *on the basis of the fact* that the state authorities act in a certain way in certain situations, which again depends on a number of psychological factors and, thereby, has in various ways an impact upon the individual's mode of behaviour" (Lundstedt 1929, 60; my translation). This is the Swedish original: "*Lika litet* som det finns några imperativer, *finns det överhuvud några rättsregler* i den mening, som man föreställer sig med detta ord. Man menar ju därmed 'skrivna' eller 'oskrivna' satser, vilka in abstracto skulle ha existens och ha den betydelse, att de vore att följa av domstolar och andra resp. myndigheter […] Men sådana satser finns icke. De äro helt enkelt otänkbara […] Rättsregler i verklighetsmening kunna icke uppfattas annorlunda än *därigenom*, att statsorganen handla på ett visst sätt i situationer av visst slag, vilket åter beror på en mängd psykologiskt verkande faktorer och vilket i sin tur på olika vägar influerar de enskildas handlingssätt." Lundstedt himself, however, frequently speaks of "legal rules" and "rules of law"—as he says, for lack of more suitable words, and simply as a *term* for something (Lundstedt 1947, 474). He also uses (and seems to prefer) the word "paragraph," in the sense of written or unwritten rules of law (ibid., 482 n. 29).

machinery" (ibid., 165) since it is, here, a question of continual interplay between man's psychological impulses and (authorized) control; and *thirdly*, that the so-called common sense of justice plays a decisive role in the satisfactory functioning of what is called "the law." The constituent elements of legal machinery are social instinct and susceptibility to the pressure of "the law" actually in force (Lundstedt 1956, 165, 167).

In Lundstedt's view, it is futile to ask what is valid law. Instead, the central question—central because referring to reality—must always be: "What is it that actually determines, or motivates, the decision-making organs?" By thus inquiring after the motive, one invariably touches upon the entire complex of the legal mechanism in which the so-called legal rules play are larger or minor role.

Hägerström had declared that the legal order was nothing but a "social machine, in which the cogs are men" (Hägerström 1953a, 354). Lundstedt adopts this image but is nevertheless not quite happy with it: The problem is that in contrast to a genuine piece of machinery (e.g., an ocean liner lifted up in dry dock), the *legal* machinery is no "dead" object but consists "of live factors, the human beings, who through their modes of conduct and mental faculties constitute the power works, drive wheels, cogs and other gears of the machinery" (Lundstedt 1956, 18).

While ordinary ("dead") machinery can and must be described from an *external* point of view, this is hardly possible as regards working *legal* machinery, for there, the expert—i.e. the legal scholar—lives in the very midst of it and himself functions as a minor cog. Therefore, it is essential that he at least imagines himself detached from legal machinery, assuming the role of an outside observer and expected to apply a sociological perspective.

With Lundstedt, legal machinery is a figure of speech referring to a continual interplay between human nature and society. Since this interplay obviously exists, Lundstedt does not deem it necessary to inquire how, exactly, it has arisen. His only purpose is to describe its functioning from the observer's point of view. In doing so, he shows great psychological insight into the nature of man as partly rational, partly emotional.[23] What is more (and, one might say, somewhat curious): His investigations encompass an earnest plea for taking seriously the so-called common sense of justice—not, of course, as a starting-point for scientific reasonings but, rather, as a kind of catalyst for the functioning of legal machinery.

Ideas connected with the common sense of justice express, as Lundstedt puts it, "most primitive feelings *for* 'the right' and *against* 'the wrong'," (ibid., 169, Lundstedt's italics)[24] and he proceeds to unveil and analyze the historical

[23] Man's mind "does not only comprise rationality, intentions and other such manifestations, but also sensations, feelings, emotions and instincts" (Lundstedt 1956, 128 n. 6).

[24] "The conceptions of rights, legal duties, guilt and its reparation, in short, right and

and psychological realities underlying those feelings. Linking up with Hägerström's explanations on man's social instinct,[25] he starts from the "very strong assumption or hypothesis" (Lundstedt 1956, 128 n.6) that there is, in man, a social, or community-building, instinct. In view of our knowledge of the history of the human race, he cannot see why social instincts should be denied to human beings—after all, nobody denies social instincts in animals, such as for instance ants or bees (ibid.).[26] One may safely assume, then, that there is, in man, a psychological disposition "to build up a society and to maintain it in order to live there" (ibid., 167). This disposition, in turn, serves as an "impulse to action preserving the life of the race" (ibid.).

However, there is not only this social, life-preserving instinct. Everyone living in a community is invariably influenced by his surroundings, and by various kinds of pressure exerted by these surroundings. Thus, pressure is exerted by what is commonly called legal rules, and their maintenance invariably prompts a certain socio-psychic attitude. As will emerge from Lundstedt's theory of the social function of criminal law (see Section 15.2.4), it is pressure from exactly this quarter which produces and maintains the people's "impulses against crimes and other so-called unlawful actions" (Lundstedt 1956, 167). The reason for this is that people simply cannot help being influenced by surroundings where there is accumulated, as Lundstedt puts it, "a moral power-generating center for the benefit of the obedience of the laws" (ibid.).[27]

The regular application of the "rules" of law does not influence man's social conduct through conscious reflection alone: The most important influence stems after all

> from the contact that diverse rules of law are capable of establishing with certain chords in the *emotional* life of man. The application of the rules in question […] maintains and strengthens in man's emotional life the ideas […] of equity and justice, of rights and duties, of right and wrong. (Lundstedt 1956, 166)

wrong—all such conceptions are included in the so-called common sense of justice, forming a most irrational jumble. In the background lie animal instincts of avarice and revenge […]" (Lundstedt 1932b, 331).

[25] "The maintenance of the legal order presupposes in the first place what is called social instinct. This expression means that in a certain community the members are inclined, *in general independently of all reflexion*, to follow certain general rules of action, whereby co-operation at least for maintenance of life and propagation within the group becomes possible. A social instinct in the same sense occurs also in animals which form communities. The difference lies in the fact that in human societies the instinct can attach itself to laws which have been consciously created […]" (Hägerström 1953a, 350).

[26] Lundstedt's next sentence is revealing: "[w]ith this remark I have only wished to point out a special example suggesting that legal science is no exact science" (ibid.).

[27] The maintenance of coercive rules exerts a "*general psychological pressure on a man to act* […] *in accordance with the rule.* In reality this is what one means *judicially* by 'right' and 'duty'" (Lundstedt 1925, 118).

In short, Lundstedt has realized that man's "primitive" feelings render an indispensable service to society,[28] and through the maintenance of the social organization (i.e., legal machinery) over the centuries, these feelings have been refined or, as Lundstedt puts it, "bridled and checked" (Lundstedt 1956, 169).[29]

In this process, it is no coincidence that the common sense of justice turns out a social instrument: It *can* do so, because there "rings at its bottom so to speak a keynote socially attuned" (ibid., 167). In other words, the common sense of justice generally yields to points of view regarded as useful to society, if only these points are asserted with due authority (ibid., 168). And this very authority is exerted through the "rules" of law being applied regularly—without their application, Lundstedt claims, the common sense of justice would lose precisely those points of support which are necessary for the indispensable role it plays in legal machinery.

Thus, the functioning of "the law" is explained, by Lundstedt, as depending on a complex of feelings and interests, which ultimately find their expression in (authoritative) legal language. In the last analysis, however, the functioning of legal machinery is explained by the state monopoly of force.[30]

15.2.3. "Situations of Right"

15.2.3.1. Introduction

In traditional jurisprudence, a right is conceived of as a legal power, authorized by material law. The right is thought to exist by itself, quite independently from the maintenance of the rules according to which punishment or

[28] "The fact that irrational ideas may play a useful rôle in the development of the community does not imply any paradox. As a matter of fact, such an idea has merely unconsciously served as a *pretext for something else* that really has been useful" (Lundstedt 1925, 22).

[29] "In fact, the conceptions of the sense of justice are actually taken into the service of the legal machinery, and, governed by law and by the spontaneous, subconscious nature of the feelings of man, they become the most efficacious instruments against the anti-social passions of man […]. If the sentiments of justice were not taken into the service of the legal machinery in this way, the social function of laws could not be realized" (Lundstedt 1932b, 332).

[30] In international law, such a monopoly is absent; therefore, it cannot be called "legal machinery." According to Lundstedt, international law consists of false ideas about rights, with frequently disastrous consequences: "[r]ighteousness is not *only* a *moral ideal*; it also implies the power of subjugating the recalcitrant [nation] in a most *materialistic* way. There is nothing to say about this insofar as the relations between individuals are concerned— individuals who are subordinated to an authoritative order controlling them. But in *international* relations, in which there is no such order, 'compulsory law' implies that a state has the right of causing a world catastrophe […] merely for the furthering of its own interests. It is the *identity* between the right of *subduing* man (inseparably connected with the idea of law), and the right of *destroying* him—it is this identity that forms the infernal side of righteousness and justice in international relations" (Lundstedt 1932b, 338–9).

damages befall the violator of the right: The right is, so to speak, the starting-point for these other (coercive) rules, that is, their application presupposes that a right has been violated. Thus, coercive rules are understood as a *reaction* against the violation of the right.

Lundstedt, now, says that it is just the other way round: What is commonly called a right, is nothing but a certain position that shows itself as a *consequence* of—or a *reaction* to—the maintenance of certain "rules" of law.

Hägerström's analysis of the traditional legal concepts "right" and "duty" had been based upon the analysis of the concept of obligation in Roman law.[31] He concluded that rights and duties are not "genuine" concepts (*äkta begrepp*) but, rather, fictitious or false concepts (*skenbegrepp*), where words are employed as expressions of subjective feelings or interests. The concepts of "right" and "duty" do not correspond to anything factual in reality. Consequently, rights and duties are not *legal* concepts but, rather, *metaphysical* (alternatively "mystical" or "superstitious") concepts, referring to a transcendental reality. As such, they have no cognitive meaning but merely express man's illusion that "rights" exist.[32]

Lundstedt wants to elaborate on Hägerström's findings and, if possible, take them one step further: He means to disclose the *realities* underlying what is called "situations of rights" (Lundstedt 1956, 93–100, 109–14; 1925, 110–9). Independently from Hägerström,[33] he realizes that in such situations, the only observable reality consists in the workings of legal machinery—specifically, in the maintenance of the "rules" of law and their influence on people's attitudes and actions.

Lundstedt does not mince his words. The common belief in rights as some sort of power, existing irrespective of enforcement by positive law, he declares

[31] The reality of legal rights can be negated by claiming that "right" does not signify anything, not even in imagination; that the word, in short, lacks semantic reference. This is Hägerström's, Olivecrona's and Ross' approach (cf. Hägerström 1953a, 4). Also, the reality of legal rights can be negated by denying the *facultas moralis* of natural law doctrine and the (positivistic) *Willensmacht*-theory, respectively. This is Lundstedt's approach. On Hägerström's, Olilvecrona's, and Ross's view on rights see respectively Sections 13.5, 14.3, and 16.3 in this tome.

[32] It is difficult to establish whether or not Lundstedt made a mistake when applying value nihilism onto juristic sentences. Ingemar Hedenius (1908–1982), assistant professor in Practical Philosophy at Uppsala University, pointed out that Hägerström (as well as Lundstedt and Olivecrona) had failed to realize the distinction between "genuine" legal statements (*äkta rättssatser*), which are theoretically meaningless sentences expressing a desire or an interest, and "spurious" legal statements (*oäkta rättssatser*) which, as Hedenius pointed out, *can* have theoretical meaning and express statements or assumptions concerning social facts. Hägerström and his followers had overlooked that statements on rights, duties, unlawefulness etc. frequently can be understood as spurious (and, thus, as true or false) legal statements (Hedenius 1963a, 57). Both Lundstedt and Olivecrona vehemently repudiated Hedenius' accusation (Lundstedt 1942, Olivecrona 1942). On Hedenius see Section 17.3 in this tome.

[33] "That conception of 'legal right' as a reality […] is *his* property, not *mine*" (Hägerström 1934a, cited in Lundstedt 1956, 7).

to be false (Lundstedt 1925, 112; cf. Lundstedt 1956, 16): It is simply wrong to believe that a right is a primary phenomenon, protected by the state.[34] According to him, all that talk about rights and duties as if they were objectively given entities is nonsense and superstition: What actually exists, in observable reality, when somebody claims to possess, say, a "right of property," is a certain position with respect to a certain object. In reality, a right is nothing but an actual situation, characterized by "the regular absence of certain acts on the part of outsiders, which absence in its turn is due to the operation of laws consistently maintained" (ibid., 118).

And Lundstedt proceeds to show that such a situation arises in a perfectly natural way.

15.2.3.2. The Reality Behind the "Right of Property"[35]

In his zeal to uncover the realities behind so-called situations of right, Lundstedt adduces the example of the "right of property," arisen through a sale (Lundstedt 1956, 93ff.): A person A has bought an object X from another person B, and the bargain having been concluded, A finds himself in a certain position with respect to the acquired object X. It is this new position of A's, the position of "owner," which Lundstedt wants to analyze.[36]

Normally, the purchased object is at the buyer's disposal, to do what he likes with it. Thus, A may handle X in any way he chooses (he may use it, sell it, give it away as a present, destroy it) without thereby risking legal reactions in the form of punishment or damages. In other words: A finds himself in a position[37] where he enjoys risk-free possibilities of action (ibid., 93–4). As Lundstedt puts it, he stands there "without competitors, as the sole master over it" (ibid., 96).

Within this context, it is interesting to note that Lundstedt, in describing A's position, does not hesitate to use the word "power." Thus, he admits that A, being the owner, has "an undeniable power in regard to this 'property'" (Lundstedt 1925, 119) notwithstanding the fact that such a power does not exist and, as Lundstedt himself points out, that it is this non-existent power

[34] "The so-called will of the State as the 'maintainer' of the law is merely a phantom that can never be seized" (Lundstedt 1925, 125). Lundstedt's analysis starts with a critique of Jhering's conception of "right" as a legally protected interest (ibid. 112–7).

[35] The political dimensions of the right of property will not be considered in the present text.

[36] Lundstedt sees no reason to reject the term "owner," as long as it is clear that the concept of ownership, understood in the traditional, ideological meaning, is untenable (Lundstedt 1956, 302, n.1).

[37] Lundstedt admits that the word "position" is unsuitable: the maintenance of legal rules cannot possibly lead to the rise of a person's position with respect to an object. A position vis-à-vis an object denotes something physical, and this is not the case here. Nevertheless, Lundstedt speaks of a "more or less beneficial or secure 'position' for A in relation to the thing" (Lundstedt 1956, 111).

which had misled jurisprudence into the (false) assumption that A is in possession of a "right."[38]

Lundstedt maintains that A's situation can be explained in a completely natural way, based on our experience (Lundstedt 1956, 94): We can see that A's situation is conditioned by an obvious fact, namely, the fact that the *other* members of the community in most cases abstain from meddling with X (that is, from stealing it, damaging it etc.), and for different reasons:

For one, people do not touch X out of fear—they do not wish to run the risk of being punished. Evidently, the regular application of the rules of criminal law has a deterrent effect (see the following Section 15.2.4);

secondly, people do not touch X out of a sense of duty. In people other than A, there is a sense of duty (often purely instinctive) against meddling with A's "property." This sense of duty, or moral instinct, is conditioned by the regularity of the application of the respective rules;

thirdly, other people do not touch X because of their (ideological) conception of A's relation to X as a "right." According to the traditional (and erroneous) way of thinking, legal reactions to violations of A's "right" are motivated, or "just," exactly because people feel that a "wrong" had been done to the owner A. This point is particularly important because the ideological conception of "right" generally enhances the influence of the other two points in forming, as Lundstedt puts it, "an extra contributive cause of a moral attitude consistent with the law" (Lundstedt 1956, 95).

In other words: The traditional, irrational belief in a right as a power, as something that *ought to* be realized, strengthens the idea that it is no more than just that A should enjoy X unmolested. An environment addicted to this belief exercises a strong pressure on the individual to behave in conformity with it, and plays also an important part for the (instinctive or conscious) feelings of duty. Such an ideological view, Lundstedt points out, implies "a disregarding of facts empirically established" (ibid.). It cannot be denied, though, that it has an important effect.

Thus, the *real* factors determining A's (more or less secure) position with respect to X are (*i*) the deterrent effect of the regular application of certain legal rules; (*ii*), and following upon (*i*), a sense of duty towards the law; and (*iii*) the irrational but nevertheless quite useful belief that A's right to X is "just" and, consequently, "ought to" be realized.

Summarizing, Lundstedt admits that no matter how the real state of things has been distorted by ideologizing, one cannot escape the fact that this ideologizing "still does contain a momentous reality of essential importance for

[38] In his use of "power" Lundstedt follows Hägerström: "what is in question must always be a *power* over the thing, which nevertheless is not in itself a real power. To understand this right to protection as following from this power we must assume that it is quite independent of whether the proprietor has *actual* power" (Hägerström 1953a, 5).

the safety of A's position in relation to the thing bought by him" (ibid.). *Without* this reality (i.e. the psychological reality of conceiving of A's situation as a "right"), the organization of society would probably have developed along other lines. *With* this reality, by contrast, a prospering society life has been made possible—thanks to legal machinery making use of certain sentiments associated with the ideas of rights, duties, and "the supposed objectively, i.e. universally, valid ought" (ibid. 96 n. 5).

According to Lundstedt's theory, then, the real factors—*the reality*—behind the so-called right of property consists in the collective consequence of the maintenance of the rules of law and the influence of this maintenance on people; or in other words: In psychological phenomena.

15.2.4. The Theory of the General Moral-Forming Significance of the Maintenance of Criminal Law

15.2.4.1. Introduction

Lundstedt's ideas on the purpose and effect of criminal law were made known to the Swedish public as early as 1920–1921: Indeed, articles on this issue (Lundstedt 1920, 1921) are his first publications after his "conversion" to Hägerström's philosophy. Lundstedt's achievements in this field[39] amount to a complete revaluation of the function of criminal law and are regarded, by his contemporaries, to be his most outstanding contributions to Swedish legal science (see Olivecrona 1959; Schmidt 1978, 149–75).[40]

According to traditional jurisprudence, criminal acts are characterized by an element of wrongfulness (or unlawfulness). By acting as he did, the wrongdoer—so it was asserted—had disobeyed a "command," issued by the community. The community was deemed superior to the individual,[41] and therefore it was the individual's "duty" to obey such commands. By disobeying, the wrongdoer had violated an objective legal duty to the community, and the community had consequently a "right" to punish him. Thus, the infliction of punishment, by the community, was considered justified on account of the individual's unlawfulness (implying a violation of a *legal* duty) and, what is more, the punishment was considered justified *morally* as well, because of the individual's guilt: Having "sinned" against the community, the wrongdoer had "deserved" punishment (ibid., 33–4).

[39] Lundstedt's critique of traditional science of criminal law parallels that concerning tort law: there, the core of his critique is the circumstance that negligence (fault, *culpa*) is grounded in the concept of guilt.

[40] It is not clear, however, to which extent Hägerström backed up Lundstedt's ideas on the function of criminal law (cf. Lundstedt 1956, 8).

[41] Lundstedt points out that it is illogical to conceive of "community" and "individual" as opposed to each other (Lundstedt 1925, 34).

According to Lundstedt, by contrast, there exists among the people a general moral attitude against crime which, in direct opposition to traditional belief, is *conditioned* by the maintenance of the rules of criminal law (Lundstedt 1936, 95–7; cf. ibid., 91–4, 25–131). The members of the community have developed a sense of duty, or moral instinct, towards the law, and this moral instinct has actually arisen "from common knowledge of the consistent enforcement of the criminal code" (Lundstedt 1925, 48). Far from constituting the basis of criminal law, the citizens' general sense of duty with respect to evading penalized acts is, on the contrary, a consequence of the administration of criminal law through generations (ibid. 44.).

15.2.4.2. The Social Function of the Maintenance of Criminal Law

The traditional view that punishment is justified on account of the wrongdoer's "guilt" (a view tied to the principle of retaliation) directed attention to *individual* punishment, and gradually, there arose the idea that the whole purpose with punishment was the moral regeneration (ibid., 45–6)[42] of the individual criminal, with the ultimate view of thereby removing a danger to society. Following the theory of Special Prevention,[43] the focus of interest lies with the wrongdoer's person and personal circumstances. Gradually, the tie between crime and punishment was loosened, and this state of things prompted the notion that punishment must be substituted by other measures—measures which were suited to the wrongdoer's individuality, not to a certain type of crime.

Lundstedt thinks otherwise. In his view, it is not the purpose of punishment to re-socialize the individual criminal, and it cannot be its purpose to punish "sin," either. He reminds us that it was one of the cardinal mistakes[44] of traditional jurisprudence to cling to the old notion of "guilt" and the idea that the offender had "sinned" somehow and thereby drawn moral blame upon himself. As long as the ideas of sin and blame are suffered to dominate peoples' minds, the focus will be on the reason and the effect of *individual* punishment, not of the whole body of criminal law (Lundstedt 1925, 49). Individual punishment, however, is only a link in the entire system of punishment and can have no other reason than being "a necessary consequence of a paragraph or section of the penal *code* as being valid law" (Lundstedt 1956, 228). The purpose of punishment must be to benefit society, by means of upholding the rules of criminal law.

[42] Lundstedt points out that in reality, frequently the exact opposite is the case, since punishment stigmatizes the criminal as morally inferior (Lundstedt 1925, 46).

[43] From the 1920's onwards (with a peak in the 1970s), there were, in Scandinavia as well as on the Continent, strong tendencies towards conceiving of *special* prevention as the essence and ultimate function of punishment.

[44] The second cardinal mistake was, to believe that the deterrent effect of punishment was mainly owing to fear.

Lundstedt cannot but marvel at the extreme short-sightedness on the part of the advocates of Special Prevention. Since it is only a comparatively small group of persons who undergo punishment, of what importance is this group compared to the overwhelming majority of people who abstain from committing crimes? (Lundstedt 1925, 47). And why do they abstain? Dismissing the concepts of guilt and wrongfulness,[45] Lundstedt approaches the obvious fact of the abstinence of millions by posing the following question: "What is the *reality* behind the widespread restraint from committing socially undesirable acts?"

The very idea of "community," Lundstedt claims, already *implies* the existence of a criminal law (Lundstedt 1925, 45; 1956, 221). This claim is grounded in the strong assumption (almost amounting to a fact) that society would not survive without a criminal law. Owing to the complexity of human nature, society, without the upholding of criminal law through punishment, would invariably meet a truly Hobbesian fate, i.e. anarchy and chaos.[46] Therefore, the central inquiry after *the reality* behind the maintenance of criminal law cannot be answered otherwise than by pointing at man's sentiment of self-preservation which, in turn, leads to the necessity, for the community, to punish every act considered detrimental to society. The essential social function of punishment is, then, "to promote in the community in general a sentiment of duty of a special kind, a *moral instinct*, as it were, against crimes," (Lundstedt 1925, 48) and this function concerns the millions in the society, not the very few individuals sentenced to punishment (Lundstedt 1956, 228).

Therefore, the individual crime and its punishment must not be seen in isolation but, rather, as an element in the entire system of punishment (which, in turn, is a necessary consequence of the existing criminal law: Lundstedt 1925, 49): Punishment is both necessary and important, but only as a part in the administration of the bulk of criminal law.[47] The community, in punishing the individual, does not proceed on any principle of justice but solely with the view of preventing disastrous social consequences. It is imperative to punish the offender, but only in order that society may go on existing (Lundstedt 1956, 229; cf. Lundstedt 1936, 87–113). To put it crudely (as Lundstedt himself did): The individual criminal is being sacrificed for the sake of society.[48]

[45] Lundstedt dismisses the concept of guilt as totally meaningless: every human action is caused by something, and as soon as the so-called crime is identified in the chain of cause and effect, it is impossible to claim that he who committed the crime "deserves" punishment (Lundstedt 1956, 220ff.).

[46] "If the criminal law were not upheld, the community would be submerged in crimes, i.e. the community […] would dissolve into a state of *disorganization, i.e. of anarchy and barbarism*" (Lundstedt 1925, 44). "Without e.g. what we call criminal law, the law of contract and the law of torts, that which we now mean by society could not possibly exist" (Lundstedt 1956, 17).

[47] "The conception of punishment is simply included in our conception of criminal law as an existing force" (Lundstedt 1925, 40).

[48] "Criminal law is maintained for the benefit of *society* and not for the benefit of *criminals*" (Lundstedt 1956, 228).

Lundstedt made a point of that the regular enforcement of the rules of criminal law has an eminently important, moral-forming function, namely, to foster and maintain "spontaneous feelings, moral instincts as it were, against those actions encumbered with punishment, i.e. crimes, or so to speak, to stir up the general, spontaneous morale against these" (Lundstedt 1956, 229).

Formerly, it was held that punishment worked as a restraint mainly because of the fear it created.[49] Lundstedt agrees that fear may have a deterrent effect with some people, but emphasizes that this effect hardly deserves mention compared with the importance of the general moral instinct. It is not the individual punishment but, rather, the "consciousness of the existence of the criminal law as operative law—i.e. consciousness that the act will be punished—which has the effect" (ibid., 50). And this consciousness exists independently of our knowledge of individual crimes. The absence of punishment, by contrast, signifies that the Criminal Law has ceased to be operative and can no longer fulfil its function, namely: To maintain order in the community by keeping crime within proper limits.

15.2.5. The Theory of Social Welfare

15.2.5.1. Introduction

Hägerström's moral philosophy is characterized by a non-cognitivist view: Moral judgements, he declares, are not genuine (real) judgements, only expressions of feelings. Thus, moral science cannot be a teaching *in* morality, but only a teaching *about* morality.[50] The same applies to *legal* science: If the statements of legal science give expression to, how the legislator and the judge "ought to" act, then they are not providing information about anything; that is to say, they are not *scientific* statements, but only (subjective) evaluations.

Now, Lundstedt frankly admits that the Swedish word *samhällsnytta* (social utility) expresses subjective evaluations (Lundstedt 1932a, 538). From this admission, it might be inferred that a theory of social utility (or social welfare) cannot possibly be scientific in Hägerström's sense.[51] To this inference, how-

[49] Feuerbach had made this mistake (Lundstedt 1925, 48).

[50] "[This] view merely asserts that the science of morality cannot be a theory *of* morality, but only a theory *about* morality" (Hägerström 1987, 50; my translation). The Swedish original: "[den här framställda åsikten] hävdar endast, att moralvetenskapen icke kan vara en lära *i* moral, utan blott en lära *om* moralen". On Hägerström's non-cognitivism see Section 13.2 in this tome.

[51] Hägerström is explicit about the purposes of science in general: "As science only has to describe what is true, but as it is an unmeaning to consider the idea of an ought as true, no science can have as its purpose to describe how we should act" (Hägerström 1987, 48; my translation). The Swedish original: "Då vetenskapen endast har att framställa, vad som är sant, men det är en omening att betrakta en föreställning om ett böra såsom sann, kan ingen vetenskap ha till uppgift att framställa, huru vi böra handla." Consequently, there can be no science of legal rights and duties, i.e., one cannot determine scientifically what rights and duties exist under such and

ever, Lundstedt strongly objects, protesting that what is called, by him, the Method of Social Welfare is a *scientific* method, grounded in reality. Taking his point of departure in the reality of social interests (conceived of as homogenous) (Lundstedt 1933, 123; 1956, 175), i.e. in facts, and thus starting with a purely descriptive theory, Lundstedt nevertheless seems to end up with a normative theory, comprising an "ought" as expressed in a utilitarian principle.

15.2.5.2. The "Principle" of Social Welfare

As early as 1920, Lundstedt had declared that it was the legal scholar's task "to define legal rules and legal institutions by having regard to those purposes that from the point of view of *social welfare* [*samhällsnyttan*] should be attached to them" (Lundstedt 1920, 6; my translation).[52]

These words—an appeal, as it were, addressed to all "men of legal science"[53]—far more than anything else point at what was essential to the jurist[54] Lundstedt, namely:

First of all, the necessity of emphasizing the legal scholar's *responsibility* vis-à-vis the society he is living in;[55]

secondly, the necessity of enforcing a *shift of focus* from the individual to the collective;[56] and

thirdly, the necessity of substituting the traditional method of justice with the method of social welfare: Legal rules should be judged, not by their "justice" or "injustice" in the concrete case but, rather, by their social effect in general.[57]

It is not clear what, exactly, Lundstedt's conception of "social welfare" actually amounts to.[58] From the reactions to his early work *Superstition or Rationality* (1925), he could gather that the introduction of the term "social welfare" (or,

such circumstances. What *can* be investigated into, and determined scientifically, are actual *ideas* of rights and duties—as appearing in legislation, in legal practice etc.

[52] Lundstedt's theory of social welfare was made known to the English-speaking public in 1925, through his work *Superstition or Rationality* (Lundstedt 1925).

[53] Lundstedt prefers to speak of the "man of legal science," instead of the "legal scholar."

[54] On various occasions (vis-à-vis Alf Ross, for instance), Lundstedt made a point of his *not* conceiving of himself as a philosopher of law.

[55] "Legal science is the science of the conditions and forms of the social life of individuals, and of the life of societies, i.e., of nations, one with another. On account of this, legal science is responsible partly for the shape of the social life of its own nation, and partly for the development of the relations between nations" (Lundstedt 1932b, 331).

[56] This is informed by Lundstedt's view that "individual" and "community" are not to be conceived of as opposites.

[57] On Lundstedt's theory of social welfare see, e.g., Bjarup 1978, 104–8.

[58] From Lundstedt's descriptions of his theory, one might think that he, at various times, attaches different meanings to the expression "social welfare." Also, he may have had trouble with the translation of the word *samhällsnytta*. This is Schmidt's view (Schmidt 1978, 161–2).

rather, of the translation of the Swedish word *samhällsnytta* with "social welfare") had caused perplexity and misunderstandings, and in the years to come, he made repeated attempts to explain the sense in which he had used the term.

Thus, we are informed that by speaking of a "principle" of social welfare, Lundstedt does not mean a principle in the established sense of the word.[59] "Social welfare" has nothing to do with moral philosophy: It is actually something *most realistic*, in the sense that it refers to that which is

> actually considered, i.e. evaluated, as useful to men in society with the way of life and the aspirations and struggles which they really have at a certain time. In general the matter can be expressed thus: Socially useful is that which is actually evaluated as a social interest. (Lundstedt 1956, 137)

His conception of "social welfare"—Lundstedt goes on to explain—has no ethical colouring whatever, nor does it refer to any ideal, absolute concept, or any principle of philosophy.[60] "Social welfare," in *his* theory, amounts to something totally different from what is usually meant by *practical view*, *demands of society*, *Gemeinwohl*, *social policy*, and *common good* (ibid., 135): In *his* use, the term refers to a guideline—a *method*—for legislation and interpretation and naturally, also for legal science (ibid., 171–2). In other words: "Social welfare" can be characterized as "comprising the general spirit of enterprise and its postulate: A general sense of security as concerns enterprising activities as well as other modes of action not harmful from a social point of view" (ibid., 137–8).

Almost desperately, it seems, Lundstedt searches after a word that would capture the fact—the *reality*—that most people actually do have certain (material and ideal) needs and wants in common[61] and, therefore, continually strive after the realization of those needs and wants. Obviously, people's actions are

[59] Lundstedt explains this vis-à-vis Alf Ross: "It is obvious that the expression "principle of social welfare," as used in my work, is a name for the *method* I am using. I claim that this method is a scientific method in the study of law. Moreover, "principle of social welfare" *indicates* what kind of method it is" (Lundstedt 1933, 126; my translation). This is the Swedish original of this passage: "'Samhällsnyttans princip' i mina undersökningar [kan endast vara] en benämning på den *metod*, som jag i juridiken hävdar såsom vetenskaplig, en benämning, som samtidigt *antyder* metodens art." In his last work, Lundstedt says the following: "It is quite true that I have at times spoken of 'social welfare' as a principle for legislation and legal interpretation. But it ought to be clear to anyone […] that I have not thereby used the word 'principle' as a technical philosophical term. This would have implied that I have accepted social welfare as an absolute value, a conception from which I have dissociated myself from the very beginning" (Lundstedt 1956, 171).

[60] Already in 1925, Lundstedt had declared that "this fundamental principle," i.e., the welfare of the community as the only possible objective, had "*no relationship whatever* to the views of—among early authors—Bentham and Stuart Mill, and—among later ones—Ritchie, Duguit, Tawney, Krabbe, etc." (Lundstedt 1925, 24). On Duguit and Krabbe see respectively Sections 12.3 and 2.2 in Tome 1 of this volume.

[61] In this sense also Schmidt, a student of Lundstedt's: Lundstedt's setting up of "social welfare" as a practical guide was not identical with Bentham's idea that laws should promote the greatest happiness of the greatest number. Rather, Lundstedt's idea of social welfare was a "more abstract conception of some 'common weal'" (Schmidt 1978, 161).

determined *partly* by the goals they want to achieve, *partly* by their views on, how these goals might best be realized. Lundstedt himself—or so he assures us—has no idea of meddling with those goals and views—he does not suggest anything people "ought to" aspire to. He merely states that people, in fact, do so.

Lundstedt follows Hägerström in the view that social *value judgments* cannot be anything but expressions of feelings and, therefore, cannot provide information about reality. He takes his analysis one step further, though, when pointing out that the *social evaluations* underlying the value judgements—"as a condition on which social value judgements are expressed" (Lundstedt 1956, 200)—are, in themselves, factual, i.e. *realities* (ibid.). In short: Social evaluations are facts and, as such, objects of empirical knowledge (ibid., 48).

This is Lundstedt's point exactly: Since the Method of Social Welfare is grounded in the reality of human needs and aspirations and, thus, in the social evaluations appertaining to them (that is, in facts), the Method of Social Welfare is a *scientific* method.

In Lundstedt's theory, then, social evaluations are understood as an observable reality, seemingly stemming from "the people." Only seemingly, though: As Lundstedt admits, the social evaluations that become *directly* decisive for legislation and statute interpretation are, on the whole, not the evaluations of "the people," but those of the "law-maker."[62] This anomaly he explains by pointing out that the people's social interests may not be expressed sufficiently clearly, and that the law-maker consequently has to play a more active role as to which interests—that is to say, which politics—are to be pursued through law.[63] By paying attention to the demands of "social welfare," the law-maker—this seems, roughly, to be Lundstedt's meaning—is simply trying to ensure those patterns of behaviour which correspond to given social evaluations (and, therefore, can be said to benefit society).

The law-maker, in turn, can be influenced more or less directly by the views of a *constructive* legal science. Thus—as Zamboni (2002, 44) correctly points out—the circle politics-law-politics is being closed by Lundstedt's criterion of social welfare: Social interests (i.e. politics) are influencing the law-making process, and the law-making process, in turn, can largely influence social interests (see also Section 15.2.4 above).

[62] On Lundstedt and the law-maker function, see Zamboni 2002.

[63] Lundstedt makes it clear that the law-creating process can be influenced by other than strictly *legal* instances (1956, 152f.).

15.2.6. "Constructive" Legal Science

15.2.6.1. Introduction

Not surprisingly, Lundstedt encountered heavy criticism with respect to the presumed objectivity of his criterion of "social welfare."[64] Alf Ross' scathing comments set the stage in 1932,[65] and in the years that followed, Lundstedt was reminded more than once that "social welfare," conceived of as a general goal or principle of interpretation, was rooted in utilitarian philosophy and, therefore, incompatible with his professed non-cognitivist outlook.[66] Lundstedt, however, kept insisting that he, with his Social Welfare theory, merely states what happens in reality.[67]

Finally, in 1943 (Lundstedt 1943, 107–42), he took a decisive step in employing the term *Constructive Legal Science* for the type of jurisprudence envisaged by himself—a jurisprudence comprising both scientific and evaluating elements and grounded in "social welfare" *qua* basis of all law and a general guideline for legal activities.

15.2.6.2. The Constructivity of Constructive Legal Science

Lundstedt maintains that the legal scholar's work cannot be exclusively *scientific* in an epistemological sense: Obviously, jurisprudence is not pursued as a science when, for example, considering the question whether or not a certain law fulfilled its social function in the most satisfactory manner, or whether the interpretation of law—in general, or in a concrete case—is in total harmony with public welfare. In cases such as these, it is evidently not merely a question of statements on the part of the legal scholar, but also of evaluations (Lundstedt 1947, 477). Nevertheless—and it is at this point that Lundstedt's novel approach comes into the picture—it is justified, in cases such as these, to speak of a *scientific* activity.

By way of illustration, Lundstedt adduces the examples of the physicist constructing an instrument and the astronomer building a telescope. In both cases, it is undoubtedly a question of scientific work, notwithstanding the fact

[64] As Zamboni puts it, "the 'objectivity' and 'scientific' character of this content of legal politics is rooted in the fact that it is based on an undefined objective reality, a universal 'social instinct in man'" (Zamboni 2002, 58 n. 80).

[65] Ross was fiercely critical vis-à-vis the ideal of social utility, as informed by (subjective) legal politics (Ross 1932, 341–9; 1959, 295–6). On Ross see Chapter 16 in this tome.

[66] To the end of his life, Lundstedt vigorously defended himself against accusations of Neo-Benthamism (cf. Lundstedt 1956, 141ff.).

[67] In this case, Lundstedt offends against the fundamental rule of imperative logic, saying that an ought-statement cannot be derived from a series of is-statements (cf. Bjarup 1978, 107f.). Although appreciative of Lundstedt's theory, Zamboni advances the following criticism: "He [Lundstedt] focuses more on embellishing upon the content of the 'public welfare' and, despite his statement of objectivity, winds up choosing his own values, referring to them as 'objective' or 'undeniably important to the community'" (Zamboni 2002, 57).

that the physicist's and the astronomer's final productions are preceded by, and necessarily must be preceded by, a series of experiments and evaluations (ibid., 479; Lundstedt 1956, 212–3).

Now, turning to the "experiments" undertaken by legal science, Lundstedt proceeds methodically. "Does Legal Science Need Legal Ideology?" he asks[68]—rhetorically, of course, for his answer is given: "Most certainly not: Legal ideologies are nothing but chimerical assumptions that ought to be dismissed from the realm of science." Consequently, he sets about investigating what it is, if not ideologies, that *in reality* motivates legal activity. In short: What is the *purpose* of legal activity? (Lundstedt 1943, 124–7).[69]

In Lundstedt's view, there is no doubt that legal activities are indispensable to society; without them, there would be chaos. Therefore, the closer shaping of these activities must be determined with an eye to legal machinery, that is to say, to the frictionless functioning of the social organization.

When speaking of legal activities, Lundstedt refers to the work of the legislator and the judge, not to that of the legal scholar. As far as the latter is concerned, *his* task includes—apart from a purely epistemological or theoretical activity—an activity "aiming more practically and, as it were, more *constructively* at social life" (Lundstedt 1947, 476).[70]

From these words, it would appear[71] as if Lundstedt were hesitating to use the word *constructive*. In any case, he hastens to add a footnote, saying that *constructive* "has, of course, nothing to do with juridical 'construction' or such like. I use the word as referring to the contribution of jurisprudence to the *construction* of society" (Lundstedt 1947, 483 n. 32).[72]

Lundstedt does not say what, exactly, falls under the expression "construction of society."[73] However, he offers a detailed description of, how a *constructive* legal scholar is expected to proceed:

Firstly, and in view of his (more or less direct) influence upon legislation, the legal scholar must be guided by considerations of, whether or not a con-

[68] This question forms the title of Lundstedt 1943.

[69] The "late" Jhering focussed on exactly this issue. The difference between Jhering's and Lundstedt's conceptions of the purpose of law will not be examined in this paper, however.

[70] In the 1943 article, this sentence reads as follows: "Utöver nämnda enbart kunskapskritiska eller teoretiska verksamhet innefattar rättsvetenskapen även en mera *aktuellt* på samhälls- eller rättslivet inriktad, en om jag så får säga mera konstruktiv verksamhet" (Lundstedt 1943, 125). "Apart from the above named, merely epistemological or theoretical, activity, legal science also comprises an activity which aims *more directly* at social or legal life; an activity which is—if I may say so—more constructive" (my translation).

[71] The phrase "as it were" seems to point in this direction.

[72] In the 1943 article, the identical note reads as follows: "Ordet 'konstruktiv' har naturligtvis intet att göra med juridisk 'konstruktion' eller dylikt. Det torde kunna försvaras såsom avseende rättsvetenskapens bidrag till *samhällsbyggnaden*" (Lundstedt 1943, 125 n. 1). The note reappears in Lundstedt 1956, 133 n. 9.

[73] As an active politician, he would presume that this goes without explanation.

templated law can be expected "to ensure the greatest benefit to society or, expressed in another way, to fulfil in the best way, a social function" (Lundstedt 1947, 476);

secondly, and "in view of the interpretation of so-called valid law," the legal scholar must expound the law in such a way that its consistent application can be expected "to benefit society as much as possible, or […] cause the law to fulfil a social function in the best possible way" (ibid.);

thirdly, when systematizing the laws and dealing with legal institutions, the scholar must "consider the historical as well as the actual significance of legal ideology" (ibid.). He must always remember, though, that for a view of law free from ideology "there is nothing on which to base arguments except social realities, i.e. people, as they are physically and psychically constituted, the facts which form conditions precedent for people's relations to each other, these relations themselves, and the actual aspirations of people" (ibid.).

Naturally, the "must" contained in the three postulates enumerated above caused a storm of criticism. Lundstedt took great pains to explain that "must" has nothing whatever to do with an objective "ought" or the like: It is, here, a question of deliberately taking up a certain position with respect to the content of laws and proposed legislation, legal interpretation as well as systematization. This same position implies that one must recollect the starting-point for all legal activity, namely, the benefit to society. In Lundstedt's words:

> The constructive *juridik* must—as long as the situation is such that no motive for legislation and administration of law, freed from chimerical ideas, can be discovered, except the purpose to benefit society—*reckon with this purpose as a starting point for legal activity*. (Lundstedt 1947, 476)

This means that *if* the legal scholar wants to avoid coming into conflict with established facts, and *if* he wants to keep in touch with empirically given *realities—then* he simply must fulfil the above-mentioned three postulates (ibid., 476).[74]

Through his work, the legal scholar has gained maximum insight into the workings of legal machinery, and exactly because of this, he seems to be the proper person to make evaluations with respect to the functioning of the law. Lundstedt is convinced that the development of society would suffer from the lack of access to the evaluations coming from legal science: For who, he asks rhetorically, can be more suitable for the task of promoting that which society considers useful, than "the man of legal science"? Would it not be absurd if precisely that category that can be presumed to have the deepest insight into legal machinery—and consequently, the most authoritative conceptions of it—

[74] Lundstedt's *constructive* legal scholar makes evaluations for two reasons: *firstly*, because he must *presume* that the legislator is guided by considerations of social welfare; and, *secondly*, because he himself must be interested in benefiting society, by means of assisting the legislator.

were to evade making evaluations concerning the most expedient way for legal machinery to function? (Lundstedt 1947, 478).

There is no denying that the word *constructive*, in Lundstedt's use, has a strong political impact. What is meant to be constructed, is the organization of society. Thus, the purpose with the construction is a political one, namely, to arrive at an organization of society which is in keeping with the legislator's views on, what is (or, better, "ought to" be) social welfare. Jurisprudence can contribute to this constructing activity through advising and assisting the legislator. The *constructive* legal scholar is expected to make evaluations as to the proper *means* in order to achieve certain (political) *ends.* Or to put it the other way round: His evaluations have to do, not so much with that which "ought to" be realized but, rather, with the appropriate "know-how."

On a certain interpretation of Lundstedt's views on the law-maker function within the legal system, his Social Welfare thesis and his suggestion of a *constructive* jurisprudence, one might think that what he really aimed at was a scientific approach to the politics of law. Such an approach would provide the law-maker with an eminent advantage, namely, of commanding a position where he could be seen to refer to *scientific* advice.

Be that as it may: The surmise[75] that Lundstedt's *constructive* legal science was ultimately intended to provide the Swedish welfare state with a scientific grounding, does not seem so very far-fetched.

[75] In this sense also see Jes Bjarup (2005b, 12): "[The] making of the law is a scientific question grounded in the authority of Lundstedt's legal science that also informs the administration of law in order to establish the Swedish welfare state as a matter of scientific paternalism."

Chapter 16

ALF ROSS'S LEGAL PHILOSOPHY

by Mauro Zamboni[*]

16.1. Introduction

Together with Karl Olivecrona, the Danish legal philosopher Alf (Niels Christian) Ross (1899–1979) is internationally recognized as the best-known representative of Scandinavian legal realism. In fact, the very label Scandinavian legal realism was created to identify that particular movement in legal philosophy that incorporates both Axel Hägerström's Uppsala School (and his pupils, like Olivecrona and Vilhelm Lundstedt) and Alf Ross (see Bjarup 1978, 9; Marshall 1956).[1] This label is not just a designator: It is meant to point up the original contribution that Ross made to Scandinavian legal realism, particularly with his 1958 book *On Law and Justice* (Ross 1958), considering that he was not simply a student of Hägerström's anti-metaphysical stance.

After obtaining a law degree in Copenhagen (in 1922), Ross received a scholarship to study abroad and spent most of that period in France and England, and in particular in Austria in 1923. Here Ross was exposed both to Hans Kelsen's ideas and to the Viennese philosophical milieu (though he did not come into contact with logical empiricism until around 1930). During his stay in Vienna, Ross completed a manuscript titled "Theorie der Rechtsquellen" (Theory of the sources of law) which he submitted as a thesis for a doctor-of-law degree at the University of Copenhagen in 1926, only to be rejected. Ross thus decided to contact Hägerström and submit the manuscript as a thesis for a doctor-of-philosophy degree at the University of Uppsala. This required Ross to first obtain a degree in philosophy, an endeavor to which he applied himself from between 1928 and 1929, at which point he graduated in philosophy, and he was then awarded the doctoral degree in philosophy in 1929 when the manuscript was finally published as *Theorie der Rechtsquellen: Ein Beitrag zur Theorie des positiven Rechts auf Grundlage dogmenhistorischer Untersuchungen* (A theory of the sources of law. Contribution to the theory of positive law on the basis of historical-dogmatical investigations: Ross 1929), a work dedicated to Hans Kelsen.

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[1] On Hägerström, Olivecrona, and Lundstedt see respectively Chapters 13, 14, and 15 in this tome.

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In order to promote an understanding of the task and method of jurisprudence through a critical analysis of fundamental concepts, Ross wrote the book *Kritik der sogenannten praktischen Erkenntnis: Zugleich Prolegomena zu einer Kritik der Rechtswissenschaft* (Critique of the so-called practical knowledge: With prolegomena towards a critique of legal science, Ross 1933), which he dedicated to Axel Hägerström. The following year, Ross published a second volume, also on the analysis of fundamental legal concepts, namely, *Virkelighed og Gyldighed i Retslæren: En Kritik af den teoretiske Retsvidenskabs Grundbegreber* (Reality and validity in jurisprudence: A critique of the basics of theoretical legal science, Ross 1934). This book was submitted for a doctoral degree in law at the University of Copenhagen, a degree he was awarded the same year, in 1934, and at the same university he would pursue his entire academic career until his retirement in 1969.

This mobility of Ross is very important to understanding his position within Scandinavian legal realism. Ross never disavowed his debt to Hägerström: To be sure, like many other Scandinavian legal realists, he wound up departing from Hägerström's teachings—he did so by addressing the concerns arising out of logical positivism (as by taking into account the central role of the philosopher in clarifying legal language)—and like those realists, he nonetheless continued to look up to Hägerström, the teacher "who opened my eyes to the emptiness of metaphysical speculations in law and morality" (Ross 1958, X; 1953, 4–5).[2]

However, unlike Olivecrona and Lundstedt, Ross never followed Hägerström's teachings faithfully (nor did he claim to do so); instead, he enriched the legal realist framework by incorporating into it insights coming from various philosophies and legal theories, primarily logical positivism and some aspects of Kelsenian legal theory and, to some extent, American legal realism.[3] For example, until the end of World War II, the Scandinavian legal realist school was heavily influenced by the German legal debate, and in particular by its search for criteria on which basis the study of law could acquire a "scientificness" (*Wissenschaftlichkeit*). Indeed, during this period, it seemed self-evident among Hägerström's followers that the study of law should modelled on the natural sciences.[4] After 1945, in part under the influences coming from the other side of the Atlantic, Ross shifted the focus of Scandinavian realism to the similarities between law and social science, noting, for example, that unlike the natural sciences, they both give rise to self-fulfilling or self-defeating prophecies (Ross 1958, 47; 1953, 61–2; Bjarup 1978, 85).

[2] The Scandinavians have always explicitly recognized, some more than others (Lundstedt more than Ross, for example), that their philosophical foundation lies in the Uppsala School and in particular in Hägerström's inquiries in the world of legal and moral philosophy. See Bjarup 1978, 23–38.

[3] See, for example, Hart 1959, 237, depicting Ross as "an American realist in Scandinavia."

[4] This conception is especially apparent in Lundstedt 1956, 129, and Olivecrona 1939, 25–7.

This incorporation of various legal philosophical ideas is one of the reasons why Ross often thought of himself as offering a new approach to law and to legal issues, an approach alternative to traditional legal theoretical streams, as could be found, for example, in legal positivism and natural law theory (see, e.g., Ross 1946, 11–3). Despite this multiplicity of sources from which Ross proceeds, he is correctly considered a proponent of Scandinavian legal realism, this on account of the attention he devoted to the nature of legal science, focusing in particular on the question whether its status is cognitive or noncognitive (Ross 1958, 31, 9; 1953, 22–3).

So, in light of that background, this entry has been structured around four main themes that all the Scandinavian realists can in one way or another be said to have been concerned with: (*i*) the concept of valid law, (*ii*) rights, (*iii*) coercion, and (*iv*) the relation between law and politics.

16.2. The Concept of Valid Law

Let us start with one of the topics to which Scandinavian legal realists paid much attention, namely, the concept of legal validity. According to Ross, law is valid when it has the property of binding a certain community or certain legal actors, such as judges, to certain modes of behavior, whatever behavior the law itself may prescribe. In this latter respect, Ross's conception of validity as a content-neutral concept can be likened to Kelsen's.[5] But whereas Kelsen rested validity on the basic norm, Ross did not understand validity as a property of law and of legal concepts that can be derived from the legal system itself (Ross 1929, 261). As legal realist, Ross believed that the source of validity needs to be sought *outside* the law, in the spatiotemporal coordinates of empirical reality:

> Our object in determining the concept of law is not to spirit away the normative ideas, but to put a different interpretation on them, reading them for what they are, the expression of certain peculiar psycho-physical experiences, which are a fundamental element in the legal phenomenon. (Ross 1946, 49)

A legal norm is valid when "in force," at which point it ceases to be a mere declaration of intent and becomes a binding statement (as when a policy guideline is implemented into a judicial decision). And there are two empirical criteria that need to be met in order for a norm to be legally valid in the sense just specified: It must be recognized and followed by the majority of the community of addressees, and in particular by the majority of the judicial body; and it must be felt by this majority to be "socially binding," as against being *morally* binding, so this second criterion serves the purpose of distinguishing law from morals (Ross 1958, 18, 34–8; 1953, 27–8, 47–51).

[5] On Kelsen's conception of legal validity see Section 8.5 in this tome and Section 2.3.2 in Tome 1 of this volume.

Alf Ross (1899–1979)

According to Ross, by incorporating these two criteria into the definition of valid law—that is, by predicating validity on (*i*) efficacy, or the fact of a norm's being in force, and (*ii*) a social feeling of being bound by the norm—we can resolve one of the classical antinomies in legal philosophy, the antinomy between efficacy and obligatory force, in that the law is considered "at the same time something factual in the world of reality [efficacy] and something valid in the world of ideas [obligatory force]" (Ross 1958, 38; 1953, 51).[6] In this way Ross avoids the radical position taken by Olivecrona, who reached the same conclusions but did so claiming that we need to do away with the very label "validity of law" if we are to avoid falling into the traditional debate between theories that stress one aspect of legal validity at the expense of the other, as has traditionally happened in particular between natural law theory and legal positivism (Olivecrona 1971, 112).[7]

Not much debate has developed around the first criterion of valid law, that is, the efficacy criterion, considering that it is also present in authors like Kelsen and Hart. The only point to be stressed in this regard is that, by incorporating the efficacy criterion into the concept of valid law, we make sure that we are talking about just that, namely, *valid* law, without also bringing into that concept the criteria needed to make law democratic or just. And although these additional criteria may not be an ingredient of valid law, they do have a fundamental role to play in making law binding, or "real," as Ross would say. Only in this way, he goes on to comment, will the law be more likely to be obeyed, since it will generally reflect values widely shared among its addressees, and in particular among judges.

By contrast, much criticism has been directed at the Scandinavian realists in response to the subjective or psychological criterion, and in particular to the move by which Ross sought to include the "feeling of being bound" by law in the very concept of (valid) law. The criticism, more to the point, was that this subjective component makes it difficult to distinguish legal concepts from moral ones, since both are grounded in the same feeling.[8] Ross conceded that law and morals operate in the same way—on a psychological basis—and that to some extent they help each other in inducing people to act in certain ways, according to modes of behavior consistent with law and morality themselves (see, e.g., Ross 1962, 1188–90). But, as much as the mode of operation may be the same, the *feelings* behind the legal and the moral phenomenon differ substantially: Whereas the addressees of legal provisions obey the law saying to themselves, "I *ought* to act thus" (that is, "I have to"), the addressees of moral prescriptions follow those rules saying, "I *must* act thus." The former thinking

[6] See also, generally, Ross 1998, 147–63, and 1968, 104.

[7] On Olivecrona see Chapter 14 in this tome.

[8] For criticism of Ross's idea of validity as expounded in *On Law and Justice*, see Hart 1959, 238–40. Ross's defence can be found in Ross 1962, 1186–7.

exemplifies what Ross calls *formal* legal consciousness; the latter, what he calls *material* legal consciousness (Ross 1958, 55; 1953, 69).

In the end, Ross understands law as whatever complex of norms and concepts happens to be binding in society, regardless of the ideologies espoused in society. That rigidity, however, is only partial, for it is tempered by the need to make the law receptive to its political and social environment. This is done by focusing on one of the constitutive and specific elements of legal concepts and categories: their validity. Their validity, in turn, means that they are "in force," in that (*i*) they are observed and, more important, (*ii*) they are felt to be binding by the majority of its qualified addressees, namely, the judges (Ross 1958, 35; 1953, 47–8).[9]

16.3. Rights

Like American legal realism, Ross's legal theory is grounded in an investigation of the central role that legal actors play (especially judges) in defining law and its conceptual constitutive elements (Ross 1958, 40, 45; 1953, 48, 50). But like his fellow Scandinavian legal realists, Ross held that a central element of law lies in its *language*. He can be said to have taken a more European approach to conceptual analysis, even though his aim is ultimately to point out, in keeping with Hägerström's teaching, that such legal concepts (and *in primis* that of rights) are just words devoid of any cognitive meaning.[10]

Ross begins his investigation by directly focusing on the different concepts and categories that constitute the essence of legal language: duties, property, damages, and, more important, rights. This starting point is common to all Scandinavian realists, but for different reasons. The linguistic aspects of law are central to Lundstedt's and Olivecrona's investigations due to the degree to which these two thinkers were influenced by Hägerström's historical analysis of the use of legal language and its fundamental role in explaining the binding nature of law (Olivecrona 1946; Hägerström 1965, 16–38). Ross also supported his analysis with investigations into the history of law, but to find out why he focused on the workings of legal language we instead have to go back to his early roots as a student of logical positivism, which shaped his legal thinking in significant ways.[11]

To wit, the language is in his view the primary means through which legal rules are produced by a legal order and addressed to the community. Legal language, however, is not seen by him as a descriptive device: Its point is not to

[9] As to the central role played by the judiciary to create "real binding law" also at the international level, see Ross 1947, 86–7.

[10] On Hägerström's non-cognitivism see Section 13.2 in this tome.

[11] Two examples of the influence of logical positivism on Ross's work can be found in Ross 1958, 67, and 1953, 82. See also Ross 1968, 15, particularly in connection with Ross 1969, 225.

describe the world of the is (*Sein*) or that of the ought (*Sollen*), nor does it describe an economically efficient reality or a relation of trust between the rulers and the ruled. In the footsteps of John Austin, Ross considers legal language as having primarily a directive function, though Ross rejects Austin's analysis of law in terms of commands in favor of Olivecrona's analysis of it in terms of independent imperatives, which Ross redefines as directives (Ross 1958, 8; 1953, 18). Legal language is an instrument of social control directed at shaping or creating a certain situation, especially through the influence it exerts on human behavior (Ross 1958, 8, 158–60; 1953, 18, 188–93). Over the course of centuries of education and ideology, the constitutive concepts of legal language, such as the concept of rights, are implanted in the mind of the population *as if* they were entities belonging to the spatiotemporal world. So in this socio-psychological dimension, legal concepts and ideas tend to somehow live and function independently of the ideological world of the values they implement in the community (Ross 1958, 55, 59; 1953, 69; 1968, 51). As a socio-psychological construct, the legal phenomenon must then make it possible for people to treat law itself as having the properties traditionally ascribed to it, especially its operating on the basis of logical reasoning (as with the dichotomy between valid and non-valid law) and by means of specific concepts, *in primis* the concept of rights. Through this attention paid to logic and legal reasoning, Ross, with his legal training and a law professor himself, moved away from Hägerström, who instead was not trained as a lawyer and was professor of practical philosophy (see, e.g., Ross 1958, chap. 2; 1953, chap. 2).[12]

Through his investigations, Ross arrived at two concurrent ideas about the nature of law in general and of rights in particular. First, legal concepts, like that of rights, are in themselves detached from any system of moral, religious, or political values: The concept of rights or that of duty are no more attached to moral or political values than is the expression *tû-tû*. In fact Ross's claim, made in an article so titled (*Tû-tû*: Ross 1957a, 818–22), is even more radical than asserting that legal concepts lack any ontological relation to the world of values. According to Ross, the legal concepts and categories constitutive of law do not even have an ontological dimension to begin with:

> "Ownership," "claim," and other words, when used in legal language, have the same function as the word "tû-tû"; they are words without meaning, without any semantic reference, and serve a purpose only as a technique of presentation. (Ibid., 821–2)

The law is a complex of linguistic signs or symbols, prominent among which is the word *rights*, used for the purpose of leading its addresses to behave or not behave in certain ways: These symbols act as signposts or "directives" pointing the way their addressees ought to take. Directives are "utterances with no

[12] See also Hägerström 1953a, 107–8. But see Peczenik 1972, 219.

representative meaning, but with the intent to exert influence" (Ross 1958, 8; 1953, 18). The legal phenomenon is a mechanism constructed through the use of linguistic or symbolic signs, and the sign *rights*, regardless of the values it carries, always works through words or symbols as a stimulus designed to elicit responses (i.e., behaviors) from the members of the community and in particular from the actors who monopolize the use of force, namely, the judges (Ross 1958, 32–3; 1953, 44–5).[13]

The very nature of the legal phenomenon is thus considered by Ross to be similar to that of a machine, and the direction the legal concept of rights point in (in realizing the value *f* or the opposite value *e*) does not influence its way of working, since that is relatively disconnected from the surrounding value environment. In order to support this idea of the nature of law as relatively neutral (i.e., relatively detached from values), Ross relies on legal history after the fashion of Hägerström and his "disclosing" of modern legal concepts through an investigation of ancient Roman legal concepts and categories (Hägerström 1941, appendix 5). Drawing on ancient Roman law, Hägerström shows how the law and its conceptual apparatus have always been a machine that invariably works in the same way even as its economic, social, and political environment changes, and with it its *value* environment. Through history, law tends to more or less retain its original nature as a complex of rules (rules of conduct as well as competence rules) designed to regulate the use of force (Ross 1958, 52–8; 1953, 69–73).

However, as noted, this detachment of the concept of rights from the surrounding environment is not absolute, since what is fundamental when speaking of a legal concept like that of rights is that, even though the concept does not connect to any concrete empirical reality, it *works within reality* as a stimulus through which to have people behave in certain ways. According to Ross, the traditional constitutive concepts of legal language (concepts such as "rights" and "duties") are in themselves meaningless. Still, they acquire an authoritative status, that is, they become law, simply by virtue of their being set in a certain social and political framework that, for example, makes words such as *tû-tû* meaningless, while making *property right*, by contrast, meaningful (Ross 1957a, 818). It is this framework, coupled with the values it embodies, that will then heavily influence lawmaking by determining what Ross would call the semantic reference of concepts and categories that otherwise would be mere *tû-tû*. Therefore, lawmaking has to lead to results (such as a new right) expressed in a legal language that in most cases shares the values of the majority of the population or, on Ross's conception, the majority of the judges. Only in this way can the law's stimulus-and-reaction mechanism work properly, bringing its addressees to actually consider the new law to be binding.

[13] Cf. Hägerström 1953, 354: "The legal order is throughout nothing but a social machine, in which the cogs are men."

So, for American legal realists and Ross alike, the overall task of legal scholars is to cut through these different ideologies and philosophies that have layered the legal phenomenon, making it almost unrecognizable. Once this work of peeling off the layers is done, the concept of rights will reveal itself in its reality as a linguistic and socio-psychological tool used to influence human behavior.[14]

16.4. Coercion

Ross starts out in his analysis of coercion and its role in the legal phenomenon by asking us to consider the normative system by analogy to the game of chess and the way the game works: If we were to observe two players engaged in a chess match but knew nothing about the rules of the game, he argues, we would perceive the players' activity as no more than a series of meaningless moves having no relation between them. In a similar way, social life is the outcome of individual behaviors whose interrelation can only be understood on the basis of a set of common rules understood by participants and observers alike. Only by knowing these rules and how they interact, Ross goes on to say, is it possible to understand, and to some extent predict, the actions that take place in social life. Hence Ross's conception of what the legal phenomenon is: This, he argues, can be defined as a complex of rules whose "real" existence depends on their being felt to be binding by their addressees, and in particular by the judges.

So legal rules are understood by Ross as a scheme of interpretation enabling us to view as an intelligible, coherent phenomenon what would otherwise appear to us as an assemblage of random and strange behaviors (such, for example, would be our understanding of what goes on in a courtroom). In fact, a whole range of human behaviors would appear that way to us if we couldn't rely on such a scheme of interpretation. Thus, for example, we would not be able to appreciate what it means for two human beings to marry—or what concrete consequences such an act entails—unless we took into account that the two parties performed a ritual created by law and existing under the law.

As to the *existence* of legal rules, there immediately comes up the question of how the rules that are perceived as binding law (and hence as valid law) can be distinguished from those that are not. This question Ross answers by pointing out *de facto* coercion (especially as implemented by the judiciary) as the basic criterion on which to rest the bindingness of legal rules: By observing which rules come to bear in regulating social relations, we can single out the ones that actually affect or are likely to affect the way judges will decide a dispute: "It is here [in the courts' decisions] that we must seek for the effectiveness that is the validity of law" (Ross 1958, 34–5; 1953, 47–8).

[14] On the similarity of the overall project of American and Ross's legal realism, see Martin 1997, 203–4, and Ross 1946, 9; 1958, 102; and 1953, 121–2.

As some commentators have pointed out, as much as Ross may assign a central role to coercion in defining law—accordingly defined as the complex of relations and measures that actually govern the way people interact or are forced to behave—his theory borders on a predictive account of law defined as whatever the judges will ultimately decide in accordance with the system of coercion they feel bound to implement (see, e.g., Duxbury 2001). According to Ross, to claim that a certain legal rule is valid means simply to claim that the rule will most likely be felt to be binding in future decision-making, in effect claiming that the rule will play a decisive role as a reason that courts in the future will invoke in deciding whether or not to apply a coercive measure.

For Ross, then, coercion plays a central role in shaping the very nature of law, that is, in its definition. The basic idea is that only "real" law is law and that real law is what is felt to be coercive, but what counts in this regard is not how the addressees in general feel—or what the people generally experience as having coercive force—but that the *judges* feel bound by as a coercive order. Not unlike Kelsen, then, Ross views valid law as a coercive system of rules regulating the institutional use of violence, especially and in the first place by the judiciary; or, as Ross puts it, what is essential about legal rules is "that they concern the application of force, not that they are upheld by means of force" (Ross 1958, 53; 1953, 70). That is the sense in which, on Ross's theory, the reality of law lies in its coercive nature: Law enables certain institutional actors to (coercively) use violence, but in a way that its addressees feel to be legitimate, and in this latter condition is captured the other component of law, namely, its validity or obligatoriness:

> The legislator is not like a god whose word creates a world out of nothing. The task of the legislator is to motivate men toward a certain desired course of action. The source of his power lies in the political ideology or myth which invests him with legal authority. (Ross 1958, 352–3; cf. Ross 1953, 444–6)

However, well aware of some of the difficulties met by the Kelsenian *Stufenbau*, Ross points out that not every legal rule is backed up by the threat of sanction. In other words, not every rule is guaranteed by coercive measures, such as physical violence as prescribed by a higher-ranking rule empowering the judges to order such violence if they should determine that the lower rule has been violated. Ross wants to stay away from this possible *regressus ad infinitum*, which, among other consequences, would entail the predicament of having to identify the competent judicial bodies and applicable coercive measures in a scenario where the basic norm written into law was hypothetical and "illegal" (Ross 1958, 81–3; 1953, 98–100).[15] Ross seeks to avert these kinds of problems by instead theorizing that in every legal system there exists a series

[15] See also Hart's account of a self-referring law in Hart 1983c, 175.

of norms whose legal validity does not rest on their being guaranteed by coercion. There are norms, like those on jurisdiction or competence (especially at the higher levels of the legal system), whose validity stands independently of any coercive means of enforcement. In other words, these norms are valid—i.e., their addressees feel bound by them—not because force can be used to ensure compliance but precisely because, through a historical process of socio-psychological and linguistic reinforcement, these "rules without coercion" come to be viewed by those addressees, and in particular by the judges, as having cultural and political legitimacy (Ross 1934, 93–4, 100–1; see also Ross 1946, 89–90, 108–12; 1958, 78–80; 1953, 95–7).

16.5. Law and Politics

In Ross's work, politics plays a central role in its relation to the law, and testifying to this centrality is the number of pages he devotes to that topic in *On Law and Justice*: more than one hundred, almost one-third of the book (Ross 1958, chaps. 13–17; 1953, chaps. 13–17). Like the other Scandinavian realists, Ross believes there to be a distinction between law and politics, on the reasoning that, although they both function as means through which people can be forced or persuaded to behave in ways they would not otherwise choose to behave in, the techniques they employ to that end differ, or at least they have historically done so: The political order "aims at bringing about practical agreement by influencing an opponent's viewpoint *through argumentation and persuasion*" (Ross 1958, 326; italics added; Ross 1953, 416); lawmaking, by contrast, produces norms that are "effectively complied with because they are *felt to be socially binding*," especially by the judges (Ross 1958, 34; italics added; Ross 1953, 47; cf. Ross 1958, 29; 1953, 41–2). In other words, over time the law has acquired a certain degree of independent legitimacy, that is, a legitimacy resting more on the specific ways a certain rule is enacted and implemented than on its content—more on its normative features than on its political goals.

However, in order for lawmaking to keep working as a system of procedures directed at producing valid law (the only kind deserving of that name), it needs to produce statutes and judicial decisions that embody the political values prevalent in the community, reproducing them as law. In other words, the legal order and its actors have to carry out procedures and processes that produce statutes and judicial decisions informed by the values embraced by the majority of the judges (or at least not contrary to their views and sentiments). As a result of so opening lawmaking to the political world, Ross is led to make the following claim: "There are no problems of legislation that are specifically legal-political, but every problem of legislation has a legal-political aspect" (Ross 1958, 329; 1953, 419).

But which values can be singled out as the ones that prevail in the community? Here Ross is inclined to say that we ought to recognize all those val-

ues traditionally embraced by the democratic political model, and he strongly criticizes Lundstedt's idea of "social welfare," stressing that the latter tends to bring together a mixed bag of interests and values that by their very nature are discordant and even incommensurable (Ross 1952, 231–43; 1958, 289–96; 1953, 375–84).[16] Ross notes that this sharing of values between legal and political orders is something that happens *most* of the time but not in all cases, recognizing that sometimes the law addresses technical issues that the majority of the population (or of the judges) have no knowledge of, and even if they did have some familiarity with such technicalities, they would not attach any value to them. In these cases, says Ross, the lawmaker needs to take into account the "legal consciousness" prevailing among the population (Ross 1958, 372–7; 1953, 471–2). Armed with that knowledge, the lawmaker can then set out to answer the question, what values would the majority of the people subscribe to if they were knowledgeable about the issue at hand or if they cared so much about it as to attach value to it?

This opening of the law to the political ideologies present in society means, for example, that we have to broaden the range of traditional sources of legally relevant materials the judges have to look to in deciding a legal issue. This can classically be appreciated in the status that in some Scandinavian countries is accorded to the *travaux préparatoires* (the parliamentary records making up a statute's legislative history)—and so to material of a clearly political nature—as authoritative sources of law ranked high in the hierarchy of sources (see, e.g., Frändberg 1999, 208–19).[17] Also attesting to the influence of this broad idea is the appreciation the Scandinavian legal community has for one of the proponents of legal realism, Per Olof Ekelöf, and for his teleological method of legal interpretation. According to Ekelöf, the aim of the interpreter (either as a legal scholar or a judge) is to achieve "*the total result* which may be regarded as the purpose of the statute" (Ekelöf 1958, 84; italics in the original).[18]

However, as previously mentioned, legal interpreters must bring this influence of the political world into balance with their legal education and with the constraints or directions imposed by existing ways of legal reasoning (see, e.g., Ross 1946, 72).[19] The law maintains its own specificity: As much as it may intersect with other phenomena, and in particular with politics, it cannot be equated with them. The legal phenomenon, in other words, is to some extent autonomous: This is why judges in particular regard the law *as if* it were free

[16] On Lundstedt's idea of social welfare, see Section 15.2.5 in this tome and Lundstedt 1956, 167–75.

[17] See also Ross's account of legal interpretation in Ross 1958, chap. 4; 1953, chap. 4.

[18] In other words, those who interpret a law or a judicial opinion must do so taking into account its underlying values, in such a way that those values come to fruition. See also Ross 1953, 171, taking Ekelöf's view into account, as is not done in *On Law and Justice* (Ross 1958, 147). On Ekelöf see also Section 17.2 in this tome.

[19] Compare Hart's criticism in Hart 1961, 133–4.

from political entanglements, and hence pure, and legal science cannot neglect to take that into account.

This limitation on the entrance of politics into legal discourse can easily be appreciated in some of Ross's textbooks. In contrast to Critical Legal Studies, for example, Ross's textbooks on constitutional law or in international law rarely make reference to political material as a source of law (see, e.g., Ross 1959b; Spiermann 2003, 699). When Ross takes up the reasoning developed within the political arena, he usually locates it under a specific and clearly separate heading dealing with the politics of law. In this sense, too, Ross's conception of legal science can be likened to Kelsen's.

According to Ross, political discourse always tends to take divergent interests and values into account at the same time, in such a way as to wind up reasoning from compromised concepts like that of social justice. These political concepts show that political reasoning is mainly concerned with integrating opposing solutions and values, as by attempting to strike a balance between individual and collective justice.[20] As a consequence, the

> political discussion does not lie on the plane of [the legal discourse's] logic: it does not strive to prove truths; it lies on the psychological-technical-causal plane: it aims at bringing about practical agreement by influencing an opponent's viewpoint through argumentation and persuasion. Within this framework a part is played by rational, argumentative assertions based on common experience or scientific insight. But their function is not to prove a truth, but to convince an opponent, that is, convert him to one's own standpoint. (Ross 1958, 326; cf. Ross 1953, 416)

In *legal* reasoning, by contrast, the *tertium* is often *non datum*: There is no third solution between opposite values (e.g., valid vs. invalid), and no compromise can be accepted ("partial validity" would not in this case be an option). The choice can only be between valid and invalid law, or, in Ross's terminology, between the law *in* force and the rules of law that are *not* in force and hence (on a realist perspective) are not valid.

This interest in drawing a boundary between law and politics plays an essential role in shaping Ross's view of how legal science relates to political material. Like the American legal realists, Ross wanted to make law a properly *scientific* discipline. To this end, it was necessary for the end result of legal science to be amenable to testing. Ross thus made it a primary task of legal science to produce statements that could be assessed as being either correct or incorrect in light of the empirical reality of the law in force, and in particular in light of judicial decisions (Ross 1958, 38–50; cf. Ross 1953, 51–65).

It is in this effort to make the study of law scientific that Ross recognized the shaping influence of political forces on law. A scientific investigation of the legal phenomenon is an investigation aimed at finding out what the law *really*

[20] Says Ross (1958, 321; cf. 1953, 411) in this regard: "The task of politics will always be anchored in a multiplicity of attitudes that do not constitute a system but are a conglomeration […] the political task is always one of integration, an adjustment of incommensurable considerations."

is. Law is a powerful tool that the political establishment uses to further its goals in society. Legal scholars therefore cannot disregard that developments in the legal world, and in particular the making of new law, stand affected by developments unfolding in the political world. It would accordingly be self-limiting for the study of law to only rely on traditional analytical tools, such as the logical techniques for assessing the coherence of legal concepts used in different legal provisions over time. Legal scholars must draw on history, political science, social science, psychology, sociolinguistics, and anthropology. As Hilaire McCoubrey and Nigel D. White comment, "it is not very surprising that Scandinavian realism originated at the beginning of the twentieth century at a time when the psychological theories of Sigmund Freud were very much in the public eye" (McCoubrey and White 1999, 178).[21]

This use of material that is not purely legal serves the purpose of situating the different legal concepts and categories in the wider value-context where these concepts and categories originated or have been used. Ross thus claims, for example, that no clear-cut distinction can be drawn, especially in the English-speaking world, between the study of law—that is, the traditional analysis of valid law, the sociology of law, and the history of law—and jurisprudence, that is, the philosophical analysis of the nature of law is (Ross 1958, 24–7; 1953, 33–6; cf. Ross 1953, 33–6).

In this way Ross opens legal science to concepts such as welfare and policy, that is, to concepts originating in disciplines typical of the political arena, disciplines like political science or political philosophy. Legal science is necessary a mixed discipline because

> it is […] impracticable to draw any sharp boundary line between cognitive pronouncements concerning valid law and legal political activity […]. Fundamentally, therefore, the cognitive study of law cannot be separated from legal politics. (Ross 1968, 48–9; cf. Ross 1953, 62–3)

It is not just on a theoretical level that Ross sought to work the overlap of the legal and the political worlds into an idea of law perceived by legal actors (and in particular by the judges) as if it was autonomous from politics: The same sort of commixture finds a parallel in Ross's own career as both a legal scholar and an engaged reformer. Ross actively participated in the politics of his own country and in the deep political reforms carried out by the social democratic governments in Scandinavia, so he knew the influence that political power exerts on the legal order and on its lawmaking activities.[22]

At the same time, however, Ross also promoted an idea of law as *separate* from politics. So, as much as he worked in the political order, he always did

[21] On a similar influence of psychological studies on American legal realism, see Duxbury 1995, 126–7.

[22] On the role of Scandinavian legal realism in the construction of a social democracy in Sweden, see Sundberg 1986, 315–20.

so as a lawyer and not as politician. According to Ross, "the role of the lawyer as legal politician is to function as far as possible as rational technologist," and legal scholars can intervene in the lawmaking process with mere "recommendations" offered to policy makers (Ross 1958, 377; 1953, 472).[23] His work and positions were those traditionally entrusted to those with the technical expertise of a lawyer: He served as professor of law and as legal consultant in the legislative process.

[23] See also Stone 1961; Ross 1958, 377; and Ekelöf 1991. Compare Ross's criticism of Ekelöf's position in Ross 1953, 430, a criticism not included in *On Law and Justice* (Ross 1958, 338).

Chapter 17

OTHER SCANDINAVIAN LEGAL REALISTS

by Uta Bindreiter, Mauro Zamboni, and Torben Spaak

17.1. Tore Strömberg: A Conventionalist Legal Realist (*by Uta Bindreiter*)

17.1.1. Introduction

The Swedish legal scholar Tore Strömberg (1912–1993)[1] is often characterized as the last true representative of the Uppsala school of legal thinking. This is correct: apart from shouldering Karl Olivecrona's heritage and refining a series of the latter's ideas, Strömberg also received much inspiration from Alf Ross. He did considerably more, however, than merely follow in his predecessors' footsteps.[2]

Strömberg's jurisprudential interest focussed on two issues: firstly, on the morphology of the law, i.e., the formal elements—in Swedish: the *byggstenar*[3]*—of the structure of a legal system; and, secondly*, on the meaning of the common assertion that a given rule is "a valid legal rule," or that it is "valid law." With respect to the first issue, it seems safe to say that Strömberg was the first to identify the rules of qualification as a special, necessary type of rule (Strömberg 1962, par. 14), and as regards the second issue, he arrives at the conclusion that people's belief in the validity of the law is nothing but a social convention, albeit an important one, since this belief constitutes the ultimate condition for the efficacy of the law.

Among Strömberg's major works, the following three monographs must be mentioned:

(*i*) *Inledning till den allmänna rättsläran* (An introduction to jurisprudence: Strömberg 1981). This work first appeared in 1962 in the form of a course compendium, to be used by the students in jurisprudence at Lund University. Published in book form, the work was used as a text book during the years 1970–1992. It reached eight editions, the latest one dating from 1981.

(*ii*) *Rättsfilosofins historia i huvuddrag* (The main features of the history of legal philosophy: Strömberg 1989). Also this work appeared first in the form of a course compendium. In book form, the work was used as a text book at

[1] Tore Strömberg was the first incumbent of the chair in jurisprudence (*Allmän rättslära*) at Lund University. He held the chair from 1961 until 1977.

[2] On Olivecrona and Ross see respectively Chapters 14 and 16 in this tome.

[3] See the title of one of Strömberg's major works (1988). Strömberg himself looked upon his investigations in connection with the formal structure of the legal system as the most important part of his work.

E. Pattaro, C. Roversi (eds.), *A Treatise of Legal Philosophy and General Jurisprudence*,
DOI 10.1007/978-94-007-1479-3_45

Lund University during the years 1970–1998. In 1989, the book had reached four editions.

(*iii*) *Rättsordningens byggstenar. Om normtyperna i lag och sedvanerätt* (The constitutive elements of the legal order: On types of norms in statutory law and customary law, Strömberg 1988). Published in 1988, this book offers inter alia a further elaboration of Chapter 3 (The Nature of the Legal System) of Strömberg's major work *Inledning till den allmänna rättsläran* (see (*i*) above).[4]

In the following, I shall restrict myself[5] to highlight the salient features of two of Strömberg's more conspicuous achievements, namely, of his classification of legal rules (Section 17.1.2) and of his conventionalist approach to the issue of the "quality" of being valid (Section 17.1.3).

17.1.2. Strömberg's Classification of Legal Rules

In Strömberg's view, the content of legal rules corresponds *partly* to real facts (i.e., human behaviour and human situations), *partly* not: Rather, it consists in the rise of unreal (ideal) conditions (*förhållanden*), the most prominent of these being legal competence and legal quality (Strömberg 1962, 123). As will be shown below (see Section 17.1.3), the latter, unreal part of the legal rule's content is ultimately tied to the—according to Strömberg, conventional—concept of "legal validity."

In the present section, I shall first describe how Strömberg arrives at his classification of legal rules and why he insists on retaining qualification rules as an independent rule type (Section 17.1.2.1). Thereupon, I shall touch upon two issues connected with this classification, namely, the dissolution, as it were, of the "rules about rights" (Section 17.1.2.2) and the specific status of what Strömberg calls "legal directions for use" (Section 17.1.2.3). That he disagrees with Olivecrona's views with respect to the issues raised in Sections 17.1.2.2 and 17.1.2.3 deserves special mention.

17.1.2.1. Rules of Action, Rules of Competence, and Rules of Qualification

Strömberg looks upon the legal system as consisting of two "layers" of rules, namely, rules addressed to individuals and rules addressed to officials. Either of these "layers" comprises different types of rules—most prominently, rules of action (or conduct). Rules of action prescribe or prohibit something: They purport, *either* to give rise to a certain human behaviour, *or* to suppress certain other types of human behaviour (Strömberg 1988, 20). Apart from rules of ac-

[4] Among Strömberg's minor works, the following articles should be mentioned: Strömberg 1969, 1970, 1984, 1986.

[5] Strömberg does not specifically treat the issue of coercion, nor that of law and politics. On his view on "rules about rights," see Section 17.1.2.2.

tion, however, there are *other* rules—rules which do not prescribe or prohibit anything but which nevertheless seem to have imperative meaning.[6] It is towards these other rules that Strömberg's interest is directed in the first place.

In contrast to Ross, Strömberg is not an ardent reductionist (cf. footnote 19 below). Even if it is logically possible to reduce the number of existent norm types, he says, "it is not sure that we *will* do so. There may be a practical need for a distinction of types of norms which are characterized not only by their content but also by their linguistic form" (Strömberg 1984, 154).

Strömberg means to arrive at such a distinction on the basis of logical criteria (*på formallogiska grunder*) (Strömberg 1988, 8). In this undertaking, he focuses on the rules of statutory law, since they show a more stabilized linguistic form than those of customary law (ibid., 13). Nevertheless, even statutory rules show a great variety of linguistic shapes, and it is evident that there is no intimate connection between a rule's linguistic form and its content and logical structure.[7]

Strömberg realizes that what ultimately distinguishes a legal rule *qua* linguistic phenomenon from other kinds of sentences (in the logical, not in the grammatical sense) cannot possibly have to do with the legal rule's conditional clause.[8] Therefore, a legal-theoretical differentiation between different types of rules must stem from the content of the rule's *principal clause*, that is, the *legal consequence* (*rättsföljd*). Adducing three examples, Strömberg can point out different types of legal consequence (Strömberg 1988, 14; my translation):[9]

> Example 1: Any finder of lost property shall, without unreasonable delay, report the find to the Police.[10]

This is a *Rule of Action*, addressed "to whom it may concern"; that is, to anybody who happens to find lost property. The legal consequence of the rule consists in a *duty*, namely, to do exactly that which is indicated by the rule's pattern of behaviour (or conduct).[11] The duty is expressed by the word

[6] *Firstly,* in the sense of establishing, categorically, that an ideal quality or an ideal competence *shall* arise; and, *secondly*, in the sense of guiding people's thoughts and actions.

[7] "In order to specify [*artbestämma*] a rule of Statutory Law, one frequently has to fall back upon the content of the rule, and more often than not, this content can only be established by studying the rule against the background of other rules. When classifying an individual rule of Statutory Law, the linguistic form of the rule can be ambiguous or even misleading" (ibid., 14; my translation).

[8] There are conditional clauses in other types of sentences as well, e.g., in mathematical sentences.

[9] Because of difficulties in translation, Strömberg's Example 1 has been substituted for another.

[10] The Swedish original: "Var och en som hittar något skall utan oskäligt dröjsmål anmäla fyndet hos polismyndighet." This rule can be found in the Swedish regulation concerning the rights of the finder of lost property, namely, Lag (1938: 121) *om hittegods*, par. 1.

[11] Even rules of action "seem to be metaphysical if understood as rules about legal duties of action [*rättsliga handlingsplikter*]" (Strömberg 1981, 154; my translation). What is more, Strömberg holds that most rules of action are metaphysical in another sense as well, namely, in so far as

"shall," whereas the pattern of conduct is expressed by the words "report […] to the Police."

Example 2: Where goods are sold and found deficient, the buyer may cancel the purchase.[12]

In this example, the legal consequence consists in the rise of a certain ability or power, namely, the power to cancel the purchase agreement. Since the effect of the cancellation is a *legal* effect, the buyer's power must be a legal power, or *legal competence*. This rule, then, is a *Rule of Competence.*

Example 3: When a Swedish man marries a woman who is an alien, any child of theirs that was born before their marriage and has not acquired Swedish citizenship under Section 1 becomes a Swedish citizen if the child is unmarried and under eighteen years of age.[13]

The legal consequence of this rule consists in the rise of a quality, namely, that of "being a Swedish citizen." Since this quality is not a *real* but only an imagined—a *legal*—quality, Strömberg calls this type of rule *Rules of Qualification*.

Thus, the three types of legal consequence pointed out by Strömberg imply, respectively, a legal duty of action (Example 1), the rise of a legal competence (Example 2), and the rise of a legal quality (Example 3). On the basis of this differentiation, he roughly classifies the rules of a legal system into rules of action, rules of competence, and rules of qualification, maintaining that the legal system can exhaustively be described as consisting of these three types of rules[14] and, in addition, of their individual counterparts, namely:

(*i*) individual imperatives of conduct (*individuella handlingsimperativer*), e.g., payment orders;
(*ii*) competence acts, e.g., authorizations, and
(*iii*) qualification acts (Strömberg 1962, 125–6)[15], e.g., nominations for an office.

Competence acts and qualification acts are interesting linguistic phenomena. They belong to a special category of sentences which are usually called *perfor-*

the prescribed actions are *symbolic* and, as regards their social significance, determined by *other* legal rules (ibid.).

[12] Strömberg's example was taken from the former Swedish Sales Law (Lag 1905 *om köp och byte av lös egendom*, par. 42).

[13] The Swedish Citizenship Act (SFS 2001: 82), sec. 4. Examples 2 and 3 are in the indicative mood, but the meaning of these rules is nevertheless imperative (Strömberg 1981, 83).

[14] Alf Ross, by contrast, looks upon the legal system as a complex of norms of conduct and norms of competence. Also, he holds that the latter are indirectly expressed norms of conduct (Ross 2004, 32, 59). Strömberg points out that on this issue, there is no unanimity in Scandinavian jurisprudence (Olivecrona, for example, did not take up a definite position).

[15] A qualification act can have a negative counterpart, which might be called a *Disqualification Act*—e.g., a divorce sentence (ibid., 126).

matives.[16] Performatives do not assert anything. On the face of it, the speaker is talking about something he is doing—such as, for instance: "I promise to come"—but the curious thing is, that what actually is being done is, that a sentence is being uttered. A performative can be called an utterance addressed to the speaker himself but, at the same time, announced to his surroundings. It is assumed that this utterance gives rise to an effect in accordance with its content. As Strömberg aptly puts it, "[t]he effect is only an imagined one, but since the conception of such an effect [*föreställningen om effekten*] influences the people's attitudes towards each other, it acquires the appearance of reality" (Strömberg 1962, 127; my translation).

In 1961, when Strömberg took the chair in Jurisprudence at Lund University, the issue of competence rules had long been a matter of discussion among the Scandinavian legal realists.[17] Realizing the important link between legal competence and legal validity (a link based upon the legal-political *desiderata* of order and legal certainty: Strömberg 1962, 128).[18] Strömberg has no doubts about the necessity of retaining the competence rules as an independent class of rules: "Obviously, competence rules cannot be totally eliminated from a system of rules, if this system is to be considered valid" (Strömberg 1981, 89; my translation).[19]

The issue of qualification rules as an independent rule type, on the other hand, dates from the year 1962, when Strömberg "launched" this idea in his manuscript compendium *Inledning till den allmänna rättsläran* (An introduction to jurisprudence: Strömberg 1962, 117, 123ff.).[20] Qualification rules do not have any pattern of conduct: They do not tell us what we should do or omit to do. Rather, they confer upon persons (things, relationships) a certain quality.[21]

Theoretically, qualification rules could be eliminated by incorporating their content into other rules—rules of action or rules of competence—which are

[16] On this issue, Strömberg relies largely on Olivecrona's studies (see Olivecrona 1971, chap. 8). On Olivecrona's theory of performatives see Section 14.2 in this tome.

[17] According to Ross, for example, norms of competence are, properly speaking, indirectly expressed norms of conduct (Ross 2004, 32).

[18] The validity of any legal rule presupposes that it has been created by somebody who had the competence to do so.

[19] According to Strömberg, a total reduction of competence norms leads to Kelsen's theory of the Basic Norm and to Hart's theory of the Rule of Recognition (Strömberg 1984, 161). Consequently, he is anxious to "preserve" the norms of competence as a special type of norm: In his view, they are an indispensable element in the organization of society (ibid.).

[20] The term *kvalifikationsregler* (rules of qualification) was adopted by Olivecrona (1976, 166 n. 1). See also Spaak (1994, 182 n. 18). Spaak does not recognize qualification norms as an independent norm type since, in his view, qualification norms do not seem to have the capacity of guiding human behaviour (ibid., 168).

[21] "The meaning content of the rule of qualification is that the legal quality arises, or exists, as a consequence of certain facts" (Strömberg 1981, 83; my translation). The Swedish original: "Kvalifikationsregelns innebörd är, att den rättsliga kvaliteten uppstår eller finnes som följd av vissa fakta." Cf. Spaak: "[if] certain operative facts are at hand, then, as a consequence of these, there ensues a certain legal effect. The effect is thus thought to occur *ipso iure*" (Spaak 1994, 168).

connected with them. In Strömberg's view, however, such a measure would be highly unpractical as well as unwise, since qualifications are of extreme importance, appearing, as they do, as legal facts in a host of statutory rules (Strömberg 1970, 300).

The following competence norm demonstrates why Strömberg deems it necessary to distinguish[22] between rules of competence and rules of qualification: "If a person is ordained as a minister in the Swedish Church he acquires a competence—in compliance with the marriage ritual of this church—to marry a man and a woman to each other" (Strömberg 1984, 155).

As Strömberg points out, this norm actually comprises three distinct criteria, namely:

(*i*) The *conditional sentence* ("if […]") comprises the claim that the respective person shall belong to a certain class of persons (namely, clergymen in the Swedish Church);
(*ii*) the *principal sentence* ("he acquires […]") endows this person with a certain competence, namely, the ability to "marry" a couple; and, what is more,
(*iii*) the *principal sentence also* ties the exercise of the competence to a certain procedure or ritual ("in compliance with […]").

Similarly to other competence norms, the competence norm above establishes "*who* can produce *what* and *how* he can do it" (ibid., 156).[23] The last mentioned point—the procedure or ritual[24]—is of particular interest, since it may be obligatory for the validity of the respective act (Strömberg 1984, 156). This is indeed the case here: The requisite procedure (i.e., the marriage ritual of the Swedish Church) is included in the *principle* sentence (*iii*), as an element of the *legal consequence*. Now, this is a controversial point, because the procedure may be conceived of as a *condition* for exercising the competence.

Therefore, one naturally wonders if the correct place for the procedure is, perhaps, a subordinate (conditional) sentence, not the principal sentence. Strömberg hastens to perform this experiment, and the norm of competence

[22] Another reason for Strömberg's retaining qualification rules as a special rule type is the circumstance that rules of competence always can be transformed into rules of qualification but that this does not apply *vice versa.*

[23] In Spaak's formulation, competence norms "express […] that persons who are qualified in a certain way in certain specified situations can bring about a certain legal effect by proceeding in a certain way" (Spaak 1994, 181). Spaak arrived at the conclusion that it is logically possible to reduce competence norms to fragments of duty-imposing norms, addressed to the officials (ibid.).

[24] Most statutory rules say nothing about the manner, in which the competence ought to be exercised: It is tacitly understood that "the competence is exercised by an enunciation that the legal effect enters" (Strömberg 1984, 156)—that is, by a *performative*. For example, a Swedish statutory rule which endows the judge with the competence of appointing an administrator of a bankrupt's estate, does not say expressly how this shall be done: It is understood that the judge shall do this by saying or writing that he appoints Mr. NN as administrator (ibid.). In other cases, however—such as, e.g., the marriage ritual—the procedure may be minutely regulated.

now reads thus: If a person is ordained as a minister in the Swedish Church and if—in compliance with the marriage ritual of this church—he declares a man and a woman to be spouses…

Then what? Strömberg asks: What will the rest of the norm be like? Obviously, the legal consequence will consist in that the man and the woman get "married" (or become "spouses"); or in other words, that the two people, pursuant to the minister's *performative*, acquire a certain quality (ibid., 157).

Evidently, the linguistic forms of the two norms differ, and their respective legal consequence is not the same, either: In the *first* norm, the legal consequence is about a competence ("he acquires a competence […] to marry […]")—in the *second* norm, the legal consequence ("that the man and the woman get 'married'") does not at all express the idea of a competence but, rather, the coming into existence of a new quality.[25]

Frequently, qualification rules have the indicative form and are, therefore, to all appearance theoretical sentences. Owing to their imperative meaning, however, they have nevertheless a practical function, in so far as they, albeit indirectly, induce people to think and act in a certain way (Strömberg 1962, 127). Strömberg's "classical" example for a simple qualification rule reads thus: "If a child is in the joint custody of its parents, both parents are the child's guardians" (my translation).[26]

Let us assume that we are used to call person *X* the "guardian" of *Y*. Our considering *X* as a "guardian" means, in effect—or so Strömberg contends—that we are looking upon *X* in such a way simply because there is a rule exhorting us to do so (namely, to consider *X* as the guardian of his son *Y*, who is a minor).[27] Interestingly, Strömberg himself is uncertain whether or not formulations such as "I consider *X* the guardian of *Y*" are correct linguistically. As he says, it can hardly be the case that qualification rules purport to encourage people to falsify reality wilfully! (Strömberg 1981, 83). Rather, it must be the case that this particular qualification rule "decrees categorically" (ibid.) that parents *shall be* the guardians of their children, and that according to the meaning content of this rule, they "really" become guardians (ibid.).

Involuntarily, what comes to mind here is the Hägerströmian exclamation: "This is magic!"[28] In Strömberg's view, however, there is nothing magi-

[25] Competence norms—and as Strömberg believes, all competence norms—can easily be transformed into qualification norms without their purpose undergoing a change: The original norm remains substantially the same, quite independently of the transformation. Strömberg likens this phenomenon to that of an ordinary statement being expressed in different terms (ibid.).

[26] The Swedish Code of Parenthood and Guardianship, chap. 10, par. 2. The Swedish original: "För barn som står under vårdnad av bägge föräldrarna är dessa förmyndare."

[27] According to Strömberg, H. L. A. Hart's Rule of Recognition is an unwritten rule of qualification, exhorting the judges to consider the rules that have been identified according to it, as valid legal rules. On this issue, see Bindreiter 2002, 51–4.

[28] Here, I am referring to Hägerström's discussion of the *mancipatio* in Roman law, where the buyer acquires a certain property by means of uttering a certain formula and making certain ges-

cal about the sudden rise of an ideal quality. Certainly, an individual—or an object, or a relationship—cannot acquire a new quality simply because there is a rule saying that he/it *shall have* this quality: "To assert such a thing would be tantamount to ascribing a supernatural effect to the rule" (Strömberg 1988, 43; my translation). Therefore, the effect which, for example, chap. 10, par. 2 of the *Swedish Code of Parenthood and Guardianship* is assumed to have—namely, to "turn" parents into "guardians"—is only to be found on an imaginary level (*på det föreställdas plan*: ibid.). Similarly to the quality of "being a Swedish citizen," the quality of "being a guardian" is an ideal, merely thought, quality: "We can call it a 'legal' quality" (ibid.; my translation).

Unreal as they are, legal qualities are of considerable technical importance because they allow for shortenings in the linguistic reproduction of a norm system's content. Among *purely legal* concepts, Strömberg mentions "guardian," "citizenship," and "marriage":

> *As links within the legal system, these concepts function only as 'conjunctions'*: Apart from this, however, they are frequently of practical importance on a socio-psychological level—something that can be used for legal-political purposes (Strömberg 1981, 102; my translation).

17.1.2.2. Strömberg's Views on "Rules about Rights"

Interestingly, Strömberg's classification of the legal rules into rules of action, rules of competence and rules of qualification allows for the "dissolution" of so-called rules about rights.[29]

Although agreeing with Olivecrona (Strömberg 1962, 135)[30] that the concept of "right" has an important co-ordinating function within the entire system of the conditions (*rekvisita*) and patterns of behaviour of legal rules, Strömberg is reluctant to engage in a discussion on the meaning of the word

tures. In the course of this discussion, Hägerström employs the German expressions *Wortmagie* (word magic) and *Zauberformel* (spell): Hägerström 1927, 40. On Hägerström's theory of legal transactions see Section 13.5.2 in this tome.

[29] As regards legal rules about duties, Strömberg considers them to be identical with legal rules of action (ibid., 154, with reference to 64).

[30] Cf. Olivecrona: "Thus, for example, it would turn out to be extremely inconvenient and confusing if one were to tie all the rules which presuppose that somebody is the owner of an object, together with all the rules there are about various kinds of lawful acquisition. By inserting the idea of a right, one achieves something similar to a traffic junction […] this technical function of tying together is extremely important. Indeed, it is so important that it is difficult to imagine how we could do without it" (Olivecrona 1960, 121–2; my translation). The Swedish original: "Det skulle t. ex. vara ytterst besvärligt och bli oöverskådligt om man direkt anknöte alla de regler, som förutsätta att någon är ägare till ett objekt, med alla de regler som finnas om olika laga fång […] Genom inskjutande av rättighetsidén åstadkommes en motsvarighet till en trafikknut […] denna sammanknytande tekniska funktion är synnerligen betydelsefull. Den är i själva verket så viktig att det är svårt att se hur man skulle kunna undvara den." On Olivecrona's theory of rights see Section 14.3 in this tome.

"right."[31] He admits, though, that it is possible to distinguish, linguistically, a special group of legal rules about rights (although of heterogeneous content).[32] The linguistic structure of the legal system is, after all, based upon an ideology of rights (Strömberg 1962, 123).

Nevertheless, Strömberg is not slow to point out (Strömberg 1981, 111–2) that what is problematic, is that there are highly different kinds of "rules about rights." Whereas some of them easily can be transformed into rules of action,[33] others might rightly be called exceptions from rules of action.[34] Also, there are "rules about rights" which, in fact, express a legal competence.[35] The most problematic group of such rules are, however, those concerning property rights: Among these, there are rules which, according to their content, give rise to a new property right (i.e., the rules about "original acquisition"). According to Strömberg's theory, such rules can easily be conceived of as qualification rules, since they endow the respective person (e.g., the hunter or fisher) with the quality of "being the owner" to his catch.

In consideration of such a variety of "rules about rights," Strömberg questions the expediency of adding a fourth category to his classification of legal rules. As he keeps emphasizing, "rules about rights" lend themselves to transformation—as he puts it: to "dissolution" —and can (as shown in the survey above) be allocated to either of the categories rules of action, rules of competence, and rules of qualification (Strömberg 1962, 123; 1981, 114).

Leaving aside this argument against the suggestion of adding the so-called "rules about rights" to the *byggstenar* of the legal order (an argument which *prima facie* seems tenable), one gets the impression that Strömberg, in the face of the Uppsala doctrine that there is no such thing as a right in reality, heartily disapproves of a special category of rules labelled "rules about rights."

17.1.2.3. "Legal Directions for Use"

In his work *Rättsordningen* (The legal order: Olivecrona 1976), Olivecrona took up the issue of those legal rules that have no sanctions attached to them (ibid., 276ff.). Among such rules, there are, for example, the rules about marriage, telling us how to proceed to create a marriage that will be considered

[31] Strömberg contents himself with referring to the Scandinavian debate on that head (see, e.g., Olivecrona 1960, 86ff., 133ff.).

[32] This was done by Olivecrona in the second edition of his work *Rättsordningen* (The legal order: 1976, 165).

[33] E.g., the rule about one's "right" to obtain a divorce, no matter how much the spouse objects. This rule can be transformed into a rule of action, addressed to the court and prescribing that the court *shall* pronounce the divorce sentence.

[34] Frequently, an exception from a rule that prohibits something presupposes an individual legal rule, such as, e.g., a licence issued by an authority.

[35] E.g., the rules about military officers' "right" to command: Properly speaking, such rules are competence rules.

valid and binding. Such rules are, then, about the proper way to achieve a certain legal effect, and according to Olivecrona, they are to be seen as a special kind of legal rules of action (ibid.).[36]

Strömberg disagrees. In his view, the formulations in question are not adequate expressions of legal rules of action (nor, for that matter, of legal "rules" at all): They do not prescribe what we shall or shall not do—rather, they tell us that *if* we want to arrive at a certain goal *A*, *then* we must use a certain means *B*. In short, such sanctionless "rules" express a relationship of means and end: They are, as Strömberg puts it, offering us "directions for use" (Strömberg 1981, 156; my translation). He considers them, not as proper legal rules but, rather, as paraphrases or corollaries of legal rules.[37]

As Strömberg points out (1986, 666), the formulations in question certainly show a pattern of behaviour. This pattern, however, is to be followed voluntarily, in a certain situation. The formulations differ from commands (*påbud*) in so far as they, according to their content, do not constitute a legal duty of action, which means that if we omit to follow the direction, no sanction will be applied. The only consequence of our omission will be that the legal effect will fail to appear.

Curiously, the formulations in question frequently contain imperative "signals" (e.g., the word "shall"), which give them the appearance of bindingness. In a certain sense this is indeed the case: Expressing, as they are, a "shall" or a "must," the "directions for use" indicate a condition which must be fulfilled if a certain result is to be achieved (ibid.). The intention behind a "direction for use" is, obviously, that we "shall" follow it. As Strömberg explains:

> To me, it seems unnatural to conceive of legal directions for use as information on facts […]. They have a practical function […] technical norms and legal directions for use are similar in so far as they are practical sentences without being prescriptive. (Ibid., 668; my translation)[38]

[36] On Olivecrona's theory of sanction in connection with rules see Section 14.4 in this tome.

[37] "I do not conceive of […] these formulations as adequate expressions of legal rules of action, nor, for that matter, as legal rules at all, but as *paraphrases or corollaries of legal rules*" (Strömberg 1981, 155; my translation and italics added). The Swedish original: "Jag uppfattar […] dessa formuleringar inte som adekvata uttryck för några rättsliga handlingsregler eller för några rättsregler överhuvudtaget utan som *omskrivningar av rättsregler eller som följdsatser till sådana*."

[38] In contrast to both Alf Ross and Nils Kristian Sundby (in whose view "directions for use" were theoretical sentences), Strömberg embraces G. H. von Wright's ideas on the subject. He refers to von Wright's discussion (1963) of what he calls "directives or technical norms," an example of these being "directions for use." According to von Wright, technical norms are practical sentences without, however, being imperatives (for example: "If you want the house to be inhabitable, you must warm it up"). This sentence is neither descriptive nor prescriptive. In contrast to these directives, there are also purely descriptive sentences, expressing that A is a necessary condition in order to achieve B (for example: "If the house is to be inhabitable, it must be warmed up"). This sentence mentions the necessary condition. According to von Wright, the two sentences are not identical but there is a logical connection between them: In the directive (technical norm), the descriptive sentence on the tie between means and end is presupposed (Strömberg 1986, 667–8; von Wright 1963, 9–8).

They are different, however, in so far as "legal directions for use," in contrast to technical terms, presuppose the existence of a legal system; otherwise, they would not have any purpose. The marriage ritual is an excellent case in point: Shall there be then any purpose with a man and a woman acting as bridegroom and bride in a wedding ceremony, it must be assumed that these two people, through this ceremony, will get "married." Thus, there has to exist a *rule of qualification*, according to which, in the marriage ceremony, the two people acquire the quality of "being spouses."

There is, then, a logical connection between a "legal directive for use" and the rules that make this directive expedient.[39]

17.1.3. Valid Law: A Social Convention

In his major work *Law as Fact* (1971), Olivecrona did not give much space to the "validity," or binding force, of legal rules:

> Ascribing binding force to a rule means proclaiming that it ought to be followed […]. This is a value judgement. It has the linguistic form of a proposition concerning a property in the rule. But the 'oughtness' is no conceivable property. To discuss whether certain rules possess oughtness or not is therefore useless. This is no scientific problem. (Olivecrona 1971, 112)

To be sure, when speaking of "valid legal rules" we are only *imagining* them to be valid and binding.[40] In Strömberg's view, this ability to imagine an undefinable quality should be explained more accurately. Intent on taking the issue one step further, he investigates into the existence, *not* of the quality of "being valid" but, rather, of people's *conception* of such a quality (Strömberg 1981, 49). He arrives at the conclusion that the concepts of "legal rule" and "valid law" are conventional concepts, and that they are conventional exactly as to those aspects in which legal rules distinguish themselves from other kinds of rules: "One might say […] that a legal rule is a rule that is considered a legal rule" (ibid., 37; my translation).[41]

Strömberg proceeds methodically. What exactly, he asks, does it mean for an ordinary Swedish citizen like himself to hear or utter the phrase "Rule X is a valid legal rule?" Well: It means, vaguely, that Rule X in one way or another belongs to, or is a part of, the Swedish legal system: The word "valid," in short, seems to include the quality of "being national" (ibid. 40; my translation). Nationality, however, is not a factual but a conventional concept.

[39] Strömberg 1986, 668–9. A "legal direction for use" (expressing a necessary condition) can always be "transformed" into a legal rule, or a part of a legal rule (ibid., 670).

[40] Cf. Olivecrona: "Every attempt to maintain scientifically that law is binding in another sense than that of actually exerting a pressure on the population necessarily leads to absurdities and contradictions […]. The 'binding force' of the law is a reality merely as an idea in human minds. There is nothing in the outside world which corresponds to this idea" (Olivecrona 1939, 17).

[41] What follows in this section is mainly based upon Strömberg1981, par. 8.

A concept or a view is *conventional*, Strömberg explains, if it is embraced by a majority of a certain group, irrespective of whether or not individual members of the group whole-heartedly accept it or merely accommodate their conduct to the attitude of the majority (ibid. 38).[42] The view that people are divided into nations, and that the surface of the earth is parcelled out into territories, occupied by those nations, is a conventional, because generally accepted view. The concept of "nationality," then, cannot help us in our quest to define the quality of "being valid."

Nevertheless, the fact remains that the expression "valid legal rule" points at the quality of "being Swedish," and in a simple, thoroughly plausible way, Strömberg shows that this is indeed the case. Our ability to *imagine* legal rules as "valid" has to do, firstly, with the organization of the Swedish state (Strömberg 1962, 124; 1981, 42)[43] and, secondly, with those legal rules by which the state organization is being "held together" and which, in their totality, constitute a "scheme of interpretation" (*meningssammanhang*) (ibid., 46, 99; my translation).[44] In Strömberg's view, Ross was right when he said that the individual legal rule's quality of "being valid" cannot be verified directly but only indirectly, namely, via its connection (*meningssammanhang*) with the legal system as a whole (Strömberg 1981, 46).

Usually, organizations arise on a voluntary basis, that is, as a consequence of the intentions of two (or more) individuals to pursue a common goal. By external observers, organizations are conceived of as unities, comprising the activities of the individuals working within them as well as their means to achieve the common goal. The "organization" of the modern state, by contrast, is based upon the co-operation of a huge number of individuals, among whom there is little natural solidarity—so very little, indeed, that an organization cannot possibly be borne up by it. Instead—or so Strömberg claims—the state organization is borne up (rather: "glued together") by *social conventions* (ibid., 43).

These conventions concern the individuals who are co-operating within the state organization; specifically, they concern these officials' respective degree of superiority (*höghet*).[45] The ordinary citizen's conceptions (*föreställningar*)

[42] Strömberg does not enter more closely into the problematic of legal conventionalism.

[43] Strömberg's point was *not* to show how, exactly, the "organization" of a state arises; rather, he meant to show what such an organization amounts to, and how it works (Strömberg 1981, 45).

[44] In this, Strömberg follows Ross (2004, 17–8, 29). The expression *meningssammanhang* implies, inter alia, that an act of qualification is a legal fact within rules of action or rules of competence only under the condition that the act has been executed in accordance with a competence rule, saying that the agent has the competence to perform such an act of qualification. Thus, a "marriage" is not "valid," or not "legally valid," if it has not come about through an official who had the necessary competence (Strömberg 1962, 128; 1981, 102).

[45] The officials functioning within the state organization occupy different levels in a structural hierarchy. In their various functions, they exercise a certain degree of "competence" or power, and as a consequence thereof, they give the impression of standing in a relationship of super- or subordination to each other. According to Strömberg, the concepts of "superiority" (*höghet*) and

of super- and subordination have an emotional basis, that is, they are grounded in *feelings* (i.e., feelings of superiority and inferiority). These feelings are objectivated as well as enhanced exactly by their being *conventional* (ibid.). Similarly to Ross, Strömberg holds that every state organization presupposes a prevailing legal ideology. In the case of Sweden, the essential precondition for the state organization is a historically given ideology of authority and power (*höghets-och maktideologi*) (ibid., 44–5), which has found its foremost expression in the written Constitution.

The organization of the modern state can be described as a pyramid, with the Head of Government (or King) at the apex, the ordinary citizens at the base, and various grades of officials occupying the middle *stratum*.[46] Owing to the ideas of super- and subordination—vague, but deeply rooted in the citizens' minds—as well as to the (imagined) power of the authorities (i.e., the "higher" officials), this kind of "organization" works and has proved viable.[47]

The Constitution of the state represents a coherent system of rules of action, rules of competence, and rules of qualification. Through legislative acts, the rules of statutory law are connected with the Constitution (and, thereby, also with each other). The rules of customary law, on the other hand, are connected with the Constitution through the organization of the courts. This system is, however, not only constituted through different types of rules: Also, it includes various types of individual acts, such as judicial decisions and other legal acts in the form of performative utterances or individual imperatives of action (*handlingsimperativer*) (ibid., 128).

By way of illustrating how the "scheme of interpretation" works, Strömberg adduces a rule of valid Swedish law, prescribing that "the court" shall, under certain conditions, appoint an estate administrator (*boutredningsman*).[48]

"competence" are irreducible and, owing to their ideological nature, do not lend themselves to definition (ibid.).

[46] In order to demonstrate the fundamental principles of state organization, Strömberg adduces the example of the absolute monarchy. The king's (or emperor's) "superiority" (*höghet*) is not a *real* quality, that is, it cannot be stated empirically. What *can* be stated empirically, however, is the fact that, for some reason or other, a certain individual is considered "a king" at least by a majority of the group. The king is thought to possess some sort of power, but similarly to the unreal "superiority" of his position, his power is *unreal* as well. Nevertheless, people *believe* in the king's power, and as a consequence of this belief, the king has possibilities of action which other individuals do not have. These possibilities, in turn, intensify the citizens' conceptions of real power—which, again, enhances the king's possibilities of action, and so on. Gradually, the king will be able to guide the citizens in the direction he wants and, thereby, acquire *real* power (ibid., 44).

[47] The differentiation between the different functionaries is achieved, *not* through qualification rules but, rather, through qualification acts. Thus, for example, when Jean-Baptiste Bernadotte was elected crown prince of Sweden in 1810, his being elected was a qualification act, on the basis of which he became king later on (1818). His successors, by contrast, possessed their "quality" of being kings as a consequence of the qualification rules of the Act of Succession 1810 (Strömberg 1962, 124).

[48] "Upon the request of the heirs, the court shall order that the estate be administrated by

This prescription, a rule of action, actually implies a competence rule, according to which "the court" alone "can" (i.e., is able to) appoint an estate administrator (that is, endow an individual with the legal quality which is denoted by the word "estate administrator"). This competence rule, in turn, presupposes *another* legal quality, namely, the quality of "being a court," which quality stems from *other* competence rules and, ultimately, from the Swedish Instrument of Government (*Regeringsformen*).

Thus, legal quality and legal competence are conditioning each other. The different types of rules "hang together" because, in people's imagination, all of them are tied, at least indirectly (via the Constitution) to one and the same pivotal point, namely, the concept of the Swedish state (Strömberg 1981, 46). This system is not seriously challenged, and the citizens have got used to look upon it as the system "that ought to be valid before other systems" (ibid.) as regards the regulation of their mutual relations. In short: The Swedish people have got used to respect the Constitution and the rules emanating from it, and to "believe in" their legal system.

But *how*? one might ask. Because—and this is Strömberg's "conventionalist" answer—because the Constitution is considered valid above all by those individuals who are the subject of constitutional norms, namely: the Head of State, the Head of Government, the ministers, the members of parliament etc; that is to say, by the individuals who are functioning on the "higher" levels of the state organization. Not surprisingly, the attitude of these persons influences that of the ordinary citizen, who gets used to embrace the same attitude. Gradually, there has arisen a general mental disposition vis-à-vis legal rules—a general *conception of their "validity"*—and what is more, the citizens' insight that the observance of the Constitution is a precondition for the maintenance of society, works in the same direction (ibid., 45).

Thus, according to Strömberg's theory, it is actually ourselves and our specific, conventional attitude towards legal rules that determines, which rules are to be considered "valid legal rules." And he proceeds to explain that their *appearance* of being valid—their leaving the *impression* of validity—is nothing but the result of an *emotional projection* on our part (ibid., 48 ff.).

Our attitude towards the law is basically subjective, that is, we are "feeling bound by" the law.[49] Owing to a general yet erroneous opinion on that head—namely, that the law *is* binding—our (subjective) attitude is being projected, or mentally transferred, to the object that aroused this feeling within us, namely,

an estate administrator, and appoint someone to deal with the administration of the estate in this capacity" (The Swedish Inheritance Code [*Ärvdabalken*], SFS 1981: 359, chap. 19, par. 1; my translation). The Swedish original: "Då dödsbodelägare begär det, skall rätten förordna, att egendomen skall avträdas till förvaltning av boutredningsman, samt utse någon att i sådan egenskap handha förvaltningen."

[49] Similarly to Ross, Strömberg includes in the very idea of "the law" the subjective component of feeling "bound" (cf. Ross 2004, 37).

the individual legal rule. This "emotional projection" (Strömberg 1981, 48; my translation) has the effect that the quality of "being valid and binding" emerges as a quality that is inherent in the legal rule itself.

Thus, for example, individual A thinks that the rules of Statute X are valid legal rules. When asked to motivate this view, A would presumably point out that X has been issued in a formally correct way. According to Strömberg's theory of the conventional nature of the concept of "valid law," however, A's opinion is ultimately grounded in the fact that individuals B, C, D etc. are of exactly the same opinion (namely, that the rules of X are valid legal rules). In Strömberg's view, this state of things cannot be explained otherwise than as a consequence of mutual and many-fold suggestions: "If nobody thought that the statutory rules in question were legal rules, there would be no reason whatsoever to assert that they *were* legal rules" (ibid.).

Interestingly, Strömberg draws attention to the logical peculiarity of conventional concepts, an issue that is frequently overlooked. If we define the concept of "week," for instance, the correctness of our definition depends on the fact that it is common usage to call seven subsequent days "a week": In natural reality, there are no seven-day-periods corresponding to the concept of "week." Thus, the assertion that "a week" is seven days, is correct only because this is the case according to an ancient and generally accepted convention as to chronology (ibid., 38).

In summary: According to Strömberg, the concepts of "valid law" and "valid legal rule" are conventional concepts, since they cannot be verified in any other way than by being compared with people's *conceptions* of their content. Our belief in the "validity" of the law and of individual legal rules is thus grounded in a social convention, which is based upon a historically given ideology of authority and power.

According to Alf Ross, a legal norm is considered valid if it is applied, or "in force." By a norm being "in force," Ross means that the norm must fulfil two criteria: Firstly, of being followed and applied by the courts, and secondly, of being felt, by the judges, to be socially binding.[50] According to Strömberg, by contrast, legal rules are not considered valid because they are actually efficacious (*faktiskt verksam*) (Strömberg 1981, 47): Rather, they are efficacious *because* they are considered valid. The ultimate condition for the efficacy of the law is our own *conception of validity* (*giltighetsföreställning*): "Legal rules become efficacious thanks to their being considered valid" (my translation).[51]

[50] "In the concept of validity two points are involved: Partially the outward observable and regular compliance with a pattern of action, and partly the experience of this pattern of action as being a socially binding norm" (Ross 1959, 37). On Ross' views on legal validity see Section 16.2 in this tome.

[51] The Swedish original: "Rättsreglerna blir effektiva genom att de betraktas som gällande."

To put it bluntly: "Valid legal rules" would simply vanish into thin air, if people were not thinking and talking about them.

17.2. Per Olof Ekelöf (*by Mauro Zamboni*)

17.2.1. Introduction

Per Olof Ekelöf (1906–1990), professor of procedural law at Uppsala University for almost thirty years, is among the lesser known Scandinavian legal realists, at least beyond Swedish borders. This is mainly due to language and to the kinds of issues he was concerned with: He wrote most of his major works in Swedish and dedicated the bulk of his scholarly production to national topics, especially in Swedish procedural law. But Ekelöf deserves a place in Scandinavian legal realism even so, considering that to a much greater extent than fellow Scandinavian legal realists, he implemented these ideals into the way law is understood and taught in Sweden, particularly in his role as a leading scholar of Scandinavian procedural law. Moreover, Ekelöf's works on procedural law certainly make him the one Scandinavian legal realist who still affects the way law in Sweden is applied by public officials and interpreted by judges.

If we look at Ekelöf's academic career, it will seem paradoxical that he should be situated among the legal realists as the "doer." He started his academic career with a degree in philosophy from Uppsala University (1928), having studied practical philosophy under Professor Axel Hägerström (1868–1939) at that time already well-established as a Scandinavian legal realist.[52] Barely a decade later, in 1937, Ekelöf had already received a law degree and successfully defended his doctoral thesis in law, at which point he took up a career as a legal scholar (Ekelöf 1937).

Ekelöf's legal philosophy was deeply inspired by Hägerström; however, Ekelöf belongs to the "second" Uppsala school of legal philosophy, which reached its peak in Sweden in the 1950s. Together with philosophers like Anders Wedberg, Ingemar Hedenius and Konrad Marc-Wogau, and unlike Karl Olivecrona, Ekelöf appears to have abandoned Hägerström's psychological approach to law, based on the idea that law can be reduced to a series of psychological processes.[53] Instead, in a pattern that in a way parallels Alf Ross's development,[54] Ekelöf prioritized a more socially grounded explanation of what law is and what it *should* be—in its lawmaking, its application and en-

[52] On Hägerström see Chapter 13 in this tome.

[53] On Wedberg and Marc-Wogau see respectively Sections 21.2.1.1 and 21.2.1.2 in Tome 1 of this volume. On Hedenius see the following Section 17.3. On Olivecrona see Chapter 14 in this tome.

[54] On Ross see Chapter 16 in this tome.

forcement, and its judicial interpretation.[55] Consequently, the essence of law, for Ekelöf, particularly when it comes to its application, is something that lies beyond the intention of the lawgivers or the conventional rules of language: It lies in the role of law as functional to the pursuit of the general welfare in society. In this way, Ekelöf further advanced the goal that Scandinavian legal realism had set out, namely, to contextualize law: This is something he did in particular by opening law to the realities of social life as an essential step in both understanding and using the law. So it should not come as a surprise, in light of this social ontology of the legal phenomenon, that the three main areas of interest of Ekelöf's legal philosophy are the social function of lawmaking, the teleological method for interpreting the law, and the concept of rights.

17.2.2. Law, Its Making, and the Sense of Duty

Looking at the social function of lawmaking, Ekelöf appears to begin where Hägerström somehow left off, that is, from the importance of that which *surrounds* the law. However, as noted, while Hägerström stressed the *psychological* aspects of the law, Ekelöf shifted his attention to its *social* dimension, following a path parallel to the one developed by Anders Vilhelm Lundstedt.[56] In particular, according to Ekelöf, the main function of law in general—the function lawmakers have to fundamentally take into account when making law—is not so much that of prohibiting or allowing certain behaviors rather than others: The ultimate goal of all lawmaking must instead be to fashion a social ideal of what is and what is not morally acceptable. For example, in *Straffet, skadestånd och vitet* (Punishment, liability and penalty: Ekelöf 1942), Ekelöf advances the theory that the basic function of criminal law should not be to threaten individuals through sanctions but rather to instill in the community the idea that they should voluntarily refrain from criminal actions: This is accomplished by building, or helping to build, a moral sense of duty. That goes for the law in general—and so also for criminal law—whose overarching goal (and so the criterion on which basis to make law) should accordingly be, in either case, to foster a general sense of duty to obey the law, rather than to reinforce a fear of the law.

In particular, Ekelöf understands the role of substantive legal rules as that of constructing a certain moral or sense of duty among addressees, while the function of procedural laws is somehow to implement the substantive rules and their goal of achieving the general welfare in society. This combination,

[55] For instance, Ekelöf would later refer to his second book, *Straffet, skadestånd och vitet: En studie över de rättsliga sanktionernas verkningssätt* (Punishment, liability, and penalty: A study on the mode of operation of legal sanctions; Ekelöf 1942), as "a speculative sociological and group-psychological work in the spirit of Weber." See also Ekelöf 1978, 13.

[56] On Lundstedt see Chapter 15 in this tome.

according to Ekelöf, entails a certain way of considering and engaging in lawmaking: Its goal, in other words, should be to promote in addressees a sense of moral duty such that they will ultimately obey the law spontaneously. When it comes to contextualizing the legal phenomenon, this goal ought to be pursued in light of the idea that the social function of law (and procedural law in particular) is to proactively guide the community's behavior toward a more law-abiding attitude, rather than to resolve conflicts or protect rights (see Ekelöf and Edelstam 2002, 13–31).

In this way, one can easily appreciate the sense of Ekelöf's effort to place the law and its making into a broader social context: The point is not to "socialize" the law, or to make the law more receptive to the needs and interests of the community, as is the case in Roscoe Pound's sociological jurisprudence, and to some extent of American legal realism at large. Quite the contrary, Ekelöf's idea (in embedding law into the social) is that lawmaking should aim to "legalize the social," on a lawmaking model that—by constructing a socially widespread moral sensibility, that is, a "moral duty to obey the law"—can integrate the law into the community in a more fluid and efficient way. In other words, Ekelöf's idea is to use lawmaking as a tool for shaping a social environment more responsive to the lawmakers' ideas, and to integrate the law into society by moulding the latter through lawmaking in accordance with political ideals (see Ekelöf 1990, 71–84).

17.2.3. A Teleological Method

As Ekelöf's idea is that the law is a tool in the hands of politicians, and that lawmaking should serve the purpose of creating a widespread sense of a duty to obey the law, it is no surprise that he should stress the *interpretation* of law as a central part of his theoretical programme, focusing in particular on the criteria that judges and public authorities should use in fulfilling these basic goals. Even in his first book (Ekelöf 1937), Ekelöf makes the interpretation of statutory law central to his legal theory, arguing that this activity—and in particular the judiciary's interpretive work—is essential in creating a legal culture centrally concerned with statutory law, its concrete consequences on society in general, and its application to the case at hand. As a consequence, Ekelöf designed and promoted a specific interpretive method to be used in particular with what Anglo-American legal scholars would describe as "hard cases": This was a *teleological* method of interpreting the law. Though still a vexed question in legal scholarship, the teleological method has become Ekelöf's most evident legacy to the Scandinavian legal world: It is a paradigm overwhelmingly endorsed by Swedish judges, public agencies, and to some extent lawyers when an issue comes up requiring the law to be interpreted in its application.

The basic idea behind the teleological method is that judges applying a statutory provision should never consider that provision as an entity per se

or as defending positions (such as rights) regardless of context (Ekelöf 1958, 75–117; Ekelöf and Edelstam 2002, 79–95). Indeed, as discussed, law is considered part of a larger social context, and so public officials and judges applying the law (particularly in its statutory forms) need to take into account the aims to advance which its provisions have been created. In order to discover those aims, public officials (as well as legal scholars) should in particular rely on an "objective teleological method" (ibid., 84; my translation), objective in the sense that legal interpretation should not be based on the subjective aims for which a given law has been enacted (the aims which this or that lawmaker was pursuing in pushing for the law, and which can be ascertained by looking at the legislative history on the public record). Instead, the interpreter should look for the *objective* goal of legislation, which lies in the function the law in question is intended to serve in society, a function that can be retraced in "objective" data, namely, the legislative texts, the relevant judicial precedent, and the customs and practices adopted by public agencies. In other words, the objective teleological method means that statutory provisions should always be interpreted taking into account the way these provisions can affect the community. In view of these effects on the environment (the broader context in which the law is set), the interpreters must then choose the interpretation best suited to the aims the law is meant to advance: This they must do by taking account of the statutory text, judicial precedent, and custom, all the while ignoring the lawmakers' subjective aims, such as they can be gleaned from the legislative history (see, e.g., Ekelöf 1991b, 1951).

17.2.4. The Concept of Rights

We can now turn to Ekelöf's third and final contribution to legal theory—a sort of theme running through the work of all the Scandinavian legal realists, namely, the question of rights.[57] It can be observed here how Ekelöf shifts the core of his analysis from the problem of identifying the real elements on which rests a statement of rights (a problem closer to the first Scandinavian realism) to that of finding what states of affairs could be substituted in such a statement.

Ekelöf attempts to discover the semantic referent of the term *rights*, and to this end he analyses in particular the semantic referent of the term *claim*. He starts out by noting how the function of the latter term changes substantially in the two statements "If there exists an advance payment, there also exists a claim" and "If a claim exists, the payment should be made on the fixed day" (Lindblom 1991, 216–41): In the first sentence, the term indicates a complex of "legal consequences"; in the second, a complex of "legal facts (or acts)."

[57] An almost complete collection of Ekelöf's writings on the concept of rights can be found in Lindblom 1991, 185–288.

And that change in turn winds up changing the very ontology of the reality expressed by the same term *claim*.

This implies that when it comes to the question of rights, we cannot rely on syllogism to yield any appreciable scientific result, since the middle term in a legal a syllogism (in this case the term *claim*) will have a different meaning in the major premise than it does in the minor. The reason for this ambiguous use of the term *claim* is the same that explains the ambiguous use of the related term *right*, namely, that it is conventionally used as an intermediate key term between two factual realities. Rights, more to the point, are understood as both (*a*) a complex of legal consequences extracted from a plurality of legal facts (as when a right to property is said to be contained in a contract) and (*b*) the legal basis or the legal facts that give rise to legal consequences (as when it is concluded that one has a right to sell the thing owned). As a result, the syllogisms so often used in legal language are bound to be always valid, independently of what one uses in place of the middle term *right* (or, in this case, *claim*). Therefore, this concept not only fails to denote anything belonging to the spatiotemporal reality; from a linguistic point of view, the word *right* also lacks a semantic referent.[58]

Still, as Ekelöf concedes, the use of this legal terminology—the use of words such as *right* and *duty*—carries unquestionable advantages by making for economy of language. In particular, the use of the word *right* makes it possible to draw a continuous line, in the psycho-social dimension, between the original legal fact or act and its legal consequences.[59] However, in order for legal terms to play this connecting function between an act and its legal consequences, they each need to be able to carry a meaning—possibly the *same* meaning—within a context wider than the single legal statement, that is, within the global organization of rules framing a legal and social order. It is this wider context of elements that gives to the word *right* its meaning, its *significatum*; outside this context, words such as *right* and *duty* will become empty.

In conclusion, it should be stressed that Ekelöf does not outright deny the existence of rights. He is simply saying that these legal concepts are not absolute, particularly in their sociolinguistic context, but relative, that is, relative to the functioning legal system. Moreover, even though rights and duties are concepts lacking any specific content, they still play an essential function. Therefore, instead of asking the question "What does such and such a right *stand for*?" legal interpreters and scholars alike should ask, "How does this right *work* in legal thinking?"

[58] Compare Ross 1957b, 151–3.

[59] See generally Bjarup 1978. For a simplified evaluation of Ekelöf's idea of rights, see Strömholm and Vogel 1974, 54–61.

17.3. The Legal Philosophy of Ingemar Hedenius (*by Torben Spaak*)*

17.3.1. Introduction

Ingemar Hedenius (1908–1982) was professor of practical philosophy at Uppsala University 1947–1973 as well as a prolific and controversial contributor to the public debate in the 1940s through the 1960s. His critique of Christianity, in particular (e.g., Hedenius 1949, 1951, 1964), caused quite a stir (on this, see Nordin 1984, 177–84). Although Hedenius was primarily a moral philosopher, he also treated legal-philosophical questions now and then, and it is these contributions that have earned him a place among the Scandinavian realists. But unlike better-known realists like Alf Ross (1946, 1959) and Karl Olivecrona (1939, 1971), Hedenius, who wrote almost exclusively in Swedish, did not put forward a comprehensive legal philosophy. He did, however, introduce into legal thinking a distinction between internal and external legal statements (Section 17.3.2), and put forward a "realistic" (or sociological) analysis of the concept of a valid legal rule (Section 17.3.3) and an ideal-type analysis of the concept of ownership (Section 17.3.4). He also analyzed the concept of a performative and discussed its relevance to legal thinking (Section 17.3.5).

17.3.2. Internal and External Legal Statements

In a celebrated book entitled *Om rätt och moral* (On law and morality: Hedenius 1941, 60–85), Hedenius maintains that Axel Hägerström and Vilhelm Lundstedt (and Karl Olivecrona) failed to maintain a distinction between internal statements, that is, first-order value judgments or rules, and external statements, that is, second-order value judgments or statements *about* rules, and as a result wrongly concluded that there is no law and that there are no rights and duties.[60] In the same book, he also maintains that in their analyses Hägerström et al. confused the meaning of normative terms, such as "right," "duty," and "ought," with a mistaken *theory* about the meaning of these terms, viz. the theory that these terms have a magical meaning (ibid., 81), and that this caused them to wrongly conclude that there is no law and that there are no rights and duties. Although Hedenius appears to hold that Hägerström et al. committed both these mistakes, he does not make it clear precisely how they relate to one another. I shall, however, focus in this entry only on the former, viz. that of failing to maintain a distinction between internal and external legal statements.

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[60] On Hägerström and Lundstedt, see respectively Chapters 13 and 15 in this tome.

The distinction between internal and external legal statements is clearly important to legal (and moral) thinking, especially for those who embrace a non-cognitivist meta-ethics, as Hedenius and the other Scandinavian realists do; and even though it may seem obvious in the abstract, it turns out to be quite difficult to maintain the distinction consistently when analyzing legal problems, especially in light of the fact that it is not always clear from the wording of a sentence whether it is of the one or the other type. The significance of the distinction should also be clear from the fact that since Hedenius introduced it, it has been accepted by a number of distinguished legal scholars or philosophers, such as Bulygin (1982, 127), Kelsen (1945, 162–4), and von Wright (1963, 103–5).[61] Indeed, Åke Frändberg (2005b, 378) refers to it as Hedenius's most important contribution to legal philosophy.

Hedenius attributes the following line of reasoning to Hägerström and Lundstedt (and Olivecrona). Since according to the non-cognitivist theory, a sentence such as "This is right" (which in its Swedish translation may mean either "This is right" or "This is the law") is *meaningless*, in the sense that the word "right" lacks cognitive meaning and does not refer, and since on one common interpretation (namely, "This is the law") this sentence is equivalent to the sentence "This rule has binding force," this latter sentence, too, will be meaningless. Moreover, since the sentence "This rule has binding force" is in turn equivalent to "This rule belongs to the law," the latter sentence can never be true (or false) either. Hence no rule can belong to the law. Hence there can be no law. Hedenius puts it as follows:

> The phrase "this rule has binding force" is equivalent to a common use of the phrase "this is right". This must mean that the words "binding force of law", and similar expressions, in the meaning they have in everyday conversations as well as in the law, do not refer to any kind of fact. If one draws the conclusions, the results are patently paradoxical. The phrase "this rule belongs to the law", which is equivalent to the phrase "this rule has binding force", can never be true. The law, which according to ordinary usage is the sum of everything that has binding force in a legal sense, is *nothing at all*. There is nothing that these words can refer to according to the use that the words have in ordinary legal language. Worse yet, the whole legal order [legal system], which is supposed to be the sum of what we call the law and its application in society, must be thrown out of the world of reality. *There does not exist any legal order.* This blunt assertion must be true in an unrestricted way: the term "legal order", precisely according to common usage, cannot refer to any facts whatsoever. And as that which we call "the state" necessarily involves maintaining a legal order, then there do not exist such things as states. The sentence "some states are monarchies while others are republics", which is based solely on terms with legal quality, cannot "be about" anything at all: it is made up of meaningless words, it does not express any assumption or assertion about anything, it cannot be true or false. (Hedenius 1941, 62–3; translation by Robert Carroll)

[61] Note that A. J. Ayer (1947, 105–6) makes the very same distinction. Note also that H. L. A. Hart's distinction (1961, 52–7) between internal and legal statements of law is closely related to, if not identical with, Hedenius's distinction. On this, see Hedenius (1977, 131).

But, Hedenius objects, clearly something has gone wrong here: We have to admit that at least in some cases, a sentence, such as "Brian owns the blue Volvo" or "This is prohibited", expresses a statement *about* something, typically about the law, and that it can therefore be true or false (ibid., 63). That is to say, he points out that in some cases such a sentence will express an external statement.

But is Hedenius right? We see that the line of reasoning attributed by Hedenius to Hägerström et al. starts with the sentence

(1) This is right,

and proceeds via the sentences

(2) This is the law, and
(3) This rule has binding force, to
(4) This rule belongs to the law.

The idea is clearly that (1) implies (2), which implies (3), which implies (4), and that since (1) lacks truth-value, so does (4). But the inference is obviously invalid. For (1) implies (4) *only* if (1) is construed as an *external* statement. If, however, (1) is construed as an external statement, the term 'right' does have cognitive meaning and does refer. More specifically, the equivocation is between (1a) "This is right," which is an internal statement, and (1b) "This is the law," which is an external statement." If (1) is construed as an *internal* statement, as in (1a), then (1) is *not* equivalent with (2), which is an external statement; if, on the other hand, (1) is construed as an *external* statement, as in (1b), then (1) is equivalent with (2), though neither (1) nor (2) will be meaningless in the sense contemplated by Hedenius. So, either way, the inference is rendered invalid.[62]

I shall leave it an open question whether Hägerström et al. really failed to maintain a distinction between these two types of statement, as Hedenius claims, though I must admit that I have my doubts (see also Bjarup 1978, 80–1). Certainly, both Lundstedt (1942, 24–6, 43–4) and Olivecrona (1942, 42–3) object that they never doubted that we can make second-order value judgments or statements *about* rules. Thus Olivecrona explains that even though the word "right" can function as an imperative in legal thinking, it does not follow from this that each and every sentence that includes "right" is an independent imperative or some sort of theoretically meaningless phrase for pressuring. It all depends on the context. For example, he says, somebody who

[62] But, one may wonder, if the relevant sentences are construed as internal statements, which lack truth-value, could one sentence really *imply* another? As is well known, the received view is that the laws of logic apply only to *statements* (or propositions), which can be true or false (on this difficulty, see Ross 1944, Alchourrón and Martino 1990).

maintains that German law underwent a radical transformation with the introduction of the *Bürgerliches Gesetzbuch* is making a true statement.[63] But even if Hedenius is wrong on this, the distinction as such is important: It is imperative in legal and moral analysis that it be maintained.

17.3.3. The Concept of a Valid Legal Rule

Having introduced the distinction between internal and external statements, Hedenius proceeds to elucidate the meaning of the latter type of statement. Focusing on statements about legal rules, his starting point is that we must conceive of such statements as statements about *valid* legal rules, and of valid legal rules as legal rules that would be *applied* by the courts, if they were applicable (Hedenius 1941, 86–7). He then explains that to say that a legal rule, according to which theft will be punished by imprisonment, is valid, is to say that *if* a person steals something, and *if* he is caught, and *if* he is indicted, and *if* the judge is satisfied that he did it, then the judge will sentence him to imprisonment. He adds that the fact that a legal rule is valid in this way is a *hypothetical state of affairs*, which is a species of *empirical* states of affairs:

> This fact is a purely empirical state of affairs that exists *now,* irrespective of whether at the moment any thieves are being discovered, prosecuted, proven guilty or sentenced. It is not just some imagined state of affairs or something that is expressed in a figurative way. It is a social fact, which constitutes a distinct element of our country's social structure just now. (Ibid., 100; translation by Robert Carroll)[64]

Hedenius observes that the occurrence of *mistaken* court judgments has been a major problem for those legal philosophers who have attempted to analyze legal concepts in terms of social facts (ibid., 102). For, he explains, if we analyze the concept of a valid legal rule in terms of what judges would do in a certain type of situation, we seem to be unable to distinguish between correct and incorrect applications of the law; and this, of course, is highly counter-intuitive. He notes that we can hardly respond to this objection that judges are supposed to judge in accordance with *valid* legal rules, since this would amount to a circular reasoning. But, he suggests, we might say that judges must judge in accordance with rules that are valid *according to* the received legal opinion, though he admits that this way of putting it is rather inexact and not very informative, unless one adds something about sources of law and legal method (ibid., 102–3).

[63] On Olivecrona, see Chapter 14 in this tome.

[64] The Swedish original reads as follows: "Detta faktum är ett rent empiriskt sakförhållande som föreligger *nu*, oavsett om just nu några tjuvar upptäcks, åtalas, överbevisas och döms. Det är icke något blott tänkt sakförhållande eller något som är uttryckt på ett bildligt sätt. Det är ett socialt faktum, som utgör en bestämd ingrediens i vårt lands sociala struktur just nu."

Hedenius returns to the analysis of the concept of a valid legal rule in his last legal-philosophical essay (Hedenius 1978). Here he repeats the essentials of his earlier analysis, and rejects a common objection to this type of analysis, viz. that it is circular because the concept of a court (Hedenius actually speaks of "authorities" or "agencies") must be defined in terms of the concept of a valid legal rule, although the analysis has it that the concept of a valid legal rule is defined in terms of the concept of a court. Hedenius's response is simply that the rules by virtue of which a purported court is indeed a court may be valid by virtue of having been applied by the court(s) in question (ibid., 43).

I cannot say that I find this response persuasive. As we have seen, the problem is that, on this analysis, a rule is a valid legal rule if, and only if, it is applied by a court, and that there can be no court that can apply the rule, unless there already are valid legal rules by virtue of which the purported court is indeed a court. Since this is so, it is hard to see how the rules by virtue of which the purported court is indeed a court may be valid by virtue of having been applied by the court(s) in question. As far as I can see, Hedenius simply insists that the alleged circle is not a circle, at least not a vicious circle. But he does not explain *why* this is so.[65]

There is also another problem that mars Hedenius's analysis. As we have seen, Hedenius (1) maintains that we need to distinguish between (*a*) internal statements, which only express the speaker's feelings or attitudes, and (*b*) external statements, which are empirical statements that can be true or false; and (2) assumes as a matter of course that an external statement can render the content of an internal statement correctly.

At first glance, this seems reasonable enough. But on closer inspection, we see that problems arise in regard to (2). If terms like "right," "duty," and "binding force" have no cognitive meaning and do not refer when they occur in an internal statement, and if the same holds when they occur in an external statement, then the latter statement cannot assert anything about the internal statement and can therefore be neither true nor false. If, on the other hand, these terms do *not* have the same meaning in internal and external statements, then an external statement cannot render the content of the internal statement correctly (Frändberg 2005a, 66–7). Either way, the analysis is inadequate. I do not know how to solve this problem, but will be content to point out that it appears to be more or less identical with the so-called Frege-Geach problem (or the embedding problem), that is, the problem that, on the non-cognitivist analysis, moral terms like "right," "duty," and "ought" do not have the same meaning in asserted and unasserted contexts (see, e.g., Blackburn 1993).

[65] Drawing on ideas put forward by Anders Wedberg (1945, 10–3), Frändberg (1986) has made an attempt to explain why this is so, however, and I believe that his attempt is successful. Swedish-speaking readers are hereby referred to Frändberg (1986) and Wedberg (1945, 10–3).

17.3.4. The Concept of Ownership

Like most Scandinavian legal philosophers, Hedenius has defended an analysis of the concept of ownership (1977). Hedenius's analysis is of particular interest, however, because it makes use of the so-called ideal-type analysis, and is put forward as an alternative to the well-known analyses defended by Anders Wedberg (1951, 272–4) and Alf Ross (1957).[66]

Hedenius's starting point is that ownership is a relation between a person, viz. the owner, and an object, viz. his property, and that an analysis of the concept of ownership must aim to clarify this relation. The terms "ownership," "owner," and "property," he explains, make up a family in a logical sense: Whoever is said to be an owner will be the owner of some property, and any piece of property will be the property of some owner (Hedenius 1977, 134–5).

He notes that the assumption that ownership is the relation between the owner and his property, although plausible, is not self-evident, and points out that in fact it has been rejected by Anders Wedberg in his influential analysis of the concept of ownership (ibid., 135–6; Wedberg 1951, 272–5). Wedberg suggests in his article that we may look upon the term "property" (or "ownership") as a purely syntactical device, whose function is to facilitate legal inferences by connecting statements about the acquisition of ownership with statements about the legal consequences of ownership (ibid., 272). Hedenius (1977, 135–6) notes, more specifically, that Wedberg holds that a statement such as "P owns O at t" will most likely differ in *meaning*, depending on whether it is asserted in regard to the one or the other legal system, and depending on whether it is construed as an internal or as an external statement (Wedberg 1951, 262–3). Hedenius cannot accept this result of Wedberg's analysis, however, and proceeds to develop an ideal-type analysis that is intended to account for his (Hedenius's) basic intuition, viz. that the term "ownership" has the *same* meaning in different legal systems and in normative and descriptive contexts. The reason why he cannot accept Wedberg's result is that he feels that it would complicate the logic of legal and moral thinking far too much (ibid., 137). I myself cannot see how the difficulty of an analysis can be a reason to reject the analysis, unless there is available an equally convincing and less complicated analysis that competes with the one under consideration. But, as we shall see in the next paragraph, this is not the case here.

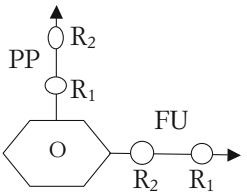
As should be clear, the proposed definitions differ in that the one (Wedberg's) is system-dependent, in the sense that the content of the concept in question depends on the content of the relevant legal rules, whereas the other (Hedenius's) is system-independent, in the sense that the content of the concept does *not* depend on the content of any legal rules at all (on this, see Frän-

[66] Note that Wedberg, not Ross, was the first philosopher to put forward such an analysis (for more on this topic, see Frändberg 2005b, 379). On Wedberg, see Section 21.2.1.1 in Tome 1 of this volume.

dberg 2005a, 69). One may, however, wonder whether the system-dependent analysis is really incompatible with the system-independent analysis. It seems to me that the one type of analysis doesn't exclude the other.

Note also that Hedenius's view that the term "ownership" has the same meaning in different legal systems and in normative and descriptive contexts is difficult to reconcile with Hedenius's commitment to non-cognitivism. For on the non-cognitivist analysis, as we have seen, normative words do not have cognitive meaning at all, though they may have so-called emotive meaning (see Stevenson 1937). But if they do not have cognitive meaning, how can the term "ownership" have the same (cognitive) meaning in different legal systems and in normative and in descriptive contexts? My guess is that Hedenius means that general normative terms like "right," "duty," and " ought" lack cognitive meaning, whereas more concrete, or thick, normative terms like "ownership," "brutality," "cowardice," and "courage" have a limited cognitive meaning.[67] That Hedenius holds such a view gains support from his discussion of Richard Hare's well-known distinction between the *phrastic* and the *neustic* part of meaning (Hedenius 1972; Hare 1952, chap. 2).

In any case, Hedenius suggests that we conceive of the concept of ownership as an *ideal-type* concept that includes two dimensions, viz. (*i*) protection of possession and (*ii*) freedom of use (1977, 145–9). In the figure below, for example, R_1 is closer than R_2 to the ideal type on the protection-of-possession dimension, whereas R_2 is closer than R_1 on the freedom-of-use dimension:



Hedenius notes that the legal rules that concern protection of possession and freedom of use will likely differ from one legal system to another, while denying that this means that there are two different concepts of ownership in the two legal systems:

> The definition of ownership as the most strongly protected and privileged *right in rem* [*Sachenrecht*] is what is essential, and this core of the concept stands firm irrespective of the variations of the content in the rules that protect the *right in rem*. (Ibid., 151; translation by Robert Carroll)[68]

[67] I would like to thank Jan Österberg for suggesting this interpretation. On thick concepts, see Williams (1985, 129–30).

[68] The Swedish original reads as follows: "Definitionen av äganderätten som den starkast skyddade och privilegierade sakrätten är det väsentliga, och denna begreppskärna står fast, oberoende av växlingarna hos innehållet i de regler som skyddar sakrätten."

That is to say, his idea is that the ideal-type analysis makes it possible to think of, say, ownership according to Norwegian law and ownership according to Swedish law as two instances of the very same concept of ownership; and this, of course, is very much in keeping with common sense.

17.3.5. Performatives

The concept of a performative was introduced into philosophical thinking by J. L. Austin (1962, 1975) and was further analyzed by John Searle (1969). As Austin (1975, 4–7) explains, a performative, such as "I promise to lend you $100" or "I hereby invite you to dinner on Saturday night," has its main verb in the first person (singular or plural) present, indicative, active, or is equivalent to such an utterance. He also explains that it differs from an ordinary statement of fact in that he who utters it (*i*) does not describe or report anything, which means that it cannot be true or false, and (*ii*) is usually thought to *do* something rather than to (merely) say something.

Legal philosophers quickly realized that performatives are of interest to anyone concerned with the law (see, e.g., Hart 1972, 820–2; Frändberg 1973, 57; Olivecrona 1971, 133–4, 217–39; Ross 1972; Samek 1965, 197), because many of the best examples of performatives are actually drawn from the world of the law. And, as one might expect, in his contribution to the literature on performatives, Hedenius emphasizes the relevance of performatives to legal thinking and points out that so-called declarations of intention (*Willenserklärungen*) are really performatives (Hedenius 1963b, 116). But unlike Austin and others, such as Ross (1972), he maintains that performatives can be true or false. Speaking of promises, he maintains that "[*a*] promise-performative is a true sentence […] if and only if it can be said that a promise has come into being through the sender's utterance of this promise-performative to the sender" (Hedenius 1963, 117; see Mautner 2001, 224–6). He maintains, in keeping with this, that performatives cannot be conceived of as imperatives, since performatives, but not imperatives, can be true or false (Hedenius 1963, 122–3); and this means that he rejects by implication Olivecrona's view that there are so-called performatory imperatives (Olivecrona 1971, 134).[69] He also objects to the view held by Hägerström (1953c, 301–2) and Olivecrona (1971, 226–33), that the belief that *saying* so can *make* it so amounts to a belief in magic. We have no reason to doubt that the act of uttering a sentence can cause the sentence to be true, he explains, and points out that performatives are just one type of such utterances (ibid., 112–5).

[69] On Olivecrona's theory of performatory imperatives see Section 14.2 in this tome.

Chapter 18

LEON PETRAŻYCKI'S THEORY OF LAW

by Edoardo Fittipaldi[*]

18.1. Introduction

Leon Petrażycki (1867–1931) was active not only as a legal theorist but also as a scholar of Roman law (e.g., Petrażycki 1892, 2002), as a forerunner of economic analysis of law (e.g., Petrażycki 1895, 2002), as a political and theoretical supporter of women's rights (e.g., Petrażycki 1915, 2010d), as a philosopher of science (e.g., Petrażycki 1908), as a philosopher of logic (e.g., Petrażycki 1939), as a psychologist (e.g., Petrażycki 1908), as an economist (e.g., Petrażycki 1911), and as a general sociologist (see Lande 1935, 42–3; 1959b, 1975).

Petrażycki set out six sciences meant to deal with legal phenomena: (1) the general theory of law, (2) descriptive legal science, (3) the history of law, (4) legal prophecies,[1] (5) legal policy, and (6) legal dogmatics.

In this text I will focus almost exclusively on Petrażycki's theory of law. Owing to space limitations, I will not discuss his conception of legal policy (and of the role of love within it).[2] As for Petrażycki's conception of legal dogmatics, it will be discussed from a strictly theoretical point of view. As for his contribution to the psychology and sociology of law, these are so intertwined with his legal theory that to a good extent discussing the latter amounts to discussing the former as well.[3] In fact, it would not be entirely inaccurate to maintain that Petrażycki's theory of law is a psycho-sociology of law. As for his logic and his philosophy of science, these will be discussed here only to the extent necessary to understand how he devises legal-theoretical concepts. Therefore,

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[1] In his *Teorija prava* (Theory of law) Petrażycki did not mention legal prophecies (Petrażycki 1909–1910, 648; Petrażycki 1955, 298–9). He would mention them in Petrażycki 1939, 111. A discussion of these different legal sciences can be found in Fittipaldi 2013a.

[2] See Petrażycki 2010a and 2010b. See also Kojder (1995, 106-23) and Fittipaldi 2015.

[3] To be sure, Petrażycki rejected the concept of *sociology of law*, and to my knowledge he used this term only once (Petrażycki 1939, 104). His rejection of that concept is connected with his classification of the sciences, a classification we need not discuss here. The reader should only bear in mind that the Petrażyckian term *theory of law* overlaps to a large extent with what would now instead be called socio-psychology of law, comparative legal science, and history of law. On Petrażycki's attitude towards sociology "of law" see Timoshina 2013a.

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I will focus exclusively on his concept of an adequate theory and on a few related concepts.

18.2. The Concept of an Adequate Theory

Petrażycki proposed many stipulative definitions of terms that traditionally belong to general jurisprudence. In particular, he proposed new definitions for such terms as *law* (*pravo*),[4] *morality* (*nravstvennost'*), *ethics* (*ėtika*), *positive law* (*pravo positivnoe*), *authority* (*vlast'*), *public law* (*publičnoe pravo*), and *private law* (*častnoe pravo*),[5] among others.

When Petrażycki proposes new definitions for old terms, his goal is neither to grasp some essence nor to describe some linguistic usage. True, most of his definitions do present an "approximate coincidence"[6] with linguistic usage, but this is not Petrażycki's aim.

His aim is exclusively to develop concepts suitable for *adequate theories*. Only these concepts are *scientific* concepts, as opposed to the *practical* concepts that emerge out of clusters of the most diverse practical needs.[7] So in or-

[4] Russian words will be written in accordance with the orthographic reform of 1918. Transliterations into the Latin alphabet will be made according to the standard ISO 9 of 1968. When quoting Petrażycki, I will always indicate the pages of both the Russian original and the English translation contained in Petrażycki 1955. If no reference is made to Petrażycki 1955, it means that I am quoting passages that have not been inserted in that compilation.

[5] To be precise, Petrażycki distinguished between *public-legal* and *private-legal* authorities. See Section 18.11 below.

[6] This term, *approximate coincidence* (*priblizitel'noe sovpadenie*), was used on at least one occasion by Petrażycki (1909–1910, 139; 1955, 91), when discussing his distinction between moral and legal phenomena, a distinction that will be discussed in Section 18.7 below.

[7] For a classic example see Petrażycki's discussion of the concept of "vegetable" as a practical—i.e. nonscientific—concept: "Professional linguistic usage naturally adapts itself to the particular practical needs and goals that are specific to its given special sphere of practical life. From the point of view of such needs and goals the *most diverse objects* (diverse as to their nature and objective properties) may have *identical* practical importance, identical value, etc., and may also be used in identical practical dealings (behaviours), and *similar* objects may have *different* importance and different practical dealings. In this way the corresponding special practical linguistic usage becomes consistent, unifying what is different and separating what is similar, according to how this is useful and proper from the point of view of a certain practical need and goal, and only from this point of view. For example, from the culinary point of view, the most diverse plants, and in particular different parts of plants of different *genera* and *species*, etc., are unified into one group and receive the same name, 'vegetable,' etc., because all of them are appreciated as material for the preparation of dishes or for some sort of culinary need (e.g., as spices, etc.); and innumerable other plants that are similar as to their nature are excluded from the group, and the corresponding name is not used; some of them because they do not taste good; a second group is excluded because the plants in it need to be boiled for a very long time, or else because it is so difficult to prepare them or because the nutritional or gastronomical result is not worth the effort; a third group of plants is excluded because they are spiny, hard, etc.; a fourth group because the plants in it cause stomach ache, headache, etc.; a fifth group because consumption of these plants is impeded by particular customs, prejudices, ignorance of their qualities, etc." (Petrażycki 1908, 52; my translation).

der to understand how Petrażycki sets out his concepts, we must first become acquainted with his concept of an adequate theory (*adekvatnaja teorija*).[8]

By *adequate theory* Petrażycki means

> a theory in which what is stated [*vyskazyvaetsja*] (the logical predicate […]) […] is stated in a true and precise way […] about a class of objects […], to the effect that if something is stated about one [class], while that statement actually holds true […] for a broader class, or if the mismatch goes in the opposite direction, the theory is not adequate. (Petrażycki 1908, 67; my translation)

In other words, a theory predicates a certain property of a certain class of objects.[9] If the class used in the theory is too narrow, Petrażycki calls the theory *limping* (*hromajuščij*) because it *fails to cover* all the phenomena for which it holds true. If the class used in the theory is too broad, Petrażycki calls the theory *leaping* (*prygajuščij*) because it *goes beyond* the phenomena for which it is true.[10] A theory is instead adequate if its class (*klass-podležaščee*) is determined with the proper generality (*nadležaščaja obščnost'*) (Petrażycki 1908, 69). An amusing and often quoted example of a limping theory given by Petrażycki in regard to 10-gram-weighing cigars:

> As regards 10-gram-weighing cigars […] we could produce a large mass of true statements and develop so many theories that it would take more than one thick volume to write them all down. We could say about 10-gram-weighing cigars that if set in motion they would tend to maintain a uniform direction and velocity (due to inertia), or that they are subject to gravity and thus fall down according to certain laws (i.e., they tend to fall if there is no air friction or other complication), or that they undergo thermal expansion, and so on. […]. Such a science, however, would be a mere parody, a splendid illustration of how not to construct scientific theories. (Petrażycki 1908, 67–8; translation adapted from Nowakowa and Nowak 2000, 400)

Limping theories are not false: they are simply too narrow.[11] Leaping theories are instead too broad, and hence partly false. An example of a leaping theory might be a theory stating that water boils at 373.15 degrees Kelvin (my example). Such a theory holds only at 1 atmosphere of pressure. It "leaps" for differ-

[8] To be precise, Petrażycki discusses, not how concepts are arrived at, but rather their *scientific legitimacy* (*naučnaja legitimost'*) (see Timoshina 2012, 193).

[9] Petrażycki (1939, 62) distinguished two kinds of classes, (*i*) realistic classes and (*ii*) ideological ones, depending on whether (*i*) they comprise *both* externally existing objects of thought (such as currently existing *dogs*) *and* externally nonexistent ones (such as past, future, or purely imaginary *dogs*) or (*ii*) they comprise *solely* externally nonexistent objects of thought (such as *triangles*, to use Petrażycki's example). On the possible connections between Petrażycki's concept of an object of thought (*przedmiot myśli*) or thought-object (*myslimyj ob"ekt*), and the similar concepts developed by Brentano, Meinong, and Husserl, see the extensive discussion in Timoshina 2012, chap. 3, sec. 3.

[10] A theory may also be at once limping and leaping (Petrażycki 1908, 81).

[11] Kortabiński (1969, 1975) showed that the concept of a limping theory had been anticipated by several authors, including Aristotle and Bacon.

ent pressures. Likewise, a sociological theory is leaping if it picks out as relevant only one factor (for example, the economy) out of many that are relevant.[12]

Although Petrażycki did not make any use of the language of *set theory*, I think his definitions can be made clearer by using it:

– A theory is *limping* if it ascribes a certain property to only a *subset* of the phenomena that have that property.

– A theory is *leaping* if the phenomena that have a certain property form only a *subset* of the set of the phenomena to which that theory ascribes that property.

– A theory is *both leaping and limping* if the set of the phenomena that have a certain property only *intersects* with the set of the phenomena to which that theory ascribes that property.[13]

We will see in Section 18.8 that the criterion according to which Petrażycki selects legal emotions, as opposed to nonlegal (i.e., moral) ones, makes it possible to select phenomena that play a role in several adequate theories in Petrażycki's sense. As I said, all the redefinitions Petrażycki offers of certain traditional concepts are intended to have this property.

There has been much discussion about Petrażycki's concept of an adequate theory (see Motyka 1993). An objection that has been often raised against it is that adequacy is too demanding a requirement to meet—one that, if taken seriously, would hamper the development of science. For instance, Kotarbiński observed that "[l]aws that are applicable to entire classes of objects often emerge out of partial laws, which are therefore 'lame,' since they ascribe a given property to only some objects in that class" (Kotarbiński 1975, 20). Kotarbiński makes the example of the general laws of genetics, which were first established only with reference to certain plant species.

In my opinion the requirement that theories be adequate can be given a less demanding interpretation. Suppose that:

1. we are using a *naive label* (e.g., *solid*[14]) to refer to the members in a certain class C,
2. the membership in class C depends on meeting a certain criterion *a*, or on meeting at least a certain number of criteria within a given set of criteria $a_1, a_2, \ldots, a_n$[15] (imagine, in our example, that one of these criteria is the property of being possibly found the biosphere),

[12] On the difference between limping and leaping theories in Petrażycki see Section 16.2 in Tome 1 of this volume.

[13] Thus, as pointed out by Kojder (1995, 58), a theory, according to Petrażycki, may be (1) adequate, (2) limping, (3) leaping, (4) both limping and leaping, and (5) completely wrong.

[14] My example.

[15] This is typically the case of such naive concepts as that of *vegetable* (see footnote 7 above). To use a modern terminology, according to Petrażycki naive concepts *usually are* polythetic, while scientific ones *should all be* monothetic. As is known, this latter requirement is too demanding. For example, polythetic concepts are used in psychiatry. But this does not touch on the issue of whether the principle of adequacy is itself too demanding.

3. about the members in C we state the feature *b* (in our example, having a certain melting point).

Suppose also that we find out that even *objects other than the members in C* have *b* (e.g., solid oxygen). In this case Petrażycki's principle of adequacy simply requires that the label we use to refer to the members in C should be used to refer also to these new-found objects (or else it should be replaced or modified), and that we should search for a criterion other than *a* (or a_1, a_2, … , a_n) or *b*[16] to establish the membership in C. We should not *stubbornly* refuse to include these new-found objects in the class referred to by that label just because we are used to our traditional, or practical, categories, or we think that these further objects are somewhat "unworthy" of being associated to that label.[17] By the same token, if we discover some "exceptions" (e.g., glass, which has no melting point) the class will need be narrowed in order to make it cover solely the objects for which the theory holds. Also such discoveries will require the search for a criterion of membership in C other than *a* (or a_1, a_2, … , a_n) or *b*, as well as the replacement, modification or qualification of the usage of the traditional labels (think again of glass, which is not considered a solid *in a strict sense*).[18]

According to Petrażycki the concept of an adequate theory is relevant as well in the teleological sciences. In this connection he showed that limping statements may be quite dangerous because of the *argumentum a contrario*—an argument that in fields other than law "is not expressed but has practical application" (Petrażycki 1985b, 414; my translation). If I just tell you that a certain mushroom is toxic when eaten *raw* (while it is toxic not only when raw but also when cooked), you might infer that if you cook it, it will no longer be toxic (my example).

With that background in place, we are equipped to examine Petrażycki's general theory of law.

18.3. Ethical Emotions

The first redefinition we encounter is that of *ethics* (*ėtika*), along with its adjectival form, *ethical* (*ėtičeskij*). Petrażycki uses these terms as hypernyms to refer to both moral (*nravstvennye*) and legal (*pravovye*) phenomena. I will use all these terms in the same way as Petrażycki.

Now, Petrażycki's legal psychologism should rather be called an *ethical* psychologism because he argued for the psychological reduction of all ethical phenomena and treated legal phenomena as a mere subclass of ethical ones.

[16] If *b* were adopted to define C we would end up with a class with no theory attached to it.

[17] We shall see that this method led Petrażycki to include among legal phenomena the rules of games, the rights a child ascribes to his or her doll, and the obligation some person may experience to give his soul to the devil, among other examples.

[18] On the question of how classes should be *named*, see Petrażycki 1908, 86–96.

The starting point for his whole theory is the concept of emotion (*ėmocija*) or impulsion (*impul'sija*), two terms he used as synonyms. Petrażycki tried to distinguish emotions from other psychical phenomena, such as sensations (*čuvstva*), cognition (*poznanie*), and volition (*volja*). According to him, emotions are different from these other psychical phenomena because emotions are *active-passive*. An example of an emotion in his sense is hunger, as it comprises both a *passive* experience (feeling hungry) and a drive toward a certain action, namely, eating (cf. Petrażycki 1908, 175ff.).

In addition to emotions such as hunger, thirst, and sexual appetite, Petrażycki holds that there are also *ethical* emotions.

Just like other kinds of emotions, ethical emotions may be either appulsive (*appul'sivnyj*) or repulsive (*repul'sivnyj*).[19] Let us look at a key passage where Petrażycki describes how a repulsive ethical emotion works:

> If an *honest* man (in exchange for money or some other benefit) is invited to commit deceit, perjury, defamation, homicide by poisoning, or the like, the very representation of such "foul" and "wicked" conduct will evoke in him repulsive emotions that reject these acts; moreover, that rejection will be so powerful as to either forestall both the attractive impulsions (the ones directed to the promised benefit) and the corresponding teleological [*celevoj*] motivation or crush such motives if they do appear. (Petrażycki 1909–1910, 20; translation adapted from Petrażycki 1955, 30; italics added)[20]

Petrażycki does not provide a correlative description of ethical "appulsions." Examples of such appulsions could be the emotion we may experience toward paying the check at the restaurant or helping a friend in need.[21]

Now, ethical emotions form the core of Petrażycki's ethical psychologism. According to him, *law and morality are made up of ethical emotions and therefore exist exclusively within each Subject's*[22] *psychical reality*. It follows that law and morality are purely individual phenomena:

> In general, every kind of law, all legal phenomena [*pravovye javlenija*]—including legal judgments [*pravovye suždenija*] that gain the consent and approval of others—are purely and exclusively individual phenomena from our [Leon Petrażycki's] point of view, and the possible consent

[19] He also uses the terms *repul'sija* (repulsion) and *appul'sija* (appulsion).

[20] To avoid misunderstandings, it should be stressed that nowhere does Petrażycki contend that ethical emotions are always successful in counteracting other kinds of motivation. I italicized the term *honest* in order to stress that in a not-so-honest man, repulsive ethical emotions—provided he can experience them—may not be able to counteract other kinds of emotions. Such cases may eventuate in regret, a phenomenon Petrażycki sometimes mentions.

[21] A totally different example of an ethical appulsion seems to be the emotion experienced by a right-holder where his own behaviour is concerned, as when he experiences, say, he has a right of way or some political liberty. See in this regard Section 18.9.3 below.

[22] In this discussion the term *subject* will be uppercased when meaning "each of us as a solipsistic ego"; it will instead be lowercased when referring to a subject as an object of predication in a judgment, or else when referring to a participant in a legal relationship (where by *participant* is understood also a possible third spectator).

and approval on the part of others are irrelevant from the point of view of defining and studying the nature of legal phenomena. […] Every sort of psychical phenomenon appears in the psyche [*psihika*] of one individual and only there: Its nature does not change depending on whether or not something happens somewhere else between individuals, or above them, or in the psyche of others, nor does it depend on whether or not other individuals exist, etc. (Petrażycki 1909–1910, 105; translation adapted from Petrazycki 1955, 75)

This is why Petrażycki's theory of law can be called a *solipsistic theory of ethics* (or *ethical solipsism*).[23]

When it comes to distinguishing ethical emotions from other kinds of emotions,[24] Petrażycki mentions the following criteria:

1. Ethical emotions seem to "procee[d] as from a source […] extraneous to our prosaic ego" (Petrażycki 1955, 37–8; 1909–1910, 34).
2. They are experienced as if provided with "some […] voice addressing us and talking to us" (ibid.).
3. They are experienced as "an inward impediment to freedom—as a particular obstacle to the free exercise of a preference and the free selection and free following of our propensities, appetences, and purposes" (ibid.).
4. They have a "unique mystic-authoritative character, […] they […] posses[s] a mystical coloration, not without a tinge of fear" (ibid.).
5. Unlike other emotions such as hunger, thirst, or sexual appetite, ethical emotions are "blanket" emotions, meaning that they "can serve as stimuli to any conduct whatever" (Petrażycki 1955, 27; 1909–1910, 11–2).
6. They "are similar to the imperative emotions (*povelitel'nye ėmocii*) aroused by commands or prohibitions addressed to us" (Petrażycki 1955, 38; 1909–1910, 35–6).

As regards point (6), it should be stressed, in order to avoid misunderstandings, that according to Petrażycki "[*n*]*either law nor morality has anything in common with commands and prohibitions as such*" (Petrażycki 1955, 158;

[23] To my knowledge, the first author who used the term *solipsyzm* to refer to Petrażycki's legal theory was Rozmaryn (1949, 17, quoted in Seidler 1950, 21). Unlike these authors, I do not use this term in a derogatory way. Olivecrona did not use the term *solipsism* but criticized Petrażycki on such grounds (see Olivecrona 1948, 178, and the discussion of Olivecrona's criticism in Fittipaldi 2012a, 12 n. 9). Znamierowski (1922, 59) used the term *solipsyzm* in order to show that Petrażycki's ethical solipsism is logically conducive to general metaphysical solipsism. Against this objection, see Fittipaldi 2012a, 114. On Olivecrona and Znamierowski see respectively Chapter 14 and Section 20.2 in this tome.

[24] According to Petrażycki ethical emotions are a subclass of the broader class of normative emotions. The class of normative emotions also takes in aesthetic emotions, which Petrażycki does not classify as ethical emotions because of their lack mystic-authoritativeness, which according to Petrażycki is the *differentia specifica* of ethical emotions. In this essay, if not otherwise specified, I will use the terms *normative* and *ethical* as synonyms.

1909–1910, 332). There are plenty of ethical phenomena where no command whatsoever can be found. Petrażycki gives the example of custom (ibid.).[25]

Moreover, from the above it follows that legal and moral behaviours have nothing to do with either teleological or aesthetic behaviour[26]:

> If larceny, defamation, or coarse treatment of a servant is rejected as uncomely, ugly, or inelegant—if, in other words, the relevant impulsion is a negative aesthetic impulsion—the judgments [*suždenija*] are then neither moral nor legal: They are aesthetic experiences. The same utterances [*izrečenija*] may in general be based on opportunistic [*opportunističeskie*], or teleological [*celevye*], judgments […]. If a person saying, "One should not steal" merely contemplated that the relevant conduct might entail a term in prison, punishment in the life to come, or the like, and by reason thereof […] when he formed the judgment "One should not steal," there arose in his psyche neither an ethical […] nor an aesthetic emotion, but the repulsive motorial excitement of a fearful nature that generally accompanies the idea of a term in prison or of torture in Hades, and this motorial excitement were here extended to larceny, his judgment "One should not steal" would be the an opportunistic and teleological [*teleologičeskoe*] experience [*perežívanie*]—a judgment of worldly prudence and calculation—and not a normative [*principial'noe*] experience at all. (Petrażycki 1909–1910, 82–1; translation adapted from Petrażycki 1955, 60–1)

In other words, by definition there can be no ethical behaviour without ethical emotions.

According to Witold Rudziński (1976, 127) a problem with Petrażycki's theory of ethical emotions is that he did not explain where they come from. Moreover, drawing on Piaget's (1985) distinction between *morality of constraint* and *morality of cooperation*, Rudziński wrote that one would be tempted to hazard the view that the kind of ethical experience Petrażycki is talking about "is an infantile relic in our adult life" (Rudziński 1976, 96). On the other hand, by drawing not only on Piaget but also on Freud and other modern psychologists it could be argued that Petrażycki's ethical appulsions and repulsions should be reduced to more basic ethical emotions, such as guilt, shame, anger, indignation, etc. (Fittipaldi 2012a).[27]

[25] We will see below (Section 18.11) that commands are involved in a particular kind of legal relation that Petrażycki calls *authority*.

[26] On aesthetic emotions, see footnote 24 above. It should be also recalled that Petrażycki's distinction between *normative* (i.e., aesthetic + ethical) and *teleological* motivation can be compared to Alfred Schütz's distinction between *Weil-Motive* and *Um-zu-Motive* and to Max Weber's distinction between *Wertrationalität* and *Zweckrationalität*. See in this regard Timoshina 2013b, 452ff.

[27] For example, if the Subject experiences an ethical repulsion toward the action of some other individual, that repulsion should be understood as the Subject's *anger* or *indignation* (among other emotions) toward that action. By the same token, if the Subject's repulsion is directed toward an action of the Subject himself, that repulsion should be understood as the Subject's anticipated *guilt* or *shame* (among other emotions) for carrying it out. On a Petrażyckian passage supporting the reduction of ethical repulsion to indignation, see also footnote 76 below).

18.4. The Theory of Projections

Petrażycki contends that all ethical phenomena should be explained in terms of ethical emotions. Such an approach raises an obvious question: If law and morality are made up of ethical emotions, where are the ethical realities jurists and laypeople usually talk about? Here is a passage where Petrażycki addresses this issue:

> Let us suppose that we are dealing with the following judgments:
>
> "The landlord A has the right [*imeet pravo*] to receive from the tenant 5,000 rubles as a price for the rental" or "The tenant B is obliged [*objazan*] to pay to the landlord A the rental price of 5,000 rubles agreed on in the contract." According to the legal terminology between A and B there exists [*suščestvuet*] a legal relationship [*pravootnošenie*].
>
> In this case there is a legal phenomenon [*pravovoe javlenie*], but where is it? Where can it be found in order to investigate it?
>
> It would be wrong to think that it is situated somewhere in the space between A and B—for example, if the landlord A and the tenant B are in the province of Tambov, then to think that the legal phenomenon in this case is [*imeetsja*] precisely in this province—or to think that the legal obligation which in the cited judgment was ascribed to the tenant B is something that is situated near to this person and that the right to receive 5,000 rubles is something that exists and can be found near to the tenant A, in his hands, in his soul or somewhere around or in him. (Petrażycki 1908, 24; translation adapted from Petrażycki 1955, 7)

Here Petrażycki mentions three possible mistakes: (1) the debt is believed to exist between A and B; (2) it is believed to exist somewhere in the province where A and B reside; (3) it is split into two entities, namely, a debt and a credit, one near to the debtor, the other near to the creditor.[28]

According to Petrażycki, all these answers are wrong. This also applies to the epistemological status of the traditional *scientia juris*, which in his view deals with *illusions of a special kind*:

> The content of the science of law, along with the issues it gives rise to and the solutions devised in the attempt to address them, appears to be an optical illusion [*optičeskij obman*] consisting in the following: It does not see legal phenomena where they actually take place, and it sees them where they in no way are, nor can they be found, observed, and known, i.e., *in the world external to him who experiences* [*perežívajuščij*] *the legal phenomena* […]. This optical illusion has […] its natural psychological causes […], just as, for example, completely understandable and natural is the optical illusion (in the literal sense of the word) by virtue of which people ignorant about astronomy think (as did the very science of astronomy prior to Copernicus) that the sun revolves around us, that it "rises" in the morning, and so on […]. (Petrażycki 1908, 25; translation adapted from Petrażycki 1955, 8; italics replacing spaced in the original)

[28] In order to avoid misunderstandings it should be stressed that Petrażycki does not mention a fourth possibility, namely, that the debt is believed to exist in some of realm-of-the-ought-to-be (*Bereich des Sollens*). As will be explained shortly in this section, Petrażycki's projectivism only makes it possible to explain why we add further entities to *this* world. This is a major difference between Petrażycki and Hägerström, as the latter maintains that *objectifications* (a concept loosely equivalent to Petrażycki's *projections*) lead us to conjure up a world of duty as existing *in distinction* to the world of facts but parallel to it (see Sections 13.2.3 and 13.3.1 in this tome).

Now, according to Petrażycki, moral and legal illusions can be all explained by way of a single mechanism, that of *projections*:

> [The emotions],[29] aroused in us by various objects (by perceptions or by representations of those objects) or experienced in reference to them, communicate [*soobščajut*] a particular coloration [*okraska*] or particular nuances (*ottenki*) to the perceptions or representations corresponding to those objects, such that the objects themselves appear to us as if they objectively possessed the relevant qualities. Thus, if a certain object such as a roast (its perception, appearance, smell, and so forth) arouses appetite in us, it then acquires a particular aspect in our eyes, and we ascribe particular qualities to it and speak of it as appetizing, as having an appetizing appearance, and the like. If the same object or another object offered to us as food awakens in us the contrary (negative) emotion instead of appetite (the physiological condition of our organism being different), and if this negative emotion is relatively weak, we will then attribute to the object the quality of being unappetizing, whereas if the [emotion] is more intense, we will confer on the object the quality of "loathsomeness" (Petrażycki 1909–1910, 38; translation adapted from Petrażycki 1955, 40).

According to Petrażycki, all kinds of emotions are more or less conducive to projections, and ethical emotions are no exception. It bears recalling that a similar mechanism was pointed out by Axel Hägerström in connection with norms.[30] That is no surprise, considering that projectivism is an explanation typically invoked by *empiricists* and *ethical emotivists*—starting from David Hume, who as far as I know is never quoted in this regard by Petrażycki.[31] Now, unlike these authors, Petrażycki holds that if all kinds of emotions are somewhat capable of producing *projective qualities*, ethical emotions can even bring about *illusions of entities* (or things):

> The ethical emotional projection […] is not restricted to the representations of the existence […] of obligatedness[32] [*objazannost'*, *dolženstvovanie*] as a specific state [*sostojanie*] of submission [*podčinennost'*] […]. It goes further into fantastic production. What we could call a materialization [*oveščestvlenie*, *materializacija*] of the obligation [*dolg*] takes place. As is apparent from the etymology of the structure of the word *ob(v)jazannost'* (*obligatio*, and the like), as well as from the diverse usages of the words *objazannost'* and *dolg* (for instance, *na nem ležit objazannost'* [lit.. "the obligation lies on him"], *tjaželyj dolg* [lit., "heavy debt"], *byt' obremenennym objazannostjami, dolgami* [lit., "to be burdened with obligations, debts"], and the like); there is here—in the place where the projection is directed, near the individuals onto whom the obligatedness is being

[29] Petrażycki uses here the term *motornoe razdraženie* (motor excitation), which he uses as synonymous with *ėmocija* or *impul'sija*.

[30] See, for instance, the following quotation: "The norm […] acts through its power to attach reverence or respect. Esteem is attached to right action, and disesteem to wrong action" (Hägerström 1953d, 194; in this translation this text is mistakenly identified as bearing the title *Till frågan om den gällende rättens begrepp*). On Hägerström's conception of norms see Section 13.3 in this tome.

[31] Cf. Hume 1978, sec. 1.3.14, 167. On the different ways the term *projection* is used in psychology, see Piaget 1985, 47 (also quoted in Fittipaldi 2012a, 55 n. 3). On the role of projections in legal realism see also Section 12.5 in this tome.

[32] Throughout this text (as well as in Fittipaldi 2012a), I use the term *obligatedness* to refer to an *individual's* "deontic" projective quality (his being obligated), while I use *obligatoriness* to refer an *action*'s "deontic" projective quality (its being obligatory). This corresponds to different Russian terms used by Petrażycki.

projected—the representation of the presence of objects of the sort that have weight, of some sort of material object, such as a rope or chain, through which those individuals are obligated and burdened. (Petrażycki 1909–1910, 42; my translation and italics added)

Unfortunately, Petrażycki failed to explain why ethical emotions are supposed to be more productive than other kinds of emotions.[33]

Another flaw in Petrażycki's theory is that he failed to expound it in any non-projective terminology. His use of terms such as *obligation*, *right*, and *power* comes without qualification. According to him,

[t]here has been such a complete adjustment to this point of view [the projectional point of view] that to start an examination of the problems of ethics from the teaching of scientific psychology […] would be to raise difficulties of thinking and of language and in substance to "speak in an incomprehensible language" (Petrażycki 1909–1910, 43; translation adapted from Petrażycki 1955, 43).

This is why, even while contending that ethical qualities and entities are illusory phenomena, Petrażycki proceeded from the projectional point of view in presenting his theory.

According to Czesław Znamierowski (1888–1967), recognized as the most important critic of the psychological theories of law (cf. Motyka 1993, 27), the fact that Petrażycki couldn't present his theory without recourse to projective terminology proves that his psychological theory of law is untenable (Znamierowski 1922, 32).[34] If a theory developed to explain any set of phenomena is tenable, it must be possible to describe these phenomena in terms of that theory itself. I think this objection is sound. But I also think that it *is* possible to present Petrażycki's theory without recourse to the projective point of view.[35] Even so, I will keep using Petrażycki's "projective" terminology so as to avoid having to introduce cumbersome and unusual neologisms.

18.5. Norms and Normative (or Ethical) Convictions

Leon Petrażycki's psychological theory of law differs from the other most complete psychological theory of law as yet proposed, namely, Pattaro 2005,[36] in that in Petrażycki's theory the concept of a norm plays but a *secondary* role.

[33] It could be objected that projections can produce solely illusions of ethical *qualities*, and that the illusions of legal *entities* should be explained in different ways. In Fittipaldi 2012a, chap. 4, I attempted to show that it is possible to explain the illusions of legal entities with hypotheses other than projections, while still remaining within the framework of Petrażycki's theory of law.

[34] On Znamierowski see also Section 20.2 in this tome.

[35] In Fittipaldi 2012a, I addressed some legal-ontological problems within the framework of Petrażycki's theory of law, without adopting the projective point of view. This made it necessary to adopt such cumbersome neologisms as *attributivesidedness* or *imperativesidedness*. On the view that projective beliefs, though "ontologically suspect," may be "useful, and indeed rational, for a practical reasoner," see Sartor 2005, 101.

[36] To be precise, Pattaro's is a psychological theory of (*what is*) *right* as distinguished from *law*. A comparison between Pattaro's and Petrażycki's conceptions can be found in Timoshina 2011, 68ff. On this issue, see also footnote 19 in Section 20.1.5 in this tome.

Let us read a passage where Petrażycki gives his own definition of a *norm*, as well as other definitions we will make use of in this and the next section:

> The existence [*suščestvovanie*] and operation in our psyche [*psihika*] of immediate combinations [*sočetanija*] of action representations [*akcionnye predstavlenija*] and emotions (rejecting or encouraging the corresponding conduct—i.e. repulsive or appulsive) *may be manifested* in the form of judgments [*suždenija*] rejecting or encouraging a certain conduct *per se*—and not as a means to a certain end: "a lie is shameful"; "one should not lie"; "one should tell the truth"; and so forth. Judgments based on such combinations of action representations with repulsions or appulsions we term […] normative-practical [*principial'nye praktičeskie*] (i.e. that determine behavior) judgments or, briefly, normative judgments [*normativnye suždenija*]; and their contents [*soderžanija*] we term normative-practical rules of behavior [*principial nye pravila povedenia*], principles of behavior [*principy povedenia*] or norms [*normy*]. The corresponding dispositions […] we term principle-practical or normative convictions [*normativnye ubeždenija*]. (Petrażycki 1955, 30; 1909–1910, 20–1; italics added)

For Petrażycki *the core phenomenon is the combination of action representations and ethical emotions*. He uses the term *normative conviction* to refer to the stable presence of such combinations in our psyches.[37] The term *norm* is instead reserved to the *contents* of the projective judgments based on these combinations (cf. in this regard Section 12.4 in this tome).

According to Petrażycki, "judgments are emotional acts [*ėmocional'nye akty*]" (Petrażycki 1908, 248; my translation):[38]

> [E]motions are the essential element of judgments. Positive, affirmative judgments—statements of something about something, of the form *S* (subject) is *P* (predicate), such as "The Earth is a sphere" or "The earth revolves around the sun"—are *appulsive*-emotional acts. Negative judgments, of the form *S* is not *P*, such as "the earth is not a sphere," are *repulsive*-emotional acts. The psychological scheme of the former is $S \leftarrow P$, where *S* designates the representation of the subject, *P* means the representation of the predicate, and the arrow between them means the attractive, acceptive emotion, bringing the second representation into connection with the first one, that is, "stating" [*"utverždajuščij"*] the second one as regards the first one. The psychological scheme of negative judgments is $S \dashv P$, where the sign between *S* and *P* designates a refusing, rebutting emotion.
> […]
> It is possible […] to discover […] the presence of extremely different […] [judgment] emotions. A judgment emotion like "Hunger is an emotion" (a *theoretical* judgment, or theoretical emotion) has a character completely different from the judgment emotion "We should forgive our neighbors for the wrong they have done" (a *moral* judgment, or moral emotion), which in turn has a different character from the judgment emotion "I have the right to do that" (a *legal* judgment, or legal emotion), etc. (Petrażycki 1908, 246–7; my translation and italics added)

[37] The terms *normativnyj* (normative) and *ėtičeskij* (ethical) are not perfect synonyms in Petrażycki (see footnote 24 above).

[38] Petrażycki kept working on these issues throughout his whole life. See his posthumous work *Nowe podstawy logiki i klasyficacja umiejętności* (New foundations of logic and a classification of competences: Petrażycki 1939) where he proposed to replace the concept of judgment with the more basic concept of *position* (*pozycja*). As regards the similarities and differences between Petrażycki's concept of *position*, on one hand, and Russell's and Wittgenstein's concepts of *atomic proposition* and *Elementarsatz* (elementary proposition) see Timoshina 2012, 56ff. (see also Section 20.1.2 of this tome).

As emotional acts, *judgments*, in Petrażycki's use of this word, are *experiences* (*perežívanija*), and *not sentences* (*predloženija*). The expression of a judgment without the underlying emotions is not to be viewed as an authentic (*podlinnyj*) judgment in his sense (Petrażycki 1908, 253). By the same token, judgments can be experienced even without a corresponding utterance.[39] They can be "mute."[40]

In the case of normative judgments, some illusory ethical predicate is experienced about some person or some course of action.[41] As noted, Petrażycki calls the *content* of this experience a *norm*. Now, *since in Petrażycki's terminology normative judgments are projective phenomena, norms cannot play a central role in his theory*.

A crucial role in his theory is instead played by *normative convictions*. In order to understand this concept, we should first read a passage where Petrażycki explains his general concept of *conviction*:

> The judgments we experience […] have the tendency to leave corresponding "tracks," dispositions, e.g., the ability to experience the same judgment—the same pairing of representations and affirmative/acceptive or negative/refusive emotions—in case the corresponding occasions [*povody*] should present themselves again […]. *We shall call "convictions"* (*ubeždenija*) *the corresponding dispositional cognitive-emotional pairings*. (Petrażycki 1908, 248; my translation)

It is difficult not to think of psychological associationism when reading such a passage. Nonetheless one can give it also a more modern interpretation. For example, think of the role of disgust in the socialization of children (M. Lewis 1992, 110). If every time a child attempts to play with his poo his parents make him feel ashamed by virtue of their disgusted faces, he will probably develop a stable disposition to experience that activity as shameful. However, even if adapted to modern psychological approaches, psychological associationism is far to being an exhaustive account of how ethical dispositions (i.e., convictions) emerge in human animals.[42]

[39] Petrażycki holds that judgments are strictly connected with our reactions to food, and in this regard he quotes Darwin's 1872 *The Expression of the Emotions in Man and Animals* (see Petrażycki 1908, 248 n. 1).

[40] Petrażycki (1939, 31) also maintained that judgments—made up as they are of three different psychical acts (the act of formulating a subject, the act of formulating the predication, and the emotion connecting the latter to the former)—originate from the development of language. Needless to say that to hold that judgments—as distinguished from positions (footnote 38 above)—*originate* from language does not amount to holding that judgments *always* need to be expressed linguistically.

[41] This ethical predicate exists exclusively within the Subject, without any externally existing (i.e., objective) counterpart. If normative judgments are formulated as if their predicate had not only an internal existence but also an external one—as is mostly the case—they are simply *erroneous* (*błędy*) objective judgments (Petrażycki 1939, 36; cf. also 18 n. 7). In this regard see also Section 12.7 in this tome.

[42] For an attempt to reconcile Petrażycki's theory with Freud's and Piaget's theories on the emergence of ethical emotions in the child, see Fittipaldi 2012a. In passing, it should be recalled

To conclude this section, a few words are in order on the question whether Petrażycki's conception of a norm is compatible with the conception set out in Pattaro 2005. In my opinion the difference between them is chiefly terminological. What Pattaro calls a *norm* roughly corresponds to what Petrażycki's calls a *normative conviction*. According to Pattaro a norm is a motive of behaviour, namely, the belief (*opinio vinculi*) that a certain type of action must be performed, in the normative sense of the word, anytime a certain type of circumstance is validly instantiated. And this must be so unconditionally, regardless of any good or bad consequences that may stem from the performance in question (Petrażycki 2005, 97).

For Pattaro a norm is made up of the following three elements: (1) a type of circumstance, (2) a type of action, and (3) a conception or experience of that type of action as binding per se. It might seem that in Pattaro's definition of norms, emotions do not play the crucial role they play in the context of Petrażycki's normative convictions. But Pattaro also writes:

> With regard to a belief in a norm, some prefer to say "acceptance" rather than internalization. […] I prefer "internalization" [because, among other reasons] an internalization will not always be conscious or determined by reasoning; it is rather often unconscious and *determined by emotions*. (Pattaro 2005, 100; italics added)

My conclusion is therefore that Petrażycki's and Pattaro's psychological theories of normativeness are compatible in this regard.[43] Since Enrico Pattaro can be recognized as a consistent developer of Scandinavian realism, this compatibility is one further argument for introducing the historiographical concept of a *Continental* or *psychological realism* to refer to both Petrażyckian and Hägerströmian legal realisms (see in this regard also Chapter 12 in this tome).

18.6. The Structure of Normative Convictions and the Distinction Between Positive and Intuitive Ethics

According to Petrażycki *the minimal psychological structure of ethical experiences consists of the representation of some behaviour coupled with an appulsive or repulsive ethical emotion*.

The behaviour in question can also be psychical—a purely *mental* action (Petrażycki 1909–1910, 45). For example, I may experience an ethical repulsion toward some thought of mine: "Thou shalt not *covet*" (thy neighbour's house, and so on).

that Petrażycki seems to have denied the existence of blanket emotions, and therefore also of ethical emotions, among animals (see Piętka (without date), 229).

[43] Another minor difference seems to be that since Pattaro also includes the type of circumstance in the structure of norms, all norms in his view seem to be somewhat hypothetical, whereas Petrażycki holds that there can be also *categorical* ethical convictions (see Section 18.6.1 below).

Furthermore, a normative conviction may involve three different kinds of cognitive elements (*poznavatel'nye elementy*): (1) the representation of a normative hypothesis, (2) the representation of addressees, and (3) the representation of a normative fact. Let us take these up in turn.

18.6.1. Normative Hypotheses

A *normative hypothesis* is a "representation of the circumstances […] upon whose presence the obligatoriness of a certain conduct depends" (Petrażycki 1955, 44; 1909–1910, 47).

The term *normative hypothesis* is mine. Petrażycki simply uses the term *gipotesa*, setting it in contrast to *dispozicija*, which is the *normative consequence*, namely, the obligatoriness of a certain conduct. Petrażycki's *gipotesa* corresponds to what German and Italian jurists call *Tatbestand* and *fattispecie astratta*,[44] respectively, as well as to what Wesley N. Hohfeld (1964) called an *operative fact*. As for *dispozicija*, this term somewhat corresponds to the German *Rechtsfolge*.[45]

That Petrażycki's concept of a normative hypothesis corresponds to the concepts of *Tatbestand*, *fattispecie astratta*, and *operative fact* does *not* mean that it thereby *coincides* with them. Unlike these terms, which refer to actual facts external to the Subject, Petrażycki's normative hypotheses are *objects of representations* within the Subject. This implies that, according to Petrażycki, in order for an obligation—understood as a psychic phenomenon, namely, a projection—to come into psychical existence, it suffices that the Subject *believe in the truth* of the representation of some normative hypothesis that brings that obligation about (e.g., Mark's breaking of John's window). The actual truth of the representation is instead completely irrelevant from a psychological point of view (Petrażycki 1909–1910, 457; 1955, 212).[46] The Subject's

[44] On this issue, cf. Pattaro 2005, 16 n. 8.

[45] I say *somewhat* because, according to Petrażycki not only legal norms but also moral norms may have a hypothetical structure, whereas *rechts-* in *Rechtsfolge* might convey the idea that hypothetical norms can be found solely in the domain of law (*Recht*).

[46] This is not to say that its truth—understood as correspondence with external reality—is not relevant from other points of view, such as that of *legal dogmatics*. Quite the contrary. What Petrażycki and Lande state as regards the *legal-dogmatic* relevance of the *truth of normative facts* (on the concept of normative fact see Section 18.6.3 below) holds also for the other cognitive elements of normative convictions (cf. Section 18.12 below, and Fittipaldi 2013d, par. 1.2, where Reinach's (1989, [178] 149) classical objection against legal psychologism is discussed). However, Petrażycki's contention that the *truth* of these representations is *completely irrelevant from a psychological point of view* may seem too radical. It could be objected that an ethical conviction based on the *false belief* in the instantiation of its hypothesis is less stable than an ethical conviction based on a *true belief*. At the end of the day, a false belief seems to be more amenable to change than a true one. Be that as it may, a change of belief does not touch on the existence of the ethical phenomenon until the belief it is based on actually gets changed. And this is precisely

believing in the truth of a representation of his makes this a *realistic* representation (*przedstawienie rzeczywistościowe*) as opposed to a *fantastic* representation (*przedstawienia fantastyczne*)—to use a terminology Petrażycki would introduce in his later lectures on logic (Petrażycki 1939, 26ff., 109).

Petrażycki distinguishes *categorical* normative convictions from *hypothetical* ones.[47] Only hypothetical normative convictions comprise the representation of a normative hypothesis. Categorical ones do not. A Petrażyckian example of a categorical normative conviction is |Thou shalt not kill|.[48]

It is in order here to recall that Hans Kelsen—like many other modern legal theorists—would oppose the very idea of a categorical norm, and that Kelsen's arguments could be used also against Petrażycki's idea of a categorical ethical conviction. Kelsen maintained that

> omissions cannot be prescribed unconditionally. Otherwise they could be complied with or violated unconditionally, which is not the case. An individual cannot lie, commit theft, murder or adultery always, but only under definite circumstances. If moral norms prescribing omissions established unconditional, that is to say, categorical obligations, an individual during his sleep would fulfil these obligations—sleeping would be an ideal state from the point of view of morality. (Kelsen 1950, 11)

It is not clear whether Kelsen's statement concerning sleeping as an ideal state from the point of view of morality is to be taken as a *reductio ad absurdum*. If I have the categorical ethical conviction that one should not kill, and nonetheless I wish or dream of killing someone, I may perfectly feel guilty or ashamed for that wish or dream. These emotions are symptoms of the existence within myself of a corresponding categorical conviction. More generally speaking, having the *categorical ethical conviction that one should not kill* is one thing, having the *hypothetical ethical conviction that if one has the opportunity to kill somebody he should abstain from doing that* is quite another one. There is reason to think that Petrażycki would have rejected the transformation of the former into the latter as *arbitrary reinterpretations of facts* (cf. Sections 18.7 and 18.9.3 below).[49]

Petrażycki's point. From another point of view, one could observe that Petrażycki's emphasis on the Subject's *belief in the truth* of his representations rather than on their *actual truth*, is perfectly compatible with the research that Sigmund Freud was doing in those very years. Indeed, Freud went even further, showing that, for example, the need for atonement in certain individuals may arise not only as a consequence of their realistic representation of having committed some crime (i.e., having instantiated a normative hypothesis) but also by virtue of the mere *wish* to commit it, when that wish is backed by a narcissistic overvaluation of one's own psychical acts (e.g., Freud 1966, sec. 4.7).

[47] But see (earlier than Petrażycki) Zitelmann 1879, 222, and Bierling 1894, 76.

[48] I shall use the pipe (|) character to signal that I am referring to a normative conviction, not to some linguistic phenomenon.

[49] Another option is to hold that categorical normative convictions are hypothetical normative convictions whose normative hypotheses are constantly being instantiated. In this case, however, the difference is retained, if in a cognitively less salient way.

Now, I think that Petrażycki's distinction can be upheld considering that there is at least one psychological difference between a hypothetical normative conviction and a categorical one. *If you have a hypothetical normative conviction, you can try to avoid the instantiation of the normative hypothesis without experiencing some ethical repulsion toward this attempt*. This does not hold for circumstances eliciting ethical emotions in the case of categorical normative convictions. Consider the categorical conviction |Give alms to the beggars you run into|. This is different from the normative conviction |*If you run into a beggar*, you should give him alms|. In this latter case, you would not feel guilty if you should decide to change your usual route in order to avoid running into a certain beggar. If some third spectator should hold such a hypothetical normative conviction, this person would neither be indignant at you for doing that nor disapproving of you. In the case of a categorical normative conviction, instead, such a behaviour could be disapproved of as a form of *normative avoidance*.[50]

In my opinion, Petrażycki's conception implies that the question whether a conviction is categorical or hypothetical should be viewed as an empirical one. A certain normative conviction is categorical if—when transformed into a hypothetical one—the avoidance of the instantiation of its "normative hypothesis" elicits ethical repulsion. It is instead hypothetical if such avoidance does *not* elicit any ethical repulsion.

Finally, it should be remarked that it is perhaps easier to conceive categorical normative convictions concerning abstentions from action than concerning engagements in action (but recall |Love thy neighbor as thyself|). This may be why the only example Petrażycki gives is |Thou shalt not kill|.[51]

18.6.2. Addressees

As a second possible cognitive element Petrażycki mentions the representation of the *addressees* of a certain normative conviction, namely, the "representation of individuals or classes of people […] or other beings [*suščestva*] […] from which a certain conduct is ethically required [*ėtičeski trebuetsja*]" (Petrażycki 1955, 44; 1909–1910, 47). This element he calls *subjectual representation* (*sub"ektnoe predstavlenie*).

Since Petrażycki draws a distinction according to whether the subjectual representation concerns (1) certain spatiotemporally individuated beings, (2) the class of all beings, or (3) certain subclasses thereof, this cognitive ele-

[50] Needless to say that this phrase is modelled on *tax avoidance*. On the phenomenon of *command avoidance*, see Section 18.11 below.

[51] Petrażycki neglected to discuss the case of categorical normative convictions that admit of exceptions (|Thou shalt not kill, except in self-defense|). I think that in order to accommodate such phenomena a distinction should be made between *affirmative*-hypothetical normative convictions and *negative*-hypothetical ones, the latter being like categorical normative convictions in every respect except that they leave room for exceptions.

ment makes it possible to distinguish three kinds of normative convictions corresponding, *mutatis mutandis*, to the traditional concepts of (1) an *individual norm*, (2) a *general norm*, and (3) a *special norm*.[52]

Now, it may be asked whether special normative convictions can be transformed into general hypothetical normative ones, or the other way around. We should devote a few words to this important issue, which unfortunately was left unattended by Petrażycki.

Consider the following ethical conviction: |Employees must wash their hands before returning to work|. It could be argued that the concept of an addressee can be replaced by the concept of a normative hypothesis, and that the historical event of having been employed is one element of the normative hypothesis making up that normative conviction (the other element being having gone to the restroom). Conversely, consider the example Petrażycki gives when discussing hypothetical normative convictions: |In God's temple we must conduct ourselves thus and so|. This normative hypothesis could be transformed into the following one: |The class of people who are in God's temple must conduct themselves thus and so|. Likewise, |Ye shall kindle no fire throughout your habitations upon the Sabbath day| (Exodus 35:3) could be transformed into |The class of people who are on Sabbath day ought to kindle no fire anywhere in their habitations|. Now, since addressees are necessarily *animate entities*, while normative hypotheses seem to be able to encompass whatever *reality* (if by *reality* we understand a hypernym for the three main naive ontological kinds: entities—whether or not animate—, qualities and events), some purported principle of economy of thought might seem to require that we should do away with the concept of an addressee and replace it with an all-embracing concept of a normative hypothesis.

Arguably, even in this case (cf. the previous Section 18.6.1) Petrażycki might have replied that such a reduction is an *arbitrary reinterpretation of psychological facts* (cf. Sections 18.7 and 18.9.3 below).

I think that Petrażycki's distinction can be maintained if we adopt the framework of prototype psycholinguistics and, among others, its concept of *inherent relationality* (Croft 1991, 62–3, see also Fittipaldi 2012a) as a *distinctive feature of prototypical qualities*. The fact that *being-on-Saturday* is construed as an event rather than as a quality necessarily inherent to something or somebody[53] is mirrored by the fact that the (pseudo-)quality of *being-on-Saturday* cannot

[52] Since according to Petrażycki (see Section 18.7 below) whatever object (*predmet*) represented as animate (*oduševlennyj*) can be experienced (on this use of *experienced* see footnote 64 below) as a duty-holder (or as a right-holder), it follows that a true *general* normative conviction has as its addressees the class of all beings the Subject represents to himself as animate. It is hardly necessary to stress how this approach is compatible with the research done by Jean Piaget (1973) on child animism.

[53] According to Croft, events *may or may not be* inherently relational to something or somebody, while qualities must necessarily be inherently relational to *one* being (animate or not).

be expressed with an acceptable linguistic construction (*?John is on Saturday*). Generally speaking, the passage of time—and the consequent succession of the days of the week—is usually construed as an *event*, and events need not be relational to anything or anybody. Now, since within ethical convictions *events* (*sobytija*) play the cognitive role of *normative hypotheses* rather than that of addressees, the occurrence of Saturday must be regarded as a normative hypothesis.[54] By contrast, some individual's *being-an-employee* is typically construed by most people as a quality (or a state)[55] inherent to that individual rather than as a historical event having occurred to him (his having being employed by someone somewhere at sometime in the past). Therefore the slot of being-an-employee within an ethical conviction is that of an addressee—if we are to take psychology seriously.

Such a defense seems to be implied by Petrażycki's theoretical and methodological tenets.

18.6.3. Normative Facts

We can now turn to the third possible cognitive element of a normative conviction: the *normative fact* (*normativnyj fakt*), which Petrażycki also calls *norm-creating fact* (*normoustanovitel'nyj fakt*).[56] He gives the following examples:

1. ⌈We must act thus *because it is so written in the New Testament, the Talmud, the Koran, or the Code of Laws*.⌋
2. ⌈We must act thus *because our fathers and grandfathers did so*.⌋
3. ⌈We must act thus *because the assembly of the people has so ordained*.⌋

Ethical experiences that comprise representations of normative facts are termed by Petrażycki *positive* (*pozitivnye*) ethical experiences.[57] Ethical experiences that do not comprise such representations are called by him *intuitive* (*intuitivnye*) or *nonpositive* (Petrażycki 1939, 111) ethical experiences.

In this case, too, Petrażycki is proposing a redefinition of traditional concepts. His distinction between *positive* and *intuitive* ethical experiences roughly corresponds to the traditional distinction between *positive law* and *natural*

[54] Of course, this holds for those people who regard Saturday as the instantiation of a Sabbath where the term *Sabbath* is to be understood as the *nomen iuris* of a particular normative hypothesis.

[55] On Croft's (1991, 137) concept of state from a Petrażyckian perspective, see Fittipaldi 2012a (67).

[56] On norm-destructing normative facts see below in this section and Section 19.4 in this tome.

[57] To be sure, according to Petrażycki, there may be normative facts also in the domain of aesthetic phenomena. On aesthetic emotions as a subclass of normative emotions, see footnote 24 above.

law. Indeed, according to Petrażycki, what natural law teorists called *natural law* was nothing but the complex of their own *intuitive* ethical experiences.[58]

Let us read a passage where Petrażycki explains his distinction:

> [I]f anyone ascribes to himself an obligation to help those in need, to pay his workers the agreed wage punctually, or the like, independently of any outside authority whatsoever, the corresponding judgments, convictions, obligations and norms are then […] intuitive ethical judgments etc.; whereas if he considers his duty to help the needy "because this was the teaching of our Savior," or to pay his workers punctually "because it is so stated in the statutes," the corresponding ethical experiences (obligations and norms) are then positive […]. (Petrażycki 1955, 44–5; 1909–1910, 47–8)

Petrażycki did not explain what precisely it means to "refer to" (*ssylat'sja na*) some normative fact as the foundation of one's ethical conviction.[59] In my opinion, for something to be a normative fact in some individual it must *at once* (1) actually bring about a normative conviction in him or her and (2) be experienced by him or her as its foundation.

Since Petrażycki's concept of a normative fact seems to be made up of two elements, we could ask whether there can be solely *causative* normative facts and solely *foundational* ones. As regards the former Petrażycki mentioned the possibility that over time positive ethical convictions become intuitive, through

> processes, where the intuitive law is produced out of the positive law, […] in which legal experiences […] take an independent character, and appear *qua* intuitive law independently of the corresponding normative fact. (Petrażycki 1909–1910, 501; translation adapted from Petrażycki 1955, 238)

In this case, however, he is referring to *historically* causative normative facts, while neglecting to address the issue of *currently* causative normative facts, despite their not being drawn on by the Subject to found some ethical conviction of his. By the same token, Petrażycki neglected to discuss the issue of solely *foundational* normative facts such as, say, the Koran when erroneously used to justify female genital mutilation (cf. Fittipaldi 2012b, 39–40).

[58] To be precise according to Petrażycki "legal natural doctrines are based […] on *legal*-intuitive psyche. The foundation of these systems is a dogmatics of intuitive *law*, namely the systematic presentation of the autonomous-*legal* convictions of their authors" (Petrażycki 2002, quoted in Timoshina 2013b, 467, my translation, italics added). Nonetheless, when one thinks of such authors, like Immanuel Kant who held that homosexuality should be punished with castration, it is difficult not to view certain natural law theorists as presenting not only their own *legal* but also their own *moral* intuitive convictions (in a Petrażyckian sense). This is so because one could ask who is to be regarded as an attributive side when it comes to the prohibition of homosexuality.

[59] He also used the term *opredeljat'sja* ("to be determined"). See in this regard also the following passage: "in the domain of positive law the rules of conduct are experienced [*soznajutsja*] as binding [*objazatel'nye*] depending on [*v zavismosti ot*] certain facts represented as authoritative-normative [*avoritetno-normativnyj*] and on the grounds [*na osnovanii*] of them" (Petrażycki 1955, 228; 1909–1910, 484).

Petrażycki's concept of a normative fact *roughly* corresponds to the traditional concept of a *source of law*. It is Petrażycki himself who held that "it is possible to retain the usual […] term 'source of law' [*istočnik prava*], but only if it is referred to normative facts and if it is strongly distinguished from the law itself, from the customary law, from the statutory law, etc." (Petrażycki 1909–1910, 519; my translation). As much as the term *normative fact* may correspond to the traditional concept of a source of law, the same cannot be said of such terms as *statutory law* and *customary ethics*. By these terms Petrażycki refers not to the classes of statutes or customs but to the classes of *positive ethical psychical experiences referring to them*.

But that is only a terminological difference. A much more important difference between the traditional concept of a source of law and Petrażycki's concept of a normative fact is that in his view the "term *normative fact* must be understood to mean, not external, objective events as such, but rather *the contents* [*soderžanija*] *of the corresponding representations, the represented facts, independently of their actual existence*" (Petrażycki 1909–1910, 521; translation adapted from Petrażycki 1955, 249 and italics added). As in the case of normative hypotheses, in the case of this possible element of an ethical conviction we also are dealing with *realistic* representations (see Section 18.6.1 above).[60]

This has the significant implication that the normative fact may not exist at all in the reality external to the Subject. In other words, the realistic representation may be false and, despite its being false, it may nonetheless bring about positive-ethical convictions in the Subject.

Moreover, Petrażycki holds that (irrespective of whether a given normative fact exists or existed in external reality) the *most diverse norms*—whether or not mutually compatible—may be extracted from the *same* normative fact. On the case where *incompatible* norms may be extracted, see below, Section 18.12. Here, let us read his example of the extraction of *compatible* norms from a provision (i.e., a normative fact) under which he who commits larceny should be subjected to a certain punishment. From it one could extract such norms as:

> (1) that all persons are bound, with regard to owners, to refrain from corresponding encroachments: that owners have a right to a corresponding abstention on the part of others; (2) that one who has committed larceny is bound to tolerate the corresponding punishment: that the subject of the punitive authority has the right to punish; (3) that a judge is obligated to the state to condemn the thief to the corresponding punishment; (4) that the public prosecutor is obligated to charge the person who has committed larceny and to obtain his *punishment*; and (5) that the police are bound to conduct investigations, make arrest, and so forth. (Petrażycki 1955, 142ff.; 1909–1019, 229)

[60] Since Petrażycki speaks of *contents* of representations, it would be more precise to speak of normative facts as *objects* of realistic representations. Generally speaking, Petrażycki's adoption of the noun *fact* in the phrase *normative fact* is misleading, as it conveys the idea that normative facts should exist outside the Subject. Other terms, such as *normative object* or *norm-active object* would be preferable. In this essay, I shall stick to Petrażycki's terminology.

I will address some of these issues in greater detail when discussing the different kinds of normative facts described by Petrażycki (Sections 18.10 and 18.11).

In addition to norm-creating normative facts, Petrażycki also discusses such norm-destructing normative facts as repealing statutes (which will be discussed below in Section 18.9.4).

18.7. Moral vs. Legal Phenomena

We can turn now to Petrażycki's distinction between moral and legal phenomena.[61]

Petrażycki viewed his distinction as *stipulative*.[62] Although he maintained that his distinction roughly coincides with nontechnical usage, it is *not* meant to so coincide but is rather meant to select classes of phenomena with the proper degree of generality for adequate theories (see Section 18.2 above). This is the only criterion by which his distinction should be evaluated.

Here is how Petrażycki drew the distinction between moral and legal phenomena:

> Obligations conceived as free with reference to others—obligations as to which nothing appertains or is due from obligors to others—we will term *moral obligations*.
>
> Obligations which are felt as unfree with reference to others—as made secure on their behalf—we shall term *legal obligations*. (Petrażycki 1955, 46; 1909–1910, 50)

In other words, while in the case of moral obligations there is exclusively an *imperative side* (a duty-holder), in the case of legal obligations there is *also* an *attributive side* (a right-holder), who, as it were, "owns" the imperative side's obligation. The *imperative side* (*imperativnaja storona*) and the *attributive side* (*atributivnaja storona*) are Petrażycki's own terms.

Although Petrażycki is not the first to have proposed bilaterality as a criterion for distinguishing legal from moral phenomena,[63] his conception is by far the most systematically developed one.

[61] I use *law* to render *pravo* and *legal* as the adjective of *law* (even if *legal* is not etymologically related to *law*). Indeed, as Enrico Pattaro (2005) has shown, it is misleading to translate *Recht*, *droit*, *diritto*, etc., with *law*. This holds as well for the Russian *pravo* (and the Polish *prawo*). In the case of Petrażycki, the best choice would be to translate *pravo* (and *prawo*) with the term *Right* (uppercased) and to use *jural* as its adjective. This terminological choice would make it possible to use the English term *law* to refer to Petrażycki's *positive Right* or to his *official Right* (on the concept of official "law," see Section 18.12 below), or to some combination of them (e.g. positive-official Right, with the exclusion of intuitive-official one). Here I shall keep using *law* and *legal* instead of *Right* and *jural*, so as not to depart to much from Babb's translation of Petrażycki 1955.

[62] This is not the term he used, but see footnote 6 above.

[63] As concerns other authors who espoused a correlativist conception before Petrażycki, see Motyka 1993, 138ff., and Opałek 1957, 424 n. 8. To be sure, Petrażycki never used the term *korelatywność* (Motyka 1993, 138 n. 172). A conception somewhat similar to Petrażycki's would subsequently be advanced by Bruno Leoni (2004), as well as by Giorgio del Vecchio and Gustav Radbruch (see Ossowska 1960).

As for *moral* phenomena, Petrażycki gives the examples of the obligation to help someone in need, the obligation of almsgiving, and the following ones taken from the Gospel:

> But I say unto you, That ye resist not evil: but whosoever shall smite thee on thy right cheek, turn to him the other also. And if any man will sue thee at the law, and take away thy coat, let him have thy cloke also. (Matthew 5:39–40; see also Luke 6:29)

Petrażycki comments thus:

> In the psyche of persons who have advocated and experienced or who are presently experiencing such ethical judgments, the underlying norms do not of course mean that corresponding claims [*pritjazanija*] in behalf of the offenders have been established: that the offenders have been endowed with the right to demand that the other cheek be offered by the smitten, or that someone who has taken another's coat should thereby be rewarded with the injured person's cloak as well (or otherwise has a rightful claim to that cloak). (Petrażycki 1909–1910, 57; translation adapted from Petrażycki 1955, 46)

As for *bilateral* ethical (i.e., *legal*) phenomena, they are phenomena where some individual's obligation is *experienced* as belonging to some attributive side. The attributive side is *experienced*[64] as entitled to some behaviour on the part of the imperative side.

Petrażycki gives the example of paying an agreed wage to a worker or a manservant. Another easy example (my own) could be the obligatoriness of the payment of the check at a restaurant:

1. The *owner of the restaurant* experiences
   – himself as an attributive side and
   – the customer as an imperative side.
2. The *customer* experiences
   – himself as an imperative side and
   – the owner of the restaurant as an attributive side.
3. A *third spectator*, if any, experiences
   – the owner of the restaurant as an attributive side and
   – the customer as an imperative side.

It is of paramount importance to stress that in Petrażycki's psychological theory of law, *in order for a legal relationship to exist it suffices that one Subject exist*. No more than one Subject is necessary. This Subject may experience him-

[64] Throughout this text I am using the verb *to experience*—in both its active and its passive form (*to be experienced*)—to render Petrażycki's usage of *perežívat'* and *soznavat'*. The verb *perežívat'* contains the same root as *žizn'* ("life"), and thus somewhat corresponds to the German verb *erleben*, as used by phenomenologists. As for the verb *soznavat'*, Petrażycki uses it in the sense of "to have the consciousness of", and its structure fully parallels the Latin etymology of the English adjective *conscious* (*cum-scire*).

self as an imperative side, as an attributive side, or as a third spectator. *The other two participants may also exist exclusively as objects of some realistic representation within the psyche of the only existing participant*, and the only existing participant may also be the third spectator.

> As to who or what can be the subject of legal relationships [*pravootnošenija*], obligations, and rights, the psychological theory holds that subjectual representations can correspond to all possible representations of a personal [*personal'nyj*] […] character […]. These can be objects that are not actually alive but are represented as animate [*oduševlennyj*] (such as stones, plants, and so forth), animals and their spirits, persons (including their embryos and their spirits after death), human societies and institutions, and various deities and other incorporeal spirits. Everything depends on the level of culture, religious creed, and individual peculiarities of the given man, his age and so forth (in *child law* [*detskoe pravo*] *there are such subjects of rights as dolls, which are not found in the legal mind of adults, and vice versa*). (Petrażycki 1909–1910, 416; translation adapted from Petrażycki 1955, 189–90 and italics added)

Thus the subject in a legal relationship is not necessarily some really existing person. The subject is whatever *animate entity* is the object of some realistic representation on the part of the Subject—which Subject, I should reiterate, can be the imperative side, the attributive side, or some third spectator. If the Subject should represent to himself a right of $subject_1$ in relation to $subject_2$, it suffices that $subject_1$ and $subject_2$ exist within the Subject's psyche, in his logical reality (to use Pattaro's terminology: see Section 13.5 in this tome).

In this way Petrażycki does away with the old jurisprudential issue of what a juristic person—as opposed to a natural one—should be deemed to be. According to him the *theory of law* should deal with people, animals, corpses, dolls, associations, states, corporations, or treasuries in the same *empirical* way. What matters is only the empirical issue of whether and in what way they are experienced by somebody as animate entities involved in legal relationships. Let us read in this regard a passage by Petrażycki:

> As a subject of a right, the "treasury" must not be interpreted to mean that the subject is the state: this would be an *arbitrary reinterpretation* [*proizvol'noe peretolkovyvanie*] contrary to reality. […] When we ascribe rights to the treasury in relation to ourselves or to others, we are concerned with a representation that is completely different from the representation to which the word "state" ordinarily corresponds. The representation of a state ordinarily comprises the representation of a territory and a people.[65] There is nothing of that in the representation of the treasury, which is akin to the idea of a cashbox and the like. The nature of other so-called juristic persons—monasteries, churches, and so forth—is misinterpreted in yet another sense if they are understood as combinations of persons, social organisms, and the like. In reality, the content of the relevant representations is different; thus the representation of buildings and so forth enters into the representation of "monastery," especially if it is a particular monastery known to the individual. (Petrażycki 1909–1910, 413–4; translation adapted from Petrażycki 1955, 188 and italics added)

[65] In order to avoid misunderstandings it should pointed out that this is the way Petrażycki reconstructs the *naive concept* of a state. On Petrażycki's stipulative class of states (which includes also certain nomadic peoples), see footnote 138 below.

Therefore, according to Petrażycki, the question of what a juristic person *is* should be translated into the question of what is *experienced as* a juristic person, and should thus solved in a purely psychological way. In this way Petrażycki's conceptualization is a suitable tool for *anthropology of law*. It recommends to take seriously—as objects of investigation—the legal beliefs of all peoples on earth, even when they are totally incompatible with the scientific view of the world.

As for the completely different question of what *should be* regarded as a juristic person, Petrażycki holds that it rather pertains to *legal dogmatics* (or *legal policy*).[66] For example, a judge wishing to decide in accordance with the official law of the state he or she works for might have to refrain from recognizing a doll, a monastery, or an unborn individual as a legal subject. But this kind of issue does not as such pertain to the theory (i.e., psycho-sociology) of law (cf. Section 18.12 below).

Another point of paramount importance that must be stressed if we are to avoid misunderstandings is that *there is no a priori reason why a certain behaviour should be experienced as morally or legally obligatory*. True, certain kinds of behaviour are mostly experienced as *legally* obligatory, while others are instead mostly experienced as *morally* obligatory. But, according to Petrażycki's theory, *any* kind of behaviour can be experienced in *either way*:

> In order to avoid misunderstandings in regard to […] the examples of the two kinds of consciousness [*soznanie*] of obligatedness [*dolženstvovanie*]—one's consciousness of the obligation [*dolg*] to pay an agreed wage to a worker or a manservant, on the one hand, and one's consciousness of the obligation [*dolg*] to help someone in need or not to refuse almsgiving, on the other—it is necessary to remark that we can imagine subjects whose psyche is such that, when they are faced with beggars asking for alms or the like, they experience a consciousness of obligatedness according to which the other side has a right to receive what he is asking for; the other side may [rightfully] claim that help be given to him, and the like; by the same token, we can imagine subjects who—when dealing with servants claiming payment of the agreed wage, and the like—experience a consciousness of obligatedness according to which nothing is owed to the other side: the latter may not [rightfully] claim payment, and the like. From the point of view of our (psychological) classification, such a consciousness of obligation toward beggars should be classified as the consciousness of a *legal* obligation; such a consciousness of obligation toward servants should be classified as the consciousness of a *moral* (not a legal) obligation. (Petrażycki 1909–1910, 51 n. 1; my translation and italics added; see also Petrażycki 1909–1910, 106 and 1955, 75)

[66] Petrażycki (1895, 462–3) also devised a specific concept of juristic person for his *legal policy*, which can, by rights, be called an *economic analysis of law*, *ante litteram*. Even in this context he rejected the distinction between natural and juristic persons. Here *a person is nothing but an ideal station of goods in the process of distribution*. This is why he called the person a *Vertheilungsstation* (or *Güterstation*), namely, a "distribution station" (or "station of goods"). This station is something ideal (*ideell*), that is, something existing exclusively within the Subject as the object of some representation of his (cf. also Petrażycki 2010a, 565). Also ideal is the *Verbindung* (connection) between rights, claims, legal transactions (*Rechtsgeschäfte*), etc., and the *Vertheilungsstation*. All this implies that nothing prevents policymakers from creating a *Vertheilungsstation* with the *name* of some god or whatever they like. Generally speaking, "in the modern world there are more *Güterstationen* than people" (Petrażycki 1895, 464; my translation). It is hardly necessary to stress that this concept somewhat resembles Kelsen's concept of *Zurechnungspunkt* (point of ascription).

Now, Petrażycki's distinction between moral and legal phenomena has been criticized as too overly skewed toward private law (see the authors discussed in Motyka 1993, 146ff.). The distinction has been argued to be incompatible with criminal law, administrative law, and the obligations of the judge.

These objections can be discarded if we bear in mind the two points that have just been made:

1. In order for a legal relationship to exist, it suffices that *one* Subject exist.
2. The question whether a certain behaviour is experienced as legally or morally obligatory is an empirical one—it cannot be solved theoretically.

If these two points are borne in mind, it is quite easy to reply to Ziembiński's objections to Petrażycki's distinction. Ziembiński's starting point is that obligations such as the obligation to display the nation's flag on private buildings on national holidays or the obligation not to pollute the environment can only be *legal* obligations (Ziembiński 1980, 350, quoted in Motyka 1993, 150). Since Ziembiński fails to find a right-holder, he concludes that Petrażycki's distinction is wrong. Ziembiński completely misses the point. He looks for a priori answers to questions that can be answered only a posteriori, namely, the question whether these obligations are experienced as moral or legal ones and the question of who is experienced as an attributive side—provided that those obligations are actually experienced as legal ones.

As regards the judge's obligations, we may begin by noting that, from a Petrażyckian perspective, the judge is probably to be regarded as an attributive side in an authority relationship. Authority relationships are a kind of legal relationship in Petrażycki's terms (Section 18.11 below). By those very terms, that suffices to call this a *legal* phenomenon. As for the obligation of the judge to decide in accordance with the (official) law[67], rather than according to personal preference, the question whether the judge experiences this obligation as a moral or a legal one is, again, empirical. Moreover, nothing excludes that the judge might abide by the (official) law out of non-ethical reasons (cf. Lande 1925a, 347). Likewise purely empirical, in case the judge should experience his or her obligation as a legal one, is the question whether entities like a god, the people, the truth, the state, or the party who is in the right, are experienced by him or her as attributive sides, attributive sides having the "right" that he or she decides in accordance with what he or she deems to be the (official) law.

Two final remarks are in order here.

First, Petrażycki's stipulative distinction between law and morality implies that *games* are *legal* phenomena:

[67] On Petrażycki's concept of official law and its connection with legal dogmatics, see Section 18.12 below. There is also addressed the difficult problem arising from the fact that on Petrażycki's definition of official law whatever law the judge applies is turned into official law by definition.

> The rules of games (such as games of cards, checkers, chess, dominoes, lotto, forfeits, bowls, billiards, cricket, etc.), which determine [*opredeljajuščie*] who can and should, in what order and how, accomplish the various actions involved therein […], all represent, from our point of view, legal norms. They are of an imperative-attributive character. (Petrażycki 1955, 64; 1909–1910, 88–9)

Second, *Petrażycki denied that there can be such a thing as purely attributive phenomena*. Jacek Kurczewski, by contrast, pointed to some phenomena that cannot be understood except in these terms. As Kurczewski puts it: "Rightful claims need not be correlated with duties. Thus a soldier has the right to kill the enemy but any duty of the killed to submit to the killer would negate the essence of war, and slaughter would take place instead" (Kurczewski 1976, 7; a discussion of pure attributive phenomena can be found in Fittipaldi 2012a, sec. 4.5 and 274, and 2012b, 50).

18.8. Features Associated with Moral vs. Legal Phenomena

As noted, Petrażycki set out his distinction between moral and legal phenomena in order to select with the proper degree of generality phenomena that fit into adequate theories. In this section I will give an account of six properties that according to Petrażycki correlate with moral or legal phenomena.

18.8.1. Possible Fulfilment of Some Legal Obligations on the Part of Persons Other than the Imperative Side

Petrażycki contended that the presence of a right-holder diverts *attention* away from (*a*) the behaviour expected of the duty-holder toward (*b*) the *concrete result* that is the main concern of the right-holder.

Aside from (or instead of) having a representation of the behaviour owed by the duty-holder, the right-holder represents to himself the useful effects that will result when the imperative side complies with its obligation. It is these useful effects that matter to the right-holder.[68] For the right-holder the duty-holder's fulfilment of an obligation "is merely a means of attaining these effects" (Petrażycki 1955, 203; 1909–1910, 443). The duty-holder knows that and focuses on these effects as well. Therefore, *while in the case of moral phenomena the focus is on the behaviour of the duty-holder, in the case of legal phenomena the focus may be exclusively on the useful effects pursued and expected by the right-holder.*

An important corollary of this theory is that in law, unlike in morality, there may be cases where *it does not matter who actually fulfils an obligation*. It just matters that it be fulfilled.

[68] Elsewhere (Fittipaldi 2012a, 218ff.), I argued that this may be why in some languages the term for *debt* stems from the idea of the usefulness the attributive side may draw from the imperative side's action (as is the case with the Ancient Greek χρέος) or from the representation of the thing the imperative side is to give to the attributive side (as is the case with the Latin *aes*).

Thus, if what is owed to the right-holder is furnished to him by others (and not by the duty-holder), as where the amount due to the creditor is paid to him not by the debtor but by his kinsman or acquaintance, all is then well from the point of view of the law, and the proper performance has been rendered (Petrażycki 1909–1910, 71; translation adapted from Petrażycki 1955, 54).

In other words, "the fulfilment of legal obligations is possible without participation and without any sacrifice by the imperative side, provided that what is due to the right-holder is furnished by someone" (Petrażycki 1955, 100–1; 1909–1910, 154).

This theory does not exclude that in certain cases the right-holder may have an interest that a certain obligation—by reason of its strictly personal nature—be fulfilled by a specific person. Petrażycki's hypothesis only excludes that *a moral obligation can be fulfilled without personal involvement of the duty-holder.* To this extent, this theory is falsifiable in Karl Popper's sense.

18.8.2. The Possibility of Representation in the Field of Legal Phenomena

In the case discussed in Section 18.8.1 third persons act "in their own name and account,"[69] without the duty-holder even knowing that some third person may wish to pay for him. Now, if that is possible, "it is understandable and natural that [legal] obligations can be fulfilled […] through representatives—third persons acting by virtue of special legal relationships to the duty-holder, in his name and for his account" (Petrażycki 1955, 101; 1909–1910, 155).

But representation is something more than the mere possibility for a person other than the duty-holder to "terminate" (by payment) the right-holder's obligation.[70] A representative is also regarded as able to "create" obligations in the name and on the account of the prospective duty-holder, who in turn is not regarded as a duty-holder by any participant until the representative's activity is carried out. Moreover, in addition to "representation of the imperative side [be it prospective or not] […], there may also be legal representation of the attributive side" (ibid.). These two aspects of representation explain why "a contract may create obligations between two newborn infants" (ibid.).

What Petrażycki neglects to explain is how the attributiveness of certain ethical phenomena (i.e., their being *legal* phenomena) explains the emergence of representation not only for the termination of obligations but also for the creation of new ones.[71]

[69] Babb's translation contains a mistake here. He refers the reflexive possessive adjective *svoj* in the phrase *postoronnimi licami, dejstvujuščimi ot svoego imini i na svoj sčet* to the duty-holder rather than to the third persons (i.e., the *postoronnye lica*. Cf. Petrażycki 1909–1910, 155 and 1955, 101).

[70] In order to avoid this "projective" terminology, we should rephrase the last part of this sentence as follows: "to terminate (by payment) some or all participants' belief in the existence of the right-holder's obligation".

[71] This issue is probably bound up with that of the emergence of illusions of legal entities (e.g., obligations) as distinguished from projective qualities (e.g. obligatedness or obligatoriness), as well as with that of the emergence of legal illusions unrelated to current legal convictions.

18.8.3. The Possibility of Coercion in the Field of Legal Phenomena

Petrażycki contends that only legal phenomena involve coercion (*prinuždenie*), or coercive fulfilment (*prinudetel'noe ispolnienie*).

The attributive side usually does not care whether or not the imperative side fulfilled its obligation voluntarily. What matters to the attributive side is just to reap his "useful effects". That is why in the field of legal phenomena coercion can play a role. That is in contrast to the field of moral phenomena, where if the duty-holder

> is not doing the bidding of the moral imperative, but is subjected to physical force which leads to the same outward result as if he had fulfilled his obligation—as where what he should have given voluntarily is taken from him by force—this does not constitute a realization of the imperative function (the only function which exists in morality) and there is no fulfillment of a moral obligation. (Petrażycki 1955, 102–3; 1909–1910, 156–7)

Now, it could be objected that Petrażycki draws this conclusion because he only takes into account those moral obligations that have as their object *actions*. Had he also taken into account moral obligations that have as their object *abstentions from actions* (e.g., the abstention from using contraception), then he would have been forced to admit that coercive fulfilment may take place in the field of morality as well.

But I think that this does not invalidate Petrażycki's hypothesis, if taken in a weaker version under which *coercion positively correlates with imperative-attributive phenomena*. That is so simply because, if in the case of moral and legal phenomena alike there can be *indignant* third spectators, it is only in the field of legal phenomena that there can *also* be attributive sides who are more likely than third spectators to resort to violence, because as attributive sides they aim to get what they feel entitled to (or require that violence be used in order to let them get it).

In order to avoid misunderstandings, it should be stressed that Petrażycki's concept of coercion is much more restrictive than the broad concept of *Zwang* ("coercion") used, for instance, by Hans Kelsen (1960b, 34). Petrażycki's concept of coercion does not encompass such phenomena as revenge or punishment.[72] As for revenge, Petrażycki deals with it under the heading of the conflict-producing nature of legal phenomena (Section 18.8.6 below), whereas he deals with punishment under the headings of *pati – facere* legal relationships (Section 18.9.3) and that of authority (Section 18.11).

18.8.4. The Role of Intentions in the Field of Moral Phenomena

According to Petrażycki "a legal obligation can be fulfilled also if the behavior of the imperative side [i.e., the duty-holder] took place fortuitously without his

[72] A similar nonconflation of coercion and punishment can be found in Axel Hägerström. See in this regard Section 13.6 in this tome.

wish and intent, as where he acted absentmindedly or mechanically, or otherwise independently of intent (Petrażycki 1909–1910, 158; 1955, 103).

This is so because in the field of legal phenomena what matters is only that the attributive side reaps the "useful effects" deriving from the fulfilment of the obligation. A moral obligation, by contrast, can never be fulfilled unintentionally.

18.8.5. The Role of the Motives of Fulfilment in the Field of Moral Phenomena

While "the satisfaction of the moral duties requires the presence of moral motives," the "law is indifferent to the motives of fulfillment" (Petrażycki 1955, 104; 1909–1910, 159).

This hypothesis is different from the hypothesis discussed in Section 18.8.4. That hypothesis concerns the possible *lack* of any intention whatsoever in the field of legal phenomena. This one instead concerns the *kind* of intention the duty-holder must have, *provided he has one*. While in the field of moral phenomena the duty-holder must have the *right* intention, that need not be the case in the field of legal phenomena. As Petrażycki puts it, the action of a legal duty-holder may be "evoked by extraneous motives entirely unrelated to law (such as egoistic motives, a desire to attain some advantage for himself, or fear of disadvantage) or even by evil motives (such as the wish to compromise the obligee)" (ibid.). Instead, if some moral duty-holder fulfils his obligation out of reasons other than the proper ones, this will elicit ethical repulsion (i.e., indignation) in third spectators.

It bears stressing, in order to avoid misunderstandings, that neither in this case nor in the case of a duty-holder acting mechanically or absentmindedly are we dealing with any *ethical* phenomenon whatsoever within the imperative side's psyche. The *legal* phenomenon is located within the psyche of one or both of the other possible participants (i.e., the attributive side or the third spectator) and consists in the appulsion that one or both of them may experience toward fulfilment, irrespective of its taking place for ethical or nonethical causes.[73]

18.8.6. The Conflict-Producing Nature of Legal Phenomena vs. the Peaceableness of Moral Phenomena (and the Unifying Tendency of Law)

Petrażycki sets up a contrast between law and morality by noting that in the domain of *morality* there is a tendency for fulfillment (when it amounts to furnishing material advantages) to arouse gratitude, love, sympathy, while nonfulfillment does not arouse malicious or vengeful reactions. In the domain of

[73] By the same token, in the case of moral phenomena, the moral psychic phenomenon consists of some third spectator's ethical repulsion toward some duty-holder who fulfils an obligation out of nonethical reasons.

law, by contrast, there is no tendency for fulfilment to arouse gratitude, while there is a tendency for "non-fulfillment […] to [be] experienced […] as a loss […], as an aggressive action", thus possibly prompting malicious or vengeful reactions (Petrażycki 1955, 111; 1909–1910, 169–70).

As Peczenik (1975, 89) summed up this contrast, "the legal psyche is aggressive, while the moral psyche is nonaggressive" (on this point see also Lande 1959b, 874; 1975, 25).[74] The attributive side experiences the imperative side's nonfulfilment as an aggression and thus reacts accordingly.

It could be objected to this thesis that aggressive reactions can be observed in the domain of legal and moral phenomena alike. Also in morality is it possible to observe third spectators becoming indignant at the non-fulfilment of some obligation or violation of some prohibition.[75] Nonetheless, it is only in the domain of legal phenomena that angry attributive sides can be found. Moreover, from a Petrażyckian perspective, in the case of a third spectator becoming indignant[76] because some person injured a third party, that third spectator is to be regarded as experiencing a legal emotion, not a moral one.[77]

The possible different reactions on the part of an attributive side and a beneficiary in case of satisfaction or disappointment of a normative expectation[78] are summed up in Table 1.

Table 1. Different reactions in case of satisfaction or disappointment of normative expectations (within round brackets are the phenomena Petrażycki neglected to consider)

		SATISFACTION	DISAPPOINTMENT
BENEFICIARY	Morality	Gratitude, (peace of mind)	Peace of mind, (indignation)
ATTRIBUTIVE SIDE	Law	Peace of mind	Anger

[74] In this regard, Petrażycki's conception is similar to Lundstedt's: see Section 15.2.1 in this tome.

[75] Cf. Ranulf 1964 (1), who defines *moral indignation* as "the emotion behind the disinterested tendency to inflict punishment". But Ranulf's definition embraces also, and foremost, the cases where indignation is aroused by the fact that some person has injured a third party. On this issue, see shortly in text, as well as Fittipaldi 2013b and 2013c.

[76] To my knowledge, nowhere did Petrażycki distinguish *anger*, as the attributive side's ethical repulsion, from *indignation*, as the third spectator's. He seems to use the terms *gnev*, *negodovanie*, *vozmuščenie* as synonyms. This notwithstanding, there is at least one passage where Petrażycki (1909–1910, 89; 1955, 65) uses the term *pravovoe negodovanie* ("*legal* indignation", italics added). Therefore, one may ask whether in addition to *legal* indignation there is also a *moral* one. Moreover, in the same passage Petrażycki seems to equate an "outbreak of imperative-attributive emotions" (*vspyška imperativno-atributnivnyh emocij*) to *pravovoe negodovanie*, therefore this passage is an argument for the reduction of Petrażycki's ethical emotions to more modern emotions like anger, indignation, etc.

[77] In the language of modern psychology, we could say that we are facing a phenomenon of identification with the victim.

[78] I am using here Luhmann's (1969) terminology to clarify Petrażycki's point.

Petrażycki's ethical solipsism, along with his criterion for selecting *legal* phenomena, implies that *law is a dangerous phenomenon*. On this view, law is not at all a means *ne cives ad arma ruant*, namely, a means by which to attain peace. More to the point, because opinions as to the existence and compass of mutual obligations and rights may well not coincide, legal phenomena often are "a source of destruction, a dangerous explosive material" (Petrażycki 1955, 113; 1909–1910, 172).

In Petrażycki's theoretical framework, the possible coincidence or compatibility of legal opinions is *not* taken for granted but is rather taken up as a sociological problem, namely, that of describing and explaining the mechanisms that to some extent counteract the natural divergence of legal opinions—a divergence that can be expected even where there is no bad faith in anybody (Petrażycki 1909–1910, 177; 1955, 116). Now, since rights and obligations do not exist in a world external to the Subject (be it psychical or physical), the fact that different Subjects may have coinciding or compatible opinions about the existence (or non-existence) of rights and obligations cannot be explained in the same way as we might explain the coincidence of their opinions about the existence (or non-existence) of, say, chairs, apples, mountains, and the like.[79]

Now, Petrażycki dealt at length with this issue and maintained that, *associated with the conflict-producing nature of legal phenomena*,

> on the ground of, and explained by, socio-cultural adaptation [*prisposoblenie*] *is the tendency of law to development and adaptation in the direction of bringing legal opinions of the parties into unity, identity and coincidence*, and in general *toward the attainment of decisions as to obligations-rights which possess the utmost possible degree of uniformity and identity of content from both sides, and*—so far as may be—*exclude or eliminate discord*. (Petrażycki 1955, 113; 1909–1910, 172–3; italics added)

Petrażycki called this tendency a *unifying tendency* (*unifikacionnaja tendencija*). He mentioned the following "subtendencies" that contain the non-coincidence of legal opinions, however much imperfectly (Petrażycki 1909–1910, 173ff.; 1955, 112):

1. The tendency of normative facts and corresponding positive law to develop (this tendency could be called *positivization*; cf. footnote 139 below).
2. The tendency for legal concepts to become precise and definite in content and compass (this could be called *intensional formalization*; cf. Petrażycki 2002, 255–8 and Fittipaldi 2012b, 61–2).

[79] According to Petrażycki (1939, 36, 38) the principle of non-contradiction (as well as the principle of the excluded middle) holds only for objective-cognitive sciences (i.e., sciences concerned with what exists outside the Subject), and legal dogmatics—understood as a science that describes the legal-dogmatic "existence" of rights and obligations—is not an objective-cognitive science but rather a subjective-relational one. On the distinction between these two kinds of sciences, see also Sections 19.2 and 20.1.2 in this tome. On Petrażycki's ideas on the role played by the principle of non-contradiction in legal dogmatics, see also Section 18.12 below.

3. The tendency for the "existence" of legal obligations and rights to become contingent on facts susceptible of proof (this could be called *extensional formalization*; cf. Petrażycki 2002, 258–60 and Fittipaldi 2012b, 61–2).
4. The tendency toward subjecting disputes to the jurisdiction of a disinterested third party (this could be called *jurisdictionalization*).
5. The tendency of legal dogmatics to bring about the unification of legal convictions (see Section 18.12 below).

Petrażycki did not satisfactorily explain what it is that causes these tendencies to emerge. He did mention socio-cultural adaptation (as we saw), but his explanations are far from convincing.[80] Be that as it may, it doesn't follow from his failure to explain these phenomena that they do not exist: That we have no explanation for a phenomenon we are describing doesn't mean that the description is thereby false.

18.9. Kinds of Legal Relationships and Compound Legal Relationships

According to Petrażycki (1955, 193; 1909–1910, 426), "all possible classes of conduct can be reduced to three categories: positive actions, abstentions, and tolerances."[81] That means that the object of one's obligation can be to (1) positively *perform* an action, (2) *abstain* from an action, or (3) *tolerate* an action.

While (1) and (2) can be objects of both a moral and a legal obligation, as they concern a behaviour of the duty-holder, (3) can only be an object of legal obligation, as the action at issue is necessarily the right-holder's.

Thus, Petrażycki set out three kinds of legal relationships depending on whether the right-holder is experienced[82] as entitled to a *facere*, a *non facere*, or a *pati* on the part of the duty-holder. In the third case the right-holder is entitled to the duty-holder's tolerance of the positive action he or she (the right-holder) performs.

By introducing both the duty-holder's and the right-holder's points of view, Petrażycki gave the following names to the three possible legal relationships: (1) *facere – accipere*; (2) *non facere – non pati*; and (3) *pati – facere*.

It should be reiterated, to avoid misunderstandings, that according to Petrażycki, in order for a legal relationship to exist it suffices that *one* side ex-

[80] Some hypotheses are advanced in Fittipaldi 2009. There is probably not a simple answer to all these questions. See, for example, the hypothesis that Max Weber (1978, 270) put forward to explain why the ancient Greeks, unlike the Romans, did not develop a formal system of law (see also Fittipaldi 2012b, 59ff.). In regard to jurisdictionalization, it could be observed that it is a long road until two strangers (or social groups)—without kinship or other bonds—accept to subject their dispute to a third stranger qua judge. Also this phenomenon requires an explanation.

[81] This tripartite classification of actions is not original with Petrażycki himself: See Bierling 1894, 242.

[82] On this use of *experienced*, see footnote 64 above.

ist. Moreover, a legal relationship can exist even exclusively in the imagination of a third spectator.

Let us now discuss the Petrażyckian legal relationships in some detail. After discussing Petrażycki's three kinds of legal relationship, I will address the question of whether Alexander Rudziński—a pupil of Petrażycki—was right to introduce a fourth kind of legal relationship, namely, *pati – non facere*.

18.9.1. Facere – Accipere

Here the duty-holder is experienced as obligated to do something for the right-holder and the duty-holder is experienced as entitled to that performance. This may consist of "paying a certain sum of money, furnishing other objects, performing a certain work, of rendering other services," etc. (Petrażycki 1955, 54; 1909–1910, 71)

Petrażycki did not analyze either this kind of legal relationship or the others in terms of ethical appulsions or repulsions. Had he done so, then perhaps he would have maintained that, in order for this legal relationship to (psychically) exist, the imperative side, the attributive side, or the third spectator must have the disposition to experience an appulsion toward the imperative side's *facere* as well as a repulsion toward whatever else imperative side's action that should be empirically incompatible with the carrying out of that *facere*.[83]

A further question is whether the duty-holder's *facere* must necessarily consist of some activity that can somehow be received (from *accipere*, "to receive") by the right-holder.

In my opinion, what matters is only that the attributive side is experienced as entitled to the imperative side's *facere*, not that that *facere* can be somehow "received" by an attributive side. A sentinel, for example, may experience his superior as entitled to have the sentinel himself keep guard, even though there is nothing to be "received" in a strict sense.[84]

18.9.2. Non Facere – Non Pati

Here the imperative side is experienced as obligated to abstain from a certain conduct, such as "encroaching on the life, health, honor of the attributive side." What belongs to the attributive side in these cases is termed by Petrażycki (1955, 55; 1909–1910, 72) "negative freedom,"[85] "immunity" (*neprikosnovennost'*), or "safeguarding" (*obrannost'*).

[83] For an analysis of this issue, see Fittipaldi 2012a, sec. 4.4.1.

[84] A. W. Rudziński (1947, 23) instead distinguished a passive *accipere* of the attributive side from an active one.

[85] Petrażycki's use of the term *negative freedom* has very little, if anything, in common with the similarly named distinction drawn by Isaiah Berlin (1958). Actually, as will be seen shortly, Petrażycki's definition of *positive freedom* covers certain freedoms that Berlin would instead characterize as *negative* (such as the freedom of speech or the freedom of association).

18.9.3. Pati – Facere

Here the imperative side is experienced as obligated to tolerate or suffer certain actions of the attributive side, for example,

> uncomplainingly enduring certain unpleasant conducts originating with the right-holder […] such as reproofs or physical punishments […]; tolerating oral or printed communications and propagandas by the right-holder of religious, political, and other opinions, the organization of public assemblies, meetings, and so forth. (Petrażycki 1955, 55–6; 1909–1910, 73)

What belongs to the attributive side in this case is termed by Petrażycki "positive freedom" (*položitel'naja svoboda*, *svobododejstvie*).

In this context, in order to better understand Petrażycki's psychological method, it is in order to recall how Petrażycki criticized Rudolf Bierling (1841–1919) for his contention that the obligation of *pati* can be reduced to the obligation to not encroach on the attributive side's action (*non facere*), on the view that "a request that something be tolerated is *nothing but* [*nichts anderes als*] a prohibition" (Bierling 1894, 243; my translation, italics added).

Understanding Petrażycki's criticism of this kind of reductionism is crucial to understanding the method of his psychological theory of law. According to him the reduction of actions of tolerance to ones of abstainment or non-opposition (where we abstain from engaging in any counteraction) results from the application of an unscientific method. He speaks of an *arbitrary reinterpretation* (*proizvol'noe peretolkovyvanie*) *of facts* from the point of view of practical considerations (in that forebearances are equivalent to abstentions, or omissions, if measured by their practical result, and the like). The psychological method, by contrast, studies what is found in one's psyche, irrespective of whether this has any practical outcome. What matters is the actual representation of the object of the obligation, or objectual representation (*ob"ektnoe predstavlenie*):

> There are […] cases of the consciousness of a duty of tolerance in a field wherein ordinarily there is not even a thought of opposition or of abstention therefrom, and from which the corresponding association of ideas is excluded: such are cases of the consciousness of a duty to tolerate patiently and without repining—to endure submissively—diseases, ruin, the death of those near to us, and other misfortunes sent down by the omnipotent God. Here the idea of opposition and of abstention therefrom—as in general in the field of the relations with the Almighty—does not *ordinarily* arise at all: it is already forestalled and eliminated by the idea of omnipotence. Moreover it is ordinarily a matter of enduring, not actions or events which are impending (so that the idea of averting or hindering them is admissible), but events which have already taken place. The obligation to endure with submission the death of one who is near, or other unhappiness sent down by God, excludes the thought of opposing or hindering: not merely because the other party is omnipotent, but because the event has already occurred. As to the time prior to the event—for instance, before the onset of the death of one who was dear—the consciousness of a duty to endure misfortunes sent down by God does not exclude resort to the physician and the like, although this means an attempt not to permit the onset of the threatening event. (Petrażycki 1955, 194; 1909–1910, 427–6)

Petrażycki's methodological refusal to arbitrarily reinterpret (psychic) phenomena is the reason why it was previously argued (in Section 18.6) that the reduction of categorical normative convictions to hypothetical normative ones and the reduction of addressees to normative hypotheses (and vice versa) are incompatible with Petrażycki's theory and method.[86]

In this regard it is useful to contrast Bierling's account of the experience of the obligation to tolerate a penalty with Petrażycki's account. According to Bierling:

> It must be denied that there are cases where by tolerance we *understand* something *more* than a pure omission, for example, when we talk of the duty of the convicted person to tolerate the penalty. In these cases […] there is always only a mixture of *action* and *omission*. (Bierling 1894, 243; my translation and italics replacing spaced in the original)

Petrażycki replied that whether or not a convicted person *inwardly* accepts the penalty matters a lot. An innocent convicted person may comply with all the rules of the prison where he is serving his sentence, but he may nonetheless not experience an obligation of tolerance. Let us read a passage that unfortunately was not included in Timasheff's compilation:

> If a criminal who has committed a serious crime is sitting shackled in prison, and if circumstances are such that he cannot think of an escape or of any other opposition, this does not in any way exclude that he can experience a more or less emotionally strong and vivid consciousness of the obligation to suffer the punishment. An example could be a person of normal ethical development […] who has done a bad and evil deed as a consequence of a particular confluence of circumstances. To the jailer and to others it may be completely indifferent whether this person experiences an obligation of tolerance: Any opposition, any attempt to escape, and the like, is ruled out, and that is enough. But from a psychological point of view there is here a peculiar […] noteworthy phenomenon with further psychic and physical consequences. If somebody who has been jailed does not experience an obligation of tolerance (supposing, for example, that he has been convicted, thrown into disrepute, and jailed as a consequence of a wrongful prosecution and of dirty intrigues, without being guilty), he might turn crazy (as often happens), or die out of despair, or start scraping the walls, ripping his chains, etc. (This would not in any way signify an attempt to *oppose* anything: It would simply be a release [*razrjady*] of strong emotions of anger [*gnev*], etc.) (Petrażycki 1909–1910, 428; my translation and italics added)

Therefore, it matters a lot whether or not the jailed person experiences himself as an imperative side in a *pati – facere* legal relationship.

Let us now devote a few words to the right-holder in such a legal relationship. Petrażycki says nothing in this regard. If the right-holder experiences an ethical appulsion toward his own *facere*, this appulsion must be something different from the appulsion experienced by a duty-holder toward his own *facere* in a *facere – accipere* legal relationship. Elsewhere (Fittipaldi 2012a, sec. 4.4.3) I have argued that in *pati – facere* legal relationships the attributive side's ap-

[86] Quite similarly, I will be arguing (in Section 18.11) that Petrażycki's normative facts cannot be reduced to elements of normative hypotheses.

pulsion toward his own *facere* could be understood in terms of a release of (otherwise restrained) aggressiveness that somewhat backs (or encourages) the attributive side when exercising or standing up for his or her rights.[87]

However that issue is taken, we can conclude by stating that what Petrażycki conceives here is a proper *Recht auf eigenes Verhalten* (a right to one's own behaviour)—a category that a few years later Hohfeld would regularly reduce to either mere *absences of duties* (i.e., "privileges") and/or to *rights to noninterference*.[88] According to Hohfeld rights always concern the behaviour of some subject *other* than the right-holder. Thus, for example, some party's right to eat shrimp salad (despite its giving him colic) should be reduced to "that party's respective privileges against A, B, C, D and others in relation to eating the salad" and to his "respective rights […] as against A, B, C, D and others that they should not interfere with the physical act of eating the salad" (Hohfeld 1964, 41). There is no need to stress that a reconstruction of that kind—as much as Bierling's one—would have been rejected by Petrażycki as an arbitrary reinterpretation of facts.

18.9.4. Pati – Non Facere, Legal Non-Experience, and Repeal

We can now turn to the criticism that has been directed at Petrażycki for not recognizing a fourth kind of legal relationship: *pati – non facere*. This discussion will also enable us to discuss Petrażycki's concept of repeal.

To my knowledge, the first author to have stated that Petrażycki's classification should be completed by adding this fourth kind of legal relationship was Alexander Witold Rudziński (1900–1989) in his *Z logiki norm* (On the logic of norms: Rudziński 1947; but see also Sztykgold 1936). This fourth kind of legal relationship, among others, was arrived at by him via negation. He contended that "the negation of a legal relationship produces, on the duty-holder's side, *a right* […] to the contrary behaviour, and, on the right-holder's side, […] *an obligation* to the contrary behavior" (Rudziński 1947, 27; my translation).

Thus, if the negation of the *facere* in a *pati – facere* legal relationship brings about a *non facere – non pati* legal relationship, the negation of the *facere* in a *facere – accipere* legal relationship should bring about some sort of *pati – non facere* legal relationship, provided that it is acceptable to equate a *non accipere* to a *pati* (see Table 2; cf. Rudziński 1947, 57).[89]

[87] This is compatible with Petrażycki's (1904, 57–60) ideas on the role of rights in pedagogy and on their influence on character. Since according to Petrażycki imperative-attributive emotions have a mystic-authoritative nuance his ideas can be compared to Olivecrona's (1939, 98–9; but see also Fittipaldi 2012a, 176). On Olivecrona's conception of rights see Section 14.3 in this tome.

[88] This might be a result of Bierling's indirect influence on Hohfeld: See Postema 2011, 100.

[89] In this way we obtain four kinds of legal relationships, which to some extent correspond to the four deontic modalities: *obligatory*, *prohibited*, *permitted*, and *omissible* (cf., in this regard, Fittipaldi 2012a, 164).

Table 2. How Rudziński devised *pati - non facere* legal relationships

DUTY	RIGHT	DUTY	RIGHT
pati	*facere*	*facere*	*accipere*
non facere	*non pati*	*pati*	*non facere*

Among the examples of *pati – non facere* legal relationships given by Rudziński are the (1) the "right" of a wounded soldier not to perform his duty, (2) the "right" of a sick worker not to work, and (3) the "right" of a taxpayer not to pay a given tax after it has been repealed.

I think Rudziński's completion is necessary. Actually, *facere* and *non facere* exhaust all possible sorts of behavior on the part of the imperative side or of the attributive side, respectively,[90] while Petrażycki did not explain the *fundamentum divisionis*[91] on which basis he distinguishes three kinds of imperative side's behaviour (*facere*, *non facere*, and *pati*) that according to him can be the object of an attributive side's right.[92]

Jerzy Lande (1953–1954), Petrażycki's most faithful pupil, instead stuck to Petrażycki's idea that there are three kinds of behaviour (*facere*, *non facere*, and *pati*) and thus rejected Rudziński's proposal. According to Lande, Rudziński's *pati – non facere* legal relationships are nothing but *phenomena consisting in a lack of legal phenomena*.[93]

In my opinion, Lande and Rudziński are both right, each in his own way. As for Lande, he points to an important phenomenon (better yet, a "non-phenomenon"), namely, *legal non-experiences*. Lande was wrong, however, to reduce Rudziński's *pati – non facere* legal relationships to phenomena of legal non-experience.[94] As for Rudziński, he was right to contend that Petrażycki's distinction of three kinds of behaviour is scientifically unsound.

Now, if on the one hand we accept Petrażycki's contention that obligations of tolerance (*pati*) are ethical phenomena not susceptible of reduction to obligations of action (*facere*) or abstention (*non facere*), but on the other hand we also argue that Petrażycki's distinction of legal relationships according to his threefold distinction of behaviours into actions, abstentions, and tolerances

[90] In other words the object of the right may be either the attributive side's own *facere* or *non facere*, or the imperative side's *facere* or *non facere*.

[91] I am drawing here on a logical tool that Petrażycki himself very often makes use of in his work, as in Petrażycki 1909–1910, 668 n. 1. Cf. Petrażycki 1908, 174 n. 1.

[92] This point was also made by Rudziński (1947, 22), but he also held that *pati* should be reduced to *facere* and *non facere*. I instead think that Petrażycki's contention of the irreducibility of *pati* is an important contribution to the theory of law.

[93] To be sure, Lande avoids a psychological language by using the phrase *stan pozbawiony regulacji prawnej* (state devoid of legal regulation) (Petrażycki 1953–1954, 992).

[94] On the distinction between legal non-experiences and *pati – non facere* legal relationships, as well as on the linguistic purport of this distinction, see Fittipaldi 2012a, 186–200.

lacks a clear *fundamentum divisionis*, we must ask the question of *how we are to accommodate the obligations of tolerance (pati).*

In my opinion the solution is to *deny* that the obligation to *pati* is present *exclusively* in *pati – facere* and *pati – non facere* legal relationships. The obligation to *pati* should be understood as an obligation to *acknowledge (or inwardly accept) the attributive side's right*, irrespective of whether the attributive side is experienced as entitled to his own behaviour or to the imperative side's. In the case of a legal relationship of the *facere – accipere* kind, for example, the imperative side *usually* has an obligation not only to *perform* the *facere* but also to *acknowledge* that he owes that *facere* to the attributive side. If the attributive side experiences this entitlement, too, he might become angry at the imperative side if the latter should perform the *facere* out of nonethical reasons and afterward regret having done that (but see the previous discussion beginning in Section 18.8.1), or else challenge[95] the "existence" of the attributive side's right.[96]

But what exactly does the difference between a legal non-experience and a *non facere – pati* legal relationship consist in? The answer is that, when an *ethical* (i.e., legal or moral) *non-experience* is at hand, *no* ethical emotion is expected to be elicited. Instead, when a *non facere–pati* legal relationship is at hand, the opposite is true. In the case, say, a wounded soldier or a sick worker is experienced as entitled not to fight or work, we can expect that even the simple *request* to fight or work may elicit *legal indignation* within that soldier or worker, or within third spectators (on legal indignation, see footnote 76 above). Here we have a *dispensation* as the object of a right.

Rights to a *non facere* have sometimes even been explicitly stated in normative facts.[97] The example that comes to mind is the one that Kazimierz Opałek (1957, 418) took from Article 70 of the Polish Constitution of 1952: *Nobody may be compelled to participate in religious activities or rites*. Here we are not dealing with a dispensation but with a full-fledged right to abstention.

Let us now turn to Rudziński's third example, which will also give us an opportunity to spend a few words on Petrażycki's concept of *repeal*. According to Rudziński we have a *non facere – pati* legal relationship even when a previous obligation to *facere* has been repealed.

[95] On the attributive side's legal indignation in case of *osparivanie* ("challenge") of his rights, see Petrażycki 1909–1910, 89.

[96] Another aspect of this duty to *pati* is the imperative side's duty to endure without lamenting the attributive side's *claim* that he perform the *facere*. In my opinion, this is the way Hägerström's observations in this regard can be worked within the framework of Petrażycki's theory. On this see also Section 13.5.1.2 in this tome.

[97] To be precise, this sentence should be rephrased as follows: "Texts have been produced by people who have the legislation in their hands to the goal of bringing about imperative-attributive convictions concerning a prospective attributive side's *non facere*." In passing, it is worthwhile to recall that Petrażycki used the phrase *imejuščie v svoih rukah zakonodatel'stvo* ("those who have legislation in their hands") at least twice (Petrażycki 1985d, 468; 1909–1910, 498), and that that phrase was not inserted in Petrażycki 1955.

To understand what is wrong with Lande's objection to Rudziński (namely, that in this case we are dealing with nothing but legal non-experiences) it is first necessary to get acquainted with Petrażycki's conception of a *repealing statute*.

According to Petrażycki *repealing statutes are normative facts*. *They are not normative convictions* (or *norms*). *The function of repealing statutes is to purify (očiščat') the legal psyche of certain legal convictions*. That is why once the legal psyches have been purified, there is no reason to keep republishing them (Petrażycki 1909–1910, 328; 1955, 157).

Repeal is a psychological phenomenon. If a repealing statute is aimed at repealing another one, repeal is accomplished in some individual's psyche once the (realistic representation of the) previous statute ceases to produce any effect in that psyche. Aside from psychological repeal, Petrażycki's conception also allows for a sociological concept of repeal. A repealing statute may be described as *sociologically efficacious* if to a sufficient degree the psyches of people in a certain community are "purified" of the normative convictions that the repealing statute aims to remove, and the cause of this purification is the repealing statute itself. Now, if a repealing statute is efficacious in some psychological or sociological sense, Lande is right. There is ethical non-experience (or absence, in my equivalent use of those two terms) of ethical phenomena.

But the efficaciousness of repealing statutes cannot be taken for granted. Repealing statutes are often thought to bring about an *immediate* state of affairs (e.g., Conte 1989; see also Section 12.6 in this tome). But this is what is believed to happen in the *Bereich des Sollens* (domain of "ought"). In other words, this is the point of view of legal dogmatics (see Section 18.12 below).

In the *Bereich des Seins* (domain of "is"), by contrast, repealing statutes may be more or less efficacious.

To be sure, in modern states the inefficaciousness of repealing statutes is an unusual phenomenon, and this may be why the point of view of legal dogmatics is taken as correct for the theory of law as well. But according to Petrażycki this is wrong.

Indeed, there are examples to be found of the inefficaciousness of repealing statutes. Petrażycki so describes the situation after the repeal (*otmena*) of serfdom in Russia:

> Some peasants—chiefly those who were aged—preserved for decades, and to the end of their lives, the earlier mentality of the law of serfdom and were unwilling to know and to acknowledge the reform, declaring to their former masters that they considered it their sacred duty to serve faithfully and truly also for the future (Petrażycki 1955, 240; 1909–1910, 503).

All this implies that there is no purely theoretical way to know a priori whether a repealing statute (*a*) produces no effect whatsoever, (*b*) produces the experience of *pati* – *non facere* or *facere* legal relationships, or (*c*) completely removes certain normative convictions.

We are now equipped to analyze Rudziński's third example. If a statute aims to repeal some tax, we can usually expect its effect to be quite immediate, such that from that point onward officials will no longer be trying to collect that tax. But this is an empirical hypothesis. It cannot be ruled out that in some inefficient state certain officials might keep collecting taxes that have been officially (or, better yet, *legal-dogmatically*) repealed. If some citizens should *rebel* against that because they know about the repealing statute, they may be experiencing repulsive ethical emotions. This could be viewed as amounting to the existence of a *pati – non facere* legal relationship within those citizens' psyches.

18.9.5. Compound Legal Relationships

18.9.5.1. Ownership

Even ownership, according to Petrażycki, is a purely psychological phenomenon. It exists solely in the psyche of one who attributes a right of ownership to himself or to another.

Ownership is a *compound* legal relationship. A person who ascribes a right of ownership to the individual X with regard to the thing T (*a*) experiences himself and others as obligated to tolerate any kind of action by X with regard to T (*pati – facere*), and (*b*) experiences himself and others as obligated to abstain from every sort of action with regard to T (*non facere – non pati*) (Petrażycki 1909–1910, 190; 1955, 124).

In other words, according to Petrażycki the right of ownership consists of "two legal relationships bound up with each other: the first one of the *pati – facere* kind, the second one of the *non facere – non pati* kind" (Lande 1959b, 877; my translation).

From an internal point of view, Petrażycki's conception of ownership has been criticized as being too narrow. First, it does not cover phenomena of *relative ownership*: X may be the owner of thing T vis-à-vis Y, but not vis-à-vis Z (Kurczewski 1977a, 366). Second, the range of actions permitted to the attributive side may be restricted. This is why Jacek Kurczewski called Petrażycki's conception a *monistic conception* (*monistyczna koncepcja*) and attempted to generalize Petrażycki's definition in the following way: "Between two persons the owner of the thing as for actions of the kind K is the person who has the freedom to carry out those actions—a freedom that others must respect [*respektować*]" (Kurczewski 1975, 162; my translation).

In my opinion, Kurczewski's definition has two easy-to-fix problems. It mentions neither *non facere – non pati* legal relationships nor *pati – non facere* ones. That is why I think that Kurczewski's definition could be improved in the following way: *X is experienced as the owner of a certain thing T vis-à-vis the imperative side Y if X is experienced as the attributive side in some*

pati – facere, pati – non facere, *or* non facere – non pati *legal relationship involving T*.[98]

18.9.5.2. Authority

Another compound legal relationship is authority (*vlast'*). Since its discussion presupposes a detailed discussion of the different kinds of normative facts, it will be discussed in Section 18.11.

18.10. The Different Kinds of Normative Facts and Positive Ethical Phenomena

In this section I will discuss in some detail the kinds of normative facts and positive ethics discussed by Petrażycki. Petrażycki discusses them in the context of legal phenomena because, as we know, legal phenomena are in his view much more conducive to positivization than moral ones (see Section 18.8 above). I prefer to use the broader term *positive ethical phenomena* in order to call the attention to the fact that, according to Petrażycki, next to positive *legal* phenomena there also exist positive *moral* ones. Moreover, as he explicitly states, the very same (representation of a) normative fact may bring about moral phenomena in one individual and legal ones in another.

18.10.1. Statute (Zakon)

Statutes are defined by Petrażycki as *"someone's legal directives* [*rasporjaženija*]*—qua objects of representation* [*predstavljaemye*]*—insofar as they play the role of* [*javljajutsja*] *normative facts (i.e., insofar as those* [*podležaščie*] *representations exert a corresponding influence on someone's legal psyche by arousing, removing, or modifying imperative-attributive experiences)"*[99] (Petrażycki 1909–1910, 543, my translation and italics added; cf. 1955, 258–9). Statutory law (*zakonnoe pravo*) is the class of "imperative-attributive experiences referring [*so ssylkoj*]

[98] More on Petrażyckian ownership can be found in Fittipaldi 2013b, 2013c, and 2012a, 272–80. Perhaps the redefinition offered in text should be further broadened so as to also include *facere – accipere* relationships, where the owner X of T, as a consequence of his being the owner of T, is entitled to a certain (kind of) *facere* on the part of the imperative side Y (who in turn may also be somehow connected to T). This further broadening would make it possible to also accommodate certain legal phenomena such as serfdom.

[99] I use the phrase *qua objects of representation* to render the Russian present passive participle *predstavljaemyj* (being represented) of the verb *predstavljat'* (to represent)—a term systematically used by Petrażycki in order to point out that he is speaking of *representations* and their *contents*. Babb in his translation (Petrażycki 1955) often neglects to translate these terms. Further, Babb translates in most cases the noun *predstavlenie* ("representation") with *idea* (a term that rather corresponds to the Russian term *ideja*).

to someone's unilateral legal directives—qua objects of representation [*predstavljaemye*]—as normative facts" (ibid.).[100]

Petrażycki sharply criticizes the idea that in order for some directive to be a statute, it would have to be enacted in accordance with the constitution, or *verfassungsmäßig* (Petrażycki uses this German term in 1909–1910, 534, 536; cf. 1955, 254–5). As an argument, he points to the possibility that, as a matter of fact, a certain directive may be experienced as a statute without having been enacted in accordance with the constitution, while another one may *not* be experienced as a statute despite its having been enacted in accordance with it.[101] Moreover, he also points out that on this definition a constitution should not be considered a statute at all. That is because not only

> constitutions of revolutionary origin [but also] constitutions of peaceful origin have been compiled and promulgated without the observance of the established form, for the simple reason that, prior to the publication of the constitution, there was no form of any sort established for the publication of statutes. (Petrażycki 1955, 254–5; 1909–1910, 534, 536)

According to Petrażycki "[w]hat is essential for the presence of a statute and of statutory law is not the enactment [*izdanie*] in the established form, but the presence of corresponding imperative-attributive experiences, the presence of the legal-psychical action [*dejstvie*] of a certain provision, as a normative fact" (Petrażycki 1909–1910, 537, my translation; cf. 1955, 255–6).[102]

In order to avoid misunderstandings, it is of paramount importance to stress that Petrażycki sharply distinguishes—if not always explicitly—(*a*) the question of whether a certain (thought) object instantiates a certain kind of normative fact, and so it is a statute, a custom, a judgment, etc., from (*b*) the question of whether a certain normative fact, like a statute, is experienced as *binding*[103] by a certain individual, by people at large, by a certain set of indi-

[100] In order to avoid misunderstandings, I should recall the fact previously pointed out (in Section 18.6.3) that Petrażycki consistently uses the term *law* (*pravo*) to refer to *a class of psychical experiences*. Consistently, a term such as *statutory law* (and others like it, such as *customary law*) refers *not* to collections of normative facts but to a certain subclass of legal experiences so caused and justified, i.e., the legal experiences caused by the representations of statutes and justified on that basis.

[101] On Petrażycki's examples, see at greater length Fittipaldi 2013a.

[102] As pointed out by Cotterrell (2015, 11): "A Petrażyckian approach would not focus on identifying 'pedigree tests' of what is to count as legal or non-legal by looking to see from what social sources the regulation in question has been brought into being. Instead it would focus on the subjective experiences of those who encounter the regulation".

[103] Petrażycki uses a variety of terms to refer to a normative fact's *playing the role of a normative fact* within someone's psyche. For example, he uses (*a*) the following nouns or adjectives+nouns: *dejstvie*, *prestiž*, *avtoritet*, *sila*, *objazatel'noe značenie*, *normativnoe značenie*, (*b*) the following participles or adjectives: *dejstvujuščij*, *objazatel'nyj*, and (*c*) the following verb: *dejstvovat'*. In order not to confuse the reader, I will constantly use the terms *bindingness*, *binding*, and *to bind*. In this connection one might ask whether a normative fact that does not play the role of a normative fact in anybody's

viduals (such as officials), or else, from (*c*) the question of whether a certain normative fact has been enacted *verfassungsmäßig* (as well as whether it at all exists or existed in external reality).

Since also *Verfassungsmäßigkeit* (namely, constitutionality, the quality of being in accordance with the constitution) indeed plays some role in Petrażycki's overall conception of law, for the sake of simplicity, I will refer to that feature by the more general term *validity*.[104] This role will be explained below in Section 18.12. For the time being, we can say that, according to Petrażycki, what matters in the *theory of law* (i.e., psychosociology of law) is only the *psychological bindingness* of a statute (or of any other kind normative fact), while its *validity*—namely, its having been produced or recognized in accordance with some procedure—plays a role solely within the domain of *legal dogmatics*.

The way Petrażycki sharply sets in contrast *bindingness*, on one hand, to *Verfassungsmäßigkeit*, or *validity*, on the other, could be criticized for neglecting the possible *causal connection* between *validity* and *bindingness*—a causal connection pointed out by Axel Hägerström (see Section 12.6 in this tome). In other words, there is no reason to rule out the possibility that a directive's constitutional enactment (its having been *validly* enacted) has any *causal* significance in explaining why someone might experience it as binding.

In order to avoid misunderstandings it should also be stressed that nowhere does Petrażycki maintain that the bindingness of a statute (or of some other normative fact) amounts to its *efficaciousness*, namely, its causing people to comply with it.[105] The bindingness of a statute means only that it is experienced as the cause and justification of an individual's normative conviction, but having a normative conviction does not unfailingly causes the people who have it to comply with it.

psyche is still a normative fact. The answer is that here it becomes apparent that Petrażycki is setting out types (or εἴδη) of normative facts by a sort of phenomenological epoché (or bracketing) that sets aside not only the assumption of their external existence but also that of their bindingness. On the possibility of a phenomenological interpretation of Petrażycki see Timoshina 2011, 2012, 2013a, 2013b and Section 20.1 in this tome. See also, in this regard, Walicki 1992, 236–7.

[104] I am borrowing this way of using the term *validity* from Enrico Pattaro, who calls a directive *metonymically* valid if it has been validly enacted through activities that congruently instantiate the type of circumstance (a type of procedure, for example) set forth in a competence norm (Pattaro 2005, 149 and chap. 2).

[105] I use the term *efficaciousness* to refer to what Pattaro (2005, 109) calls *effectiveness* in the context of directives (in the context of norms he uses *efficaciousness* in the way I do here). He calls *effective* those directives "that contribute to carrying a conative effect" (ibid., 197), and according to him "the production of such effects [amounts to] the directive being complied with" (ibid., 196). On this last point there is perhaps a difference between Petrażycki and Pattaro. Petrażycki *never* contends that experiencing an ethical appulsion toward (or a repulsion for) a certain action unfailingly causes the performance of that action (or the abstention therefrom). Nor, as I point out in text, does Petrażycki contend that the bindingness of a normative fact unfailingly causes its efficaciousness or effectiveness.

18.10.2. Custom (Obyčaj)

Petrażycki's definition of custom is one of his most original contributions to legal theory. He defines *customary law as the class of imperative-attributive experiences involving the representation of a mass conduct as a normative fact*: "I (or we, or he, or they) have a right to this, or are bound to that, because it was always heretofore observed, because our forebears acted so, etc." (Petrażycki 1955, 263; 1909–1910, 553).

This definition is completely different from any other definition hitherto proposed. Nonetheless, it captures an important aspect of the naive conception of custom, namely, its role when it comes to the justification of the Subject's conduct ("I did that because everybody does"). What the people object of representation *actually* do or have done in the past does not matter. What matters is only what the Subject *realistically represents to himself*,[106] what he believes to have taken place. Whether that belief is true or not does not matter from the point of view of the theory of law.[107] The Subject's "ancestors may have known nothing whatever of the custom ascribed to them or have acted in a completely different way" (Petrażycki 1955, 248–9; 1909–1910, 519–20).

Thus Petrażycki's customary law is a purely psychological phenomenon.

In order to avoid misunderstandings, it should be stressed that *customary law is a completely different phenomenon from intuitive law*. In intuitive legal phenomena there is no representation of a fact that causes and justifies an individual's normative conviction. For example, in Petrażycki's conceptualization, the taboo of incest could be hardly viewed as a phenomenon of *customary law* (or morality). In most—if not all—cases it should be regarded as a phenomenon of *intuitive law* (or morality).[108] In passing, it bears recalling here that according to Petrażycki (1909-10, 481) intuitive law adapts itself more easily than customary law to historical evolution (*istoričeskoe razvitie*).[109]

Finally, it is worth recalling that Petrażycki distinguished two kinds of customary law: (1) *staroobraznyj* (modelled on antiquity) and (2) *novoobraznyj* (modelled on novelty). In the first kind of customary law the principle is *the*

[106] On the concept of realistic representation, see Section 18.6.1 above.

[107] But it usually matters from the point of view of legal dogmatics. See Section 18.12 below.

[108] From a Petrażyckian perspective, it goes without saying that the conceptualization of the taboo of incest as a legal or a moral phenomenon depends on the presence or absence of the representation of an attributive side (experienced as having the right that incest does not occur). If we read Freud (1966, cf. also De Waal 1998, 162) from this perspective, the attributive side may have been the father (or the chief of the "primal horde") up to the age when the taboo of incest has become a moral phenomenon. Nowadays, in case of incest with minors, it is perhaps the minor who is experienced as an attributive side.

[109] From this perspective, LGBT rights should be viewed as originating from intuitive legal phenomena, which do not have anything in common with customary legal phenomena.

older, the more binding; in the second one the principle is *the more widespread, the more binding*[110] (Petrażycki 1909–1910, 553–4; 1955, 264–5).

18.10.3. Kinds of Normative Facts Related to the Activity of the Courts

Petrażycki distinguishes three kinds of normative facts related to the activity of the courts: (1) the practice of the courts (*sudebnaja praktika*), (2) a single *praejudicium* (*otdel'naja prejudicija*), and (3) the res judicata (*res judicata*).

The courts' practice assumes the role of a normative fact if certain "legal obligations or rights are ascribed with reference to the fact that such is the court practice—that in this way analogous problems were 'always' decided by the courts or a definite higher court" (Petrażycki 1955, 272; 1909–1910, 573).

This phenomenon is often referred to by civil lawyers by such terms as *ständige Rechtssprechung*, *jurisprudence constant*, etc. (consistent line of court rulings).

Petrażycki sharply distinguished this kind of positive law from the law of a single *praejudicium*. This latter phenomenon is present when the legal experiences refer to individual *praejudicia* (Petrażycki 1909–1910, 575; 1955, 273).

Petrażycki calls *praejudicial law* (*prejudicial'noe pravo*) both the class of legal experiences referring to court practice and the class of legal experiences referring to a single *praejudicium*.

In order to avoid misunderstandings, it is of paramount importance to stress that Petrażycki's claims about praejudicial law are *purely theoretical* (i.e., psychosociological). They should not be taken to be *legal-dogmatic* or *legal-political* claims. Let us read a passage where this is expressly stated:

> The foregoing statements are statements of legal theory [*teorija prava*] which state the facts (regardless of what seems desirable or proper from the practical point of view) without predetermining questions of legal dogmatics [*dogmatika*] or legal policy [*politika prava*] as to whether or not the binding significance [*objazatel'noe značenie*] of this law should be acknowledged (and, if so, upon what conditions and to what degree). (Petrażycki 1909–1910, 576; translation adapted from Petrażycki 1955, 273–4)

Indeed, this is Petrażycki's consistent approach as to all the normative facts he discusses.

As normative facts, *praejudicia* stand in contrast to a third kind of normative fact related to the courts' activity, namely, *judgments*. Petrażycki calls the resulting kind of law *judicial law* (*judicial'noe pravo*).

Here the judgment referred to is the very judgment sought by the litigants. In the case of praejudicial law, by contrast, the legal experiences refer to judgments issued for *other* (previous) litigants.

[110] The terms Petrażycki uses here are *prestiž* (prestige), *avtoritet* (authoritativeness), and *ėmocional'naja sila* (emotional force). On this terminology, see footnote 103 above.

According to Petrażycki, judicial law is a phenomenon closely associated with the imperative-attributive nature of law as well as with the corresponding need to eliminate conflicts and unify legal convictions (see Section 18.8.6 above). In this phenomenon he expressly includes the decisions of any third party called on to decide some legal dispute, *including the "father, mother, nurse or companions in the case of childish legal disputes"* (Petrażycki 1955, 274; italics added; 1909–1910, 577).

As a matter of fact, Petrażycki observes that a judgment "eliminates or renders unimportant the earlier (conflicting) legal views of the parties […] and substitutes for them a third legal view with reference to the fact that a court or a judge (official or otherwise) has so decided" (Petrażycki 1955, 274; 1909–1910, 576–7).

It is also worth stressing that in Petrażycki's theory of law (that is, in his psycho-sociology of law) there is no such thing as a *Stufenbau* à la Kelsen.[111] Nowhere does Petrażycki argue that our experience of judgments as binding is a phenomenon to be explained by having recourse to some other binding normative fact —indeed, a *meta-…* normative fact—by virtue of which judgments, as a matter of fact, happen to be experienced as binding.[112]

18.10.4. Books (Knigy)

Even books—that is "collections of legal statements compiled even by a private person—sometimes acquire in legal life a normative significance [*normativnoe značenie*] similar to that of legislative codes" (Petrażycki 1909–1910, 579–80; translation adapted from Petrażycki 1955, 276). In such cases legal experience refers to what is written in such and such a book. Petrażycki mentions, for example, the Sachsenspiegel and the Talmud. This kind of legal experiences he calls *knižnoe pravo*, literally "book law".

18.10.5. Communis Doctorum Opinio

In addition to books, Petrażycki mentions the opinions accepted in legal science (*nauka prava*): "Earlier jurists held legal science to be a source of law and ascribed binding significance [*objazatel'noe značenie*] to the opinions commonly accepted therein" (Petrażycki 1955, 279; 1909–1910, 586).

[111] On the compatibility of the idea of a *Stufenbau* with Petrażycki's legal dogmatics see Section 19.4 in this tome.

[112] On the possibility of *meta-…* normative facts as well as of resulting *positive convictions on normative facts* ("positive normative-factical convictions") in a Petrażyckian theory of law, see Fittipaldi 2014 and 2015.

18.10.6. Doctrines of Individual Jurists or Groups Thereof

Here the role of a normative fact is played by "the teaching of such and such a great jurist, or such and such a school of jurists" (Petrażycki 1955, 280; 1909–1910, 587–8).

In this context Petrażycki points to an interesting phenomenon concerning the way different kinds of normative facts may affect one another.

The opinion of some scholar about a certain normative fact (e.g., a statute) may eventually replace that very normative fact in the legal psyches, thereby becoming the only relevant normative fact. Petrażycki gives the example of Roman law, where "jurists interpreted, extended by analogy and developed a positive-law material (statutory or otherwise) which was fairly meager (the law of the Twelve Tables, the praetorian edicts, etc.)" (Petrażycki 1955, 281; 1909–1910, 588). Over time, it came to be that "the original positive bases of law were so thrust into the background and bereft of normative significance that they were no longer referred to as normative facts, and their place was taken by words of eminent jurists of an earlier time (Petrażycki 1955, 281; 1909–1910, 589).[113]

Here, too, Petrażycki is merely describing these phenomena from the standpoint of the theory of law. He is not recommending anything from the standpoint of the policy of law or of legal dogmatics.

18.10.7. Legal Expertise (Juridičeskaja Expertiza)

According to Petrażycki, one of the functions of legal scholars is to solve "legal questions at the request of private persons or societies, administrative authorities and institutions, and occasionally of the courts" (Petrażycki 1955, 282; 1909–1910, 591). These opinions are not usually experienced as normative facts. Sometimes, however, they "may be raised to that degree […] and thus [be] acknowledged as binding [*objazatel'nye*] by the court having jurisdiction of the matter which occasioned the request for the expert opinion" (ibid.). Petrażycki gives several examples.

Petrażycki held that expert law is akin to judicial law, and in certain cases, as where schools of law prepare decisions for the courts, it may not be entirely clear whether the phenomenon pertains to judicial or to expert law (Petrażycki 1909–1910, 593; 1955, 283).[114]

[113] Here Petrażycki also discusses the Laws of Citations. That discussion has not been included in Petrażycki 1955.

[114] See also Petrażycki 1909–1910, n. 2, as regards the correct way to view the judgments rendered by courts of cassation.

18.10.8. Contracts and Treaties (Dogovory)[115]

Petrażycki criticizes the theory that contracts create rights, while treaties create law (*ob"ektivnoe pravo*). According to him, treaties, contracts, and even pacts between children, when experienced as normative facts, all bring about the same kind of positive law (Petrażycki 1909–1910, 597–8; 1955, 285).[116]

Just as in the case of judicial law (above, Section 18.10.3), *nowhere does Petrażycki contend that contracts are experienced as binding because of some other binding normative fact by virtue of which contracts, as a matter of fact, happen to be experienced as binding normative facts*. Thus, Petrażycki's theory does not say anything about whether it is by virtue of Article 1372, first paragraph, of the Italian Civil Code ("Contracts have the force of law between the parties") that Italians ordinarily experience contracts as binding. In the frame of Petrażyckianism the question whether Italian legislators could abolish contracts as normative facts in the psyches of Italians is to be viewed as an empirical one. Petrażyckianism is therefore at odds with Kelsen's idea that "the parties, exercising powers delegated [*delegiert*] to them by statute, set concrete norms that prescribe their reciprocal behaviour" (Kelsen 1934b, 82; my translation).

This difference between Petrażycki and Kelsen can be framed as a difference between the standpoint of the *theory* of law (its psycho-sociology) and the standpoint of legal *dogmatics*. But this is not where the differences between Petrażycki and Kelsen end. Also divergent are their conceptions of legal dogmatics. If we assume—as I do—that Jerzy Lande's conception of legal dogmatics is to a good extent a plain development of Petrażycki's main tenets, we have to conclude that Petrażycki would never have contended that certain normative facts—of whatever kind: contracts, customs, statutes, or the like—are included *a priori* among a Subject's ultimate normative facts as transcendental conditions of that Subject's legal-dogmatic knowledge (cf. Section 19.3 in this tome). This is instead precisely what Kelsen did when contending that the constitution in a legal-logical sense includes even the *unconstitutional custom* (Kelsen 1960b, sec. 35.b, 232–3), such that one might ask why custom should

[115] Just like the German term *Vertrag*, the Russian *dogovor* means both "contract" and "treaty." I shall use both terms (*contract/treaty*) whenever necessary.

[116] Indeed, it is not clear whether according to Petrażycki contracts/treaties should be regarded as being, at one and the same time, normative facts *and* normative hypotheses. Elena Timoshina has called my attention to a passage where Petrażycki treats a *dogovor* as a normative *hypothesis* (Petrażycki 1909–1910, 340), suggesting the conclusion that contracts/treaties are indeed both (or at least that they *may* be both) a normative fact and a normative hypothesis. In Fittipaldi 2012b, sec. 3.5.8, I argued that normative hypotheses and normative facts must be kept apart. Now, if this Petrażyckian distinction is to be maintained, Petrażycki was wrong not to set contracts and commands in contraposition to treaties and statutes (the former being normative hypotheses and the latter normative facts). The same could be argued about judgments as opposed to *praejudicia* (in which regard, see also Section 18.11 below).

be included, while *pacta sunt servanda* should not.[117] Petrażycki's overall philosophical system implies that the question whether it is *advisable* that legal-dogmaticians should include custom, *praejudicia*, contracts, treaties, or other normative facts among their ultimate normative facts should not be worked out by reference to any purported transcendental philosophy,[118] but rather by an empirical science of *legal policy*.[119]

18.10.9. Promises (Obeščanija)*, Programs* (Programmy)*, and Acknowledgments* (Priznanija)

Aside from contracts, Petrażycki mentions *promises*. These are to be distinguished from *programs*, which Petrażycki also refers to as "information about future behaviour." Writes Petrażycki in this regard:

> Sometimes the legal psyche elevates even simple communications of certain persons as to the course of their future actions to the rank of normative facts, ascribing to the authors the obligation to act accordingly as regards those for whom the observance of what is announced is important, who had reason to hope for the observance, and the like. (Petrażycki 1955, 286; 1909–1910, 599)

In other words, the persons for whom the observance of what is announced is important may come to feel *anger* in the event of nonobservance, and this anger—this ethical repulsion, in Petrażycki's language—amounts to a *legal* phenomenon.

The example by which Petrażycki illustrates the way programs may bring about program law (i.e., legal experiences) is the *edictum* and the *ius honorarium* resulting therefrom in Roman law.

Still a different phenomenon, according to him, is *priznanie*, a statement by which someone to whom certain obligations are ascribed recognizes those obligations.

According to Petrażycki, this acknowledgment is an independent and special normative fact, in that "after the act of admission, *claims patently unfounded* become proper and enforceable" (Petrażycki 1955, 287; italics added; 1909–1910, 603).[120] Examples of such acknowledgments, in the

[117] On the parallelism between Kelsen's *Grundnorm* and Grotius's *pacta sunt servanda*, see Pattaro 2005, 48.

[118] Petrażycki (1985a) was sharply critical of Kant's philosophy and of that of his followers. See also, in this regard, Section 19.3 in this tome.

[119] On Petrażycki's critical stance on custom, see for example Petrażycki 2010c and Timoshina 2013b, 80 n. 10.

[120] It may be asked what "patently unfounded" (*javno neosnovatel'nyj*) means in the context of legal solipsism. In my opinion it could mean, for example, that the contract one of the participants referred to in order to found her right in relation to the other one was not validly executed. This amounts to the incorrectness of the legal-dogmatic judgment stating the "existence" of that right. On this issue from a Petrażyckian perspective see Section 19.4 in this tome.

view of Petrażycki, are charters of rights when unilaterally granted by a king (Petrażycki 1909–1910, 605; 1955, 605).

18.10.10. Precedents (Precedenty)

We have a form of precedential law (*precedentnoe pravo*) when someone claims that since a given legal problem was solved in a certain way in a certain situation in the past (and no clear or established standard exists yet for solving that problem), "this [past way of solving the problem] should 'therefore' be followed in the new situation as well" (Petrażycki 1955, 289; 1909–1910, 607). So, for example, "if a 10 was left face up when dealing the cards, and similar circumstances occur again, then the corresponding positive legal psyche will operate, referring to the precedent so as to claim that the behaviour should be the same" (Petrażycki 1955, 289; 1909–1910, 607).

This kind of normative fact should not be confused with the single *praejudicium* (Section 18.10.3 above), for in the case of precedents the role of normative fact is not played by a judgment but by some behaviour other than issuing a judgment.[121]

18.10.11. Other Kinds of Normative Facts

Petrażycki mentions further kinds of normative facts, such as *maxims and proverbs* as well as the *statements and models of conduct of religious-ethical authorities* (Petrażycki 1909–1910, 596; 1955, 283ff.). As regards the latter, Petrażycki offers examples taken from the history of Christendom, but it is not difficult to accommodate here the phenomenon of *Sunnah* in Islamic law.

Petrażycki also mentions the phenomenon that sometimes "claims are made, and obligations are ascribed, with reference to what is ordinarily done 'in the whole world' or 'in all the nations' or 'in all civilized countries' or 'in all constitutional states'" (Petrażycki 1955, 14; 1909–1910, 596), thus pointing to a phenomenon (so-called "legal transnationalism") that would subsequently play a role in the spread of human rights.

But there is a kind of normative fact he does *not* mention, namely, *commands*.[122] To this silence I will devote a few words in the next section.

[121] On the distinction between precedent and custom, see Petrażycki 1909-1910, 609 n. 1.

[122] Another kind of normative fact Petrażycki does not mention is regulations (*rasporjaženija*, *Verordnungen*, *réglements*). This is due, once again, to the absence of anything like a *Stufenbau* in his theory of law (but not so, in his conception of legal dogmatics). He would probably have viewed them as nothing but statutes. As for legislative preparatory works (i.e., legislative history, or parliamentary record) as discussed by Ross see Section 16.4 in this tome, there is no reason not to view these materials as a special kind of normative fact that Petrażycki simply forgot to mention.

18.10.12. What Do Normative Facts Have in Common with One Another?

We can now ask whether there are constraints concerning what can play the role of a normative fact. Most normative facts are *symbolic*, though they are so in a broad sense (Kurczewski 1977b, 103). But some are not, not even in a broad sense. Think of precedents. The fact that a 10 was dealt face up is not symbolic of anything. In my opinion, the feature a fact needs to have in order to play the role of a *normative* fact is that *it must be possible to extract from it some pattern of behaviour, even by the way of pure imitation*.[123] If this may perhaps be enough to rule out as normative facts (the representation of), say, pencils or steps, this is for sure not enough to rule out such "curious [*kur'eznye*] 'normative facts'" as (the representation of) a neighbour's or passerby's *dixit*, to use Elena Timoshina's words and examples (Timoshina 2011, 65; see also Section 20.1.5 in this tome). A possible explanation, for Timoshina, is that normative facts are spontaneously selected in such a way as to enhance social coordination, that is, in such a way that they contain the conflict-producing nature of legal phenomena. A different explanation, which nonetheless seems to me to be compatible with Timoshina's, could be that in order for some fact to be capable of playing the role of a normative fact it must be metonymical or metaphorical of the parental agency or of the significant others encountered by the individual during his or her primary and secondary socialization (on this question, see also the next Section 18.11).

18.11. Authority (*Vlast'*)

As anticipated above (in Section 18.9.5.2) Petrażycki conceptualized two kinds of compound legal relationship: ownership and authority. After discussing the various kinds of normative facts, we are now ready to discuss authority.

Unlike ownership, authority (*a*) does *not* involve things and (*b*) is made up of *all* three kinds (or four, if accept Rudzińzki's proposal) of legal relationships set out by Petrażycki, in the sense that the attributive side (the authority-holder) is experienced[124] as entitled to actions, abstentions and tolerances on the part of the imperative side (the subordinate).

Petrażycki distinguished two kinds of authority: *general* and *special* (Petrażycki 1909–1910, 199; 1955, 129).

General authority (*obščaja vlast'*) is a kind of legal relationship involving a *general obligation to obey any sort of command (velenie) issued by the attributive side along with a general obligation to tolerate any sort of action by the attributive side*—including corporal punishments that involve maiming or kill-

[123] Petrażycki (1909-1910, 528; 1955, 253), when dealing with this issue uses the verb *izvlekat'* ("to extract"), and the nouns *pravilo* ("rule") and *šablon* ("template", "pattern").

[124] On this use of *experienced*, see footnote 64 above.

ing. Petrażycki further sub-distinguished general authority into *limited* or *unlimited* depending on whether or not the attributive side's authority is *subject to specific exceptions*.[125]

As for *special authority*, it too involves both kinds of obligations. But it differs from general authority in that the obligations it involves are limited to a specific scope of behaviour (*ograničennye opredelennoj oblast'ju povedenija*). Petrażycki gives the example of the president of a legislative assembly.[126] This person has the right to have the members of the assembly (*a*) observe his arrangements and (*b*) tolerate his actions such as these actions and arrangements "relate to the observance of the proper order of considering the appropriate issues (*and not, for example, such as relate to the private domestic life of the members of the assembly*)" (Petrażycki 1955, 129; 1909–1910, 199; italics added).

Authority is made up of two completely different kinds of *facere* by the attributive side:

1. the *facere* (and *non facere*, if we are to accept Rudzinski's proposal: see the previous Section 18.9.4) involved in *pati – facere* (and *pati – non facere*) legal relationships; and
2. a *facere* consisting of issuing commands to subordinates—thus determining their obligations and prohibitions (*facere – accipere* and *non facere – non pati*), if the authority-holder so wishes or deems it necessary.

Two questions can be raised here: (1) Are commands normative facts and, if so, of what sort are they? and (2) What happens if an authority oversteps the limits—if any—of his authority?

Let us start with the first question. To my knowledge, nowhere in his *Teorija prava* (Theory of law) does Petrażycki state that commands are normative facts.[127] Nonetheless, two reasons can be adduced to argue that commands are normative facts.

First, Petrażycki sometimes uses the term *rasporjaženie* (provision) when discussing authority (e.g., Petrażycki 1909–1910, 208). This is the same term he uses when he defines statutes (see Section 18.10.1 above).

A second reason is that in *Ogólna teoria prawa* (General theory of law: Kormanicki 1931–1932)—a compilation of lectures based on Petrażycki's theo-

[125] From a Petrażyckian perspective, it is obvious that one should regard as forms of authority not only the authority of the *paterfamilias*'s in ancient Roman law (which authority also included *ius vitae necisque*) but also the forms of authority discussed by Lonnie Athens (1992, 28) in the context of brutalization: "Submission to authority figures requires not only obeying their commands, but equally important, showing proper respect for them as superiors. When a subordinate is perceived as being disobedient or disrespectful, an authority figure may exert or threaten extreme physical force in a brutal attempt to make the subordinate obedient and respectful".

[126] A question that to my knowledge was never discussed by Petrażycki is whether the power of judges should be viewed as a sort of special authority.

[127] But see Petrażycki 1904, 12, where he mentions a *mother*'s commands to her children.

ries—Wacław Kormanicki (1891–1954) holds that statutes, internal provisions of associations, and commands (*rozkazy*) are similar phenomena, and for the positive law that makes reference to them he proposes the term *prawo stanowione* (Kormanicki 1931–1932, 259–60).[128]

But there may be two reasons why in *Teorija prava* Petrażycki does not explicitly state that commands are normative facts.

First, only in the case of commands is the authority-holder experienced as an attributive side. But this seems hardly to apply where the authority-holder is a legislative assembly. It could actually be argued that in the case of a statute the projective quality of being an authority is shifted from the legislative assembly to the documents it produces.[129] This may be why Petrażycki sometimes uses the term *postoronnye avtoritety* (external authorities) to refer to normative facts (e.g., Petrażycki 1909–1910, 479).[130]

Second, Petrażycki may have suspected that commands are sometimes not full-fledged normative facts. That is because, by "logical" transformation, commands can be transformed into either (*a*) normative hypotheses (or elements thereof) within (hypothetical) legal convictions or (*b*) elements of categorical legal convictions.

In case (*a*) we obtain a hypothetical legal conviction, such as |*If the authority-holder issues a command*, the subordinate should comply with it|. In other words, we have here a *facere – accipere* legal relationship where the *facere*[131] is determined by the attributive side.[132] In case (*b*) we obtain a categorical legal conviction such as |The subordinate should do *whatever* the authority-holder commands|.

In my opinion, Petrażycki's psychological method implies that the question whether a command should be regarded as a normative fact, as an element of a normative hypothesis, or as an element of a categorical legal conviction is purely empirical.

Normative facts are conscious causes and justifications of possibly diverse, and sometimes ever mutually incompatible, normative convictions, while normative

[128] *Prawo stanowione* should be translated as *statutory law*. Since I view as unsettled the question of whenever legal convictions based on commands should be regarded as *statutory* legal phenomena, I prefer not to translate that term in this way.

[129] This may carry implications in that, unlike prototypical commands, prototypical statutes are experienced as binding on those who enact them (cf. Fittipaldi 2012a, par. 4.10), and are suitable to analogical construction.

[130] But recall that the authority we are discussing in this section is called by Petrażycki *vlast'* not *avtoritet*. Petrażycki uses the latter term to refer to the bindingness of normative facts. On the variety of terms used by Petrażycki to refer to the bindingness of normative facts, see footnote 103 above.

[131] This is a *facere* in a broad sense, as it could also amount to a *non facere*.

[132] On this kind of reduction, see Pattaro 2005, 123ff., 145ff. Pattaro's line of reasoning (as in Pattaro 2005, 125–6) seems to imply that *all* normative facts, rather than only commands, should be viewed as elements of normative hypotheses.

hypotheses and normative consequences presuppose specific normative convictions and concern the elicitation of ethical emotions. For example, while "Thou shalt love thy neighbour as thyself" (Matthew 22:39) was aimed at bringing about normative convictions, "Rise up, let us go!" (Mark 14:42) probably did not. "Rise up, let us go!" was aimed at giving rise to emotions, not convictions. That may be why in many languages "Thou shalt love thy neighbour as thyself" is not called a *command* but a command*ment*.

In the case where a command is not experienced as a normative fact, we face the question of whether it should be reduced to (*a*) or (*b*). In my opinion Petrażyckianism requires to view this question as an empirical one, where the distinction between (*a*) and (*b*) can be operationalized by drawing on the criterion of the ethical repulsion towards *command avoidance*—a criterion parallel to that of normative avoidance (cf. above, Section 18.6.1).

We can now turn to the second question: What happens if the attributive side oversteps the limits—if any—of his authority, by issuing a command in an area of conduct that should either *be excluded* from its reach (limited general authority) or *not be included* in it (special authority)? In other words, what happens if an authority acts *ultra vires*?[133]

My opinion is that Petrażycki's very definition of a limited or special authority implies that *there must be a factual threshold* beyond which a command ceases to be experienced as binding. If there is no such a factual threshold the authority is by definition an unlimited one.[134] If this interpretation is correct, it should be applied also to the case where the authority-holder not only issues commands but also *acts* beyond the limits of his authority. In such cases the subordinate will not experience any obligation of tolerance in regard to the authority-holder's action (e.g., an act of violence will not be experienced as a "punishment").

Before concluding this section, we should mention that Petrażycki distinguished the forms of authority not only into unlimited, limited, or special ones

[133] I know of only one passage where Petrażycki indirectly deals with this issue, and it reads as follows: "In several social organizations […] a big role is played by the right of certain persons […] that the holder of a certain authority [*władza*] perform [*wykonywał*] certain acts of authority only if he has obtained the consent of the [holder of the] *ius consentiendi*. Such a right is usually sanctioned by the invalidity [*nieważność*] of any acts performed without the consent of the holder of that right (*ius perfectum*, *lex perfecta*)" (Petrażycki 1985c, 457; my translation). The problem here is that this is one of the few passages in Petrażycki's mature works where it is not clear whether he is adopting the point of view of the psychological theory of law or that of legal dogmatics. In other words, is it the case that such an act *would* be or *should* be experienced as invalid and consequently as nonbinding?

[134] It should be observed that, as famous experiments such as the Milgram or Stanford experiment have shown, the threshold—if any—may not be as clear-cut as Petrażycki would have it. In the case of some forms of special authority there is perhaps a further threshold beyond which the commands issued by the authority-holder cannot even be taken seriously. This could be the case if the president of an assembly—to use Petrażycki's example—should issue commands that "relate to the private domestic life of the members of the assembly," as by prohibiting them from having clam chowder for dinner.

but also into *private-legal* (*publično-pravnye*) and *public-legal* (*častno-pravnye*) ones. A public-legal authority is characterized by its being experienced as obligated to act and issue commands *for the welfare of its subordinates*, while in the case of a private-legal authority such an experience of obligation is absent, and so the authority is experienced as entitled to act and issue commands in its own interest (Petrażycki 1909–1910, 728ff.; 1955, 313ff.).[135]

Of course, Petrażycki does not maintain that a public-legal authority *is* always exercised in the interest of its subordinates. In order for a certain authority to be classified as a public-legal one it suffices that that authority's acting upon egoistic considerations be experienced as an abuse (*zloupotreblenie*) (Petrażycki 1909–1910, 733; 1955, 316). In other words, it suffices that such a behavior elicit legal repulsion.

18.12. Official Law and the Role of Legal Dogmatics

Petrażycki sharply distinguished the theory of law from legal dogmatics. He uses the term *science* (*nauka*) to refer to both of them but, while he regards the theory of law as a theoretical, or descriptive science (*nauka teoretyczna*), he regards legal dogmatics as a normative, or prescriptive one (*nauka normatywna*). The correctness of the judgments produced by legal dogmatics does not depend on their correspondence with reality (i.e. their truth) but on the possibility of their *foundation* (*uzasadnienie*) *on normative facts* experienced as binding by the Subject. This is so because according to Petrażycki the judgments[136] produced by legal theory belong the broader class of *objective-cognitive judgments*, while the judgments produced by legal dogmatics belong to the broader class of *subjective-relational judgments* (see at length Petrażycki 1939, as well as Sections 12.7, 19.3, and 20.1.2 in this tome). Subjective-relational judgments do not describe reality, they rather express the Subject's attitudes in relation to it.[137]

Even though one can conceive dogmatic sciences concerned with the most diverse and curious normative facts, the most developed forms of dogmatic sciences happen to be the ones *concerned with the normative facts produced or recognized by state*[138] *officials* (at least in certain legal traditions). This is due

[135] A work that to my knowledge is yet to be done it to compare these Petrażyckian concepts with Max Weber's (1978, 1006 ff.) concepts of *Herrschaft* (domination).

[136] To be precise we should be speaking of *positions* (see footnote 38 above).

[137] It goes without saying that Petrażycki was a relativist (cf. Lande 1959d, 613: "Petrażycki jest relatiwistą"). On how to reconcile Petrażycki's relativism with his ideal of love, see Fittipaldi 2015.

[138] Petrażycki offers a stipulative definition of *state*. His starting point for defining states is his concept of an *independent social group*, namely, a group that is united (*obëdenennyj*) by one *supreme authority* (*verhovnaja vlast'*) (Petrażycki 1909–1910, 210; 1955, 133). Within independent social groups he distinguished groups united by the ascription of legal relationships of kinship (*pripisyvanie pravootnošenij rodstva*), on the one hand, and groups that are not united by

to the conflict-producing nature of legal-phenomena (see Section 18.8.6 above and Chapter 19 in this tome).

Petrażycki also offered a stipulative definition of *official* or *state law* (the two phrases are synonyms in Petrażycki), as distinguished from *unofficial law*. *Official law is "the law that is the object* [*podležaščee*] *of application* [*priminenie*] *and support* [*podderžka*] *by the representatives of state authority in the line of their duty* [*po dolgu*] *to serve society* (Petrażycki 1909–1910, 221; cf. 1955, 139).[139] *Unofficial law* is any other kind of law. In order to avoid misunderstandings, it is of paramount importance to stress that Petrażycki's definition of official law is a *descriptive definition*. Petrażycki's class of *official imperative-attributive phenomena* is made up by what state officials *actually* experience in their capacity of public-legal authorities (Section 18.11 above)[140], not by what—from a legal-political or legal-dogmatic point of view—they *should* experience in that capacity. As will be illustrated shortly, from a Petrażyckian perspective, *whatever legal conviction or normative fact state officials apply or support is turned by definition into official law or into an official normative fact*.[141] This is so even if from a legal-dogmatic point of view what they do is against the constitution.[142]

such ascriptions, on the other (Petrażycki 1909–1910, 212; 1955, 133–4). He called the latter *official groups* (*oficial'nye grupy*) or *states* (*gosudarstva*), and included in this class also certain nomadic groups (Petrażycki 1909–1910, 212-3, cf. also 1955, 135).

[139] In order to avoid misunderstandings, it should be stressed that Petrażycki's concept of official law is completely independent of his concept of positive law (see Kurczewski 1971). The representatives of state authority may well be officially authorized to draw on their own *intuitive* legal experiences. Petrażycki (1909–1910, 491; 1955, 231–2) makes the examples of sentencing in criminal law and giving marks in school. He also discusses processes of positivization of formerly intuitive-official law, and makes the example of how equity underwent positivization in England.

[140] Claims have been made that Petrażycki's extra-psychological concepts of a state and of official law are inconsistent with the psychological premises of his theory of law (for references, see Cotterrell 2015, 13; Motyka 2006, 130; 2007, 37). This is a serious objection, but I think that one could reply that, if these claims were correct, then Petrażycki's theory of law would not allow for the phenomenon of *civil war* (I am thinking, for example, of the Italian civil war of 1943–1945, as characterized by V. Ferrari 2004, 53, in the context of his discussion of legal pluralism). Now, from a Petrażyckian perspective, nothing rules out the possibility of a *civil war*. In case of civil war the Subjects—whether or not representing themselves or others as state officials—represent to themselves the members and the officials of independent social groups (in particular, states) other than their own as obligated to recognize their own supreme authority (in my example: either the king or the "Duce") and officials. The subjectivism of the Petrażyckian approach requires that we take into account the incompatible ways different Subjects *may* represent to themselves (or construct—one would say in a more modern jargon) their own independent social groups, their own supreme authorities and officials, as well as these authorities' and officials' capacities.

[141] In order to avoid misunderstandings (cf. footnote 140 above) we should rephrase the sentence in text as follows: "whatever legal conviction or normative fact (the Subject believes the animate entities he represent to himself as) state officials apply or support is turned by definition into official law or into an official normative fact (within that Subject's psyche)".

[142] In this not too far-fetched to contend that as for *theory of law* Petrażycki maintains Kelsen's (1945a, 161) Midas principle that "just as everything King Midas touched turned into

Petrażycki neglected to discuss legal dogmatics in detail and to explain the difference—if any—between the way a legal theoretician and a legal dogmatician are to "choose" their *ultimate normative facts*. This question would be tackled by Jerzy Lande (see also Section 19.3 in this tome and Fittipaldi 2013a). Here I will stick to the scanty observations to be found in Petrażycki's works.

According to Petrażycki legal dogmatics has both a duty (*zadača*) and a function (*funkcija*):

1. It has a "duty […] to protect […] the principle of legality [*princip legal'nosti*] and to cooperate toward its realization" (Petrażycki 1897, 375; my translation).
2. It unintentionally serves the function of unifying our legal convictions (Petrażycki [1909–1910, 231] speaks of a *bessoznatel'naja tendencija*, "unconscious tendency").[143]

We have seen (Section 18.10.1 above) that Petrażycki, in order to discard the definition of a *statute* in the terms of its *Verfassungmäßigkeit*, or *validity* (to use a more modern terminology), argued that it may perfectly be the case that a statute is experienced as binding despite its not having been validly enacted, or the other way around. But it would be a huge mistake to conclude that, for Petrażycki, legal dogmatics should acknowledge reality and only take into account those, and only those, normative facts which, as a matter of fact, happen to be experienced as binding by officials and people at large. The opposite is true.

I think it useful to discuss an example in some detail because it may cast more light on the way Petrażycki conceived the bindingness and the validity of normative facts.

In his *Theory of Law and State* Petrażycki devotes an appendix to the situation of official law in Russia. Here he adopts the point of view of legal dogmatics and discusses the questions of the bindingness and of the validity of the *Svod zakonov Rossijskoij Imperii*, a compilation of statutes made during the Russian empire. To understand this example, it should be borne in mind that the commission established in 1832 to make this compilation *was not endowed with legislative power*, and yet it sometimes would make substantial changes to the texts it included in it. These texts began to be experienced as binding in the amended version, while the texts that had *not* been included ceased to be experienced as binding.

gold, everything to which the law refers becomes law". But there is a huge difference. Kelsen held this view as for legal dogmatics and sociology of law *alike*, while Petrażycki held this view *only as for his theory (i.e., psychosociology) of law*. Indeed, we will be seeing shortly that Petrażycki's opinion as for legal dogmatics was opposite to Kelsen's.

[143] This aspect was stressed by Peczenik (1975, 1969).

Now, when discussing this situation, Petrażycki himself recalled that under Article 86 of the *Osnovnye Zakony Rossiskoj Imperii* (Fundamental Laws of the Russian Empire) read as follows: "No new statute shall follow without the approval of the State Council and the State Duma, nor shall it take effect without the assent of the Emperor" (quoted in Petrażycki 1909–1910, 625 n. 1).

Petrażycki reports that at his time a debate was going on about the legal significance to be attributed to the omissions and the amendments made by the commission.

According to Petrażycki, from the *point of view of the psychological theory of law*, there was no doubt that the "people's legal psyche […] deal[s] with the Svod as an autonomous set of statutes that substituted the statutes previously binding [*dejstvujuščie*] until the Svod was compiled." Still from the psychological point of view, Petrażycki remarked that

> ancient statutes […] that were not included in the Svod, or parts of their content that did not end up in the Svod do not play the role of statutes in force [*dejstvujuščie zakony*], either in the people's legal psyche or in state institutions (Petrażycki 1909–1910, 629–30; my translation)

To put it otherwise, from a theoretical point of view, the Svod was turned into *an official normative fact* playing the role of both a norm-creating and a norm-destructing normative fact (see Section 18.6 above and Section 19.4 in this tome). But Petrażycki also held that the *point of view of legal dogmatics* should be different:

> Of course, this situation or, better yet, these facts (with which not only a theorist but also a dogmatician who supports the principle of law [*princip prava*] against arbitrariness [*proizvol*] must reckon do not exclude the possibility and the obligation for legal dogmaticians [*juristy-dogmatiki*], for the senate, for the other courts to exact […] that the original statute [*podlinnyj zakon*], and not the amended one contained in the Svod, be applied, and in particular to refer [*ssylat'sja*] to Article 86 the of *Osnovnye zakony* [the fundamental laws] […], pointing to the fact that "the approval of the State Council and of the State Duma" never concerned certain propositions [*položenija*] of the Svod, but exclusively certain propositions of the original statute. (ibid., 630 n. 1; my translation and italics added)

In other words, even though a validly enacted (and not yet validly repealed) statute is *no longer being experienced as binding by the courts, officials, and the people*, it *should be* regarded as binding by *legal dogmaticians*. By the same token, legal dogmaticians *should* regard as *nonbinding* an invalidly enacted statute that is experienced as *binding* by the courts, officials, and the people despite its not having been validly enacted. According to Petrażycki the question of a statute's *legal-psychological* bindingness must be kept carefully apart from the question of its *legal-dogmatic* bindingness.[144]

[144] The term *dogmatycznie obowiązujący* ("dogmatically binding") was used at least once by Lande. See in this regard Section 19.3 in this tome.

It is apparent that Petrażycki's theory of legal dogmatics is quite different from Hans Kelsen's, who contended, for example, that any legal norm, even a statutory norm, may lose its bindingness by way of desuetude (Kelsen 1945a, 119).[145] Elsewhere (Fittipaldi 2010, 2012b, 2013a) I have given other examples to show that Kelsen's legal dogmatics, unlike Petrażycki's, is not at the service of the principle of legality and that, from a Petrażyckian point of view, it conflates the point of view of the psycho-sociology of law (or theory of law, as Petrażycki would have called it) with that of legal dogmatics.

We can now devote a few words to the unifying function of legal dogmatics.[146] Unification is achieved through activities as follows (Petrażycki 1909–1910, 226ff.; 1955, 142ff.):

1. ascertaining whether or not a normative fact exists or existed in the reality external to the Subject (e.g., the external existence of a custom; see Sections 19.3 and 19.4);
2. identifying normative facts (e.g., establishing the original text of a statute);
3. differentiating the spheres of application of different normative facts in order to avoid conflicts between them;
4. working out precise concepts (i.e., concepts whose scope or meaning cannot be stretched or compressed) for the terms used in legal texts (what I propose to call *intensional formalism*, as discussed in Section 18.8.6 above);
5. enumerating special categories of cases that should be subsumed under a certain term;
6. casuistry (*kasuistika*), namely, finding solutions to hard cases;
7. creating abstract concepts and propositions and bringing them into a systematic order;
8. using these concepts and propositions as premises on which basis to deductively solve cases whose solutions are neither directly contemplated nor predetermined by normative facts (i.e., what Phillip Heck would derogatorily call *Inversionsmethode*);
9. recourse to analogy.

Two points should be made here in order to avoid misunderstandings.

First, Petrażycki was *opposed to the teleological construction of statutes*. In his view a teleological construction of statutes would be "a hypocritical slave, openly cheating his master, and explaining his words according to his own convenience" (Petrażycki 1897; translation by Peczenik in Peczenik 1975, 91; see also at greater length Peczenik 1969).

[145] Here Kelsen uses the term *validity*, not *bindingness*, but I choose the latter term in order to avoid confusion (in this regard, see Pattaro 2005, 156).

[146] The topic is further discussed in Fittipaldi 2012b, sec. 4.3.

Second, Petrażycki *did not hold that legal dogmatics can arrive at objective truths*. Quite the opposite. He held that legal dogmatics is a sort of innocent and unintentional (*neumyšlennaja*) sophistry (*sofistika*) (Petrażycki 1909–1910, 231). For instance, he argued that "*if the main purpose of the doctrinal study of law consisted of an objective, historical study of the content of statutes, etc., it would often be forced to admit plain contradictions between […] statutes*" (ibid.; traslated by Peczenik [1975, 91]; italics added). By the same token, Petrażycki held that legal dogmaticians refuse to admit that there is "*a quantity of ambiguous expressions that can be understood in different ways with the same degree of plausibility*" (ibid.; traslated by Peczenik [1975, 91]; italics added).[147]

According to Petrażycki, in other words, legal dogmatics assumes that official normative facts do not conflict with one another, are not ambiguous, and do not contain any gaps. These assumptions are often completely false, but they make it possible for legal dogmatics to unintentionally contribute to the unification of legal experiences, thus conteracting the conflict-producing nature of legal phenomena.

[147] One could ask whether these statements are compatible with the statements Petrażycki would make in his posthumous *New foundations of logic* (Petrażycki 1939, see footnote 79 above). In my opinion they are compatible if we understand the principle of non-contradiction in the context of legal dogmatics not as a cognitive-objective hypothesis (i.e., a hypothesis concerning external reality) but as a subjective-relational decision (i.e., a postulate concerning the Subject's own internal attitudes)—a decision that the Subject may or may not adopt. See in this regard Chapter 19 in this tome, as well as Fittipaldi 2013d and 2013e.

Chapter 19

JERZY LANDE

by Edoardo Fittipaldi[*]

19.1. Introduction

Jerzy Lande (1886–1954) was Petrażycki's most faithful pupil. From a historical point of view he can be credited with having been the liaison between Leon Petrażycki and the modern Polish sociology of law developed by Adam Podgórecki (1925–1998) (cf. Kojder 2009, 22). From a theoretical point of view, among others,[1] he has the merit of having developed Leon Petrażycki's conception of legal dogmatics by both drawing on Petrażycki's posthumous works and completing that conception with some ideas borrowed from Hans Kelsen (provided that they were compatible with the main tenets of Petrażycki's theory of law).

Presenting Lande's ideas is difficult for two reasons.

First, he mostly expressed his views when discussing the ideas of other scholars, so many important ideas of his are scattered across different writings and are not presented systematically.

Second, it is often not easy to understand whether certain ideas expressed by Lande are

1) Petrażycki's, only Petrażycki did not publish them, since there was generally very little he published in his Warsaw period;
2) plain developments of Petrażycki's ideas; or
3) Lande's original contributions, to some extent departing from Petrażycki's ideas.

Presenting Lande's ideas on legal dogmatics is of paramount importance because much criticism addressed to Petrażycki's theory of law was based on the misunderstanding that his legal-theoretical statements were to be understood as legal-dogmatic ones. Unlike what Petrażycki had been wont to do in his

[*] I wish to thank Piotr Szymaniec who helped me to find two rare texts by Jerzy Lande: Lande 1947 and 1935. I wish also to thank Corrado Roversi and Filippo Valente for their extremely valuable suggestions in critiquing an earlier version of this essay.

[1] On those aspects of Lande's thought that I will not be discussing here, see Wróblewski 1959, 69ff. Generally speaking, the interpretation of Lande offered here is opposite to Wróblewski's, as he is at pains to demonstrate Lande's discontinuity with Petrażycki, while I am convinced that Lande's work can be understood exclusively within the overall framework of Petrażycki's philosophical system. As to the fact that Lande accepted Petrażycki's philosophical system without reservations, see also Waśkiewicz 1955–1957, 274.

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German and Russian years, in his Polish years he refrained from replying to the criticism addressed to him, so it was Jerzy Lande who took on the task of replying to it. The most systematic criticism was the one that Czesław Znamierowski advanced in his *Psychologistyczna teoria prawa* (The psychological theory of law: Znamierowski 1922). This can very well be our starting point.[2] It goes without saying that an understanding of the following discussion presupposes a prior knowledge of Petrażycki's theory of law and conception of legal dogmatics (on which the reader can refer to Chapter 18 in this tome).

19.2. From the Reply to Znamierowski to the Postulate of Uniqueness in Legal Dogmatics

Jerzy Lande replied to Znamierowski as early as during the *Narady nad teorją prawa* (Meetings on the theory of law) that took place at the Philosophical Society (*Towarzystwo filozoficzne*) in Cracow on March 25–27, 1924. But to my knowledge, the text with the most detailed reply to Znamierowski's criticism is Lande's *Socjologia Petrażyckiego* (The Sociology of Petrazycki: Lande 1959b, in particular at 864ff.).

Among Lande's replies to Znamierowski's objections to Petrażycki's theory, it is worth recalling Lande's reply to Znamierowski's attempt at *reductio ad absurdum*. Here is a selection of Znamierowski's contentions quoted in Lande's text:

> If *A* and *B* are clashing over the right of ownership over *t*, it is evident that both […] *may* view themselves as owners. Let us assume that this is the case. In this case both *A* and *B* must experience "the emotion of being owner of *t*." And, in Petrażycki's view, as soon as they experience that emotion they are owners. What judgment is to be rendered by the judge who has to decide who the owner is? It seems that such disputes should be settled by recognizing joint ownership. (Znamierowski 1922, 66; my translation)

Lande observes that Znamierowski is confusing two kinds of judgments (in a logical sense):

1) descriptive (or theoretical) ones, according to which, say, certain psychical legal experiences are taking place in *A* and *B*, namely, each of them experiences himself or herself, at the same time, as *exclusive* owner of *t*; and
2) legal-dogmatic ones, according to which, say, *A* (or *B*) *should be* regarded as the *exclusive* owner of *t*.

[2] Not only did Lande reply to Znamierowski's criticism on Petrażycki's theory of law, but he also sharply criticized Znamierowski's *Podstawowe pojęcia teorji prawa* (Fundamental concepts of legal theory: Znamierowski 1924) See Lande's contributions in Jaworski 1925 and Lande 1926. On Znamierowski see Section 20.2 in this tome. On the debate between Lande and Znamierowski, see Makarewicz 2014.

Now, Lande rightly remarks that, according to Petrażycki's theory of law, these two kinds of judgments have nothing to do with each other, and Petrażycki would surely never have maintained that if two people contemporarily claim to be the exclusive owners of something, the judge should issue a judgment to the effect that they are joint owners of that thing.

As regards the crucial distinction between the point of view of the theory of law and that of legal dogmatics, it is worth reading the following passage by Lande:

> The [legal-dogmatic] question of who the owner of *t* is […] is a normative question requiring a normative answer. The theory of law does not ask this question and has no answers to it: The [legal-dogmatic] right to a plot of land *t* is not affected by any legal phenomenon [i.e., by any psycho-legal phenomenon], and so not only is it not affected by the convictions of B, C, D (who are mentally healthy but are mistakenly [*błędnie*] convinced of having an ownership title), and not only is it not affected by the conviction of E (who is crazy), but it is not even affected by the "correct" [*"słuszny"*] conviction of A (the registered owner [*właściciel hipoteczny*]). This question is asked by each of the aforementioned people—and rightly so—but for the legal theorist it is only the selfsame process of having a conviction [*sam proces przekonania*] that can be an object of investigation; whether it is A or somebody else who is right [*ma słuszność*] or not is a question that can be answered only by the legal dogmatician by recourse to the civil code and the land registry. (Lande 1925a, 343; my translation)

Here Lande has recourse to his idea that the conditions for the correctness of legal-dogmatic statements are twofold: There is a semantic condition (the meaning of certain provisions in the civil code) and a historical one (the land registry as *current* evidence of certain *past* events (but see footnote 34 below).

This is an issue I will return to, but let us now focus on another point instead.

According to Lande, Znamierowski's *theoretical* contention that *A* and *B* cannot be at once the exclusive owners of *t* is the incorrect consequence of Znamierowski's mistakenly taking legal-dogmatic contentions for theoretical truths. The contention that *A* and *B* cannot at once be the exclusive owners of *t* is a consequence of the *postulate of uniqueness* (*postulat jedności*) typical of legal-dogmatic approaches (Lande 1959b, 867). According to Lande, this postulate is a consequence of the tendency to hypostatize the law in force into something existing outside the Subject.[3]

Here Lande seems to adopt the metaphysics emerging from Petrażycki's posthumous *Nowe Podstawy logiki* (New foundations of logic: Petrażycki 1939). In this book Petrażycki sets up a sharp contrast between objective-cog-

[3] I am using the verb *to hypostatize* to render Lande's noun *hipostaza*, and the phrase *existing outside the Subject* to render Lande's phrase *realnie istniejące* (really existing). As to Petrażycki's sometimes confusing way of using these terms and why it is better always to state explicitly if we are speaking of internal or external reality, or else to adapt to Petrażyckianism the Hägerströmian distinction between logical and effectual reality, see Section 12.5 in this tome. In this text I will be using *Subject* uppercased for the reasons explained in Sections 12.2 and 18.3 in this tome.

nitive judgments (*sądy objektywno-poznawcze*) and subjective-relational (*subjektywno-poznawcze*) ones.[4] Objective-cognitive judgments concern "what exists and how it exists, independently of whether we like it or not, whether we want it or not, whether in our opinion we should strive for it, etc." (Petrażycki 1939, 35; my translation). Subjective-relational judgments are instead

> concerned with our subjective attitude toward something that is either existing or imagined, that is, they are concerned with our sympathy for it, our liking it, our wanting it, or our dislike, our disgust, our censure, or our desire to eliminate or create something, the goals toward which we strive, principles of behavior, etc. (Ibid.; my translation)

Now, according to Petrażycki (ibid., 36, 38), the *principle of noncontradiction* and the *principle of the excluded third* hold only in the context of the objective-cognitive sciences, and not in the subjective-relational ones. This contention seems to stem from the *hypotheses that nothing can at once externally exist and externally not exist* and *that either something externally exists or it does not externally exist*. This seems to imply that Petrażycki gives an empirical interpretation of the principles of noncontradiction[5] and of the excluded third. Now, if the principle of noncontradiction by contrast does not hold for the Subject's *internal attitudes*, we must conclude that according to Petrażycki nothing prevents the very same Subject from at once hating and loving—*odisse et amare*!—the very same person, from experiencing at once ethical appulsion and repulsion to the very same action, from experiencing the very same statute as being at once in force and repealed.[6] (It should be recalled that according to Petrażycki, legal dogmatics is a subjective-relational science; therefore, in his view the principle of noncontradiction does not hold for legal-dogmatic.)

Now, according to Jerzy Lande, too, the principle of noncontradiction does not hold for legal-dogmatic judgments, because they are of a subjective-relational nature.[7] Nonetheless, the fact that subjective-relational experiences are often *hypostatized* into objective-cognitive ones induces legal dogmaticians to

[4] To be precise, Petrażycki speaks of *positions*. See Section 18.5, fotnote 38, in this tome..

[5] In Łukasiewicz's (1987) terminology, Petrażycki could be said to adopt an ontological conception of the principle of noncontradiction and that the logical principle of noncontradiction, according to Petrażycki, is a corollary of its ontological nature.

[6] One need scarcely mention how compatible this view is with Sigmund Freud's ideas in this regard: See Freud 1932, sec. 32; Matte Blanco 1998; Fittipaldi 2013e, 2013d.

[7] In the following I will focus on the role of the principle of noncontradiction because this is an issue that Lande, as well as Petrażycki, explicitly addressed. Since Petrażycki maintained that not even the principle of the excluded third holds in the subjective-relational sciences, it could be asked whether legal dogmatics is an exception. I don't think so. It bears recalling here that it is this principle that Kelsen relied on in order to argue that legal-dogmatic systems contain no lacunae: "If the legal system establishes no legal obligation of some individual to carry out a certain behavior, it thereby authorizes that behavior" (Kelsen 1960b, par. 25.g, 251; my translation).

adopt a postulate that counteracts the fact that the legal sources (normative facts) the legal dogmaticians adopt as their points of departure (dogmata) are often ridden with contradictions (see Section 18.12 in this tome). This results in the dogmaticians' belief that there is no contradiction in their system, that a statute cannot at once be in force and not in force, that a debt cannot at once exist and not exist, that nobody can at once be and not be the exclusive owner of something, and so on.[8]

According to Lande—very much in a Petrażyckian spirit—the *dogmaticians' (empirically) false assumption of the principle of noncontradiction is a fortunate mistake, for in this way legal dogmaticians are prompted to give an extremely precious contribution to the containment of the conflict-producing nature of legal phenomena*.

But this valuable practical contribution should not be mistaken for a theoretical truth. To be sure, it is practically valuable that a judge should not find *A* and *B* to be (1) at once the exclusive owners of *t* or (2) joint owners just because both of them claim to be the exclusive owners of *t*, but that fact does not exclude that it is perfectly possible for each of them to experience himself as the exclusive owner of *t*, and that it is this experience which forms the core of the phenomena investigated by legal theory.

In legal dogmatics contradictions are possible, and the principle of noncontradiction is not a hypothesis but a mere postulate—a *postulate of uniqueness*, as Lande called it—resulting from a process of socially useful hypostatization.

19.3. The Task of Legal Dogmatics and how Legal Dogmaticians Choose Their *Grundnorm*

The way Lande distinguishes legal dogmatics from the theory of law plainly corresponds to the scanty indications in this regard that can be found in Petrażycki's *Nowe podstawy* (Petrażycki 1939, 111). According to Lande, the theory of law is concerned with imperative-attributive emotions and convictions, while legal dogmatics is exclusively concerned with normative facts and their contents (Lande 1925b, 70).[9]

[8] This situation, according to Lande, is akin to that of the medieval Scholastics, who assumed that there cannot be contradiction within the Holy Scriptures or between those scriptures and the writings of Aristotle and the church fathers (Lande 1925a, 323), and so were at pains to force all those writings and scriptures into unity.

[9] To be sure, Petrażycki seems to have changed his mind in this regard, as he also contended that "in general, legal natural doctrines are based […] on the legal-intuitive psyche. The foundation of these systems is a dogmatics of intuitive law, which is the systematic presentation of their authors' autonomous-legal [i.e. intuitive-legal] convictions" (Petrażycki 1902, quoted in Timoshina 2013b, 467; my translation). This is to say that there can be kinds of legal dogmatics that also elaborate intuitive legal convictions, and not only normative facts. I will return to this question shortly.

To be precise, legal dogmatics is not concerned with normative facts proper, because in Petrażycki's terminology normative facts are psychical phenomena (namely, objects of *realistic representations*—see Sections 18.6.1 and 18.6.3 in this tome). Legal dogmatics is instead concerned with the *truth* of normative facts, where truth is understood as correspondence.[10]

This crucial difference can be appreciated by considering *custom*. A legal theorist is exclusively interested in ascertaining whether some Subject experiences his realistic representation of people behaving in a certain way as a foundation for a certain ethical emotion, conviction, or action of his.[11] This is what Lande, in line with Petrażycki, calls a phenomenon of customary law (*zjawisko prawa zwyczajowego*). From a legal-theoretical perspective, it is not necessary that the Subject's representation of a custom be true in order for a phenomenon of customary law to exist within him. It suffices that the Subject *believe* in its truth.

From the perspective of a legal dogmatician, it is instead the actual truth of the representation that matters:

> The dogmatics of customary law is aimed at ascertaining, not the phenomena of customary law, but rather the normative facts of custom (which may not be legal phenomena at all) in order to found on them legal norms.[12] (Lande 1925a, 276; my translation)

To ascertain the normative facts of customary law is to investigate whether the representation which has as its object certain people$_1$ behaving in a certain way is true. That is the question with which legal dogmatics is exclusively concerned: It is *not* concerned with whether people$_1$—provided that they exist (or existed) and that they behave (or have behaved) in that way—would, in turn, justify (or would have justified) their own behavior by invoking the behavior of *other* people$_2$. In this case also the behavior of people$_1$ would be a phenomenon of customary law. But this is a matter only for legal theory, not for legal dogmatics. Legal dogmatics is not even concerned with whether people$_1$ act in that way out of moral or legal convictions (*opinio iuris*). Even this question, according to Lande, concerns only legal theory, not legal dogmatics. Finally, according to Lande, legal dogmatics is not concerned with whether the Subject invoking the custom (who may, but need not be, a plaintiff or defendant in

[10] To be even more precise, legal dogmatics is concerned, among other things, with the question of the external existence of those—internally existent—objects of representation called *normative facts*. If it is the case that these internal objects are also externally existent, the representation of those objects is true.

[11] To avoid misunderstandings, it should be stressed that the Subject's having an ethical conviction that he should behave in a certain way does not imply that he will actually behave in that way.

[12] The Polish original: "[D]ogmatyka prawa zwyczajowego ma za cel stwierdzanie nie zjawisk prawa zwyczajowego, lecz faktów normatywnych zwyczaju (które mogą nie być bynajmniej zjawiskami prawnemi), aby na nich oprzeć normy prawa." On Lande's concept of a norm, see Section 12.4, footnote 21, in this tome.

court) actually experiences his own behavior as ethically permitted or mandatory. Even these legal phenomena concern only legal theory, not legal dogmatics. Legal dogmatics—I should reiterate—is concerned only with whether people$_1$ actually behave or have behaved in the way represented in the representation in question. This can be said, *mutatis mutandis*, of each of the normative facts discussed by Petrażycki (see Section 18.10 in this tome).

We are facing here a plain development of the main tenets of Petrażyckianism.

Now, a difference between Petrażycki and Lande seems to be that, while Petrażycki (Section 18.12 in this tome), in discussing legal dogmatics, mentioned both the (*a*) task of being at the service of the principle of legality and (*b*) the function of unifying legal convictions, Lande, to my knowledge, never mentioned the principle of legality and focused *exclusively* on the unifying function.

In my opinion, a possible reason why Lande dropped the principle of legality is that it is impossible to consistently comply with it. Indeed, Lande explicitly states that the "logical unity of every official system is an ideal rather than a real possibility" (Lande 1959d, 663; my translation).

In this regard Petrażycki seems to have had a contradictory attitude. If, on the one hand, he was very well aware that legal dogmatic systems may be ridden with flaws, indeterminacies, contradictions, inconsistencies, on the other, he never parted with (1) his conviction of the paramount importance of the principle of legality and with (2) his idea that the theory of law (i.e., not the psycho-sociology of law) and legal dogmatics should—in neither direction—interfere with one another.[13] Petrażycki held that for a legal dogmatician who cares about the principle of legality, normative facts (e.g. statutes, customs, etc.) that have not been passed (or recognized) in accordance with the constitution must be treated as *nonbinding* even if they are experienced as binding by officials and people at large, whereas normative facts that have been passed (or recognized) in accordance with the constitution must be treated as *binding* even if they are *not* experienced as binding by officials and people at large.[14]

Now, as far as I know, Lande did not discuss this formalistic aspect of Petrażycki's conception of legal dogmatics, but he did discuss the comparable positions expounded by Hans Kelsen in *Hauptprobleme*.

Of Kelsen's positions, those that in my opinion should be compared with Petrażycki's are the ones he expressed on *desuetudo* and the unconstitutional

[13] To avoid misunderstandings it bears stressing that (2) is not a corollary of (1). It is rather a corollary of Petrażycki's classification of judgments (or positions—to be precise). See Petrażycki 1939.

[14] In this regard, see above the discussion of Petrażycki's treatment of the psycho-sociological bindingness of *Svod zakonov Rossiskoj Imperii* (the code law of the Russian Empire) in Section 18.12 of this tome.

acts of the monarch. As regards *desuetudo*, Kelsen held that the "process of a purely factual repeal [*bloß faktisches Außerkraftsetzen*] of provisions is […] completely ungraspable from a legal perspective [*rechtlich völlig unfaßbar*]" (Kelsen 1923, 50; my translation). Symmetrically, as regards the monarch's possible unconstitutional acts, Kelsen took the view in *Hauptprobleme* that "the legal construction [*juristische Konstruktion*] fails [*versagt*] anytime there are violations of the constitution—as when the monarch enacts unconstitutional acts—that produce factual effects" (ibid.; my translation). While in the parallel case of the *Svod zakonov Rossijskoj Imperii* Leon Petrażycki required that legal dogmaticians fulfil their legal duty to comply with the principle of legality, in *Hauptprobleme* Hans Kelsen simply speaks of *rechtliche Unfaßbarkeiten* (legal unintelligibilities) and of *Versagungen der juristischen Konstruktion* (failures of the legal construction) because, as he argues, it would be "nonsensical [*unsinnig*] to legally justify the revolution" (ibid.; my translation). Since these problems relate to the very nature of one's conception of legal dogmatics, let us read Lande's opinion as regards Kelsen contentions:

> Kelsen states that we are dealing with acts that go beyond the limits of legal construction, with "legally ungraspable" acts. This is definitely correct [*słuszne*] from the point of view of the "law" contained [*się zawiera*] in the violated system—and it would be more appropriate to frankly speak of violations. But every such violation of one system commences a new system, new "law," just as a revolution does. And if the new law catches on [*przyjmuje się*] and lives on [*utrwali w życiu*], the dogmatician [*dogmatyk* (in the singular)] is faced with no other option than to recognize both systems as law for himself, despite their contradicting [*sprzeczne*] each other. Of course [*oczywista*], he would be acting more correctly [*słuszniej*] if, instead of stretching them into unity with false constructions [*fałszywe konstrukcje*], he openly recognized the diversity of sources and the contradiction among norms [*odmienność źródeł i sprzeczność norm*]. (Lande 1925a, 301; my translation)

It seems that according to Lande, the legal dogmatician has four options:

1. He can build a new system every time there is a violation of the constitution, thus building an endless series of new systems (*szereg nieskończony systemów*: ibid., 301), and this series *has to* be endless, as these violations are frequent, even in normally functioning states (ibid., 334, 337).
2. He can build two or more independent systems at the same time, though these systems will be, at least partially, incompatible with one another.
3. He can rely on false constructions to artificially force the unconstitutional phenomena into his previously adopted system.
4. He can simply admit that the principle of noncontradiction applies only to the reality external to the Subject, and since legal dogmatics is a subjective-relational science, not an objective-cognitive one, the principle of noncontradiction is not inherent in it but is rather a mere postulate, the viability of which may depend on the normative facts the legal dogmatician adopts as his ultimate ones.

We know that Kelsen would eventually choose the third option—not with a *false* legal construction, however, but with a *transcendental* one. He would maintain that the "insertion of custom as a law-generating legal hypothesis happens as high up as within the *Grundnorm*, understood as the constitution in a legal-logical sense [*Verfassung im rechtslogischen Sinne*]" and that "[c]ustomary law has repealing effect even as against some […] constitutional statute explicitly prohibiting the application of customary law" (Kelsen 1960b, par. 35.b, 232–3; my translation). As for the monarch's unconstitutional acts, Kelsen would likewise maintain that his alleged "*rechtslogische Verfassung*" (legal-logical constitution) also contains an *Alternativbestimmung* (alternative clause) "authorizing the legislator to produce general legal norms, even through a procedure other than the one directly established by the constitution, and to give these norms a content other than the one directly established by the constitution" (ibid., par. 35.j.β, 277; my translation).[15]

Lande's solution differs from both Petrażycki's formalistic one and Kelsen's "transcendental" one. Lande is aware that from a Petrażyckian perspective these problems pertain neither to legal dogmatics nor to the sociology of law but to *legal policy*. But in the meantime, according to Lande, legal dogmaticians have to provide judges, officials, and laypeople with answers. According to Lande, "a legal dogmatician cannot refuse to answer the question *quid juris*" (Lande 1925a, 322; my translation):[16]

> The legal dogmatician in his line of work is condemned to make use of the incomplete design [*niedoskonała koncepcja*] of the system in force. The inevitable virtual non-unity of the system owed to the collision between different "sources," namely, normative facts, is not an impossible obstacle to overcome: Dogmatic thinking [*myśl dogmatyczna*] elaborates principles on which basis cases of collision can be settled, which principles may be fixed and over time enacted into law; the evolution of legal life itself imposes the removal of certain provisions as "obsolete" and the creation of others for their the substitution or for the filling of lacunae on the part of court practice, parliamentary practice, etc. […] [S]ome fluidity and elasticity as to the determination of what is law and what is not law in the sense of the provision dogmatically in force [*przepis dogmatycznie obowiązujący*]—insofar it does not exceed certain limits [*o ile nie przekracza pewnych granic*]—does not cause damage, and is even to some extent useful, as it makes possible some evolution within the system, an evolution that the legislative machinery [*aparat ustawodawczy*] is usually unable to consciously guide, and about which science is unable to give conscious advice, owing to the lack of development of legal policy. (Lande 1925a, 336–7; my translation)

Here Lande, by drawing on Petrażycki's ideas on legal policy, is more or less contending that allowing some room to the free evolution of spontaneous law, as distinguished from legislation, may be conducive to the selection of rules

[15] Let me remark in passing that, ironically, what Kelsen wrote about a socio-dogmatic approach to *desuetudo* in 1923 (Kelsen 1923, 51) is an excellent criticism of what he would write in Kelsen 1945a, par. 12.I.

[16] The situation of a legal dogmatician, according to Lande, thus closely resembles that of the French judge according to Art. 4 of the *Code Civil*.

beneficial to society—including economically efficient rules (cf. Petrażycki, 1892, 202ff.; 1895, 582).[17]

If, from a legal-political point of view, it may be advisable—especially in default of a properly developed science of legal policy—not to determine too strictly what the law dogmatically in force is, as opposed to the law dogmatically *not* in force, a legal dogmatician could still ask how he is to select the *supreme normative facts* on which to found his own legal-dogmatic system, namely, his own subjective-relational judgments.

It goes without saying that this *selection of ultimate normative facts* largely overlaps with Kelsen's concept of the *Grundnorm*.[18] Since Lande's *Norma a zjawisko prawne* (Norm and legal phenomenon) was published in 1925, and at that time Kelsen was using the term *Grundnorm*—along with other terms, such as *Ursprungsnormen* (source norms), *Verfassung im rechtslogischen Sinne* (constitution in a legal-logical sense), and *letzte Quellen des Rechtssystem* (ultimate sources of the legal system) (e.g., Kelsen 1928b, 251, 94)—there is no strict coincidence with the terminology the modern reader is most acquainted with. But I do not think that this will create a major obstacle to understanding the following passage, where Lande discusses the proposal that Kelsen made in this regard in the *Problem der Souveränität*, and where Lande ultimately makes his own proposal:

> Kelsen […] does not cease to […] come back to the factual criteria he programmatically expunged from the field of normative knowledge. When criticizing the old conception of positiveness, understood as factual efficaciousness, he explains that the selection of a system that at least to some extent is complied with by real people—and in this way he still remains on the ground of the relativity of the system—is only a principle of "economy of knowledge," which requires "to reduce as much as possible the tension between *Sollen* [*powinność*] and *Sein* [*byt*], namely, to cognize the biggest possible content of *Sein* as being in accord with the content of *Sollen*"[19] [… If] we here forget his incorrect use of the "principles of knowledge" [20], he is only a small step away from correctly understanding the issue: Among several different systems of legal norms which from an epistemological [*naukowo-poznawczego*] point of view have exactly the same rights, the dogmatician will choose as his basis [*podstawa*] the one that in social life achieves the

[17] No need to stress how this approach is compatible with that propounded by Hayek (e.g., 1973–1979) and by modern economic analysis law, specifically as regards the pressure that ligation exerts toward the selection of efficient rules (see Postema 2011, 200; Posner 1998, chap. 8; Cooter and Ulen 1996, 376). In Fittipaldi 2009, it is instead argued, drawing on Petrażycki 2002 and on modern economic analysis of law, that litigation is conducive to formalization rather than to the selection of efficient rules.

[18] On Kelsen's *Grundnorm* see Section 8.5 in this tome and Section 2.3.2 in Tome 1 of this volume.

[19] That is my translation based on the German original: Kelsen speaks of "die möglichste Reduzierung [d]er Spannung […] zwischen Sollen und Sein" and of the tendency "möglichst viel Inhalt des Seins als mit dem Inhalt des Sollens übereinstimmend […] zu erkennen" (Kelsen 1928b, par. 24).

[20] According to Lande, this is wrong because the Subject here is confronted with a practical (in this case: political) choice, and not with principles of knowledge (Lande 1925a, 328).

maximum of force and unity, thanks to its being backed by the social organization that in a given moment becomes predominant: That is why a dogmatic science [*nauka dogmatyczna*] elaborates the law of the *state* (N) but not the law of a criminal organization roaming within that state; that is why, at the time of a state revolution, it adopts [*przyjmuje*] the law—be it legal or revolutionary—that manages to gain the prevalence of implementations [*przewaga realizacji*]; and that is also why the dogmatician can move so easily from one system to another system that just a while earlier in his eyes was "nonlaw" [*nieprawny*, "nonlegal"]. (Lande 1925a, 331–2; my translation)

Here Lande is merely trying to *sociologically explain* what prompts the legal dogmatician to choose one *Grundnorm* rather than another. He is *not* recommending any one choice over any other.[21] Moreover, he is completely opposed to Kelsen's pretentious terminology (*pretensjonalna terminologia*) consisting of speaking of *transcendental idealism* (Lande 1925a, 323).[22]

From a *logical and epistemological point of view*, according to Lande, there is no difference between a legal dogmatics concerned with a constitution and a legal dogmatics concerned with a manifesto put out by some madman:

From the point of view of the critique of knowledge [*krytyki poznania*], the statement [*zdanie*] "According to Art. A of Constitution C the president of the Republic has right R" has the same value [*walor*] as the statement "According to the manifesto of Madman M, its author has the hereditary right to rule the moon," as both statements are founded [*oparte*] in an identically correct way on corresponding "sources" […], or normative facts. (Lande 1925b, 70; my translation)

According to Lande, any normative "fact can be taken as the foundation of a positive system; the selection […] of the positive basis of bindingness [*postawa obowiązywania*] is scientifically free [*naukowo dowolny*]" (Lande 1925a, 299; my translation). There is no way to distinguish a subjective sense from an objective one (to use Kelsen's terminology), since Lande—very much in line with the sparse clues that can be found in Petrażycki's work—takes the view that legal dogmatics is a subjective-relational science, namely, a science concerned exclusively with attitudes existing *within* the Subject. This is an issue I will return to in the next section.

Further, it should be reiterated that, unlike Kelsen, Lande does not seek to "enact" any recommendation as regards the possible contents of the *Grundnorm*. He merely adopts a sociological stance. With that important qualification, we can now attempt to reconstruct and summarize what contents according to Lande the *Grundnorm ordinarily* takes.

1. The *Grundnorm* contains convictions concerning diverse normative facts (*odmienność źródeł*), which normative facts may come into conflict with one another. These conflicts may be of two kinds:

[21] A different treatment of the question of how to choose the *Grundnorm* from viewpoint of Petrażyckianism can be found in Fittipaldi 2013d, 2013a.

[22] Cf. the similar criticism in Max Lazerson: see Section 20.1.2 in this tome.

1.1. substantive conflicts (i.e., some $norm_{\alpha}$ extracted from normative $fact_1$ is empirically incompatible with some $norm_{\beta}$ extracted from normative $fact_2$), or
1.2. procedural conflicts (e.g., normative $fact_2$ has been passed or recognized in a way_{β} other than some way_{α} extracted from normative $fact_1$ as the only "possible" one).

2. The *Grundnorm* also contains, along with convictions about the bindingness of certain normative facts, intuitive legal convictions that not only people but also judges and jurists may "put forward as sources [*źródła*] completing [*uzupełniające*] or reforming [*reformujące*] statutes" and other normative facts (cf. Lande 1925a, 346; my translation).[23]

We can conclude that according to Lande the contents of the *Grundnorm* result from the Subject's selection of (1) certain supreme normative facts and (2) certain intuitive-legal convictions as his own axioms. Lande (1945, 829) uses the term *axiomat* only in the second context (2). Elsewhere (Fittipaldi 2013a, 2013d), I have proposed a more symmetrical terminology, referring to (1) by the term *normative-factical axioms* and to (2) by the term *intuitive-legal axioms* (2). Henceforth I will use my own terminology.[24]

To avoid misunderstandings let me reiterate that from a Landian-cum-Petrażyckian perspective nothing rules out that the Subject adopts axioms—be they intuitive-legal or normative-factical—in conflict with one another.

Further, it should be recalled that according to Lande, legal dogmatics is not the exclusive to judges or scholars. This is perfectly consistent with the Petrażyckian conception that legal phenomena take place first and foremost outside courts: "Legal dogmatics is practised by any citizen who asserts [*twierdzi*] or founds [*uzasadnia*] his rights or obligations, by any lawyer who explains to his client his rights and obligations, by the judge when formulating his judgment and its grounds" (Lande 1959f, 387; my translation).

19.4. The Truth-Incapability of Legal-Dogmatic Judgments and Their Conditions of Correctness

One of the main tenets of Petrażyckianism is the strict distinction between the theory (or psycho-sociology) of law and legal dogmatics. As an objective-cog-

[23] But Lande's talk of sources in the case of legal-intuitive convictions is terminologically inconsistent, as he elsewhere uses the term *źródło* solely to refer to Petrażycki's normative facts. In this regard, see also footnote 9 above.

[24] Judging from the table at the end of Petrażycki's *Nowe podstawy* (Petrażycki 1939, 111), it seems that the unification of the Subject's intuitive-legal and normative-factical axioms as the axioms of a single normative science of the Subject is compatible with the last developments of Petrażycki's thought, as in that table he inserts *prawoznawstwo normatywne* (normative legal science) in the singular.

nitive science, the theory of law produces judgments concerning what exists *outside* the Subject.[25] Therefore, its statements are capable of truth. Legal dogmatics is instead concerned with attitudes existing *within* the Subject, namely, his freely chosen *Grundnorm* and the legal-dogmatic system resulting therefrom. Its statements are not capable of truth, as they do not concern any reality external to the Subject.[26]

Lande gives two arguments to demonstrate that legal-dogmatic judgments are incapable of truth.

The first argument is that legal-dogmatic judgments are ultimately made up of emotions within the Subject and therefore do not concern the reality external to him (Lande 1959a, 827; cf. footnote 58 below).

The second argument is rather a *set of metaphysical arguments* related to the fact that *many legal-dogmatic statements assert "facts" that are totally impossible in the reality external to the Subject*, and therefore they must concern phenomena that take place exclusively in the Subject's fantasy. In Lande's writings I have found the following three subarguments, pertaining to

1. the possibility of contradictions;
2. the violation of the principle *Natura non facit saltus*;
3. the violation of the principle of locality.

The first subargument was previously discussed in Section 19.2. Such "contradictions" as the same apple at once existing and not existing, the same table at once being completely white and not being completely white, etc., are impossible in the reality external to the Subject. But *within* the Subject it is perfectly possible for the same person to be loved and hated, or for the same behavior to be experienced as being at once obligatory and permitted, or for the same statute to be experienced at once as in force and repealed. This possibility of contradictions implies that legal-dogmatic judgments concern objects that exist *within* the Subject's psyche.

The second subargument is *Natura non facit saltus*.[27] According to Lande,

> a reality that ceases to exist [*przestaje istnieć*] in accord with a clause in a new statute regarding the time when [that new statute] "comes into force" (e.g., at the stroke of midnight on a given day of the calendar) would be a strange "social reality" indeed. (Lande 1959b, 865; my translation)

[25] To avoid misunderstandings it should be emphasized that the theory of law may also be concerned with psychical phenomena taking place within "Subjects" other than the Subject proper, as is the case when the Subject is concerned with other people's legal convictions. In this regard, see Section 12.5, footnote 30, in this tome.

[26] Indeed, it could be objected that the concept of truth can also be applied to the Subject's internal reality (*Innenwelt*), provided that it is independent of him. On the Subject's *Innenwelt* as a possible realist assumption, see Section 12.7, footnote 54, in this tome.

[27] This is the way Lande puts it: "a phenomenon may have a certain real feature or it may not; it can show a certain gradual evolution [*ewolucja stopniowa*], but is cannot show sudden leaps" (Lande 1925a, 334; my translation).

A Scandinavian realist would contend that these phenomena pertain to the realm of magic.

The third subargument is somewhat implicit in the last-quoted passage by Lande and was more explicit in Petrażycki. It concerns the violation of the principle of locality: It is impossible for a statute to come into force for everybody everywhere in a given state at the very moment when the head of state signs it into law or at the stroke of midnight (see Section 12.6 in this tome).

As I have said, Lande—very much in line with a consistent development of the main tenets of Petrażyckianism—takes the view that since these phenomena are impossible in the reality *external* to the Subject, they must be searched for *within* the Subject himself.

But *the fact that legal-dogmatic judgments are truth-incapable, because they do not concern external reality, does not rule out that they may be founded in a somewhat intersubjectively reliable way*. In other words, there can well be a connection between legal-dogmatic judgments and external reality, but that connection is not a direct one as the one presupposed by the concept of truth as correspondence.

If we are to properly address this issue, we will need to examine Lande's ideas on the classes of practical judgments, since (as Table 1 below illustrates) legal-dogmatic judgments are a subclass of one of those classes.

Lande's starting point is Petrażycki's classification (Petrażycki 1939).

Petrażycki classified legal-dogmatic judgments as a subclass of ethical-dogmatic judgments. These latter judgments, in turn, he classified as a subclass of ethical judgments, which in further turn are a subclass of practical judgments. According to Petrażycki, the class of practical judgments contains not only the subclass of ethical judgments but also that of teleological judgments.

Table 1. Kinds of judgments according to Petrażycki and Lande

Practical judgments				
Ethical (or normative)[28] judgments				Teleological judgments
Ethical-intuitive judgments		Ethical-dogmatic judgments		
Moral-intuitive judgments	Legal-intuitive judgments	Moral-dogmatic judgments	Legal-dogmatic judgments	

According to Lande ethical judgments should be distinguished from teleological ones according to their method of foundation (*metoda uzasadnienia*).

[28] In Petrażycki's terminology, to be accurate, the class of normative judgments is larger than that of ethical judgments, as it also includes aesthetic judgments. See Section 18.3, footnote 24, in this tome.

The correctness of teleological judgments depends on the truth of judgments expressing causal laws, which are a kind of theoretical judgments[29] (Lande 1959g, 411; 1959a, 789). The subjective nature of teleological judgments is owed to the Subject's freedom to choose his own goals or τέλη.[30]

The methods for the foundation of ethical judgments should be distinguished according to their ethical-intuitive or ethical-positive nature. Let us first consider the foundation of legal-dogmatic judgments and then turn to intuitive-ethical ones.[31]

According to Lande, even though legal-dogmatic statements are truth-*incapable*, they are formulated as if they were truth-*capable*, that is, as if they expressed theoretical judgments (to use Lande's Petrażyckian terminology):

> The form of the statements [*zdania*] in which the dogmatician expresses his doctrine [*wykład*] should not deceive. If, for example, a treatise on Polish constitutional law should state—repeating after Art. 95 of the March Constitution—that "The republic of Poland guarantees across its territory a complete protection of everybody's life, freedom, and property without distinction of descent, nationality, language, race, or religion," its author is not expressing the theoretical (historical[32]) judgment that that declaration was factually made or that that state of affairs factually exists in Poland, but is exclusively expressing a normative, dogmatic judgment, namely, that pursuant to Art. 95 of the Polish Constitution the citizens of Poland and foreigners in Poland have a right to the protection of life, etc., and the other citizens and officials have an obligation to abstain from certain actions as to those citizen. (Lande 1959f, 387; my translation)

Now, Lande subscribes to Petrażycki's contention that rights and obligations do not exist outside the Subject. Therefore, judgments about them are not capable of truth. But this incapability according to him is not a flaw to be fixed by arbitrarily reinterpreting them as such truth-capable judgments as historical or sociological ones. This is something a careful realist like Lande would not do (on the concept of careful realism see Chapter 12 in this tome).

[29] Petrażycki and Lande distinguished theoretical judgments in a strict sense from theoretical judgments in a broad sense. All of them depend on the reality external to the Subject as for their truth. But theoretical judgments in a strict sense concern exclusively *classes*, while theoretical judgments in a broad sense include also judgments concerning *spatiotemporally individuated* phenomena. As for theoretical judgments in a strict sense they seem *not* to overlap with judgments expressing causal laws. A theoretical judgment in a strict sense, on Petrażycki's conception, has the form *every object that has property A also has property B*. If B need not also come *after* A, a theoretical judgment may be also a judgment concerning mere correlations. Neither Lande nor Petrażycki seem to have discussed this problem (cf. Petrażycki 1908, 100; Lande 1959d, 579). Moreover, both Lande and Petrażycki seem to assume that the connection between A and B may be not only causal but also logical, yet neither of them clarifies what a *purely* logical relation is supposed to consist in.

[30] As to the question of how to choose these teleological postulates, see Lande 1948, 830ff.

[31] Along with the subclass of moral-positive judgments, legal-dogmatic (i.e., legal-positive) judgments are a subclass of ethical-positive judgments. What Lande says on legal-dogmatic judgments holds also for moral-positive ones.

[32] On judgments concerning spatio-temporally individuated past events as theoretical judgments in a broad sense, see footnote 29 above.

Lande maintains that legal-dogmatic judgments, despite their truth-incapability, are capable of a foundation:

> We can found [*uzasadniamy*] [the correctness of a legal-]positive [judgment][33] ("Pursuant to normative fact NF, it is obligatory that P") by combining two theoretical statements [*konjunkcja dwóch zdań teoretycznych*]; a historical one,[34] namely, that that [normative] fact happened; and a descriptive one, namely, that that [normative] fact contains [*zawiera*] that provision; for instance, we can found the prohibition of homicide by invoking [*powołanie się*] the fifth divine commandment or the appropriate article within the penal code (in common practice, the proof of the historical statement [*zdanie*]—which would often cause difficulties—is dropped, and we are content with indicating the text where the norm can be read). (Lande 1959a, 828ff.; my translation)

Thus, the correctness[35] of a legal-dogmatic statement is founded through the conjunction of two operations, which consist in

1. proving the truth of a historical judgment,[36] and
2. proving the truth of a descriptive judgment.

As regards (1), the fact that this kind of investigation is usually not undertaken is a consequence of the historical development of official gazettes (cf. Petrażycki 1909–1910, 520).

[33] To be sure, Lande uses the phrase *obowiązywanie normy* (the bindingness of a norm). I choose to avoid this terminology in the text because it may deceive the reader. Indeed, from Lande's Petrażyckian perspective a norm is *not* a linguistic phenomenon but rather the content of an ethical judgments—and judgments need not be expressed linguistically (see Sections 12.4, footnote 21, and 18.5 in this tome). In Lande the term *obowiązywanie* designates the Subject's adhesion to the content of some normative judgment. The *obowiązywanie* of the content of a normative judgment within the Subject parallels the Subject's belief in the *truth* of the content of a judgment (cf. Lande 1925a, 333, and footnote 57 below).

[34] Here Lande is using the term *historical* in a strict Petrażyckian sense. In the same text, however, Lande rejects Petrażycki's breakdown of spatiotemporally determined (or *konkretno-indywidualne*) judgments into historical, descriptive, and predictive ones, proposing in its place an opposition between judgments about objects in a *static* state and judgments about objects in a *processual* one (Lande 1948, 736).

[35] Lande was not as precise as Olivecrona in using the terms for "correctness," but he definitely did on occasion use these terms in order to avoid using other terms meaning "truth" (see Section 12.7 in this tome).

[36] In the case of certain normative facts, such as novelty-modelled custom (see Section 18.10.2 in this tome), the judgment is a descriptive one, since it concerns facts believed to take place *currently*. Let me remark that this also holds for cases of normative facts where some special *currently existing form* is required. Think of some kind of contract for the validity (and consequent bindingness) of which the *current existence* of a written instrument is necessary (*forma ad substantiam*, in Italian legal Latin, its equivalent in English law being the memorandum required under the statute of frauds). In such cases historical investigations are not necessary for the foundation of the correctness of a judgment about the "existence" of the obligation founded on that contract. It is the contract—understood as an *instrument*—that must be currently existing, and the same may hold in certain legal systems for registration of property in a land registry as discussed by Lande (see Section 2 above). This implies that the conditions of correctness that Lande talks about are indeed two, but they cannot be distinguished depending on their being historical or descriptive: They must instead be distinguished depending on their being semantic or nonsemantic.

As regards (2), it could be asked what exactly it means to *ascertain whether a certain normative fact contains a certain provision*. To my knowledge, Lande did not address this question. Neither Lande nor Petrażycki sufficiently investigated the problem of the interpretation of the various kinds of normative facts. As an adherent to this tradition of thought, I think the ascertainment Lande talks about cannot be understood in any other way than as an empirical-semantic investigation as regards the psychical-representational effects that a certain normative fact may cause in the people exposed to it.[37]

The fact that the correctness of legal-dogmatic judgments depends on empirically ascertainable facts makes some intersubjective convergence possible as regards their correctness or incorrectness, and this despite their truth-incapability. It is worth remarking, in passing, that this intersubjectiveness depends on the objectivity of both sematic and historical phenomena—namely, on assumptions that are largely out of fashion in the contemporary philosophical market, with the notable exception of Popper and Albert's critical rationalism.[38]

Lande's contribution in this context is especially important because he showed that Petrażycki's conception of legal dogmatics is by and large compatible with Kelsen's (so long as we forgo Kelsen's claim that legal dogmatics should be entrusted with providing a general concept of law).[39]

This compatibility comes through clearly where Lande incorporates into his Petrażyckian conception of legal dogmatics Kelsen's idea of a *Stufenbau*, an idea that to my knowledge never emerges in Petrażycki's writings.[40]

[37] A line of investigation that may prove necessary (especially where statutory interpretation is concerned) is into the historical intentions of those who have drafted a statute. The distinction between the representation in the psyche of the *producer* of some statement (*Sinn*) and the representation in the psyche of the *receiver* of that statement (*Bedeutung*) is Hans Albert's (e.g., 1994, 65; cf. also Fittipaldi 2003, 108, n. 86). It goes without saying that where normative facts such as custom are concerned, only the *Bedeutung* can be investigated. To my knowledge the symbolic nature of normative facts was first pointed out by Jacek Kurczewski (1977b, 103).

[38] Let me observe, again in passing, that the Hartian debate on the meaning of the term *vehicle* might have perhaps looked quite different if analytical philosophers had been interested in empirical investigations such as the ones undertaken by Eleanor Rosch (e.g., Rosch 1975). On Hans Albert's ideas about history as a *Realwissenschaft* (a science of reality), see the extensive discussion in Fittipaldi 2003, 2013d.

[39] The effort to produce a *reductio ad absurdum* of this claim of Kelsen's is basically the subject matter of Lande's *Norma a zjawisko prawne* (Norm and legal phenomenon: Lande 1925a).

[40] To avoid misunderstandings, I should stress that in Petrażycki's theory of law (which is a psychosociology of law) there is hardly any room for a *Stufenbau* (cf. Section 18.10.3 in this tome). From a Petrażyckian perspective, for example, whether or not people experience contracts as psychologically binding normative facts *because that is stated in the civil code* is a purely empirical question, so it cannot be answered by any a priori method. Instead, as Lande demonstrates (see the discussion that follows), a *Stufenbau* is perfectly compatible with a Petrażyckian legal dogmatics.

Lande (1959a, 829)[41] explicitly contends that the proof of the correctness of a *legal-dogmatic judgment*[42] *concerning the "existence"*[43] *of a contractual obligation* depends on its being in accordance with the civil code. This being in accordance depends on the truth of the following two theoretical statements:

1. a historical one, namely, that the contract was actually entered into; and
2. a descriptive one, namely, that the civil code contains a provision such as "Il contratto ha forza di legge tra le parti" (Art. 1372, first paragraph, of the Italian Civil Code) and that this provision means[44] that the contract has the force of law between the parties.[45]

In turn, the correctness of a judgment about a contractual obligation is logically correlated with the correctness of a judgment concerning the dogmatic being-in-force (or bindingness) of the civil code. Here, too, the correctness of the judgment at issue (i.e. the one concerning the being-in-force of the civil code) depends on two theoretical judgments:

1. a historical one, namely, that the civil code was historically passed;[46] and
2. a descriptive one, namely, that contained in the constitution is a provision such as "Tutti i cittadini hanno il dovere di essere fedeli alla Repubblica e di osservarne la Costituzione e le leggi" (Art. 54 of the Italian Constitution) and that this provision means that all citizens have a duty to be loyal to the republic and to uphold its constitution and statutes.[47]

[41] In the text I make explicit what in Lande is implicit by combining what he says about the *Stufenbau* with what he says about the correctness of legal-dogmatic statements as depending on the truth of two theoretical judgments: a historical one and descriptive one. The examples are mine.

[42] Lande speaks of *obowiązywanie pewnej normy umownej* (the bindingness of a certain contractual norm). I will stick to my terminology (see footnote 33 above).

[43] I use *existence* in quotation marks because from a Petrażyckian-Landian perspective we are dealing here, not with an existence *external* to the Subject, but with a *purely internal* existence. Although Lande does not use here a term meaning "existence," elsewhere (e.g., Lande 1959b, 864) he uses terms such as *istnienie* often enclosing them within quotation marks. As a careful realist, Lande takes care when using terms meaning "existence" or "reality," and so do I in the text.

[44] On the meaning of *meaning*, see footnotes 37 and 38 above.

[45] To be sure, the conditions of correctness may be more complicated than is stated in the text, as anankastic conditions may also be involved. The concept of an anankastic condition is by Amedeo G. Conte (e.g., Conte 1997). Lande would have refused to use the term *norm* (*norma*) to refer to Conte's anankastic-constitutive rules (cf. Lande 1959c, 934) because, according to Lande, the "rules" that Conte would call "anankastic-constitutive" are exclusively concerned with the *hypothesis* of a norm (its *Tatbestand* or *fattispecie astratta*, in German and Italian, respectively), and so they contain no ought-effect (*Rechtsfolge* or *disciplina*, in German and Italian, respectively). A similar position is argued as well in Pattaro 2005, 18. (In Fittipaldi 2014 and 2015, I suggest a possible way in which Petrażyckian legal realism can be made to accommodate the phenomena pointed out by Conte.)

[46] On the *anankastic* requirement that the code be enacted in accordance with a constitution, see the previous footnote 45.

[47] For the sake of example we are assuming that the Italian Civil Code was enacted or recog-

In further turn, Lande mentions a previous constitution and concludes—very much in line with Kelsen—that "the fact of the revolution happens to be the normative system's supreme normative fact [*najwyższy fakt normatywny*]" (Lande 1959a, 829; my translation).

Lande observes that also in the case of the correctness of legal-dogmatic statements, and not only in the case of teleological judgments, there is some sort of connection with empirical facts. But, according to him, it is obvious (*oczywista*) that the empirical foundation (*uzasadnienie empiryczne*) of legal dogmatic statements is completely different (*zupełnie inne*) from the empirical foundation of teleological ones. While in the case of teleological judgments the facts being drawn upon are *causal laws*, in the case of legal dogmatic judgments the facts being drawn upon are *spatiotemporally ones*, and so capable of being individuated.

Now it should be clear why Lande held that Kelsen went—"not without mistakes"—in the same direction as Petrażycki in trying to "purify legal dogmatics of psychological elements extraneous to it" (Lande 1925c, 376; my translation; cf. 1925a, 262 n. 2). Kelsen's purification corresponds to Petrażycki's sharp distinction between practical and theoretical sciences.

The foundation of legal-dogmatic judgments has nothing to do with the ascertaining of psycho-legal experiences outside the Subject. If that were the case, those judgments would be capable of truth. The foundation of legal-dogmatic statements is made via an indirect reference to empirical facts, and these empirical facts can in no way be understood as their conditions of *truth*, since legal-dogmatic judgments do not concern any reality external to the Subject.

Let us now turn to legal-intuitive judgments.[48] These form a subclass of ethical-intuitive statements, in which regard Lande simply writes that "also in this case the foundation can go through a few steps and will then encounter a vacuum where the psychologist spots an emotion, and a philosopher—an ethicist or axiologist—spots an axiom [*axiomat*] or a 'primitive feature' [*cecha pierwotna*]" (Lande 1959a, 829; my translation). It is not clear whether Lande thinks these judgments should rest on a foundation like that of judgments belonging to Kelsen's static systems (e.g., Kelsen 1945a, sec. X.A.b). In my opinion, another line of development, one that is even more compatible with Petrażyckianism, could be found in Weber's (1968) discussion of *letzte Wertaxiome* (ultimate value axioms), as he discussed the possibility of multiple potentially conflicting axioms within the same Subject.

nized in accordance with the 1948 constitution, even though this is not what happened (on how this problem might be dealt with from a Petrażyckian perspective, see Fittipaldi 2013a).

[48] The term Lande uses for these is *normy absolutne*, which in a Petrażyckian terminology is synonymous with *intuitive norms*.

19.5. Comparing Legal Dogmatics with Prescriptive Grammar to Understand the Nature of Dogmatic Sciences

In most of his writings, Jerzy Lande compares legal dogmatics to prescriptive grammar. He does so in order to discard the claim of certain legal philosophers (first among them Hans Kelsen) that the basic concepts of the theory of law should be provided by legal dogmatics.

Through this comparison Lande seeks to show that it is impossible to reduce the concept of law to the concept of positive law, and even less to the concept of dogmatically binding law.

For example, the class of legal phenomena comprises not only the experience of powers on the part of some "duly"[49] appointed police officer or the convictions of certain contractual parties concerning the obligations stemming from a "valid" execution of their contract (my examples), but also the convictions of the members of some criminal organization as to the way they should distribute the spoils of a robbery or some madman's conviction of being entitled to rule the moon and to transmit this power to his descendants (Lande's examples). A legal theorist who should refuse to recognize even these latter phenomena as *legal* phenomena would be acting like a linguist who should refuse to recognize as a *linguistic* phenomenon some such English usage as "There ain't no war" or "all of the sudden" just because that linguist considers these specimens of language to be poor or incorrect English (Lande 1959b, 869).[50]

In my opinion, the purport of Lande's comparison is much more than polemical. The comparison may be scattered across different writings, to be sure, but it shows how Petrażycki's conception of normative phenomena can be fruitfully applied even in a field where Petrażycki, to my knowledge, never thought of applying it.[51]

To begin with, Lande (1959b, 874ff.) remarks that, owing to the conflict-producing nature of legal phenomena (see Section 18.8.6 in this tome), there

[49] The term *duly*, as well as the term *valid* just below, is written in quotation marks to emphasize that in a Landian-Petrażyckian perspective the being *duly* appointed of some police officer or the being *validly* executed of some contract are not their *objective* qualities, but rather qualities superimposed on them by the Subject.

[50] The usage examples are mine. Lande just writes that a "jurist who limits his concept of law to the domain of official law acts in the same way as a linguist who were to recognize as Polish language exclusively the system according to which he evaluates the 'correctness' [*poprawność*] of the way students speak" (Lande 1959b, 869; my translation).

[51] In his early writings, Petrażycki held that linguistic normative evaluations are of an esthetic nature. But Lande reports that Petrażycki subsequently became sceptical of that view, so Petrażycki may have held that there can be also normative emotions that are neither ethical nor esthetical (Lande 1959a, 826). Be that as it may, it bears recalling here that Lande not only compared legal dogmatics to prescriptive grammar (he spoke of *dogmatyka językowa*, "linguistic dogmatics": Lande 1947, 36) but also explicitly addressed the issue of *policy of language* (*polityka językowa*) (ibid.). Thus, Petrażycki's distinction between theoretical legal sciences, legal dogmatics and legal policy is perfectly mirrored in Lande's treatment of language.

is a much stronger tendency toward the positivization of legal convictions than toward the positivization of linguistic-normative ones. But that is not to deny that even in language there may be normative facts that people may invoke in order to found some linguistic conviction of theirs.[52]

Lande (1959h, 658; 1947, 36ff.) mentions in order of importance four normative facts prescriptive grammarians, as well as educated people, use to refer to: (1) custom, (2) models taken from certain writers, (3) the opinions of grammarians, and (4) statutes.[53]

As for custom (cf. Section 18.10.2 in this tome), it usually consists not in (the representation of)[54] the language spoken by the people at large but rather in (the representation of) the language spoken in certain milieus or areas (Lande 1959a, 831). In certain cases multiple customs are taken into account at the same time, as has been the case in Italy for centuries: *Lingua toscana in bocca romana*, meaning "Tuscan language in a Roman mouth" (my example).

As for the models taken from the most prominent writers (ibid.), it is usually only the most prominent literary writers that are taken into account (as for Italy, think of Manzoni in 19th century),[55] but in certain cases this role has been played by intellectuals, such as Martin Luther and his influential translation of the Bible into German (my examples). It goes without saying that this normative fact parallels the models of conduct of religious-ethical authorities mentioned by Petrażycki (see Section 18.10.11 in this tome).

As for the opinions of grammarians (which parallel the opinions of the individual jurist: see Section 18.10.6 in this tome), think of how influential Noah Webster was on the development of American English (my example).

Finally, as regards statutes, Lande gives the example of the 1936 reformation of Polish orthography (Lande 1946, 701). In order to avoid misunderstandings, it should be stressed that Lande uses the term *statute* in Petrażycki's sense (see Section 18.10.1 in this tome), so, for example, there is no need for the academy that issues certain linguistic directives to be officially charged with that role by the state. It suffices that these directives be *experienced* as binding linguistic statutes by somebody. Their prestige[56] may be completely independent of their recognition by a state authority.

[52] Lande does not discuss where the push toward the standardization of languages may come from. One factor may be the nation-building processes.

[53] On further normative facts in the field of language see Lande 1947 (34ff.).

[54] Let me observe, in passing, that even in this context Petrażycki's emphasis on the fact that normative facts are *representations* is paramount. Only with this qualification is it possible to accommodate such phenomena as hypercorrections (e.g., *expresso*) or hyperurbanisms, neither of which Lande examined.

[55] For instance, Manzoni often used the suffixes *-avo*, *-evo*, and *-ivo* to form the imperfect first person singular of verbs, and that probably led to their eventual replacement of the more antiquate suffixes *-ava*, *-eva*, and *-iva* (Serianni 1988, sec. 11.72).

[56] It bears recalling that in a Landian-Petrażyckian perspective terms, such as *prestige*, *being-in-force*, *bindingness*, *authority*, are used as synonyms when referred to normative facts.

Just like legal dogmatics, prescriptive linguistics is also a subjective-relational science. The correctness or incorrectness of linguistic behaviors lies exclusively within the Subject and depends on his *Grundnorm*. This phenomenon is in turn akin to that of dogmatic religion:

> "The law in force" is a section of the whole domain of law in general, a section selected through our recognizing it as binding for us [*obowiązujący dla nas*[57]], just as the "true religion" is a system selected from among innumerable religions on the basis that we believe in it, or "correct language" is a section of linguistic phenomena selected on the basis that we recognize it as a binding model. (Lande 1959h, 657; my translation)

All kinds of dogmatics, according to Lande, presuppose that the Subject subscribes to their ultimate axioms,[58] and this makes them subjective sciences that have nothing to say about the reality external to the Subject as such. Prescriptive grammar is simply a case where this is more evident.

[57] To avoid misunderstandings it should emphasized that the pronoun *nas* in the phrase *obowiązujący dla nas* ("binding for us") is not to be taken as referring to a collective Subjectivity. That pronoun should rather be understood as referring to the dogmatician as *the* Subject. See, for example, among many passages, Lande 1925a, 303, where Lande talks of the researcher in the singular (*badacz uznaje za obowiązujący*). See also the second block quotation in the previous Section 19.3, as well as the next footnote.

[58] Where legal and moral dogmatics are concerned, Lande (1925a, 294) speaks of *zsolidaryzowanie się z jego treścią* ("solidarity with its content"). It is not clear whether it suffices to have an *als ob* solidarity, just like the one Hart refers to when saying, "One vivid way of teaching Roman Law is to speak *as if* the system were efficacious still" (Hart 1994a, 104). Elsewhere Lande writes that "a norm is binding, a religious thesis obliges, a theoretical thesis is true, only for the person who accepts its content as his own" (Lande 1925a, 320; my translation). To be sure, here Lande is probably stating that a theoretical thesis is *experienced as true* only for the person who adheres to it.

A problem with Lande's (and probably Petrażycki's) contention that subjective-relational sciences presuppose the Subject's adherence to their ultimate normative facts or axioms is that this contention seems to rule out the possibility of *assumptions* (*Annahmen*) *without inward adherence*. This argument, if taken seriously, would rule out the very possibility of such an argument as a *reductio ad absurdum* (cf. Fittipaldi 2013d, 92ff.). How can we not be reminded of Giovanni Saccheri here? He attempted to prove Euclid's fifth postulate by *reductio ad absurdum*, by first (*a*) assuming that the sum of the internal angles of a triangle is less than 180° and then (*b*) assuming that that sum is more than 180°. In case (*a*) he proved that straight lines are finite, while in case (*b*) he proved that there exist two straight lines which, when stretched to infinity, merge into a single straight line and have a common perpendicular at infinity (Wolfe 1945, sec. 22, 32). It is obvious that Saccheri did *not adhere* to either (*a*) or (*b*), as his goal was to prove Euclid's fifth postulate precisely by proving postulates (*a*) and (*b*) to be absurd.

That the theorist of dogmatics should abandon the view that a dogmatician must necessarily adhere to the axioms of the dogmatic system he elaborates is all the more implied in Lande's reconstruction of dogmatic (or axiomatic) thinking, considering that Lande (1925a, 333) himself speaks of one among several possible systems of logic and mathematics (*z pośród możliwych*). Such a statement seems to rule out inward adhesion as always necessary (cf. Fittipaldi 2013d, 92). If this is so, then Lande was able to go a little bit farther than Olivecrona, who as recently as in 1971 expressed the view that "the assertion that a statement is correct contains a reference to fundamental evaluations" (Olirecrona 1971, 265) and that "[a]rgumentation of this kind becomes meaningless from the point or view of a neutral observer" (ibid.). On this issue see Spaak 2014, 210, as well as the other authors quoted there. For a defence of Olivecrona's distinction between truth and correctness from the standpoints of 1960s Polish-Russian legal realism and modern logical and mathematical pluralism, see Fittipaldi 2013d.

Chapter 20

OTHER RUSSIAN OR POLISH LEGAL REALISTS

by Elena V. Timoshina, G. Lorini, and W. Żełaniec

20.1. Max Lazerson's Psychological Theory of Law (*by Elena V. Timoshina*)*

20.1.1. Introduction

Max Lazerson (1887–1951)—a disciple of Leon Petrażycki, graduated from the university of Saint Petersburg in 1916. In 1920, he emigrated to Latvia, where he wrote his major work, namely, *Obščaja teorija prava* (General theory of law: Lazerson 1930). After that he lived for some years in Palestine. In the early 1940s, through the help of another pupil of Petrażycki, Pitirim A. Sorokin, he moved to the United States and taught at Columbia University.[1]

Whereas other pupils of Petrażycki took different methodological directions, Lazerson in his works consistently kept to the tenets of psychological realism.[2] His most original idea (as compared with Petrażycki's) was probably his development of a realist conception of natural law. Aside from that, his works are interesting because they make it possible, to some extent, to reconstruct the attitude the psychological theory of law took to certain new directions in theoretical jurisprudence (such as Kelsen's theory of law and phenomenology).

20.1.2. The Object and Method of Legal Theory from the Standpoint of Psychological Realism

Lazerson characterizes his theoretical position as *psychological realism*, or *psychological positivism*, and this, according to him, is the only possible—and even "inevitable"—path for the development of legal theory.

In the first place, he considers it necessary to draw a strict line of demarcation between legal theory and the philosophy of law. The lack of such a demarcation, according to him, hampered the development of legal theory as a freestanding science. As a consequence of the continuous close contact between general philosophy and so-called philosophy of law, the latter turned

* I am grateful to Edoardo Fittipaldi for his remarks, which helped me to improve the final version of this essay. This Section 20.1 has been translated from Russian into English by him.

[1] Over the course of this discussion several of Lazerson's most important works will be mentioned. Following is a list of works that will not be mentioned directly but are nonetheless significant for an understanding of his philosophy: Lazerson 1918, 1926, 1927, 1933, 1945a, 1945b, 1951, 1981.

[2] On Petrażycki's theory of law see Chapter 18 in this tome and Section 16.2 in Tome 1 of this volume.

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into a branch of general philosophy. This results in the fact that the variability and diversity of the different philosophical schools find their stereotypical mirroring in the philosophy of law. Lazerson suggests that this is to account for the marginal position of legal theory. Philosophically educated jurists devote their efforts to styling their works after fashionable philosophical doctrines and remain within the framework of the legal philosophy developed within those doctrines. As for dogmatic jurists, they are not interested in philosophical issues, because they do not regard them as relevant for practical disciplines. In this way legal theory and its adepts "hang in the air [*povisajut v vozduhe*]" (Lazerson 1930, 69; my translation) between philosophers of law and worshippers of dogmatic jurisprudence. That, Lazerson (ibid., 69ff.) concludes, is the tragic destiny of legal theory.

Hiding behind the dividing line that Lazerson draws between legal theory and the philosophy of law is his conviction of the latter's superfluity. In making that argument, he refers to Petrażycki's scheme:

philosophy of law = legal theory + legal policy

It is apparent that the objective-cognitive theses of the theory of law and the subjective-relational theses of legal policy cannot, by addition, amount to a freestanding scientific discipline, and this very addition contradicts Petrażycki's thesis—a thesis Lazerson subscribed to—on which theoretical and practical judgments cannot be mixed within the same science.

Lazerson thought it necessary to conceive legal theory as a "premiseless [*bespredposyločnaja*] science" (Lazerson 1930, 60–2; my translation) whose purpose in investigating its object is not to illustrate the correctness of the contentions of this or that philosophical school. In the end legal theory should become "immanent [*immanentnaja*] in an authentic sense" (ibid.; my translation), rather than be built in the spirit of this or that stream. The only path that makes it possible to build a legal theory that ceases to be "a conglomerate of certain premises lying […] outside and before any empirical experience [*opyt*] and causal research—a conglomerate brought about by changing religions, ideologies, and philosophical and sociopolitical schools" (ibid.; my translation)—is the path proposed by psychological positivism. Only proceeding from the explanation of law (*pravo*)[3] as a psychical experience can legal science rid itself of its dependence on the historically changing aprioristic

[3] Since Lazerson adopts Petrażycki's correlativist theory of *pravo*, *Recht*, *droit*, etc., translating the Russian term *pravo* with the English term *law* may sometimes prove misleading. In these cases, depending on the context, I will sometimes use *law* followed by the Russian *pravo* within square brackets, or I will translate *pravo* as *right*. See Pattaro 2005, 5ff., on the difficulties involved in the attempt to systematically use *law* as a translation for *Recht*, *droit, diritto*, etc., *in an objective sense*. (Translator's footnote.)

premises posited by different philosophical trends (*napravlenija*), as well as to exclude references to certain meta-juridical facts—like the state's will or the economic basis—as law-generating (*pravoporoždajuščie*) factors. According to Lazerson, legal positivism's traditional denial of natural law and its restriction of its subject of investigation to nothing other than the positive law that has at its disposal the sanction of official recognition does not yet say anything about "the positiveness of legal theory" (ibid. my translation).

From here comes the *first* meaning of the term *psychologičeskij pozitivizm* (psychological positivism) understood as the "*positivization* of legal theory" (ibid.) namely, as a science concerned with the law's psychical *existence* [*bytie*], whereas the *second* meaning comes from its being characterized by its making use of the explanatory method, namely, the "method of causal research" (ibid.; my translation).

Following Petrażycki, Lazerson (ibid., 61) draws a distinction between theoretical and practical legal sciences.[4] The logical foundation of this distinction, according to Petrażycki, lies in the so-called *positions* (*pozycie*), which he defined as "the simple, not further reducible meaning, or content, of judgments or sentences" (Petrażycki 1939, 17; my translation). In the structure of a scientific theory he distinguished three kinds of positions: (1) the main ones, namely, the *theses* (*tezy*); (2) the *bases* (*bazy*), which play the role of foundations (*uzasadnienia*) for the theses; and (3) the accessories (*accessoria*: ibid., 60), such as examples and illustrations, etc. Petrażycki points out that the criterion for the classification of sciences lies precisely in theses. He distinguishes theses into *objective-cognitive* ones—evaluatively neutral, constative positions to which the criterion of truth can be applied—and *subjective-relational* ones, expressing evaluations, wishes, claims (*wymagania*), etc., to which the criterion of truth is inapplicable. Accordingly, he distinguishes the sciences into *theoretical* ones, whose theses have an objective-cognitive character, and *subjective-relational* (or *practical*) ones, and formulates the methodological rule that the bases of the theoretical sciences must be objective-cognitive positions, while the bases of the practical sciences may be both objective-cognitive positions and subjective-relational ones. As for the *theses* within one science, there should not be the confusion between theoretical and practical theses that is so typical of the social and human sciences. From this we can reconstruct Petrażycki's definition of theoretical and practical knowledge: A *theory* is a methodologically founded (*obosnovannyj*) system of objective-cognitive theses—the object of truth evaluations—whose subject is an adequate class; a *practical science* is a system, which is also built in accordance with the principle of adequacy but that is not an object of truth evaluations, and whose bases

[4] As regards the fact the Petrażycki's distinction between objective-relational sciences and subjective relational ones seems to violate Petrażycki's own principle that in every distinction there should be a unique *fundamentum divisionis*, see Fittipaldi 2013.

may have both an objective-cognitive and a subjective-relational character.[5] The definition just given highlights the possible connection between the theoretical and practical sciences where the theoretical validity (*obosnovannost'*) of some practical knowledge *may be one of the conditions* of its scientific soundness (*sostojatel'nost'*).

Also, Lazerson's starting point is that the theses of theoretical sciences are judgments concerning existence (*bytie*) and that they are capable of truth or falsity; the theses of the practical sciences, instead, indicate desirable or obligatory behaviors and as such are not subject of truth evaluations. Thus, if under the legal-customary norms of some peasants "a horse thief shall be killed," we are facing a normative judgment, which cannot be rejected as untrue. It can be rejected only through an evaluation, as by judging it "barbaric" or "obsolete" (Lazerson 1930, 66; my translation). Therefore, legal theory and legal dogmatics are a theoretical and a practical science, respectively, differing from each other as to both their object and their method. Legal theory is a science concerned with the psychical *existence* of law and is characterized by its using an explanatory method, while legal dogmatics is a science that studies positive law as a system of normative judgments by means of the so-called normative method.[6]

Lazerson's methodological position defines the main directions of his criticism of Kelsen's pure theory of law (for details, see Section 20.1.3 below). He views it as disastrous for legal theory that Kelsen should have removed it from the class of explanatory sciences—those that study "that which exists and the causal connections among phenomena [*byvanie i pričinnaja svjaz' javlenij*]" (Lazerson 1930, 64; my translation)—attributing a normative character to that science. On this ground Lazerson refused to recognize normativism as having a *theoretical* character. Lazerson characterizes as *methodological monism* the transformation of a method admissible within a certain subspecies of legal sciences into the universal method of jurisprudence (*jurisprudencija*). He viewed Petrażycki's classification of legal sciences as having the undoubted advantage of proposing a pure (*čistaja*) distinction between theoretical and practical disciplines, between their objects, theses, and methods (ibid., 64ff.).

In this connection, an essential difference between Petrażycki's position and Lazerson's should be recalled. Petrażycki formulates the following methodological rule: In order to build a theory, it is not sufficient to establish some factual existence (*faktičeskoe byvanie*); it is also necessary to establish

[5] See the previous Chapter 19 in this tome (on Lande) for a discussion of the kinds of possible involvement of theoretical judgments in the foundation of practical judgments in a Petrażyckian perspective.

[6] It should be observed that Petrażycki seems to have also recognized a dogmatics of intuitive law. See Petrażycki 1902, col. 1802, as well as Timoshina 2013b, 467, and Fittipaldi 2013a, sec. 4.

the existence of some *logical or causal connection* between the specific feature (*priznak*), or *differentia specifica*, of one class of objects (the theoretical subject) and the specific feature of another (that which is stated about that class, i.e., the predicate).[7] Lazerson instead confines the method of the construction of a theory exclusively to the establishment of *causal connections*, even though he does not explain the reasons for this limitation.

Finally, psychological positivism eliminates evaluative and normative judgments in the context of the definition of the essence of law (*pravo*). For this positivism there is no limitation on the law of a given era by the exclusion of other allegedly unjust laws, nor is there any limitation exclusive to positive law. As Lazerson maintains, "Unjust law [*nespravedlivoe pravo*] *is* law" (Lazerson 1930, 64; my translation and italics added). Evaluations do not exist in the context of a *positive* investigation of phenomena, and the elimination of clouding evaluations is possible if we address that which continues to be the only data directly accessible to investigation, namely, the human psyche.

20.1.3. A Realist Criticism of Normativism

In Petrażycki's works we can find only few critical mentions of "Kelsen and his school" (Petrażycki 1939, 59, 104; my translation). Lazerson's works are interesting also because they make it possible to reconstruct an attitude that psychological realism may possibly take to the pure theory of law.

According to Lazerson's characterization, normativism is a scientific trend that "does not consider it possible to search for the law in the domain of what really exists [*real'noe bytie*]" (Lazerson 1930, 22–3; my translation). Lazerson maintains that this produces the result that "norms lose the real roots [*real'nye korni*] of their causal existence and start to appear as something existing outside or above the real world of things" (ibid.; my translation). In analogy to the concept of commodity fetishism (*Warenfetisch*) of Marx's political economy, Lazerson characterizes this position as *legal fetishism* (*pravovoj fetišizm*). Just as the commodity fetishist ascribes a value to the commodity and to its material properties, the legal fetishist does something analogous to the legal norm *as such*, ascribing to it "the necessary property of obligatoriness [*dolženstvovanie*]" (ibid.; my translation), bindingness (*objazatel'nost'*), or

[7] Petrażycki (2010f, 461) clarifies this methodological rule in the following way. If it is established that between a feature *a* of a certain class *A* and another feature *b* there exists a *necessary logical connection*, such that from the assumption of the presence of *a* the presence of *b* necessarily follows, it is thereby proved that all thinkable *A*s are related to *b*. In just the same way, if it is established that between some property of a certain class and some property of another one there exists a *necessary causal connection*—that is, if the causal tendency *b* is characteristic (*prisuščaja*) of property *a* of class *A*—it is thereby proved that all thinkable *A*s have the property of having tendency *b*, that is, this tendency must be mentally ascribed.

force (*sila*).[8] Normativism, on Lazerson's interpretation, is the manifestation of the hypostatization (*gipostazirovanie*), or divinization (*obožestvlenie*), of norms characteristic of everyday thinking (ibid., 53). Accordingly, Lazerson views the uncovering (*razoblačenie*) of legal fetishism as one of the necessary conditions for the development of legal theory.

Lazerson views normativism in the same way as he views what he calls dogmatic positivism and historical materialism applied to law. All these conceptions are described as *naïve-realistic*,[9] in that they each identify the psychical existence of law with a reality of a different order: Law is viewed as something that acts upon the individual *from without*, and the individual appears exclusively as the object of an external influence.[10] According to him, as long as this heteronomy is not uncovered in a causal way, the scientific value of the corresponding statements is not much greater than that of the doctrine of the divine origin of law. Lazerson (1930, 53–5) holds that one of the methodological flaws of normativism consists in the fact that the naive-projective point of view—which in the first place is typical of everyday consciousness (*soznanie*), and which prompts one to see norms as entities existing outside time and space and as endowed with binding force—is turned into the methodology of legal-theoretical investigations.

But the main critical argument that Lazerson levels at the pure theory of law is its "methodological confusion" between legal theory and legal dogmatics. As a consequence of this confusion, the method of dogmatic jurisprudence in Kelsen appears as "the method for the knowledge of the essence of law" (Lazerson 1930, 24; my translation). The transformation of the normative method into the sole method of legal science, according to Lazerson, does not provide any methodological advantage: The analysis of positive law carried out by means of the normative method remains within traditional legal-logic

[8] Lazerson views his use of the concept of fetishism as analogous to Petrażycki's concept of emotional projection (on which see Section 20.1.5 below).

[9] This term is used by Petrażycki to characterize one of three possible "naïve-fantastical constructions" in legal theory. Next to *naive-realistic* (*naivno-realističeskie*) conceptions, he also distinguishes *naive-nihilistic* (*naivno-nigilističeskie*) ones—consisting in the negation of the existence of a certain legal phenomenon owing to the impossibility of detecting it in the "space" of external world (an example being the theory that juristic persons are nothing other than fictions)—and *naive-constructivist* (*naivno-konstruktivnye* or *naivno-konstruktivistskie*—Petrażycki used both terms interchangeably) ones, consisting in the creation of factitious constructions or excogitations for the phenomena pertaining to legal reality, a creation prompted by "a lack of something real corresponding to them" (examples are several different metaphysical legal theories, such as that of the "general will" as the fundamental source of law). In this regard, see Petrażycki 2010f, 399ff.

[10] Lazerson refers to Goethe's Mephisto (disguised as Faust): *Vom Rechte, das mit uns geboren ist* (*Faust*, I. Vers 1978), and in so doing he emphasizes that law has never seriously been considered as "born with us." In other words, it has never been conceived as an internal, psychological experience of the individual. According to him, not even the numerous supporters of natural law who talked of "innate" human rights are free from this reproach, because even here we have nothing other than a realistic *terminology* (Lazerson 1913, 870).

line of work by virtue of its using the rules of interpretation developed in legal dogmatics, and so it does not need a neo-Kantian characterization (ibid., 27).[11]

Finally, Lazerson emphasizes that by using two critical arguments—the argument of the tautological nature of the definition of the concept of law in terms of authoritatively enacted norms[12] and the argument of the infinite regress of sanctions[13] under the assumption that every legal norm must be guaranteed by a sanction[14]—Petrażycki "predicted" (*predskazal*) the necessary

[11] Compare in this regard Jerzy Lande's characterization of Kelsen's talk of transcendental idealism as "pretentious terminology." On Lande see the previous Chapter 19 in this tome.

[12] Petrażycki points to the fact that in that definition there is a *definitio per idem*: "A norm of law (*x*) is a norm set forth in the manner prescribed by the law (*x*) on the part of the organs established by the law (*x*) of the legal (*x*) community, namely, the state" (Petrażycki 2010e, 283ff.; my translation). With the rejection of the idea of a personified sovereign as the authority founding the legal order, the classical positivist concept of law necessarily took on a tautological character. As is known, and as is stated below in the text, the basic norm was also a tool intended to break out of this logical circle.

[13] Writes Petrażycki in this regard: "From the point of view of the theory of coercion, A norm (*x*) is a legal norm only in case there is another legal norm (x_1) that provides for the application of coercive measures in default of voluntary compliance with it (*x*), as when, for example, that other norm (x_1) prescribes to other people (a bailiff, policeman, etc.) to enforce it [*primenet' prinuditel'noe ispolnenie*]. But in turn, according to the theory of coercion, this norm (x_1) can be a legal norm only if there exists a further norm (x_2) that in case of default of voluntary compliance with norm (x_1) in its own turn provides for coercive measures (for example, if the bailiff, police officers, etc., are unwilling to voluntarily comply with their obligations, it prescribes that certain people adopt coercive measures against these disobeyers. In just the same way, norm x_2, must have a further sanction with a corresponding content, namely, x_3; and norm x_3 must be followed by sanction x_4; and so on to infinity" (Petrażycki 2010e, 289; my translation). Petrażycki accordingly concludes that "it is impossible to prove that a given norm fits such a definition, and so that it must be recognized as a legal norm, because that would require an infinite proof, and every end of the proof […], absent a further sanction, would at the same time be a proof of the fact that all the preceding norms are not legal norms (for example, if we arrived at norm x_{20}, but no norm (x_{21}) could be found that should provide for coercive measures in case of noncompliance with norm x_{20}, then it would turn out that x_{20}—because of its being a "noncoercive" legal norm—is a nonlegal norm, and so x_{19}—because of its being devoid of any legal sanction, namely, a sanction in the form of a legal norm prescribing coercion—would itself turn out to be a nonlegal norm, etc.)" (ibid.).

[14] Petrażycki's argument of the infinite regress of sanctions was subsequently recalled by Kelsen (1945a) and by Olivecrona (1948), as well as by Hart (2001, 171–3), in the context of the debate with Ross concerning self-reference in law. In a section titled "The never-ending series of sanctions," Kelsen agrees with this argument. At the same time, he proposes a solution for the problem raised by Petrażycki: On the assumption that the series of legal norms establishing sanctions cannot continue infinitely, Kelsen closes the series of sanctions with an ultimate norm whose sanction does not amount to an obligation for the subject authorized to exercise coercion. Kelsen makes the point as follows: "That a behavior is 'commanded' means that the contrary behaviour is the condition of a sanction which 'ought' to be executed. The execution of the sanction is *commanded* (i.e., it is the content of a legal obligation), if nonexecution is the condition of a sanction. If this is not the case, the sanction is only authorized, not commanded. Since this regression cannot go on indefinitely, the last sanction in this chain can only be authorized, not commanded" (Kelsen 1967, 25). But the impossibility of guaranteeing the efficacy of all rules of

and only possible line of thought for a consistently dogmatic "theory" of law, namely, the postulation of a basic norm (*Grundnorm, osnovnaja norma*) as the foundation (*osnovanie*) of a normative order (Lazerson 1930, 26).

According to Lazerson, the pure theory of law gives "an interesting, but stylized picture [of law] in one normative dimension" (ibid., 29; my translation). In Kelsenian normativism Lazerson sees the "historical fruit of 19th-century jurisprudence, which knew only positive law and its dogma, which stubbornly refused to view law as a real phenomenon and—against the general rise of empiricism in the sciences—moved […] legal phenomena into a world of constructional noumena [*konstruktivnye noumeny*]" (Lazerson 1914, 2161; my translation). Contemporary legal theory, according to him, must be built as a consistently realist theory. It is necessary to turn from the search for new methods of logical analysis of positive law to the internal psychical experience of norms and so to investigate, so far as possible, *the existence of the ought* (*suščestvovanie dolžnogo*).

20.1.4. The Psychological Theory of Law and Phenomenology

From the standpoint of psychological positivism, Lazerson also makes some remarks critical of phenomenological legal conceptions, characterizing them as "a phenomenological version of normativism." According to him, these conceptions reject the two main tenets (*osnovy*) on which the psychological theory of law rests: (1) the idea of the psyche, and hence psychology, as the sphere where law must be searched for [*nahoždenie*]; and (2) Aristotelian logic. He therefore establishes two fundamental differences separating the phenomenological theory of law from the psychological theory: Anti-psychologism and the rejection of the pyramidal system of traditional logic, namely, the method of definition *per genus et differentiam*. Lazerson (1930, 56–7) comes to the conclusion that the phenomenological school in jurisprudence simply transforms *definitio per idem* into logical necessity.

Lazerson's brief critical review of phenomenological legal conceptions provides us with an opportunity to say a few words about the general issue of a possible connection of the psychological theory with phenomenology.

A typical feature of Petrażycki's theory of law was the ambiguity of its methodological foundations. This resulted (1) in the possibility of its subsequent development, not only in a realist-sociological direction (Jerzy Lande, Adam Podgórecki, Jacek Kurczewski, Nicholas Timasheff, etc.), but also in a phenomenological one (Georges Gurvitch, Pëtr E. Mihajlov, Georgij A. Nanejšvili) and (2) in the establishment of a research tradition consisting of a

the legal order by means of rules establishing sanctions does not exclude the possibility of counting as legal norms only those rules that establish a sanction (for a critique of Kelsen's solution, see Timoshina 2011; Kraevskij and Timoshina 2012).

phenomenological interpretation of his theory. Phenomenological undertones were found in Petrażycki's idea of a self-sufficient (normative) motivation. For example, Gurvitch (2004, 345) held that the very method of describing the immediate data of legal consciousness (*pravosoznanie*)—a method that according to him was very close to the method of his contemporary German phenomenologists—allowed Petrażycki to arrive at the penetrating discovery of the imperative-attributive structure of legal (*pravovoe*) experience.[15]

An attempt to unify psychological realism, on the one hand, and the analytical phenomenology of Husserl's *Logische Untersuchungen* (*Logical Investigations*), on the other, was made by Pëtr E. Mihailov. He maintained that law can be viewed in two ways: (1) as a *real-psychical* experience and (2) as an *ideal-normative* element (*ėlement*) of consciousness. This "element" consists of legal norms, which according to Mihajlov have "an ideal-objective content [*ideal'no-ob"ektivnoe soderžanie*]" (Mihajlov 1914, 41–2; my translation), and which, along with mathematical entities (*veličiny*), belong to the domain of ideal-objective existence (*bytie*). In this connection, Mihailov emphasizes that legal norms, as contents of legal judgments,[16] should not be identified with judgments themselves understood as processes of thinking (*processy myšlenija*), namely, with certain psychical experiences. Mihajlov thus attempts to unify the "subjectivism of the real-psychological element of legal consciousness" (ibid.) with the "objectivism of the ideal-normative element of consciousness" (ibid.). As Mihailov writes: "Corresponding to the law as a real-psychical experience and process is the legal norm as an ideal entity [*veličina*] containing in itself *the objective idea of the legal ought* [*pravno-dolžnoe*] as such" (ibid.). In this way he concludes that, along with an understanding of law as a real phenomenon of psychical activity with its own laws of causal connections, we also need an understanding of law "as [a complex of] norms of legal-ethical obligatoriness [*normy pravno-ėtičeskogo dolženstvovanija*], as an ideal-objective element of legal consciousness dependent on the ideal connections of foundation [*osnova*] and consequence [*sledstvie*], and not at all on the real causal connections of coexistence [*sosuščestvovanie*] and consecution [*posledovatel'nost'*]" (ibid.).

The thesis can be advanced that Husserl's *Logische Untersuchungen* influenced the methodology of the psychological theory of law (Timoshina 2012, 177–203). This would make it possible to highlight several respects in which Petrażycki's epistemological ideas are similar both to the analytical-phenom-

[15] Gurvitch (2004, 345) maintained that the conception of a self-sufficient motivation is close to Max Scheler's theory of the emotional intuition of values. Georgij A. Nanejšvili, a pupil of Petrażycki, held that if we remove from Petrażycki's theory all that is incompatible with emotional apriorism—in which according to him lies its basic idea (*osnovnaja mysl'*)—then what we "gain is an extremely elegant phenomenological theory of law" (Nanejšvili 1987, 68).

[16] Judgment in a logical sense: *suždenie*.

enological tradition of Gottlob Frege, Franz Brentano, and Alexius Meinong in general and to the analytical phenomenology of Edmund Husserl's *Logische Untersuchungen* in particular. At least seven arguments as follows can be offered in support of that thesis.

(1) It is a common idea that the object of knowledge is not the external world but the internal experience of the subject psychologically (Brentano, Petrażycki) or phenomenologically (Husserl) understood.

(2) Both Husserl and Petrażycki admitted the mental existence of general objects (classes) and of corresponding general concepts as a necessary condition for theoretical knowledge.

(3) Petrażycki's conception of a general concept as "the idea of all that is thinkable as possessing certain features" ("every idea having the structure 'all that has the feature *a*'") and of a class as a thinkable object ("all objects possessing the property *a*") (Petrażycki 2010f, 428; my translation) can be compared to Husserl's conception of intentional objects and of general concepts.[17]

(4) Frege, Husserl, and Petrażycki all took as their starting point the idea that the extension (*ob"jom*) of a general concept (*ponjatie*) does not depend on the empirical existence of a certain finite set (*množestvo*) of objects, thinkable by means of a certain concept. In other words, the extension of a general concept is infinite, and the corresponding class (*klass*)—or, in Husserl's terminology, the *allgemeiner Gegenstand* (general object)—is a thinkable object distinct from the empirical population of the members of the class.

(5) Brentano, Meinong, and Husserl's conception of intentional objects as objects present in the consciousness regardless of the question of their correlation with empirically existing objects parallels one of the main tenets of the psychological theory of law, namely, that we should not search—"somewhere in space"—for empirical counterparts of the concepts of legal theory, be it the concept of a legal subject or of a legal object, of a right, or of a legal obligation. These concepts and the corresponding objects of thought exist exclusively as elements of the intellectual structure of legal emotions, that is, they exist exclusively in the consciousness of the subjects experiencing the corresponding emotions.

(6) When comparing Husserl's and Petrażycki's ideas, it should also be noticed that a starting point for both thinkers was the idea of the logical unity of scientific knowledge—an idea that, as Husserl wrote, ruled out the arbitrariness of the division of the realm of truth (*Reich der Wahrheit*) into objective

[17] An indirect argument confirming the conceptual "kinship" of the ideas developed by both authors lies in the fact that from a nominalist standpoint, Stanisław Leśniewski—an exponent of the Lvov-Warsaw school—spoke critically of Petrażycki's and Husserl's conceptions of general objects, emphasizing that these conceptions "distinguish themselves by the characteristic of taking even extremely fine thinkers to the 'back roads' [*proseločnye dorogi*] of objectless 'speculations'" (Leśniewski 1913, 29; my translation).

areas (E. Husserl 1900, 5) and brought about in Petrażycki an awareness of the need for a reformulation of the then-existing system of sciences in accordance with the principle of adequacy.

(7) Both thinkers shared the idea of the incommensurability between theoretical and empirical knowledge, and so of the logical impossibility of deducing a theory from a knowledge of collections of individual facts, an idea involving the criticism of the empiricist theory of abstraction on the part of both thinkers.[18]

Of course, from these comparisons it does not follow that Petrażycki's theory has a phenomenological nature, not least because the conceptual apparatus of phenomenology and its very method in the *Logische Untersuchungen* had not been yet developed. However, there are at least two conclusions that can be drawn from this comparison.

(*a*) The traditional appraisal (*ocenka*) of Petrażycki's theory as a consistent psychological positivism—an appraisal that Lazerson (1930, 65) subscribed to—may be partly undermined.

(*b*) The appraisal of the methodological foundations of the psychological theory of law partly depends on the theoretical orientation of the interpreter, who to some extent reduces this theory to his or her own methodological positions—in Lazerson's case, to his psychological positivism.

20.1.5. Law without Norms?

As suggested by Fittipaldi in Chapter 18 of this tome, on Petrażycki, one of the main points on which Petrażycki's theory differs from the other most consistent psychological theory of law ever proposed—namely, Enrico Pattaro's—is the secondary role that in Petrażycki's theory is played by the concept of a norm.[19] In Lazerson, the legal norm does not even play a secondary role; it is

[18] For further similarities and arguments, see Timoshina 2012, 177–203.

[19] It bears pointing out the following proximities between Petrażycki's and Pattaro's (2005) theoretical positions. (1) A proximity is to be seen, in the first place, in their idea that legal norms have a mental existence: In Petrażycki's interpretation, a legal norm is the content of a normative judgment understood as an emotional act, and the disposition to experience such normative judgments he calls *normative conviction* (*normativnoe ubeždenie*); in Pattaro's theory a legal norm is the content of a deontic judgment, experienced as normative by at least one individual, called a *believer in a norm*, and this individual's characteristic psychical state he calls *normative belief*. (2) Just like Petrażycki, Pattaro views legal norms as a "powerful motive of human behaviour" (ibid., 88). (3) Pattaro understands a legal norm as a rule experienced as "binding per se," and on these grounds he distinguishes legal norms from rules of prudence, which have a teleological orientation. This corresponds to the two kinds of motivation highlighted by Petrażycki: The self-sufficient, or normative, motivation (including the legal one as a species thereof) and the teleological one, motivating actions in view of a given goal. Therefore, the starting point for both Petrażycki and Pattaro is a general concept of normativeness as self-bindingness [*samoobjazyvanie*]. (4) Pattaro makes use of the concept of "type of action" in a sense analogous to the Petrażyckian con-

simply redundant: "We can […] think of law," he states, "without the existence of legal norms" (Lazerson 1930, 129; my translation).

Lazerson holds that the time of manifestation of norms does not coincide with the time of manifestation of law (*pravo*). Initially, legal claims where satisfied even without the existence of norms, as through a judicial decision. Only a long evolution of law under the influence of its unifying tendency (see Section 18.8.6 in this tome) can prevent us from removing the historical stratification and from seeing law in its "normless state [*beznormennoe sostojanie*]" (Lazerson 1930, 130; my translation). In supporting the thesis that legal norms are not necessary, Lazerson, among others, refers to the free law movement and to Soviet judicial practice, with its "revolutionary sense of justice [*pravosoznanie*]" (ibid.), as a foundation for judicial decisions.

The motivational action of law manifests itself not through norms but rather by virtue of the very emotional experience of law (*pravo*), which as such does not require norms. Legal norms have no reality. What in science are called *legal norms* consist exclusively in *the rationalization of the behavior that in a certain legal order is desirable*. Lazerson actually reduces the intellectual (*intellektual'nyj*) structure of legal emotions to the representation of action:

> What commands is not the norm itself, as its primitive understanding naively imagines, but exclusively the *pattern of behavior* [*obraz povedenija*] that was developed in that situation on a given range of conducts. (Lazerson 1930, 128ff.; my translation and italics added)

It could be remarked that Petrażycki's legal theory gives no grounds for so radical a conclusion as Lazerson's. According to Petrażycki, a legal norm is the content of a normative judgment—where a normative judgment is understood as an emotional act, namely, an emotion, the disposition to experience which Petrażycki called "normative conviction" (cf. footnote 19 above and Chapter 18 in this tome). The specific feature of normative judgments—as well as of normative emotions (of which legal emotions are a species)—is that (1) they approve or reject a certain type (*tip*) of behavior "not as a means to a certain end but as such," and that (2) they motivationally affect the subject's behavior. If we consider that the intellectual structure (*sostav*) of legal emotions coincides with the very elements of the structure that Petrażycki ascribed to legal norms, we can conclude that concealed in the term *legal emotion* is the concept of a legal norm understood, not as an emotional projection, but as a

cept of "action representation" [*akcionnoe predstavlenie*], understood as a representation of the type of obligatory behavior accompanying the normative motivation. (5) A proximity between their theoretical positions can be also seen in their explanations of the psychological mechanism by which legal norms are objectivized and universalized, a mechanism connected by Petrażycki to the "mystical-authoritative" nature of legal emotions and by Pattaro to the concept of *catholodoxia*—a reification, or hypostatization, of normative beliefs that results in the normative system being represented as "objectively" existent. More on the similarities between Petrażycki and Pattaro can be found in Timoshina 2011.

"real" psychical phenomenon, that is, as the actual experience of the value of the ought, which motivates one to realize that ought in action.

20.1.6. The Realist Interpretation of Natural Law

Lazerson's realist interpretation of natural law is probably the most original part of his legal views, because in the other parts he is entirely aligned with Petrażycki's legal theory. On the basis of Petrażycki's distinction of law into positive and intuitive,[20] Lazerson distinguishes different *kinds of intuitive law*. His purpose—in accordance with the position of psychological positivism—was to decouple the concept of natural law from any ideology and consider it "in a real-psychological way," namely, as a certain kind of psychical experience formed as the result of the evolution (*ėvolucija*) of the legal psyche. According to Lazerson, contending that the essential feature of natural law lies in one of its ideological vestments (religious, rationalist, etc.) is a mistake owed to a lack of understanding about the psychological nature of natural law (Lazerson 1930, 298ff.).

As is known, Petrażycki identified intuitive law with justice. In emotions of justice, he writes, "we deal with judgments concerning, not what is required according to the laws, etc., but what belongs, should be attributed to whom according to our 'conscience,' according to our autonomous convictions, independent of other authorities" (Petrażycki 2000, 404; my translation). The sphere of action of justice is that of the *distributio bonorum et malorum* (literally, "distribution of goods and bads") in which intuitive law coexists alongside positive law. The experience of justice influences the interpretation, application, and scientific construction (*osmyslenie*) of positive law and is a (peacefully or revolutionarily active) factor of its enactment, amendment, and abrogation. Clearly, Petrażycki is reproducing in a different terminology the old dichotomy between natural and positive law, despite his objecting to such a treatment of his conception of intuitive law as a sort of natural law with historically changing content. Petrażycki himself held that intuitive law should be recognized as "a more suitable *scale* [*masštab*] than morality *in criticizing positive law*" (Petrażycki 1902, col. 1802; my translation and italics added), because morality does not know claims and so is an inadequate scale for law.

Lazerson holds that the properties that Petrażycki determines for the whole sphere of intuitive law—first among them its individual variability[21]—

[20] While positive law consists of *heteronomous* imperative-attributive emotions prompted within the subject's psyche by normative facts, intuitive law consists of *autonomous* imperative-attributive emotions arising within the psyche of the subject without the mediation of normative facts (more in this regard in Chapter 18 of this tome).

[21] "Essentially [*principial'no*], intuitive law remains […] a law whose content varies for each individual, a law with no template, and as for its content, it can be stated that there are as many collections [*sovokupnosti*] of intuitive-legal convictions or collections of intuitive rights [*prava*] as there are individuals" (Petrażycki 2000, 383).

can be attributed only to one of its kinds, that is, to *individually-adapted* (*individual'no-prisposoblennoe*) intuitive law. Next to this kind he also distinguishes *socially-adapted* (*social'no-prisposoblennoe*) intuitive law, which according to Lazerson is what is conventionally referred to as natural law (*estestvennoe pravo*).

Between the two kinds of intuitive law there is an *evolutionary connection*. Through *social selection*, individually-changing (*individual'no-izmenčivoe*) law may become socially-adapted (natural) law. Lazerson clarifies this point through the following example: At a certain stage of social development a certain individual may feel the need for a certain independence from others. The transformation of such an individually-changing intuitive law into a natural-law "personal liberty" is the result of a continuous process of social selection. From Lazerson's point of view, it is only the individually-adapted law capable of motivating mass behavior that can turn into natural law. One of the factors of this transformation is the commonality of the conditions of formation and development of the individuals' intuitive-legal psyche within the confines of a social group.[22] At the same time he holds that there exist natural-law positions that can be thought of only as originally socially-adapted, an example being freedom of association or of assembly (Lazerson 1930, 282ff.).

It is apparent that in the illustrated argument, Lazerson is hardly successful in completely avoiding ideological biases. The question why and how certain natural rights (*prava*) are socially selected and not others, namely, the question of why these rights have the quality of "social adaptation" (*social'naja prisposoblennost'*), remains unanswered by him.

While the formula of individually-adapted intuitive law corresponds to the saying "Everyone has his truth" (*u každogo Pavla svoja pravda*), socially-adapted intuitive law purportedly recognizes that which has always, everywhere been held by everybody: *Quod semper, quod ubique, quod ab omnibus*. Natural law's claim to universality and immutability is viewed by Lazerson as a psychological *tendency* necessarily inherent in it, without which natural law—as socially-adapted intuitive law—could not assert itself next to individually-changing law, on the one hand, and to positive law, on the other. While the bindingness of positive law is owed to corresponding normative facts, the bindingness, or_motivational force, of natural law can be achieved only by invoking its "eternity," its sociocultural universality, its reasonableness (*razumnost'*). In this way, certain features that certain scholars traditionally ascribe to natural law are exclusively the expression of a "psychological necessity," namely, the strengthening of its motivational force in the absence of normative facts. Accordingly, natural law—viewed by Lazerson as "a stable element of people's

[22] However, this idea can also be found in Petrażycki (2000, 381), who talked of the intuitive law of a given contemporary civilized society, or of a given social class (workers, manufacturers, farmers, landowners), or of a given family, or of children, women, men, etc.

legal psyche [*narodno-pravovaja psihika*]"—is a universal socio-psychical phenomenon, and not in any way the set of natural-law doctrines formulated in the European culture of the modern era. It is precisely for that reason, according to Lazerson (1930, 310), that to argue for the "death" of natural law in consequence of the decline of natural-law doctrines is to misunderstand the psycho-legal and social essence of natural law as socially-adapted intuitive law.

Lazerson (1930, 287) distinguishes three kinds of law according to the degree of their motivational force: individually-adapted intuitive law, socially-adapted intuitive law (natural law), and positive law. In this connection he makes the proviso that positive law has strong motivational force only when its content coincides with natural law.[23]

Lazerson sums up his view as follows:

> The […] foregoing investigation of natural law as a kind of intuitive law does not need any ideological justification. It rejects theism, pantheism, rationalism, socialism, etc., as historically changing shells connected to different eras. By focusing on *functional role* [*funktional'noe značenie*], our objective investigation—ultimately based on the psychological theory of law—does not connect the *essence* of natural law to the *content* of the legal requests [*trebovanija*] it made in different ages, one after another. According to our point of view, not only is it inadmissible to reduce natural law to few norms mirroring […] its *eternal* minimal content: It is also inadmissible to be satisfied with affirming […] the *changing* content of natural law. (Lazerson 1930, 287; my translation and italics added in the first occurrence)

Lazerson's hypothesis about the evolutionary selection of intuitive-legal emotions makes it possible to assume, in turn, that the same evolutionary selection acts on positive law, first and foremost in determining normative facts. Therefore, Lazerson's idea may serve as an argument for the hypothesis that Petrażycki assumed that in the process of sociopsychological development a selection takes place in determining which facts wind up being interpreted as having a normative sense. If we consider the sociocultural perspective on the evolution of law as an evolution directed "toward the common good"—a perspective that goes to the very core of Petrażycki's Weltanschauung—then it becomes possible to remove some contradictions from his construction of normative facts. It cannot be maintained at all that *any fact whatever* can have a social relevance as to the foundation of rights and legal obligations. Those facts that cannot bring about "a social coordination of behaviors" cannot contribute to ethical progress. Therefore, the ethical end of the sociocultural evolution of law not only determines the social legitimacy of normative facts,[24] but also

[23] In setting out the connection between positive and natural law, Lazerson by his own telling went a little further than Petrażycki, but here we will not enter into the details of Lazerson's position.

[24] An interesting discussion and development of Petrażycki's conception of normative facts that differs from the account just offered can be found in Fittipaldi 2012b, 107ff., 112; see also Sections 18.6.3 and 18.10.12 in this tome. It should be recalled in this context that in Fittipaldi

shapes the character of the motivational processes responsible for the selection of what is socially obligatory (*social'no dolžnoe*) on the part of the subject.[25]

At the same time Lazerson's postulation of the action of a universal evolutionary tendency within law is the *premise* at the basis of his self-claimed premiseless (see Section 20.1.2 above) legal conception.

20.2. Czesław Znamierowski: From Social Ontology to Legal Realism
(*by Giuseppe Lorini and Wojciech Żełaniec*)

20.2.1. The Threefold Realist Dimension of Czesław Znamierowski's Philosophy of Law

Professor Czesław Znamierowski (1888–1967)[26] is reported to have been in the habit of interposing a peculiar question when giving exams at the law school of the University of Poznań. He would ask his students, "If you stood atop the City Hall tower and looked down, what would you see?" Observing his students at a loss for words, he would step in and answer, "Nothing but people and things." "But if that is the case," he would then go on to ask, "what use is legal reality, with its contracts, its legal statuses, its legal entities? How is a reality like that possible in the first place in a world of physical and mental beings?"

It is precisely that question that Znamierowski's philosophy of law attempts to answer, taking a realist premise as its point of departure.[27]

This realist premise consists in the negation of the existence of a dimension of reality above and beyond the dimension of the physical and the mental, be it a *social* dimension (a critique of Adolf Reinach's phenomenology)[28] or a *deontic* one (a critique of Hans Kelsen's "pure theory").

2012a an extensive linguistic investigation of legal phenomena is developed within the framework of Petrażyckianism, and before Fittipaldi's work, the only such attempt made was by Max Lazerson (1919).

[25] More in this regard can be found in Timoshina 2011, 65.

[26] Czesław Znamierowski (CHESSwahff znahmyairOFFsky) was a Polish legal scholar as well as a legal and social philosopher. For most of his life he taught at the University of Poznań (Poland) and was prolific from the early 1920s until his death. He studied for the most part in Germany, where he learned the phenomenological method as developed by Husserl's most brilliant student, Adolf Reinach, yet the stance he took to it was critical, as was his stance to the rest of contemporary German philosophy—and the same goes for his attitude to the legal philosophy of his great fellow countryman, Leon Petrażycki (cf. Fittipaldi 2012a and 2012b). He was and remained a lone genius, not only because he wrote in Polish but also, as we should like to argue, because the time in which his influence might, or should, have begun to make itself felt was uncongenial to intellectual endeavours like his, this owing to the Moscow-imposed totalitarian (Bolshevist-Communist) dictatorship in Poland (1944–1989). See Czepita 1986 and 1987, as well as Lorini and Żełaniec 2013. On Znamierowski see also Section 16.2 in Tome 1 of this volume.

[27] For a different take on Znamierowski's legal realism, see Gidyński 1968.

[28] For a discussion of Reinach as himself a realist, even if in a *sui generis* sense, see De Vecchi 2012. On Reinach see Section 4.2 in Tome 1 of this volume.

Using Occam's razor,[29] and unlike what Reinach thought, Znamierowski maintains that it is not necessary to accept the existence of a world of legal objects with their purportedly autonomous existence not reducible to either the physical or the mental, or a dyadic ontology à la Hans Kelsen that sets a world of the *ought* (*Sollen*) against the world of the *is* (*Sein*).

Znamierowski explicitly criticizes phenomenology for its assumption of a "new, social 'dimension' of reality," again invoking Occam's razor: "Phenomenology, so generous in multiplying beings beyond any necessity, is ready to enrich reality with a new dimension like that" (Znamierowski 1924, 71; our translation).

For Znamierowski, there is just the psychophysical reality, and legal reality is a part or a sub-domain thereof.

Znamierowski's legal realism takes shape, too, in the (originally phenomenological) postulate of returning to things (*res*) themselves, against what he calls "jurisprudence mythology," of whatever kind: "It appears important to me to accustom the reader to direct thinking of what things are like and disaccustom him from [a] museum-like interest in what various people think of […] things" (Gidyński 1968, 50; slightly modified quotation).

Other than that, Znamierowski's legal realism is characterised by a "substantialist" conception of legal reality, on which "the main role in the world of legal reality is played by the category of 'things' [*rzeczy*]" (Znamierowski 1922, 28; our translation).

In what follows, we shall try to reconstruct this Znamierowskian conception of legal reality taking our point of departure in social ontology, a philosophical discipline of which Znamierowski was one of the founders. Social ontology is the theoretical framework in which his realist theory of law can best be understood.

20.2.2. On the Origins of Social Ontology

Among the first thinkers to speak of social ontology was the German phenomenologist Edmund Husserl, who as early as 1910 introduced the term (*soziale*

[29] In the folklore of English-speaking countries, this principle seems to be about the simplicity of explanations (the simpler, the better; the more involved, the worse—all other things being equal). In Continental folklore, by contrast, the razor is about the number of assumed entities. The latter is also suggested by formulations in mediaeval Latin (or what is considered to be such) like *Entia non sunt multiplicanda praeter necessitatem* (Entities must not be multiplied beyond necessity). Now, these two razors are by no means equivalent. Explanations (proofs, considerations) that employ fewer entities are usually more complex than those that use more. As has been known at least since Russell and Whitehead, all mathematics can be built on the assumption that there exists just one entity, namely, the empty set (plus the operation of forming a set of any given elements). But even a schoolbook for grade-schoolers with mathematics employing just that entity would run to hundreds, if not thousands, of pages. Znamierowski himself mentions the razor (in the Continental sense) in Znamierowski 1925b, 7.

Ontologie) in a short essay accordingly titled *Soziale Ontologie und deskriptive Soziologie* (Social ontology and descriptive sociology), published posthumously in 1973 (Di Lucia 2003, 10).

It is with critical reference to the phenomenological tradition that in the 1920s Znamierowski began his studies in social ontology.[30] Social ontology was first mentioned by him as *ontologia społeczna* (see Lorini 2010) in a 1921 essay titled *O przedmiocie i fakcie społecznym* (On social objects and social facts: Znamierowski 1921, 2).[31] By *ontologia społeczna* (social ontology) Znamierowski means a new philosophical discipline distinct from sociology (*socjologia*), which Znamierowski understands as a science devoted to the task of building a "theory of specific social groupings" (*teoria konkretnych zgrupowań społecznych*).[32]

According to Znamierowski, social ontology is an a priori science (*nauka aprioryczna*) whose business it is to "establish general truths concerning every (actually existing or merely possible) form of social being" (*byt społeczny*). This science, he noted, is best "called social ontology, because it establishes general truths that hold for all social beings, both actually existing and merely possible, and because, as an a priori science, it is legitimate for it to point to its philosophical character by its very name" (Znamierowski 1921, 2; our translation).

Znamierowski returned to the expression *ontologia społeczna* three years later—in the introduction he wrote to his own book *Podstawowe pojęcia teorji prawa: Układ prawny i norma prawna* (Basic concepts for a theory of law: The legal system and legal norms, Znamierowski 1924, 5–6)[33]—so as to distance himself, ironically, from Husserl's phenomenology. In that work, Znamierowski refuses to construe *ontologia społeczna* in the rather narrow meaning attributed to it in Husserl's phenomenology. To him, social ontology is "not just direct, intuitive knowledge […] of the essence [*istota*] of entities—a knowledge gained by a pure eidetic intuition [*reine Wesensanschauung*]—but a system of more general cognitions of a class of objects delimited by conventionally accepted definitions" (ibid. 137; our translation).

[30] To be sure, even before that time, in an article of 1915, Znamierowski (1915) used the similar-sounding concept of the metaphysics of society (*metafizyka społeczności*), but on that occasion he was discussing Josiah Royce's philosophy of Christianity, so the concept (as developed in that context) does not have the requisite generality.

[31] As is known, exactly seventy years later, in 1991, Searle would be speaking of an "ontology of social facts" in his essay *Intentionalistic Explanations in the Social Sciences* (Searle 1991, 340), thus revitalising research in social ontology. Searle's major contribution to the field is his 1995 book *The Construction of Social Reality*. Znamierowski investigated social ontology in his essays *Psychologistyczna teorja prawa* (A psychologistic theory of law: Znamierowski 1922) and *Z nauki o normie postępowania* (From a theory of norms of conduct: Znamierowski 1927) and in his book *Podstawowe pojęcia teorji prawa: Układ prawny i norma prawna* (Basic concepts for a theory of law: The legal system and legal norms, Znamierowski 1924).

[32] More to the point, Znamierowski (1924) explained that relation by describing social ontology as the *foundation* of sociology and of the social sciences in general.

[33] Parts of that book are available in English in Znamierowski 1987.

The social sciences, Znamierowski (1921, 1–2) goes on to claim, badly need a unified and unifying foundation for basic concepts such as society, social act, social object, and social function: This unifying discipline is precisely what Znamierowski proposes to call social ontology, and without the basic concepts it seeks to ground, the single social sciences (each going its own way) will grope in the dark and entangle themselves in absurdities. In fact, Znamierowski is lucidly aware of the importance of method and of the consequences that, through the intermediating role of epistemology, first methodological choices will have on a theory yet to be built, and he opts for a method of "conventional construction whose legitimizing touchstone lies not in the 'dignity of truth' but in utility (fruitfulness)" (ibid., 3; our translation)—which is to say that he rejects the Reinachian intuitive insight into essence as a method.

Social ontology as proposed by Znamierowski in the 1920s branches out into an ontology of "social reality" and an ontology of "thetic reality." To these two branches we devote the next two sections.

20.2.3. Czesław Znamierowski's Ontology of Social Reality

In the 1921 article *O przedmiocie i fakcie społecznym* (On social objects and social facts: Znamierowski 1921), Znamierowski sketches out his own ontology of social reality in opposition to Adolf Reinach's phenomenology. At the basis of that ontology is an investigation of the essence of society and of social entities.

His main concern is to establish the essence of society as such, not by what he saw as a merely pretended intuitive insight, but by meticulously analyzing the concepts employed (and, to no lesser degree, the realities corresponding to these concepts) and the construction of new concepts.

After discussing this topic at length, Znamierowski arrives at the following definition: A society is a collective of at least two persons such that at least one of them knows of the existence of the other, not *simpliciter* but *qua* person, and there is a non-mind-dependent possibility for the person who knows of the existence of the other to consciously affect that other person by her action, and the former person knows of this possibility.[34] To be sure, in his original phrasing of this definition, Znamierowski (1921, 10) resorts to the metalinguistic device of saying "by the word 'society' we shall be denoting a collective," rather than saying (as we have) "a society is a collective," but it is clear from the context that what he means is the *thing*, not the word. That is, his definition is more like Aristotle's definition (ὁρισμός) than what we can expect from a modern philosopher.

He then goes on to discuss persons, the milieu, mind-independence, and other things relevant to his definition of society—always speaking of *things,* not of the corresponding *words*.

[34] Relevant in this context are the highly sophisticated views that Znamierowski (1939–1946) has on the nature of causality.

Znamierowski (ibid., 20ff.) then turns to the main subject matter of his essay, namely, social objects and social acts. Examples of the former are legal norms (including state constitutions), rules of social etiquette, and social institutions. He observes that the ontological status of such objects has not yet been established, and he embarks on a long refutation of Reinach's (1983) account of social objects as having a status different from, but on a par with, that of both physical and mental objects. Both an admirer of Reinach and a critic of him, Znamierowski tries to find a middle ground: It would be silly, he notes, cautiously siding with Reinach, to confuse the Polish Constitution of 17 March 1921 with the copies of this text which at the time were signed by the Marshal of the Sejm (the "speaker" of the Polish parliament), and which in this sense are the only "authentic" copies of that constitution, or with the mental processes of the lawmakers as they set about enacting that law. It would more generally be simplistic to insist that there is no third category of objects aside from the physical and the mental—that would amount to philosophical dogmatism, which Znamierowski (1921, 21) disapproves of. But wishing to take his point of departure in a position that implies the smallest number of contestable assumptions, Znamierowski maintains that a social object like the Polish Constitution of 17 March 1921 can be identified (which is not the same as asserting it to be identical) with a "peculiar system" (*specyficzny układ*)[35] of objects both physical and mental (mind-dependent), and perhaps ideal, such as Fregean "thoughts" or Russellian "propositions."

Next, we have social *facts* or *acts* (dynamic objects, as it were). Znamierowski faults Reinach for what in his view amounts to unduly restricting the concept to only one of its structural components, that is, to psychological-intentional experiences of both the actor and the person the act is directed at (the promisee, say, in the case of a promise). While this "undue restriction" (if it is such) gives Reinach the distinction of being the most important pre-Austinian student of what Searle later called "speech acts" (Smith 1990),[36] Znamierowski is right to point out that it is inadequate, as it leaves out the whole aspect of social facts that bears a connection to the environment and no connection to intentionality. The killing of a person, or a theft, Znamierowski observes, are very important classes of social facts in their own right, even though by their very nature they fail to contain the element of the "need of being heard":[37] They are not *vernehmungsbedürftig* (Znamierowski 1921, 3; our translation). A social fact, according to Znamierowski (ibid., 23), is (1) an intentional act aimed at bringing about a change in the social structure (2) via

[35] The word *układ*—which can be translated as "system," "arrangement," "disposition," "array," or the like—plays a very prominent role in throughout Znamierowski's work.

[36] Reinach's insightful and penetrating analysis of social acts is in Reinach 1983, 18–22.

[37] This "need of being heard," (or, more generally, perceived) according to Reinach (1983, 19), is one of the constitutive moments of a social act.

a change in the environment that envelops that structure, a change that brings about (3) an effective change in that structure itself. So, for example, in order for a homicide to be such (a homicide), it must be (1) conscious and purposeful (which involves intentionally envisaging the person to be killed *qua* person); but it must also (2) go through the stage of where someone (the killer) uses a lethal weapon (e.g., shooting a revolver), which is typically part of the environment enveloping the social structure the agent is intending to change; and (3) it must "hit its target" (in the literal sense of the person to be killed). These three moments—the intentional psychological act, the use of a means by which to change the environment, and the change actually effected in the social structure—are inseparable, and none of them is more important than the other two (ibid., 24).

Znamierowski (ibid. 24ff.) goes on to offer an interesting consideration on what he calls the social "significance" or "bearing" (*doniosłość*), on the one hand, and the social function (*funkcja*), on the other, of various social as well as nonsocial objects. Objects that are not intrinsically social but have social bearing are objects that in one way or another have an influence on social facts, as is the case with climate, the health of the population, technological advancements, and works of art. All objects of this sort, whether physical or cultural, are socially significant and have a social impact in that they can, and typically do, influence social facts. Of course, social objects and facts can themselves have such a bearing (ibid., 27). An object's social function, by contrast, consists in its being a condition for a social structure, or in its symbolizing a social structure, or in its being a regular means for a type of social action (ibid., 27). A social function so understood can be ascribed to material objects such as the property of a member of society, as well as to symbols, such as coats of arms, military flags, border posts, and suchlike. Objects that are social in themselves also have a social function.

At this point, Znamierowski extends his definition of a social act or fact by adding that it also includes acts directed not at persons but at other types of objects, as long as such objects are endowed with either a social function or a social bearing. An example is the theft or destruction of a military flag, and another is setting fire to a forest in an area of military action, in which case the social bearing of a forest lies in its strategic importance (ibid., 28).

An important difference between social bearing and social function is that the former, but not the latter, can come in degrees: It can be a matter of "more or less." An object can have various functions (an individual may happen to be at the same time the director of a local church choir, the president of a walking grandfathers' club, and chairman of the Joint Chiefs of Staff), thereby acquiring social bearing to a very high degree. But its different social functions remain separate: They do not "grow together," or concresce, just in virtue of existing next to other social functions. Another example might be a pathogenic bacterium, which ordinarily would have no social function at all, but it would

perhaps take one on if it were deployed as a bacteriological weapon, and in this case its social bearing would obviously be higher the more contagious the corresponding disease is (ibid., 29).

Armed with such distinctions, Znamierowski is in a position to solve various abiding problems in the social sciences. For example, is religion a social phenomenon, a complex of social objects and acts? he asks without mentioning Durkheim. No, because (as he argues) it is possible to be religious and practice one's religion all alone, without this entailing any changes in any social structure or any impact on the environment in which those structures exist. Yet religious practices typically do have a social bearing, and quite often a social function, and at least in this derivative sense they can be said to be social. Another example: Is the economy as such social? The production of material goods need not be, as Robinson Crusoe has clearly demonstrated. But then, again, as we noted above, the very existence of such goods typically has a social bearing and can be assigned a social function. Similarly, a buyer's choice, useful as this concept may be for the theory of marginal utility, is a nonsocial act; in the context of other such acts, that choice can acquire both a social bearing and a function (ibid., 31ff.).

20.2.4. Czesław Znamierowski's Ontology of Thetic Reality

Still more innovative is the ontology of thetic reality that Znamierowski expounds in his previously mentioned book *Podstawowe pojęcia teorji prawa: Układ prawny i norma prawna* (Znamierowski 1924). Here Znamierowski does not proceed from a presupposed ontological theory, as he did three years earlier (in Znamierowski 1921), taking Reinach's phenomenology of social reality as his point of departure. He instead charts an entirely new philosophical path. In his examination of concepts relevant to the philosophical study of the social and of the corresponding objects, Znamierowski makes a discovery that is fundamental for social ontology. He discovers a particular kind of *social entity*: These are entities that can exist only within society (*społeczność*), and he calls them *thetic entities*. (Forty years later John Searle will rediscover the ontological specificity of these entities, calling them institutional facts: Searle 2010, 10–1; cf. Lorini 2000.)

The ontological specificity of thetic entities lies in their existing by virtue of a norm, and in particular of a type of norm that Znamierowski calls a norm of construction (*norma konstrukcyjna*).

There is one kind of thetic entity that Znamierowski is particularly interested in studying: He calls it a *thetic act*, and in this class we find acts such as saluting, drawing up a will, playing chess, or celebrating a wedding—all of which he distinguishes from mere "psychophysical acts," such as walking or drinking a glass of water.[38]

[38] Much of what follows was anticipated by Znamierowski one year earlier in a talk he gave

As we shall see, this discovery of thetic acts marks a revolutionary moment in the study of legal realities. But let us begin with the ontology of social reality, examining its fundamental moments as presented in Znamierowski 1924.

Right at the beginning of this work, Znamierowski (1924, 2) explains his method of simplified models and conceptual constructions: This, he says, is a method that has proven useful in the natural sciences, and he is recommending it for what he calls the "ontology of the social sciences." In a note to this expression in which he is much more explicit on what this method involves, he uses the phrase "social ontology" and explains that the method begins by analyzing the concepts currently used in thinking about society and then establishes the relations that hold among these concepts, and consequently also those that hold among the corresponding objects (ibid. 136; our translation). From the very first pages of the book, Znamierowski's language is directed at *objects*, not concepts. So as he proceeds, the distinctions he draws and the new categories of objects he finds lie in social reality itself, not among the concepts used by social scientists.

Among the first types of objects he finds (and, of course, among the first concepts) are *thetic norms*. A norm—he tells us after having carefully distinguished norms from commands and orders—is "a linguistic proposition" (ibid., 8) that contains the word *ought* in the predicate position, but this "ought" can be taken to express various meanings. So in Poland, for example,

> when I say that one ought to register with the local authorities no later than twenty-four hours after arriving [at a new place], I mean […] that doing so is in conformity with the [legal] norms of conduct *laid down* in Poland. In this sense, a thing that ought to be is simply a thing which is in conformity with a valid norm, which [in its turn] is something that belongs to the class of things distinguished by an act we shall later call an "enactment." This new sense of the expression *ought to* I shall call "thetic" (from τίθημι), as it refers to something's being enacted or laid down. (Znamierowski 1924, 12; our translation)

The source of thetic norms—that is, norms whose "ought" must be taken in the thetic sense just explained—is an act of legislation, an "enactment" (*ustanowienie*), as Znamierowski calls it.

Thetic norms in turn give rise to thetic *acts* and thetic *states* of affairs:

> I shall call thetic acts particular actions connected with other actions by a thetic norm, in such a way as to take on a specific meaning,[39] or organic wholes constructed by a norm from the actions of one or more persons. The meaning of the objects and acting subjects involved in such acts I shall call their conventional meaning.[40] The psychophysical actions themselves, which in virtue of

at a Polish congress of philosophy held in Lwów (perhaps better known under its German name, Lemberg) and published only in 1927 (Znamierowski 1927). Much of the material presented in this section is accessible in Lorini's Italian translation (Znamierowski 2002).

[39] *Znaczenie* in Polish. *Meaning* is understood here not just as semiotic meaning but also as a new ontological identity that meaning-bearing actions acquire in virtue of a thetic norm.

[40] Znamierowski (1924, 64–6) carefully distinguishes between actions and acts—the former distinguished by their having an *aim*, the latter by their having *accomplished* or completed something—but we need not go into this matter here, as the difference is not material in every context.

a norm become thetic acts or parts of thetic acts, shall be called the material acts of the thetic acts in question. (Ibid., 68; our translation)

The concept of a thetic act becomes a formidable instrument for an innovative study of a classic object of jurisprudence—namely, legal acts, or acts in the law—and it turns out to be a fundamental conceptual instrument in the study of the legal reality. As Znamierowski writes:

According to this definition, activities such as parlour games, which are founded on a convention, are thetic acts. Among such acts are, for instance, chess moves, all kinds of activities in card games, and so on. But, even more importantly for us here, thetic acts also include those in the class of acts done exercising one's "legal" will. A sale, for instance, is not a simple psychophysical action, nor is it a simple social act; it is rather an arrangement of actions and acts held together by a system of norms that construct a sale as an act. Drawing up a will, entering into marriage, delivering a verdict, a detention—in a word all types of acts called "legal." (Ibid.; our translation)

Legal acts are nothing but thetic acts, that is, acts constructed by means of norms, which are then necessary conditions for the possibility of these acts. We have to do here with a kind of reality whose very existence depends on norms for its validity.

None of them would have existed if the norms which construct them had not existed. Just as it is not possible to "kill a pawn" (in chess) in the absence of the norms of chess, it is not possible to donate a horse if there are no norms establishing the institution of property and the act of donation. In the absence of these norms, it is only possible, in the former case, to move pieces of wood on the chessboard, and, in the latter case, to transfer the *de facto* possession (*faktyczne posiadanie*)[41] of the horse by putting the reins in someone else's hands, taking the animal to someone else's stable, or something like that. (Ibid., our translation)

Without these norms, the thetic act disappears and leaves its own shadow the material act or acts that were its substrate. Without the norms that constitute donation as a *type* of act, it is impossible to donate a horse. It is at best possible to put the reins into someone else's hands.

However, alongside the concept of a thetic act, it is necessary to emphasise the relevance of the concept of a material act, akin to (but not identical with) the concept of a "brute fact" introduced by Elizabeth Anscombe (1958) and made famous by Searle in his theory of constitutive rules.

In one of the previous quotations Znamierowski speaks as though all material acts were psychophysical acts: "The psychophysical actions themselves, which in virtue of a norm become thetic acts or parts of thetic acts, shall be called the material acts of [i.e., underlying] the thetic acts in question" (Znamierowski 1924, 68). Yet later on, he makes it clear that whether an act is "material" or "thetic" depends on its position in the hierarchical construction of

[41] By this he means not a legal title to possession of an object, not even the *animus rem sibi habendi*, but the "brute fact" of having the object in one's power.

acts: The material acts (*i*) underlying a thetic act (*ii*) can be *thetic* acts with respect to certain acts (*iii*) that underlie them (*i*), which acts (*iii*) will consequently be *material* acts with respect to the former acts (*i*), and can, though need not, be psychophysical:

> For a comprehensive explanation of the structure of thetic acts it must here be added that a thetic act can have not just psychophysical actions but also other thetic acts as components. So, in contract bridge, for example, the player who plays the highest card in the suit led "wins the trick," but this "winning the trick" is a thetic act composed of a series of thetic acts, namely, the acts consisting in the other players playing their cards. Similarly, what with the passing of a new law: For the law to become valid it must first be passed by the Chamber of Deputies and the Senate and then be signed by the President. Only after these three acts—all three doubtless thetic—will the unitary act of enacting a law be completed and the law itself take effect. (Znamierowski 1924, 71ff.; our translation)

As can be seen from the last part of this quotation, the analogon of Searle's "brute fact" is, in Znamierowski, not the material act (which need not be all that "brute"), but rather the psychophysical act.[42]

Znamierowski is explicit about a further point: Thetic acts (at any given level) enjoy a degree of freedom relative to their underlying material acts, which, once again, to bring home the point, need not be "brute," or merely psychophysical. This links him to Aristotle's investigations into the relation between form and matter, as well as to modern contemporary theories of emergence: "Quite different or partly different material acts can go into the making of the same thetic acts, in that the individual peculiarities of these material acts are not taken into consideration at all" (Znamierowski 1924, 71; our translation).

Here, the conventionalism of the Znamierowskian conception of thetic reality comes through. To clarify the thesis just quoted, Znamierowski examines the conditions for the existence of the thetic state of affairs called "the enforceability of a ruling":

> In order for the thetic state of affairs called "the enforceability of a ruling" to come into being, there has to be a thetic act called "the issuing of the ruling." The corresponding norm may require that the issuing of a ruling should take place by the act of the judge in the courtroom reading out the ruling as already written down. Would the reading out of the ruling then be identical with its issuing? By no means. It would not, in the first place because the reading out is just one of the material acts that go into the act of issuing a ruling—another, prior act would be that of the judge writing the ruling down and signing it. Second, there is also another reason why it is not possible to identify the issuing of the ruling with its being read out, which is that such reading out may be performed not by the judge but by the secretary of the court, or it may be replaced by the act of handing a copy of the ruling to the parties. If, then, a material act can be removed from the composition of a thetic act, it can no longer be identified with it. (Znamierowski 1924, 71; our translation)

[42] We suspect that Anscombe's "brute facts" are closer to Znamierowski's "material acts" than to Searle's "brute facts." That question, however, remains outside the scope of this essay.

Yet this does not mean that thetic acts are a separate domain of reality. Here Znamierowski clearly parts company with Reinach (1983) and the whole phenomenological tradition. As if echoing Aristotle's doctrine of matter and form[43] (and, in the background, Aristotle's objections to "separate forms"), Znamierowski continues:

> This possibility of replacing one material act with another creates the appearance that the thetic act is completely independent of material acts, as if it belonged to a new, social "dimension" of reality. Phenomenology, so generous in multiplying beings beyond any necessity, is ready to enrich reality with a new dimension like that. But the appearance is explained away if we realize that *thetic acts are organic wholes, constructed by a norm out of material acts*; the latter can be different in any two given cases, yet the wholes will be the same in the sense that their conventional meaning will be the same in the system of thetic actions. (Ibid., 71; our translation, italics added)

This is very important for a proper understanding of Znamierowski's social ontology and his theory of legal entities: There is the psychophysical reality,[44] and there is also the thetic reality, but this must not be understood as a juxtaposition. To use an Aristotelian analogy, there are heaps of brick and slabs of wood on the one hand, *and* there are houses on the other,[45] but not as separate realities on a par with each other (nor is *house* just a fancy name for what in reality is just a pile of bricks and slabs of wood). A house is an "organic whole," in which the form (the structure) constitutes an "organic whole" together with the (not quite) "raw" materials of brick, wood, and whatnot. Analogously, thetic acts are real wholes, not just *entia rationis* employed in speaking of psychophysical acts, and yet they are not juxtaposed with the latter but are wholes comprising the psychophysical acts as their "materials."

Now, it is not without reason that in the passage last quoted the word *construct* occurs: A thetic act is an organic whole *constructed* through a norm. That word is also key to another important distinction: Among thetic norms there are some that, as it were, "engage" or involve only a selection of mental or physical properties of certain actions, taking these properties as "input":

> Suppose I have a stick I sometimes use as a makeshift walking stick and sometimes as a measuring rod. The entirety of my actions with the stick (including those in which it is a walking stick and those in which it is a measuring rod, and all the others) constitutes a unity that is natural in the sense that they are all actions which a single subject exerts on or does with one and the same

[43] See, e.g., Aristotle, *Metaphysics*, VIII, 1043b–1044a.

[44] We are simplifying things here. In the passage just quoted, Znamierowski speaks of *material* acts, not of *psychophysical* acts. However, the hypostasising of the sphere of thetic acts (a misstep he ascribes to phenomenology) would be quite pointless unless there were a level of acts that are *only* material—and not *also* thetic with respect to acts at some lower level. (Just as well, one could think that "taller things" form a separate domain of reality: This would make sense only if we could assume that there is a class of things that are less tall than anything else.) There *is,* in fact, such a lowermost level: that of (merely) psychophysical acts.

[45] This is just an analogy: We are not suggesting that houses are thetic objects.

thing. In some cases—supposing, for example, that my ownership title to the stick were at issue—precisely this natural unity would be relevant, because every action done with or involving the object in question would be relevant in settling this issue. However, from the perspective of a rule of action, that is, a norm, the entirety of my actions involving the stick is clearly divided in two classes. From the perspective of the rules for handling a walking stick the classes comprise, on the one hand, those actions which satisfy the conditions defining the activity of "handling a walking stick" and, on the other, those actions which do not. The former class is further characterized by a certain qualitative homogeneity, in clear contrast to the heterogeneity of the second class. So the property of having a relation to a norm singles out a class of actions. This class of actions, as against the natural unity of all actions involving the stick, I shall call a *conventional system*. The norm is thus a rule of inclusion in a system. If my uses of the stick are brought under the norm of "handling a walking stick," on the one hand, and the norm of "handling a measuring rod," on the other, we shall get two different conventional systems, such that the class of all other actions involving the stick remains outside of them. (Ibid., 13; our translation)

The thetic norms that enable me to use the stick as a walking stick on the one hand and as a measuring rod on the other may be atypical, because they are for my own use, but in either case they exploit certain natural properties of the wooden object, one set of properties being exploited in the former case, another set in the latter. In thetic acts of this sort there is nothing essential that had not been in their "raw materials," that is, in the corresponding material acts; the new element lies in the specific selection and arrangement of the material acts serving as input for both norms. But there are human enactments that create new social objects (acts) in a much stronger sense.[46]

Znamierowski examines in particular the function served by thetic norms in three different game activities: (*i*) saluting with a flag; (*ii*) solitaire; and (*iii*) chess.

Under (*i*), Znamierowski has us imagine a game in which two boys agree that if either of them raises a little flag in salute, the other will also. These two flag-raising activities are merely psychophysical activities (*czynność psychofizyczna*), mere movements devoid of any meaning. It is only in virtue of the thetic norm constituted by way of the agreement between the two boys that these two movements acquire the meaning of a salute, or rather, that they become a salute (in the game in question): "This thetic norm has created a connection between the two movements of the two flags, giving to each of them a specific meaning, say, that of mutual greeting—not a meaning selected from an assortment of preexisting natural meanings but a new, constructed one" (ibid., 66–7; our translation).

As Znamierowski writes, it is only in virtue of, and with reference to, that thetic norm that "the first physical movement becomes a greeting, while the other becomes an acknowledgment of that greeting. It is only with respect to the norm that has instituted the two movements that they acquire their mean-

[46] Here we are inclined to see an analogy with Searle's distinction between "causal functions" and "status functions."

ings, and only in virtue of that norm do they become correlative actions" (ibid., 67; our translation).

Under (*ii*)—solitaire (*pasjans*)—Znamierowski considers in particular a rule that in certain situations allows an ace to be placed on top of a king. According to Znamierowski, "Placing an ace on the table and placing a king on the table are doubtless two psychophysical activities" (ibid., our translation). But in virtue of that rule, the activities acquire a new meaning in solitaire, in that

> the rule of solitaire has constructed a connection between them that bestows on them a meaning in virtue of which they are henceforth related to each other. In virtue of this norm they are no longer just acts of placing coloured paper on the table but become the acts of "playing a king" and "playing an ace:" They are acts laid down and constructed by the norm in question. (Ibid., our translation)

The same idea applies to (*iii*), namely, chess:

> Here, too, in virtue of a certain rule, or rather a whole system of rules, certain psychophysical actions acquire a new meaning constructed through norms. The chessmen, which are initially just pieces of lathed wood or bone, become "chessmen" that can be moved in this or that way. Physical objects and psychophysical actions acquire a new meaning constructed through a norm. (Ibid.; our translation)[47]

This passage is particularly relevant to social ontology and legal ontology. In his analysis of chess, Znamierowski brings out the fact that the rules of chess do not just assign a conventional meaning to *acts*, but also assign that meaning to physical objects (*przedmiot fizyczny*). In virtue of the rules of chess, pieces of wood or ivory assume a new meaning—a *conventional* one, such as that of "chess king"—and thereby become "chessmen."

Although the term *przedmiot tetyczny* (thetic object) does not appear in *Podstawowe pojęcia teorji prawa* (Basic concepts for a theory of law), Znamierowski does, in that work, bring to the fore the particular nature of certain objects (*przedmiot*), such as the chessmen, whose *type* is constructed in virtue of norms (Czepita 1990, 400).

Aside from the three aforementioned examples of thetic acts that are structurally extremely simple (in that they all have a single psychophysical act as a substrate), there are thetic acts that are much more complex. Znamierowski calls them *cooperative* thetic acts:

> Sometimes, things are more complex. A norm does not construct an act on the basis of a single action but creates an organic whole out of several psychophysical actions, introducing this whole, as a single act, into the system [*układ*] of actions it constructs. That is the case, for instance, when under a group's organizational rules, an act of the group may arise only if all members of the group do certain actions or social acts. As can be seen from this example, a whole consisting of actions done by more than one acting subject […] can belong to a system constructed by a norm. (Znamierowski 1924, 66ff.; our translation)

[47] At least three other authors, after Znamierowski and without any reference to him, have used chess as an example of an activity constituted in virtue of rules: Alf Ross, John R. Searle, and Amedeo Giovanni Conte.

Such thetic norms—which confer a new, conventional meaning on objects and acts—Znamierowski (ibid., 72) proposes to call "norms of construction" (*norma konstrukcyjna*). This concept is very close to Searle's concept of a constitutive rule.[48] One would expect Searle's correlative concept of a *regulative* rule to crop up somewhere in Znamierowski, too. But it does not, at least not directly. In a sense, all thetic and other norms except for those of construction are a counterpart to regulative rules in Searle's sense (ibid., 77). But, more specifically, one finds in Znamierowski a type of norm he calls coercitive norm, whose concept is subtler than that of a regulative rule. A norm is coercitive if it provides for the eventuality that someone could act out of keeping with some other norm—even if the latter is a norm of construction (in our previous flag-raising example, this would mean that one of the two boys refuses to raise the flag when prompted)—by constructing a thetic act of punishment (ibid., 83ff.). If either of the two boys refuses to raise the flag when prompted (thus contravening the rules of the game), then a penalty ought to follow. The norm of construction about raising a flag in salute frames the behaviour of the "thetic group"—another type of social, or thetic, object distinguished by Znamierowski—from the point of view of legal doctrine (*dogmatyka prawa*); from this point of view, the group of boys at play simply ceases to exist once either of the boys stops playing by the rules (ibid., 77). But the second norm of construction, which places a penalty on such noncompliant behaviour, frames the actions of "the same" group from a sociological (and commonsensical) point of view, turning the first norm into one that, unlike a "sheer" norm of construction (or constitutive rule), is not blind to noncompliant behaviour, and yet remains a norm of construction in its own right. But the two norms taken jointly are coercitive (ibid., 75–84).

20.2.5. The Ontology of Legal Reality and Occam's Razor

As we saw at the beginning of this discussion, Znamierowski uses Occam's razor, in the Continental sense (as explained in footnote 29 above), to deny the existence of any further dimension of reality above and beyond that of the physical and the mental: There is simply no such thing as a reality other than psychophysical reality.[49] As he was wont to remind his students, it is only people and things that you can see from atop Poznań's City Hall tower.

[48] Writes Znamierowski (1924, 103): "A norm of construction creates new possibilities of action." Compare that with Searle's classic formula, under which "constitutive rules […] create or define new forms of behavior" (Searle 1969, 33). A particular aspect of this similarity is discussed in Conte 1995, 532. Cf. Żełaniec 2013, chap. 2.

[49] This is more catholic than the position of Znamierowski's famous compatriot, Tadeusz Kotarbiński, who claimed that there is nothing other than merely *physical* reality (such was his "reism," on which see Woleński 1990).

But if that is the case, how can legal reality exist, given that it is "made of" legal acts, legal statuses, legal objects—which *prima facie* are neither mental nor physical?

Znamierowski agrees with Reinach that legal realities cannot be identified with any single mental or physical object: "I do not in the least claim that legal objects are identical with all the various physical or mental objects" (Znamierowski 1925a, 408; our translation).

As Znamierowski writes, for example: "My property right to the book in front of me does not lie in the book itself or in any thoughts that I or someone else may have about that book" (Znamierowski 1921, 20; our translation). But, as we know, unlike Reinach, Znamierowski does not intend to introduce a new dimension of reality. Even though Znamierowski takes phenomenology as his point of departure, it is neither a point of arrival nor a safe haven for him. In fact, he is very critical of the phenomenological tenet of the existence of a level of reality distinct from both the physical and the mental.

So how can legal reality exist? The key concept here, in answer to this problem, is that legal entities form specific "systems" (*układy*) which include both physical and mental elements, but which (as just noted) cannot be identified with any single object, be it physical or mental.

This thesis features both in Znamierowski's ontology of social reality and in that of thetic reality.

In the essay *O przedmiocie i fakcie społecznym* (On social objects and social facts: Znamierowski 1921), Znamierowski examines, for instance, the nature of a particular type of social object, namely, the law. According to Znamierowski, a given law

> is a specific system, a unifying structure of physical objects, to wit, the "original" statute and its official copies, as much as of mental objects, such as mental processes and dispositions—processes through which citizens and authorities become aware of the contents of the statute as valid law, and through which arises the design and decision to act in conformity with this law or, on the contrary, to intentionally run afoul of it, and dispositions to undergo such processes. (Znamierowski 1921, 21; our translation)

In his book *Podstawowe pojęcia teorji prawa: Układ prawny i norma prawna* (Basic concepts for a theory of law: The legal system and legal norms, Znamierowski 1924), Znamierowski conceives of legal acts as thetic acts in the form of specific systems of both physical and mental elements constructed through norms of construction.

"Thetic acts," he says, "are organic wholes that a norm constructs out of material acts" (ibid., 71; our translation).

With the ontology of thetic reality a new element comes into play (new with respect to the ontology of social reality), and that is the norm. In particular, thetic realities are, for Znamierowski, realities made possible by (and constructed in virtue of) norms of construction. But there is yet another new

element to the ontology of thetic reality: the quasi-semantic element, consisting in meaning (*znaczenie*) conferred through norms.

In fact, according to Znamierowski, norms of construction perform their function by assigning a new, conventional meaning to activities and things.[50] Here, Znamierowski's legal realism must reckon with a mystery which it was beyond its powers to explain, namely, the mystery of meaning—the same mystery that Emil Lask had described back in 1905 as the "problem of the mutual engagement of legal meaning and the real substrate in the individual case" (Lask 1923, 318; our translation). We shall not try our hand at uncovering this mystery, at least not here.

[50] A remarkable analogy surfaces here between Znamierowski and the ontology of cultural objects developed by Heinrich Rickert (1921). Rickert distinguishes two types of real objects: natural objects and cultural objects (*Kulturobjekte)*. The latter are such in relation to values (*Werte*), rather than in relation to norms (of construction), as is the case in Znamierowski. For Rickert (1921, 21ff.), it is values that assign a determinate cultural meaning (*Kulturbedeutung*) to natural objects. Rickert defines cultural objects as objects provided with meaning and "realities furnished with value" (*wertvolle Wirklichkeiten*). On Rickert see also Section 1.1 in Tome 1 of this volume.

Part Four

Legal Reasoning

Introduction

A NOTE ON TERMINOLOGY AND PURPOSE

by Pierluigi Chiassoni and Eveline Feteris

"Legal interpretation" is notoriously ambiguous. On the one hand, the phrase may refer to an activity or process in the mind of a judge, a jurist, a lawyer, etc. (*interpretation-process*). On the other hand, it may also refer, alternatively, to the outcome or product of such intellectual activity (*interpretation-output*).

As a general label for intellectual processes dealing with legal materials in view of solving legal problems and interpersonal conflicts, "legal interpretation" is in turn capable of a variety of further, more specific, meanings.

The central of these meanings points to *textual interpretation* or *interpretation proper*, i.e., to the activity that consists in the determination of the meaning of a (legal) norm-formulation (hereinafter a *provision*), translating it into one or more *explicit norms*, contextually justified or potentially justifiable as the legally "correct" meaning of the provision itself.

There is also a broader meaning of "legal interpretation"(-process), where the phrase refers to a set of activities, which are different from, but related to, textual interpretation. The qualification of previously identified legal norms (understood, e.g., as simple rules, principles, exceptions, general clauses, etc.), the filling of (presumed) gaps in the law, the resolution of normative conflicts, and doctrinal systematization of normative sets all belong to the reference of "legal interpretation" in such a broader sense: "legal interpretation" as *meta-textual* interpretation, one might say.

The above definition of textual interpretation establishes a conceptual connection between the determination of the meaning of a norm-formulation, on the one side, and its actual or potential justification, on the other side. This is neither casual nor arbitrary. Indeed, the deliberate reference to justification and correctness, as far as textual interpretation and its outputs are concerned, makes the definition a (purported) rational reconstruction of a concept that may be considered pivotal in practical and theoretical legal discourse alike. In fact, whenever a judge or a jurist provides an interpretation-output for some provision (claiming, for instance, that "Section *X* of Act *Z* means *N*"), that interpretation-output (*N*) is usually put forward as the correct interpretation of provision *X*; furthermore, it is usually accompanied by some argument purporting to justify it. The game of textual interpretation is a practical game. And people expect, and often have a legal right to expect, that interpreters provide good reasons for their interpretive claims—for claiming, e.g., that provision *D* expresses the explicit norm *N*, at least as far as the context of application *C* is concerned; or, in other terms, that *N* is the (all things considered) legally correct

or proper meaning of provision *D* in context *C*. This claim—from a theoretical point of view—is to be regarded as a *relative* claim: relative to the *interpretation-setting* the interpreter unavoidably *selects* and *is committed to*, which is made of a discrete set of *authoritative legal materials* (basically, provisions), *interpretive directives* (rules or canons of interpretation), *interpretive resources* (dictionaries, history, *travaux préparatoires*, case-law, juristic essays, scientific treatises, etc.), and *values* (ideologies about the law, interpretation, adjudication, the proper role of judges and jurists within the legal fabric, etc.). Accordingly, from the perspective of the activity of textual interpretation, it seems worth distinguishing between two different, but related, sorts of *interpretive outputs*, namely, (*a*) the explicit norm(s) the interpreter puts forward as the "correct" meaning(s) of a provision, which is/are tantamount to as many sentences belonging to the interpreter's discourse *(interpretation-output in a narrow sense)*; (*b*) the formulation of the "correct" meaning(s), *plus* the line of argument deployed by the interpreter to justify it, which is a piece of interpretive argumentation or interpretive justificatory discourse *(interpretation-output in a broad sense)*.

When, in their essays, jurists and legal philosophers deal with the subject of legal interpretation and argumentation, whichever label they may use (though *theory—Theorie*, *théorie*, *teoria*, *teoría*—is most often employed) and whichever view they may entertain about their own activity, they usually perform one or more of the following tasks:

(1) They describe how provisions have been and/or are being interpreted in fact, and which interpretive arguments are usually provided, in a given legal context (legal experience, legal order, legal system) at a given moment.

(2) They describe how provisions ought to be interpreted, and which arguments ought to be resorted to, in a given legal context at a given moment, according to the methodological views entertained by the judges and jurists working there.

(3) They (claim to) account for what the law of the land "really" requires interpreters to do, when interpreting its provisions, and invite them to act accordingly.

(4) They (claim to) account for what the law, "properly" understood in its very nature, "really" requires interpreters to do, when interpreting the provisions (especially statutory and/or constitutional provisions) of any legal order whatsoever, and invite them to act accordingly.

(5) They provide definitions of the interpretive-argumentative terminology—which, according to the perspective assumed by the jurist or legal philosopher, may be lexical definitions, rational reconstructions of lexical definitions for theoretical purposes, rational reconstructions of lexical definitions for practical purposes, or even outright stipulations for practical purposes;

(6) They analyze the tools—techniques, methods, arguments, canons, directives—of legal interpretation and argumentation, in order to cast light on their structure and functioning.

(7) They state which interpretive tools are to be employed, and how, if a certain goal (e.g., a certain politics of the judiciary) is to be attained.

Clearly, the several tasks we have just listed are heterogeneous. The first two tasks are genuinely descriptive: They belong to descriptive methodology and the sociology of legal interpretation. Contrariwise, tasks (3) and (4) belong to the domain of normative jurisprudence: to the field of legal politics and legal ideology, where moral and political allegiances are at stake. Task (5)—the definitional task—takes its colour from the discourse and perspective it happens to belong to. Task (6) is an analytical task, usually performed, for theoretical and informative purposes, by legal theorists. Task (7), finally, is a technical task, purporting to show the proper means to some goal that practitioners may, or do, opt for.

The present Part 4 of this tome is devoted to the "theories" of legal interpretation, argumentation, and reasoning that perform one or more of the above-mentioned tasks in contemporary Continental legal culture, from the early 19th century to the end of the 20th century. Though its major focus is on the 20th century, it has been deemed necessary to cast a glance at a few fundamental theories of the 19th century, since they make up the scenery for a better understanding of the methodological issues, attitudes, and revolutions that characterize the 20th century. In any case, due to space limits, only the most meaningful and influential conceptions have been selected for presentation from both centuries.

This part comprises seven chapters.

The first one, Chapter 21—"The Heritage of the 19th Century"—contains a concise exposition of the theories of interpretation associated with the jurists of the exegetical school, namely, Friedrich Carl von Savigny, Rudolf von Jhering, and Bernhard Windscheid.

Chapter 22—"The Age of Discontent"—deals with the most important anti-formalist movements in Continental legal culture between the end of the 19th century and, roughly, the first half of the 20th century. Gény and the so-called scientific school, the free law movement, the jurisprudence of interests and, last but not least, the pure theory of law are covered here as major subjects.

Chapter 23—"Taking Stock of the Past: Rhetoric, Topics, Hermeneutics"—deals with a distinctively backward-looking side of the theoretical and methodological revolution affecting the Continental theory of legal interpretation and argumentation from the mid-20th century. Taken into account here are Chaïm Perelman's new rhetoric, Theodor Viehweg's topics, and the hermeneutic outlooks of Emilio Betti (1890–1968), Hans-Georg Gadamer (1900–2002), and Josef Esser (1910–1995).

Chapter 24—"The Age of Analysis"—concerns those theories of legal interpretation and argumentation that, from the mid-20th century onward, turned to some variety of analytical philosophy to find the tools and methods

for properly performing their philosophical inquiry into such an immense subject. The outcomes of the analytical turn in Continental jurisprudence is represented here by the views of Norberto Bobbio (1909–2004), Alf Ross (1899–1979), Carlos Alchourrón (1931–1996) and Eugenio Bulygin (1931–), Jerzy Wróblewski (1926–1990), Giovanni Tarello (1934–1987), and Riccardo Guastini (1946–).

Chapter 25—"Legal Argumentation as Practical Discourse"—deals with the most meaningful developments, mostly by analytical legal theorists, in the field of the theory of legal argumentation and justification, from the 1970s onwards. The theories of Neil MacCormick (1941–2009)—exceptionally included here, even though he belongs to the common-law tradition—Jürgen Habermas (1929–), Robert Alexy (1945–), and Aleksander Peczenick (1937–2005) are exposed and analyzed.

Chapters 26 and 27—"Law and Logic in the 20th Century" and "Recent Developments in Legal Logic"—are devoted to the analysis of legal reasoning by means of symbolic logic, and hence to the development of deontic logic from its outset to its most recent trends.

Chapter 21

THE HERITAGE OF THE 19TH CENTURY: THE AGE OF INTERPRETIVE COGNITIVISM

by Pierluigi Chiassoni

21.1. Foreword

This chapter deals with the three most influential theories concerning legal interpretation and argumentation in 19th-century Continental jurisprudence: the views of the jurists belonging to the so-called *École de l'exégèse*; the views of Friedrich Carl von Savigny, the foremost founder of the historical school of law in Germany; the views of Rudolf von Jhering (the "first" Jhering) and Bernhard Windscheid (1817–1892), among the most important representatives of Conceptual Jurisprudence (*Begriffsjurisprudenz*) and Pandecticism.

As a whole, these outlooks are usually considered to represent as many varieties of *interpretive cognitivism* or, as legal philosophers like to say, (interpretive) *formalism*: the view according to which textual interpretation, the resolution of normative conflicts and gap-filling are not as many "acts of will" but, rather, "acts of knowledge" concerning the discovery of the true meaning of provisions and, generally speaking, the one-right-answer to legal problems (see Bobbio 1979, 86ff., 141ff., 153–4, 249–63; Hart 1961, chap. 7; Tarello 1974b). From this perspective, the 19th century is indeed an "Age of formalism" (Morton White). Generations of jurists and legal philosophers, from the late 1800s onwards, and at an intensified pace during the first half of the 20th century, will revolt against it, while a more nuanced setting will finally prevail from the 1960s. So runs the story about 19th century legal methodology on the Continent.

Going beyond stereotypes and received views, it is worth knowing the details of interpretive cognitivism at its heyday, in order to be able to get a fuller and sounder appreciation of the ideas and attitudes it apparently provoked by way of reaction.

21.2. The Exegetical School

The label *École de l'exégèse* (exegetical school) was coined by Emile Glasson in 1904, but did not enter into common usage until after Julien Bonnecase's successful 1919 book *L'École de l'exégèse en droit civil* (The exegetical school in civil law: Bonnecase 1924). From that time onwards, it has been employed by jurists and legal philosophers to refer at once to:

(*a*) The group of French and Belgian jurists and law professors who, during the 19th century, devoted themselves to the interpretation, exposition, and

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teaching of the 1804 *Code civil*, also known as *Code Napoléon*, the centrepiece of the Napoleonic reform of French law.

(*b*) The theories worked out by these jurists and law professors as to the proper "method of interpretation" of the Code, together with their theoretical and ideological presuppositions (see Bonnecase 1924).

It is customary to arrange the members of the exegetical school into three generations, if only as a clue to some difference among their views.

The first generation—the dawn generation—includes those jurists who were still educated under the *ancien régime* and were active until about 1825–1830, like, e.g., C. Delvincourt, A. Proudhon, C.-B.-M. Toullier, G. A. Chabot de l'Allier, and P. A. Merlin.

The second generation—the heyday generation—includes those jurists who were already educated under the Napoleonic and Restoration regimes, and were active roughly between 1830 and 1880. A. Duranton, C. Demolombe, R. T. Troplong, F. Laurent, F. Mourlon, V. Marcadé, and A. M. Demante all belong to this generation, and are usually acknowledged as having the status of paradigmatic members of the school.[1]

The third generation—the dusk generation—includes the last followers of the exegetical method. They were active from the 1880s, and worked between the increasingly stronger, German-imported, dogmatic method, on one side, and the criticisms by the incoming anti-formalist movements, on the other side. T. Huc and H. Baudry-Lacantinerie are usually listed in this last group.

21.2.1. The Professional Ideology of the Exegetical Jurists

The representatives of the Exegetical School shared a few basic ideas about the law, its sources, and the proper role of judges and the function of adjudication. These ideas make up the professional ideology of the exegetical school.

1. *The law properly so called is positive, state-made law.* Law proper is positive law: the law set by the political authorities of a community. Positive law is state-made law. Natural law, on the contrary, is not really law, not law properly so called; rather, it is morality—though a morality which positive law usually refers to and dwells upon, like an island dwells upon the high sea. Furthermore, natural law is inherently indeterminate, vague, most of the time unable to provide a secure guidance for human conduct. By contrast, positive law, as state-made, codified, law, is inherently determinate and does usually provide

[1] There is no agreement as to whether two other eminent 19th-century French jurists—Charles Aubry (1803–1883) and Frédéric-Charles Rau (1803–1877)—do belong to this generation or not, due to the deep Germanic influence displayed by their masterpiece: the *Cours de droit civil français* (1st ed., 1839; 4th ed., 1869). See Bonnecase 1924; Bobbio 1979; Tarello 1988a; Husson 1972; Perelman 1976; Frydman 2005, 343ff.; Halpérin 2008a.

clear guidance for human affairs. Accordingly, so-called natural law may be resorted to, when applying positive law, only insofar as it is either *secundum legem positivam* or *praeter legem positivam*; it may never work *contra legem*, though, provided that, far from being superior to positive law, it only works, if at all, as a helpful servant to the latter.[2]

2. *Legalism.* Due to its technical and ethical superiority, the major source of positive law should be legislation, as a set of well-written and well-ordered legislative sentences expressing legal norms, enacted by the elected representatives of the nation. Customary law, by contrast, should play a marginal role in the legal regulation of human conduct. Furthermore, case-law and juristic opinions should be ruled out from legal sources in any society that cares about the certainty of the law and the well-being of its members.[3]

3. *Voluntarism*. Positive law—in its more valuable and extended part: legislation—is the outcome of deliberate acts of creation by the legislator. Behind any piece of legislation, there is a corresponding piece of legislative will (*will-to-content claim*). This will pre-exist the judicial application of laws and is fixed forever to guide it for the times to come (see, e.g., Laurent 1878, 12, 22).[4]

4. *Subordination of the judge to the legislator (separation of powers)*. In a statutory-centred legal system, judges should be regarded as utterly subordinate to the legislator. They ought to limit their activity to the application of binding legislation, without making any addition, change, or innovation whatsoever to it.[5]

[2] It is worth looking at a passage from Mourlon 1846, quoted by Bonnecase 1924, 150–1: "For the jurist, for the attorney, for the judge, *there is only one law*, positive law […]. Indeed, natural or moral laws, *are not binding unless* they have been *sanctioned by the written law* […]. Only the legislator has the right to determine, among the many and disputed rules of natural law, which ones are at the same time obligatory […]. *Nothing is above legislation*, and eluding its provisions under the pretext that natural equity is incompatible with it amounts to sheer prevarication. So far as the doctrinal study of law and case-law are concerned, there is no, nor can there be, any *more reasonable reason* or *fairer equity* than the reason and equity of legislation" (my translation).

[3] "All the [enacted] law," claims Aubry, quoted by Husson 1972, 116, "both in her spirit and in her letter, with a wide application of her principles and the most thorough development of the consequences coming from her, and nothing but the law: that has been the motto of the professors teaching the *Code Napoléon*" (my translation).

[4] Obviously, by endorsing voluntarism, the Exegetical jurists cut no new ground, though, of course, their attitude was supported by the most powerful example of law-making will from the time of Justinian. See, e.g., Mailher de Chassat 1822, 101–2.

[5] According to another of the greatest, heyday-generation Exegetical jurists, Laurent (1869, 62), "When we say that the judge is bound by legislation this means that the judge has no right to review it, that he is not allowed to analyse whether it is in accordance with the principles of right and wrong that God has written in our conscience […]. It is pointless to emphasize a principle that is basic within our modern public law" (my translation). The *Cour de Cassation* made this point very neatly in a decision of May 25, 1814: "It is by no means up to the courts […] to judge legislation; they ought to apply it as it is, and they are not allowed to make any modification or restriction, whatever its urgency may be" (my translation). See also Laurent 1978, 9, 54: "The

5. *The cognitivist conception of adjudication*. The subordination of judges to the law is a viable goal if, and only if, adjudication can be performed in such a way as to be an act of knowledge, where the judge discovers the law, discovers the relevant facts of a case, and then simply deduces the right legal decision from these data.

The philosopher Louis Liard provided the following description of the jobs in the law:

> The law is written legislation. Accordingly, their task [of the faculties of law] consists in teaching how to interpret legislation. It follows that their method is deductive. The sections of the Code are as many theorems, between which it is necessary to show their mutual connections and to draw their consequences. The pure jurist is a geometer; the purely juristic training is dialectical. The main task of the judge or attorney consists in unravelling the texture of the cases, and connecting their components to this or that rule established by the laws. (Quoted in Gény 1919, 54–5; my translation)

The Exegetical jurists, however, were apparently not so passionate about this theoretical point. François Laurent (1810–1887), for instance, may be regarded, rather than a sheer, naïf theoretical cognitivist, as a staunch preacher of a critical passivism in front of the "enacted law" and "the principles following from it" ("la loi et […] les principes qui en découlent"), and the enemy of the sweeping activism of his fellow jurists and lower judges (see Laurent 1878, 58–61).[6]

6. *The (quasi-)completeness of statutory law*. According to the common view about the exegetical school, a central point in the ideology of its representatives would be the idea that Napoleonic codification provides people with a complete, i.e., gapless, normative system (see, e.g., Bonnecase 1924, 52; Bobbio 1961, 85, 95–6; Tarello 1988a, 82–83, 85).[7]

Such a point, however, must be qualified in light of the attitudes actually held on the subject by eminent Exegetical jurists.

codes leave nothing to the arbitrariness of the interpreter, who no longer has the task of making the law: The law has already been made. There is no more uncertainty: The law is written in authentic texts. However, in order that the codes may provide this advantage, it is necessary that the authors and the magistrates accept their new position; I would say that they have to resign themselves to it […]. It is not true that the role of the jurists is being downgraded; only, […] their sole mission consists in interpreting [the law] […]. In making the law, scholars and magistrates would usurp the power that the sovereign nation has conferred with such an attribution" (my translation).

[6] "In all respects, accordingly, interpreters do make law, as to the specific case: I contest their right to do so" (Laurent 1878, 61; my translation).

[7] For instance, Bobbio finds evidence for this view in a sentence Demolombe writes in his commentary to Art. 4 of the Preliminary Title to the *Code civil*: "the judge cannot *legally* pretend that legislation does not provide him with the means for deciding the lawsuit he is hearing." This sentence, however, may also be read in a dimmer way, as Demolombe's colleagues openly suggest. Such a realistic interpretation of Demolombe's passage is shared, e.g., by Husson 1972, 118.

Following Portalis, who was one of the drafters of the *Code civil*, Charles-Bonaventure-Marie Toullier (1752–1835), among the most famous first-generation exegetical jurists, holds that statutes and codes may in fact prove gappy. In such an event, Toullier claims, judges should resort to equity and custom.[8]

Like Toullier, Alexandre Duranton (1785–1866) admits as a matter of course the possibility that legislation—Napoleonic legislation—may be gappy. In such a case, however, unlike Toullier, Duranton claims that the judge should find the right answer on the very basis of legislation (i.e., by way of "self-integration," as Francesco Carnelutti put it later on in the 20th century), by means of analogical reasoning, and only by default should he resort to "reason and natural equity."[9]

It is François Laurent, however, who provides the most realistic and disenchanted view. Indeed, in his commentary to Art. 4 of the Preliminary title of the *Code civil*, Laurent claims what follows:

(*a*) Positive laws do not—and cannot—provide a complete regulation of human conduct in a social context.
(*b*) Art. 4, far from presupposing positive law to be a complete normative system in itself, presupposes that it may prove gappy in the face of experience.
(*c*) On such a presuppostion, Art. 4 is meant to confer on judges, if only within the limits of individual lawsuits, a quasi-legislative lawmaking power: the power to interstitially make the rule for the unregulated case.
(*d*) Hence, when there is a gap, adjudication is not simply the "retrieval" of an already established solution.[10]

Toullier, Duranton, and Laurent all agree that legislation—including that very drafting masterpiece represented by the Napoleonic codification—may be

[8] "[W]hich rule shall the judge follow in those hard cases where the laws seem to be silent? In the first place, equity, by which we go back to the law of nature, and, in the second place, usage, which is the most natural supplement to the laws" (Toullier 1825, 103; my translation)—echoing a clause to the same effect of the unenacted "Preliminary book" to the *Code civil*.

[9] "[T]he judge faces two alternatives in order to get to his decision. In the first place, he may decide according to inductions from the laws pertaining to different matters, which nonetheless display some analogy with the matter to be decided upon. In the second place, he may decide with the support of reason and natural equity" (Duranton 1844, 21; my translation).

[10] "The Code, by prohibiting to the judge any appeal to the legislator, and by imposing on him a duty to adjudicate, even when there is no law applicable, does nothing but avoid one of the mischiefs resulting from the insufficiency of legislation: If the legislator is not turned into the judge of lawsuits, then the judge must be turned into a legislator […] among the two evils, the drafters of the Code have chosen the lesser one […]. Notwithstanding that, Art. 4 confers on the tribunals a great power, and somehow a part of the exercise of the legislative power. Whenever a law is obscure or insufficient, the judicial decision is legislative in character, for it is the judge who writes down the rule before applying it" (Laurent 1869, 294; my translation).

gappy. They disagree, apparently, about the ways judges ought to follow in filling gaps properly. The former two consider further sources, including natural law; the latter, contrariwise, is a partisan for statutory self-integration (as we shall see below). In any case, however, no naïf view about the "natural" or "logical" completeness of positive legal orders seems to belong to the conceptual apparatus through which these skilled and worldly jurists looked at their law. Indeed, the *postulat de la plénitude de la loi écrite*, also with heyday-generation Exegetical jurists like Laurent, is, to be understood as pointing to an interpretive ("hermetic") or, more properly, a "methodological," completeness, and not to an "ontological" one.

21.2.2. The Interpretive Codes of the Exegetical Jurists (the Exegetical Codes)

Unlike many of the codes that were enacted in the ancient, pre-modern, and modern age (from the *Codex Iustinianus* down to the Prussian 1794 *Allgemeine Landrecht*, the Austrian 1811 *Allgemeine Bürgerliche Gesetzbuch*, the 1819 Neapolitan *Codice per lo Regno delle Due Sicilie*, the 1837 Sardinian *Codice civile*, etc.), the *Code Napoléon* does not contain any section directly dealing with statutory interpretation.

In fact, the drafters of the *Code*—Portalis, Bigot-Préameneau, Maleville, Tronchet—had planned a "Preliminary book" that included a Title V dealing with "the application and interpretation of the laws," where a few telling sections on the subject were set forth. The opinion prevailed, however, that those sections should not be enacted, since interpretation—being a "logical" process—was considered to be a subject unfit for legal regulation. The "Preliminary book" was never enacted. Many exegetical jurists, however, while dealing with statutory interpretation in their commentaries to Arts. 4 and 5 of the enacted "Preliminary title," used its sections as valuable doctrinal statements, as we shall see in a moment.[11]

The basic distinction, in the exegetical method of interpretation, is between "authentic interpretation" (*interprétation par voie de autorité*) and "doctrinal interpretation" (*interprétation par voie de doctrine*, *interprétation de doctrine*).

Authentic interpretation is exclusively to be provided by the legislator, in order to clarify, by means of an interpretive statute, the meaning of some section of a previously enacted statute the sense of which proved doubtful against the benchmark of its application to real cases.[12] It is to be given in the form of

[11] The texts of the two clauses run as follows: Art. 4: "The judge who will refuse to adjudicate, under the pretext of the silence, obscurity, or insufficiency of the law, shall be liable to be prosecuted under the charge of denial of justice." Art. 5: "It is forbidden for judges to pronounce, by way of general or regulatory provisions, on the lawsuits that are brought to them" (both translations are mine).

[12] "Interpretation by way of authority consists in solving [interpretive] doubts in the form of general provisions and command" (Art. 2 of the Preliminary book; my translation).

a generally binding law; it is basically an act of will, though eventually grounded in some pretended act of cognition on the part of the legislator.

Doctrinal interpretation, by contrast, is performed by judges, jurists, lawyers, and laypeople at large. It has no binding force, but for judicial interpretation, its force is, in any case, limited to the individual lawsuits.

Doctrinal interpretation is characterized in terms apt to suggest that its nature is purely cognitive. According to Art. 2 of the unenacted Title V of the "Preliminary book," "Doctrinal interpretation consists in grasping the true meaning [*le véritable sens*] of a law, in its application to a particular case."

These words are clearly echoed in the doctrinal definitions provided, e.g., by François Laurent (1810–1887)[13] and Antoine Demante (1789–1856).[14]

Beyond this point, however, there is no general agreement among the exegetical jurists: neither as to the proper scope of interpretation, nor as to the proper tools to perform it.

Concerning the proper scope of interpretation, two sides may be singled out.

On the one hand, there are those—like Laurent—who mean *interpretation* to be a necessary task in general: Any case whatsoever of application of a law necessarily presupposes its interpretation, for it is impossible to apply it without having previously grasped its (true or proper) meaning (see Laurent 1878, 14).

On the other hand, there are those—like Demante and Mourlon—who, following a more traditional way of thinking, suggested by the *ius commune* maxim *In claris non fit interpretatio*, hold "interpretation" to be necessary if, but only if, the text of the law has proved indeterminate.[15]

Turning to the proper tools of interpretation, and the proper way to use them, the attitudes of the exegetical jurists are so nuanced that no unitary exegetical interpretive code can be reconstructed out of them. To account for their basic methodological views, I will use François Laurent's opinions as the starting point, pointing out the differences with other eminent representatives of the exegetical school, as they come up.[16] Furthermore, since we are dealing

[13] "To interpret a law is to grasp its meaning in its application to the concrete case" (see Laurent 1869, 302; my translation); see also Demolombe 1860, 128–9.

[14] "It is almost totally pointless to know the general effects of the laws, if one does not know how to make a correct application [*juste application*] of them to the different concrete situations [*espèces*] that may come up. But in order to make a correct application of a law, it is above all necessary to grasp its true meaning. It is for logic to direct our understanding [*esprit*] in the search for truth" (see Demante 1876, 5; my translation).

[15] According, e.g., to Mourlon 1846, 61, "Interpretation consists in determining, with the aid of reasoning, the true sense of the laws that are obscure or ambiguous." See also M. A. Mailher de Chassat 1822, 3.

[16] In fact, Laurent thought the most eminent among his colleagues had accepted a method of interpretation that did not pay the laws their due respect. See Laurent 1878, 6, where he justifies his criticism of fellow jurists like Toullier, Merlin, Duranton, Troplong, Demolombe, Aubry, and Rau by claiming that "the interpreters of the code have chosen to follow a wrong way: They ne-

with methodological instructions, I will express them in the form of as many interpretive directives.

Directive 1. The fundamental duty of interpreters. Any interpretive code, any discrete set of interpretive directives, either actually used in legal practice or set forth by way of a methodological proposal, rests on some—consciously or unconsciously adopted—fundamental axiological directive. This directive usually belongs to a certain ideology about the law and the proper role of interpretation and interpreters within the constitutional framework as a whole: it sets out the "point of interpretation-making" and affects the selection of the other directives in the code. Now, according to Laurent, "the first duty of the interpreter" is "to be respectful of the enacted law."[17] This is a view that was shared also by the other exegetical jurists. As we shall see in a moment, however, Laurent provided a more demanding reading.

Directive 2. Modes of textual interpretation. Respect for enacted law requires giving to legislative clauses their true meaning, i.e., the meaning corresponding to the will of the legislator (*la volonté du législateur*) that enacted it. This will be carried out by two means: the text of the law (*le texte de la loi*) and the spirit of the law (*l'esprit de la loi*) (see Laurent 1878, 12). Consequently, in order to grasp the true meaning of a law in its application to an individual case, interpreters should resort *in any case* to grammatical interpretation (*interprétation grammaticale*) and logical interpretation (*interprétation logique*) (see Laurent 1869, par. 272; see also Laurent 1878, 66).[18]

glect the text of the law [*la loi*], or they depart from it at any moment, to look for what they call the spirit of the law […] and […] such a pretended spirit of the law is nothing but the personal opinion of each interpreter" (my translation).

[17] The French original: "Le respect de la loi, tel est le premier devoir de l'interprète" (Laurent 1878, 37).

[18] M. A. Mailher de Chassat, who writes about interpretation from the standpoint of the prerevolutionary legal tradition, also approves of such a basic distinction, originally drawn by Quintilian, and then retrieved by "the modern jurists," i.e., the jurists of the exegetical school (see Mailher de Chassat 1822, 7, 101ff.), though he distinguishes five basic resources helpful to get to the "true meaning" of a legislative clause: (*i*) grammar, (*ii*) rethoric, (*iii*) logic, (*iv*) legal history from the Roman Age, and (*v*) moral philosophy and natural law (natural reason). Among these resources, he considers grammar, logic, and equity to be paramount. The distinction between "logical" and "grammatical" interpretation was the centrepiece of one of the most influential essays on legal interpretation of the period, surely known by the exegetical jurists, if only through the French translation by Mailher de Chassat: I mean *Theorie der logischen Auslegung des Römischen Rechts* (Theory of logical interpretation of Roman law: Thibaut 1806), by Anton F. J. Thibaut. Thibaut apparently had a peculiar view about "logical interpretation," which he conceived, as being at once subjective and objective: "Logical interpretation explains the spirit of the laws, and this it finds partly in what the legislator really had in mind, and partly in their reasons" (ibid., par. 6; my translation). So, according to Thibaut, there are apparently three basic resources for any act of interpretation intending to know the thought expressed in any legislative clause: the letter (*littera legis*), the actual legislative purpose (*mens legislatoris*), the reason behind the law itself (*ratio legis*). By way of an interpretive "fiction," the legislator is to be supposed to have willed, and intended, "whatever can be deduced from the reason behind the law" (ibid., par. 3; my translation).

Notice that this directive performs a double job. On the one hand, it selects the proper tools for textual interpretation. On the other hand, it regulates their use, prescribing that any section whatsoever is always to be interpreted according to *both* tools.[19] In so doing, the directive endorsed by Laurent departs from the view—usually labelled "the clear meaning doctrine" (*la doctrine du sens clair*)—according to which logical interpretation should be regarded as a subordinate, supplementary, by-default, interpretive tool, to be resorted to if, and only if, grammatical interpretation failed to provide the relevant section with a clear meaning applicable to the case at hand.

Directive 3. Grammatical interpretation. Grammatical interpretation focuses on the words of the laws. It is the subject of a three-pronged directive.

Ordinary words should be given the meaning they have in common usage, as the best dictionaries of the relevant natural language record it.

Technical words should be given the meaning that is established for them by the legislator, by means of legislative definitions or, in defect thereof, the meaning that has been sanctioned by the legal tradition.

When a word has both an ordinary and a technical meaning, the technical meaning should generally be preferred to the ordinary meaning.[20]

Notice that this directive performs, again, a double job. On the on hand, it establishes the resources, which grammatical, or literal, interpretation should take into account. On the other hand, it establishes a priority rule for situations of conflict between the first two instructions.

Directive 4. Logical interpretation. Logical interpretation focuses on "the spirit of the enacted law" (*l'esprit de la loi*), legislative thought (*la pensée du législateur*), the subject and purpose of the law (*l'objet de la loi*), or the will of the legislator (*la volonté du législateur*) as something to be gleaned by going beyond the text of the law in its grammatical meaning. It should be used in view of three different purposes:

First, in order to "vivify" or "animate" the clear grammatical meaning of the interpreted clause, so as to perform what *ius commune* jurists were used to calling "declarative interpretation" (*interpretatio declarativa*) (see, e.g., Heinecke 1778, 27).

Second, in order to "clarify" the grammatical meaning of a clause whenever it proves indeterminate (obscure, ambiguous, vague), by way of a supplementary interpretation (*interpretatio suppletiva*).[21]

[19] From a logical, or conceptual, viewpoint, this is not one directive, but the combination of two different, second-level interpretive directives: a selection-directive and a (pure) procedural directive, pertaining to two first-level interpretive directives. On this point, see Chiassoni 2007, chap. 2.

[20] In this sense, Aubry, Rau, Laurent, Baudry-Lacantinerie, and Houques-Fourcade, all quoted in Gény 1919, 31.

[21] According to Thibaut (1799, par. 7), this would be the proper situation where *interpretatio declarativa* steps in. According to Laurent, "Though the text may be clear, it is necessary to

Third, in order to "correct" the clear grammatical meaning of a clause whenever it proves to be at odds with the will of the legislator (*interpretatio correctiva*).

Against the corrective use of logical interpretation, Art. 5 of Title V of the unenacted "Preliminary book" sanctioned the doctrine of clear meaning: "Whenever a law is clear, one ought by no means to elude its letter, under the pretext of penetrating its spirit."

Following this directive, Laurent strongly opposes using the spirit of the law as a way to correct the clear meaning of a legislative provision, since "the pretended spirit of the law is really the spirit of the interpreter" (see Laurent 1878, 16; my translation). Accordingly, Laurent qualifies the clear-meaning doctrine with prudential considerations:

> It is necessary to go farther than that. Maybe the letter, though clear, does not express the true thought of the legislator. If it has been proved that this is so, surely the spirit should be preferred to the text. But it is necessary that such a case be proved, for it is not likely that the legislator, while speaking with a clear voice, said the contrary of what he meant to say. Accordingly, if that occurs, it is surely a very rare exception […] the letter must give way to the spirit. But the exception confirms the rule; and the rule is that the clear letter is tantamount to the spirit of the law. (Laurent 1869, par. 274; my translation.)[22]

Directive 5. Tools of logical interpretation. In the view of Laurent, the spirit of a law should be identified on the basis of three interpretive resources: *travaux préparatoires*, "history" (or "tradition"), and, above all, legal "principles." They are to be used as follows.

Travaux préparatoires. *Travaux préparatoires*—in the most extensive meaning—include all the parliamentary materials preceding the enactment of a law: bills and projects, official expositions, reports, records of the discussions within legislative commissions and on the floor, etc. According to Laurent—who is voicing a still widespread Continental attitude on the subject—these materials should have at most a supplementary value in the interpretation of an "obscure and dubious" text for they are provided with a mere "authority of reason," and most of the time are uncertain, obscure and self-contradictory, such that "the most opposed systems find support" in them.[23] They should never be employed to justify a corrective interpretation of the clear text of a law (see Laurent 1878, 22–3, 25, 28, 34ff.).

animate it, to vivify it by resorting to history, to discussion, to *travaux préparatoires*; with stronger reason, this is necessary when the law is obscure!" (Laurent 1869, par. 274; my translation; see also Laurent 1878, 20).

[22] See also Laurent 1878, 12–22. Laurent, however, seems to claim that such an event is very rare, if not totally impossible. For a less qualified statement, see Mailher de Chassat 1822, 102.

[23] "Our conclusion is that one should always consult the *travaux préparatoires*; but one should also avoid to see in them an authentic interpretaion of the *Code*. One would end up riddled with legal heresies if they were taken literally" (Laurent 1869, 309; my translation). See also Laurent 1878, 15–6, 22ff., 36–7.

History. Like *travaux préparatoires*, history—the ancient law and legal tradition from which the Code got its content—is an interpretive resource rife with uncertainties and contradictions (that's why it was replaced by a code), where interpreters may find support for any interpretive outcome whatsoever (see Laurent 1878, 38–9, 40ff., 50–1). Accordingly, Laurent urges that history be used as a supplementary tool for coping with obscure, dubious, or insufficient statutory provisions; it should never be used, though, to subvert (or "correct") the clear, principle-supported, literal meaning of legislative clauses.

Apparently, Laurent maintains that the proper interpretive use of history should be Janus-like, so as to give pride of place to the time of the enactment of the clause, against *both* the past and the future.

On the one hand, interpreters should not presume that the legislator intended always to defer to the legal tradition. This means a presumption against—so to speak—the rule of the dead over the living legislator and its subjects. It means, in other words, a presumption against the overall conservative thrust of legislative intent—against the idea that, while enacting a law, the legislator simply wished to preserve the previous legal regulation, though eventually couching it in new, different, clearer words (see Laurent 1878, 51). The target behind this presumption is the contrary interpretive presumption that was a matter of course for *ancien régime* interpreters, according to whom statutes were never presumed to be against past law, as represented by the *ius commune*.[24]

On the other hand, however, once a law has been enacted, its meaning should be fixed, for the coming time, with regard to the time of its enactment. That is the most relevant temporal frame for the purpose of ("true") interpretation. Accordingly, jurists should abstain from providing evolutionary interpretations of old statutes and, in particular, from making a new code out of the old one.[25]

[24] See, on this point, the criticism Laurent makes of Merlin: Laurent 1878, 89ff. As to the traditional presumption, see, e.g., Mailher de Chassat 1822, 281, where as "Rule II" ("Règle II") of doctrinal interpretation, it is stated, that "Interpretatio illa capienda semper, per quam ad jus commune reducimur, quae juri communi convenit, et per quam juris communis correctio vitatur, et per quam jus communis minùs offenditur, et per quam minimè receditur à jure communi" ("Always that interpretation is to be accepted by which we hew to the common law, which is appropriate to the common law, by which any correction of the common law is avoided, by which the common law is minimally offended, by which we depart minimally from the common law") Mailher de Chassat, however, also records an exception to the rule: It does not hold, whenever "primaevus status et antiqua natura rei prorsus et in totum mutata sit et extincta" ("the primordial and ancient nature of the thing is totally changed and extinguished." At the end of his treatise, he records one hundred "General rules of interpretation" (*Régles générales d'interprétation*) drawn from the tradition of the *ius commune* (Roman sources, Civilians, Canonists, etc.), and concerning doctrinal interpretation. These "rules," making up a chaotic whole pulling in whichever direction is suitable to the interpreters' desires, Mailher de Chassat justifies as being "undisputable principles, declared by universal reason, that shall always direct the wise spirits, the men of good faith" (see Mailher de Chassat, 1822, 2).

[25] "We should not rule out […] the old doctrines in the name of our modern ideas, introducing into the texts a spirit that is foreign to them. It is this latter tendency that ought to be feared

The prohibition against the evolutionary interpretation of laws, so forcefully advocated by Laurent, was to become one of the major targets of the "critique of the traditional legal method" launched by François Gény at the end of the 19th century (as we shall see in Section 22.3 in this tome).

Legal principles. Legal principles—according to Laurent—are the most reliable resource for getting to the spirit of a law. They are either directly formulated in the codes or derivable from their provisions. They find their ultimate "explanation and justification" in "reason and tradition." The will of the legislator is always to be presumed to be in accord with them. They are the ultimate benchmark for the viability of the interpretive suggestions coming from *travaux préparatoires* and from history (see Laurent 1878, 17, 29, 39).[26]

Further perspectives. Other exegetical jurists apparently have a wider, and more liberal, view than Laurent, about the tools of logical interpretation and, above all, their proper use.

Concerning the "means" for identifying "the spirit of the legislator," Antoine Demante urges interpreters to take into account the following six: (1) preambles; (2) *travaux préparatoires*; (3) legal tradition, paying particular attention to Roman law; (4) foreign laws; (5) customs; and, last but not least, (6) the "system" of legislation.[27]

Likewise, Aubry and Rau include among the "main tools" of logical interpretation—beyond the appeal to the system, conceived in the same way as

most, for we are quite eager to accomodate to it; if the interpreter is not wary against this need for progress, he will end up making himself the legislator, changing the laws, and even doing violence to them when necessary. He ought to cast light on gaps, but it is not for him to fill them up; he ought to cast light on shortcomings, but it is not for him to correct what the legislator has done" (Laurent 1869, 308; my translation). See also Laurent 1878, 9, 61ff., and in particular the following quotation: "Humanity is constantly rejuvenating; this is a law of its life, and to live is to make progress. But there is another element which is also necessary, and this is stability; now, our science is conservative par excellence, because it is traditional; and reconciling progress and stability is easy. While interpreting the law, we do not have the right to innovate, but we have a duty to cast light on gaps and flaws" (Laurent 1878, 65; my translation). The French original: "[L]'humanité– se rajeunit sans cesse, c'est une loi de sa vie, et vivre c'est progresser. Mais il y un autre élément tout aussi nécessaire, c'est la stabilité; or notre science est conservatrice par excellence, puisqu'elle est traditionnelle; et la conciliation entre le progrès et la conservation est facile. En interprétant la loi, nous n'avons pas le droit d'innover, mais nous avons le devoir de signaler les lacunes et le défauts."

[26] "What to do? Keep to text and principles" ("Que faire? S'en tenir au texte et aux principes") (Laurent 1878, 12).

[27] See Demante 1876, 5–6: "One may find [the spirit of the legislator] above all in the set of the provisions that make up the same statute, or likewise in the comparison of a law with other laws, paying attention to the stronger or weaker analogy between the matters they concern. This latter practice is particularly advisable with respect to those laws that, like the different titles of our codes, make up a single body of legislation." Cf. Mailher de Chassat 1822, 26: "Logic allows us to appreciate the ordering and the method employed by the legislator in conceiving and drafting the law, in arranging the several matters, in the way in which each part is deduced from the other; therefrom we gather new means to discover the legislator's will." See also, in this regard, Demolombe 1860, 129–30.

Demante—two further means: (*a*) teleological interpretation, i.e., the "investigation concerning the motives and purposes of the law" to be performed on *travaux préparatoires* and the legal tradition (the law of the past); (*b*) consequentialist interpretation, i.e., "the evaluation of the consequences that would follow from the application of the law," if interpreted in a certain way—being careful to avoid any absurd outcome (see Bonnecase 1924, 146–7).[28]

Finally, other exegetical jurists—like e.g., Demolombe and Duranton—expressly considered case-law (*la jurisprudence*) to be a further, valuable, means to get to legislative will (see Bonnecase 1924, 139–43).

Directive 6. Dissociative interpretation. Dissociative interpretation is that kind of corrective interpretation where the interpreter reads into a legislative clause a distinction that does not appear on a literal reading of the clause itself. Accordingly, dissociative interpretation is a form of restrictive, narrowing interpretation, usually justified by appealing to legislative intent and/or the objective purpose of the law (*teleological restriction*). It is also the way through which exceptions are introduced to a general rule, thereby defeating it.

Laurent—with an altogether different terminology—considers dissociative interpretation, making it the subject of two directives.

Generally speaking, interpreters should abide by the old juristic dictum, *Ubi lex non distinguit nec nos distinguere debemus* (Where the law does not make any distinction, we ought not to make any distinction either).

This directive, coming from the age of the *ius commune*, was included by the drafters of the *Code Napoléon* as Art. 7 of Title V of the unenacted "Preliminary book": "It is not permitted to distinguish where the law does not distinguish."

A legislative clause may nonetheless be interpreted or reinterpreted, so as to draw from it a norm containing a distinction which has not been literally expressed if, and only if, such a distinction is justified in light of legal principles expressed by, or derived from, other clauses (see Laurent 1869, 312; Laurent 1878, 63–4, 70–1).

This means, in terms of present-day legal theory, that Laurent thought there was only one kind of defeasibility compatible with the proper deference due by interpreters to the legislator: "closed" defeasibility grounded in systemic interpretation.

Directive 7. The authority of case-law. As to case-law, and the connected directive, and argument, from the (persuasive) authority of judicial precedents, Laurent suggests a prudential approach roughly as follows: Interpreters should always make a critically aware use of judicial interpretive precedents. This view was in line with the idea that doctrinal interpretation is a rational activity (*Veri-*

[28] Laurent objects that the (negative) criterion of absurd effects, far from providing a reliable clue to legislative intent, is biased toward the interpreters' own views and is a way to make them prevail over the legislator's will. See Laurent 1878, 18–9, 68ff.

tas, non auctoritas, facit interpretationem: see Laurent 1869, par. 281; Laurent 1878, 74–6, 84ff.). A different attitude, one apparently more deferent to precedent, was advocated instead by Demolombe.

It is time to take stock of the exegetical directives considered so far, concerning the textual interpretation of legislative clauses. Apparently, they outline a picture of the exegetical method that is not totally in line with the common view.

1. According to a widespread and persistent commonplace, the exegetical school would be characterized by an interpretive code centred on two basic criteria: literal meaning and legislative intent, as it may be gathered from the *travaux préparatoires*.

2. The interpretive tools of the exegetical school, however, appear to make a more complex and articulated set.

To begin with, *travaux préparatoires* have neither an exclusive nor a privileged place as to legislative intent: legal history and legal tradition, legal principles, the systematic arrangement of legislative materials, the goals and consequences of the law, foreign law, and case-law are all resources to be used "in the search for the true meaning of a law."

Furthermore, all these tools are not reducible to the idea, and method, of so-called subjective interpretation: The intent of the actual, historical legislator is, of course, paramount; however, its identification follows ways where the boundaries between the actual intention of the historical legislator, on the one hand, and his counterfactual or even his ideal intention (according to the interpreters' own ideals), on the other hand, are very thin and blurred.

Finally, the exegetical jurists, far from being a unitary group, divide roughly into two parties as to their preferred interpretive code.

On the one hand, there are the partisans for a *strict* interpretive code, centred on literal and systemic interpretation, as the most suitable way for interpreters to perform their constitutional duty of respect for the enacted laws. This party opposes any resort to the spirit of the laws, as something to be gathered from *travaux préparatoires*, tradition, and equity, to be used liberally for the purpose of corrective interpretation.

On the other hand, there are the partisans for a *liberal* interpretive code, centred on the paramount relevance of the spirit of the laws as the main tool for both supplementary and corrective interpretation.

3. The official view of the exegetical jurists is usually accounted for by historians and critics in a way expressed by the following words of Mailher de Chassat: "The general methods of interpretation may be considered the most natural and the simplest ways *to get to know* the meaning of the laws" (Mailher de Chassat 1822, 77; my translation and italics added). The exegetical codes for textual interpretation, however, do not provide interpreters with sets of rigorously defined tools arranged in a fixed sequence of use, leading always to the same outcome from the same materials. Indeed, they allow for much leeway,

where the interpreters' own ideological allegiances, skills, and sense of the law come through to play a pivotal role. Furthermore, notwithstanding the simplistic picture usually provided by their critics, at least some of the exegetical jurists were well aware of that, and willing to alert their readers to it. This seems to be case, for instance, with Charles Demolombe and François Laurent.[29]

So far, I have dealt with that part of the exegetical code that deals with textual interpretation. Interpreters, however, usually have to deal with further problems, like normative gaps and normative conflicts. It is time to see which methodological prescriptions Laurent and other exegetical jurists have considered for such events.

Directive 8. Normative gaps. *Gaps* is a very ambiguous term. It may refer either to a *casus omissus* (a normative gap proper, a real gap), or to a *casus male inclusus* (an ideological gap, an axiological gap, an apparent gap, a *contra legem* gap). In the first situation, there is by hypothesis no law regulating a case; in the latter situation, contrariwise, there is a law, but—in the interpreter's opinion—it is a bad law.

Whenever there is a normative gap, according to Laurent, judges, in order to fulfil properly the duty imposed on them by Art. 4, should resort to the principles concerning analogical and *a contrario* reasoning, to legal tradition, and, eventually, to equity.

To begin with, any normative gap in the *Code* should be filled by means of analogical reasoning from the provisions of the *Code* itself. Analogical reasoning, however, is forbidden if the disposition from which it would proceed is an exception: In such a case, the proper way to fill the gap is by *a contrario* reasoning. But if the exception is itself—or is justified by—a general rule, it may be applied by way of analogy on the basis of the *eadem ratio*.

Concerning *a contrario* reasoning, interpreters may resort to this tool if, and only if, its use is compatible with legal principles and does not lead to absurd results.[30]

It may also happen that, in a matter insufficiently regulated by legislation, the enacted clauses refer to the legal tradition (e.g., to some institute of Roman

[29] According to Demolombe: "Interpretation may be more or less ingenious or subtle, and it may sometimes *even attribute to the legislator intentions he did not have* […] [which may be] better or worse, though under the condition that *he not pretend to have invented it*; otherwise, *it would not be interpretation anymore*" (quoted by Bonnecase 1924, 141–2; my translation and italics added; see also Laurent 1878, 71).

[30] The example Laurent offers is as follows: "Art. 3 of the *Code* says: 'Immovable property, even though owned by foreigners, is regulated by French law.' Arguing from the silence of the law, we may say: The legislator speaks of *immovable* property, and makes it subject to French law; he does not speak of *movable* property; hence he does not make it subject to French law: What he says of the former, he denies of the latter. '*Qui de uno dicit* […] *de altero negat*.' A similar interpretation would lead to this supremely absurd outcome: that French law would not regulate the movable property owned by French people in France" (Laurent 1869, 313; my translation); see also Laurent 1878, 70–1.

law). In such a case, the gap should be filled by applying the rules of the pertinent ancient law.

If, and only if, all the preceding means are not viable, a gap may be filled by resorting to equity: The judge would then become "a minister of equity." Laurent, however, claims that "such an hypothesis is so rare that we can rule it out in our debate."[31]

The position of Laurent is to be contrasted with the more traditional attitudes of those first- and second-generation exegetical jurists who point to equity, natural reason, and customs as primary resources for filling statutory gaps. This means that, from the viewpoint of contemporary judges and lawyers, the task of filling gaps could be performed by means of alternative sets of tools (alternative gap-filling codes), to be used depending on circumstances.

Directive 9. Normative conflicts. Whenever there is a normative conflict, according to Demante, interpreters should proceed as follows.

To begin with, they should try to solve the conflict by way of prevention: by means of a suitable re-interpretation of the relevant legislative clauses, so as to derive mutually compatible legal norms from them.

Secondly, whenever such a corrective re-interpretation of the clauses is not viable, the interpreter should see whether one of the two laws makes an exception to the other, so as to settle the conflict by means of the *lex specialis* criterion (*lex specialis derogat legi generali*).

Thirdly, and finally, if neither of those two ways is viable, the normative conflict should be solved by means of the *lex posterior* criterion (*lex posterior derogat legi priori*).[32]

One last word is in order, before proceeding to the historical school.

While dealing with *a contrario* reasoning, Laurent comes to the following general conclusion about the virtues (and limits) of the "rules," or directives, concerning interpretation: "We are here again looking at a rule of interpreta-

[31] "Sometimes the exception, though derogating from some rule, is an application of some other legal rule. In such a case, the will of the legislator is not that the exception be limited to the case for which it was specifically provided for; it is, rather, an example that the legislator offers and, consequently, the interpreter may and ought to allow for the same decision as to the unregulated cases, where there is the same reason for deciding" (Laurent 1869, 312; my translation). "When the law has spoken, the interpreter cannot pay heed to equity: The judge is by no means the minister of equity, he is the organ and slave of the law" (Laurent 1878, 57–8; my translation). The French original: "Quand le droit a parlé, l'interprète ne peut plus écouter l'équité: le juge n'est point le ministre de l'équité, il est l'organe et l'esclave de la loi."

[32] "When two laws seem to be contrary to each other, it is first of all necessary to see whether the legislator did not have different cases in mind; in such a case, to make them agree is enough to apply each law to the case it concerns. It is then necessary to see whether one of the two laws does not make exception to the other, for in such a case it is evident that the general rule cannot prevail over the exception. Finally, if the contradiction is a real one, it is clear that one should follow the later law, which has derogated the previous one" (Demante 1876, 6; my translation).

tion that has nothing of the absolute, that here and now is good, there and then is bad" (See Laurent 1869, 313; my translation).[33]

Far from being an isolated, short-lived spark of sound realism in the otherwise foggy sea of methodological (self)-deception depicted by Gény (see Section 22.3 in this tome), this sentence may be considered as (further) evidence of a disenchanted interpretive attitude, apparently shared as well, for instance, by the other exegetical giant, Charles Demolombe. This understanding suggests, in turn, the following conclusions.

Perhaps, we may reproach the exegetical jurists—maybe, with the notable exception of Laurent—for having advocated a style of interpretive reasoning riddled with the rhetoric of "principles" and the "spirit of the law," and by no means effective in setting actual limits on interpretive discretion: a style of reasoning that, incidentally, is not here and now the pale and waning heritage of a long-gone past. It seems, however, that the charge of naïf or even fraudulent interpretive cognitivism (interpretive formalism) should be considerably played down.

Perhaps the proper way to pass judgment on the exegetical school would amount to singling out a seeming fundamental incoherence.

On the one hand, judging by what the exegetical jurists say about the *notion* of interpretation, they seem to consider it a sheer matter of knowledge—a matter of grasping the "true meaning" of statutory clauses.

On the other hand, however, judging by what they say about *interpretive directives*, they seem aware that even the most austere method of statutory construction—the textualist approach advocated by Laurent—has leeway for interpretive discretion. Their methodological candour is at odds with their pretended interpretive cognitivism.

Whoever frames the exegetical school as a paradigm of theoretical interpretive formalism misses the target. The capital issue for the exegetical jurists was not theoretical, an issue of descriptive methodology, but normative, an issue of prescriptive methodology. It may be formulated roughly as follows: Design the interpretive method that is most adequate to the constitution and ideology of a legislative, rule-of-law State, while at the same time preserving a key role for legal science. For jurists like Laurent, this meant taming the mutinous horses of interpretation, as far as possible. For other jurists, like Demolombe, it meant leaving those very horses unbridled, as far as possible.

[33] The passage also contains the following: "In any case, these maxims are to be dealt with carefully: one must avoid applying them mechanically. The law is not a mechanical science, and principles are not to be treated as algebraic formulas. Our science proceeds from reason, we should never take principles away from the motives which justify them" (Laurent 1869, 313). See also Laurent 1878. Cf. Mailher de Chassat 1822, 8: "Finally, one should never forget that what does the work in interpretation is not so much science as good faith" (my translation).

21.3. The Organicistic Legal Hermeneutics of Friedrich Carl von Savigny

The historical school of law emerged in Germany roughly in the second decade of the 19th century. Though obviously tied to the preceding age through forerunners (Gustav Hugo, Justus Möser)[34] and the personal experiences of some of its followers, it rose in stark opposition to the core tenets of the ideology of legal Enlightenment: individualism; the paramount relevance of reason in legal matters; universal eternal natural law and the natural rights of man; the artificiality of positive law and self-confident, radical, constitutional engineering; the primacy of written law and codification over custom, case-law, and the authority of the jurists (see Becchi 2009).

The forefront founder and representative of the historical school was Friedrich Carl von Savigny (1779–1861). In the editorial essay *Über den Zweck dieser Zeitschrift* (On the purpose of this review: Savigny 1815), introducing the first issue of the *Zeitschrift für geschichtliche Rechtswissenschaft* (Review for an Historical Legal Science)—the school's mouthpiece, founded in 1815 with Karl F. Eichhorn (1781–1854) and J.-F. Göschen (1778–1837)—Savigny distinguishes two antagonistic philosophical standpoints: the "a-historical" and the "historical" standpoint, corresponding to as many "schools" of German jurists.

The a-historical standpoint, as a general view about men and their political institutions, maintains what might be called a double separation thesis.

On the one hand, the present age is "separate"—or "autonomous"—from the past: Each age is properly to be considered as being fully capable of "creating for herself, at liberty and discretion, her own existence and her own world, be it good and happy or bad and unhappy," according to "the measure of her understanding and strength." This "historical egoism" of each age carries with it a dim view of history, looking at it simply as a collection of "moral-political examples" that may be useful, and used, in creating the present-day world.

On the other hand, individuals are to be regarded as "separate from the whole": In particular, they are—and ought to be made—autonomous from the state.

Once applied to the law, these individualistic ideas suggest that the "matter" or substance of the law is, for any age, the output of the will of the people endowed with legislative power; it is completely independent from the law of the past; it depends solely on the "conviction" that presents itself to the legislators as "the best for the time being."

[34] See Savigny 1814, par. 2. On Savigny, see, e.g., Jhering 1861; Marini 1978. On the historical school, see, e.g. Marx 1842; Solari 1971; Wilhelm 1958, chap. 1; Losano 1968; Bobbio 1979, 43ff., where five identifying traits are singled out: (*i*) flesh-and-blood men in specific historical settings, rather then the idealized "man" of Enlightenment and natural law theories; (*ii*) irrational impulses and attitudes as the real working factor of any historical development; (*iii*) anthropological pessimism; (*iv*) appreciation and love for the past; (*v*) a respectful, conservative attitude towards legal tradition. See also Tarello 1988b.

Contrariwise, the historical standpoint, as a general view about men and their political institutions, maintains a double necessary-connection thesis.

On the one hand, each age, far from being separate from past ones, is to be regarded as intimately connected to them, like a ring is tied to the other rings of a same chain: "Each age of a people" is "the follow-up to and the development of all the past ages."

On the other hand, "there is no human existence that is altogether autonomous and isolated; rather, what may appear to be autonomous, if considered from another angle, is a ring of a higher whole." Accordingly, "each single man," far from being a separate moral agent, "is also to be thought of as a member of a family, of a people, of a state."

Once applied to the law, these holistic ideas suggest that legal matter, for any age, is produced by the whole past of the nation; it is not just the output of arbitrary acts of creation by a body of passing legislators; it is rather the output of "the inner essence of the nation's self and of her history." Accordingly, far from entertaining any false thought of legislative omnipotence, "each historical age"—by legislators, judges, and jurists—"should be directed to studying, renewing, and keeping alive such legal matter as exists in virtue of an inner necessity."[35]

Starting from these ideas, Savigny worked out a theory of law, legal sources, and legal interpretation that was destined for great influence on the legal culture of the 19th century, in Germany and abroad (see Savigny 1840).

21.3.1. An Organicistic Conception of Legal Interpretation: Savigny's Interpretive Code

Savigny's "theory" of interpretation—basically a piece of normative methodology heavily dependent on his holistic, organicist, and historical jurisprudence—is set forth in the first volume of his *System des heutigen römischen Rechts* (System of contemporary Roman law: see Savigny 1840, 1, pars. 32–51; see also Savigny 2004b, 2004c, 2004d). It divides into three parts: (1) the interpretation of "single," non-defective laws "considered in themselves"; (2) the interpretation of "single," "defective laws" considered in themselves; (3) the interpretation of "the sources [of law] as a whole."

21.3.1.1. Interpreting Single, Non-defective Laws

The core of Savigny's methodology is a concept of interpretation (*Auslegung*), according to which interpretation is the "free intellectual activity" by means of which we "recognize a law in its truth," we discover "the true thought" expressed by the norm-formulation (see Savigny 1840, vol. 1, pars. 32–3).

[35] All the quotations in the text are from Savigny 1968; see also Savigny 1814, pars. 1–2; 2004a, 263–4.

This definition makes of Savigny's methodology a clear example of interpretive cognitivism. Furthermore, unlike the exegetical jurists, whose cognitivism was apparently shallow and at odds with their methodological avowals, Savigny's cognitivism is supported by a powerful, comprehensive vision of the world of law. In this vision, where all law is popular law, living in the people's common conscience, and legislators are its agents, any piece of legislation is presumed to express a thought, the thought of the legislator, which thought is presumed in turn to have grasped the essence of legal reality as to a certain type of legal relation. From such a perspective, interpretation is a "doctrinal" or "scientific" enterprise, which by its very nature is free ("a free intellectual activity"), within the limits, if any, eventually placed on it by "legal interpretation," in the two varieties of "authentic" interpretation (the legislator's own) and customary interpretation (*interpretatio usualis*).

Doctrinal interpretation is an act of knowledge: It is *scientific* interpretation proper. Accordingly, Savigny claims, the "modern writers" who claim interpretation to be "a form of legislation," or a way to "reform the laws," are mistaken.

Scientific interpretation is always necessary: It is not possible to apply a legal norm to the real or imaginary case at hand (to "translate legal rules into practical life"), without having previously grasped its content. Accordingly, those jurists who accept the old adage *in claris non fit interpretatio* are likewise mistaken.

As to the proper way to conceive the structure of such an intellectual activity, Savigny emphasizes that it is a "reconstruction" of the thought (*Gedanke*) "enclosed in a law," by means of a thought experiment: (Good) interpreters should put themselves in the same starting point of the legislator, and "artificially repeat in themselves his way of proceeding, so that the law may come to be born again in their mind" (Savigny 1840, vol. 1, 212–3; my translation).[36]

From the standpoint of (what I have called) its structure, statutory interpretation does not differ from any other interpretation of any other "expressed thought" (like philological interpretation). Indeed, according to Savigny, the specificity of statutory interpretation lies rather in its tools or techniques ("elements," in Savigny's own words).

Against that background, the basic interpretive directives of the Savignyan interpretive code may be roughly set out as follows.

Directive 1. The four-elements doctrine. To gain to a complete understanding of the content of a law, interpreters should resort to four "concurring" interpretive resources: grammar, logic, history, and system.

Grammatical interpretation (the "grammatical element") focuses on the words of the norm-formulation, appealing to the rules of the language employed by the legislator.

[36] This same idea may also be found in Savigny's earlier methodological lectures: see, e.g., Savigny 2004b, 93; Savigny 2004d, 217.

Logical interpretation (the "logical element") focuses on the arrangement of the legislator's thought and, more precisely, on "the logical relations among its several parts."[37]

Historical interpretation (the "historical element") pays attention to the condition of objective law, as to the legal relation concerned, at the time of the enactment of the norm-formulation to be interpreted as formulated, in order to grasp the effects that the enacted law should have had on it and the changes it made to pre-existing law.

Finally, *systemic interpretation* (the "systematic element") concerns the

> inner connection, encompassing all institutes and all legal norms in a great unity. This connection, like the historical connection, was likewise present to the mind of the legislator, so that we shall know his thought fully only when we shall have learned the relation in which the (single) law stands to the whole system of the law, and the effect that law is to have within it. (Savigny 1840, vol. 1, 213–5; my translation)

From the perspective of the history of Western methodology, two different systems can be said to be at stake here. On the one hand, logical interpretation deals with the "logic of legislation": with the arrangement of legislative provisions by the legislator and with their mutual relationships. It deals with a *designed* system. On the other hand, systemic interpretation, concerned as it is with the inner connections between legal institutes, norms, and relations, deals with a *spontaneous* and *organic* system. The two systems are connected: The designed—shallow, outer—system is assumed to mirror, though always incompletely, as we have seen, the organic—deep, inner—system.

Directive 2. The proper interpretive functions of the ratio legis. The "motivation" for a law, or its *ratio legis*, is something to be regarded as separate from the law itself.

On the one hand, from a backward-looking perspective, it may consist in some pre-existing "rule" of the system, of which the "present" law is a "logical development."

On the other hand, from a forward-looking perspective, it may consist in the goal, or purpose, the present law is meant to serve in the future.

According to Savigny, the *ratio legis* may be profitably and confidently resorted to in order to establish "the legal nature" of a norm: whether, for instance, it is a rule of *ius commune* (ordinary law) or instead a rule of *ius singulare* (an exception). Contrariwise, as a tool for the textual interpretation of legal formulations it may be used only with "great care" and a full awareness of the risk it involves of replacing the interpreter's own thought with that of the legislator (see Savigny 1840, vol. 1, 217–8).

[37] Here, from a technical point of view, Savigny's position seems in line with that of exegetical jurists like Demante, Aubry, and Rau.

As we shall see in a moment, Savigny believes the *ratio legis* to be a proper, though dangerous, interpretive tool for those laws whose expression has proved to be "defective."

Directive 3. Forbidden interpretive resources. A third directive, by way of a possible reconstruction of Savigny's interpretive code, establishes a prohibition against the two following interpretive resources: on the one hand, the non-determinant *occasio legis*, i.e., those circumstances, present at the time of the enactment of the law to be interpreted, which had no determining causal impact on the legislator's activity; on the other hand, the purely subjective motives, the personal and changing goals of the legislator (see Savigny 1840, vol. 1, 221).

So far, if viewed with the cold glance of dispassionate appreciation, the interpretive code Savigny provides for the legal profession seems affected by obscurity and incoherence. Obscurity: Systemic interpretation, with its romantic appeal to the inner, organic, unity of legal institutes, defies any rational control. Incoherence: Systemic interpretation seems to include, as a matter of course, interpretation according to the *ratio legis*, whenever the *ratio legis* is some pre-existing norm of the system. As we have just seen, however, Savigny does not seem to think so. The picture gets even worse, as we shall see now, when Savigny's methodology turns to the interpretation of defective laws.

21.3.1.2. Interpreting Defective Laws

The four-elements directive concerns the methodological tools fit, and necessary, to cope with laws "in a normal state." These tools fall short, however, in the face of laws that are "defective."

A law is in a "normal state" whenever two conditions are met: The norm-formulation ("expression") "encloses a thought that is complete in itself"; there is no obstacle preventing interpreters from "recogniz[ing] this thought as the true content of the law."[38]

Contrariwise, a law is defective whenever its formulation has proved defective. This may happen in two different situations: The law has been provided with an "indeterminate expression," one that "does not convey any thought perfectly"; the law has been provided with an "erroneous expression," one that "immediately" sets forth a thought that is "different from the true thought of the law" (Savigny 1840, vol. 1, 222; my translation).

[38] See Savigny 1840, vol. 1, 222: "The fundamental principles of interpretation above established (par. 33) may be enough for the normal state of legislation, where the expression of the law encloses a thought that is complete in itself, and there is no circumstance preventing the recognition of this thought as the true content of the law. Now, however, we have to deal with the more difficult cases of imperfect laws, and propose at the same time the means by which these difficulties can be removed" (my translation).

To cope with these situations, Savigny deems it necessary to resort to further tools. Accordingly, in Savigny's methodology the textual interpretation of formulations considered in themselves appears to be regarded as a two-stage activity.

In the first, necessary stage, interpreters try to get to the true content of a norm-formulation by means of the four-elements directive.

If this approach fails, a second stage of textual interpretation will become necessary so as to overcome the defects of the norm-formulation and get to the true content of the law. By way of charitable interpretation, we may suggest that, here, Savigny is pointing to the following two situations: first, the four elements (grammar, logic, history, system) do not make it possible to translate the norm-formulation into one clear legal norm (indeterminate expression); second, the grammatical element and the logical element lead to different interpretive outputs, while the historical and systemic elements do not provide any clue as to which of them is to be preferred (erroneous expression).

We may wonder, in passing, how it could ever be that the joint use of the four elements above fails, given their wide, declared scope. Somehow, by introducing this distinction, Savigny is downplaying the interpretive and argumentative power of the four elements. In so doing, he adds a confusing, unfit part to his interpretive code. From this standpoint, Savigny's methodology seems the output of the clumsy, not fully successful combination of heterogeneous intellectual sources: the new, romantic-organicist-historical view, on one side; the tradition of juristic hermeneutics, with its usual way of handling interpretive problems and the interpretive process, on the other side.

Directive 4. Tools for interpreting single defective laws. To cope with defective laws, interpreters should in turn resort to three interpretive criteria.

To begin with, they should employ the systemic criterion of the "inner connection of legislation." This requires interpreting "the imperfect part" of a law in light both of the other parts of the same law, and of other laws as well.

Secondly, they should employ the teleological criterion of the "connection between the law and its motivation (*ratio legis*)." This criterion may prove useless, however, whenever interpreters face either the absence of one, determinate *ratio legis* or the presence of a plurality of competing, irreducible *rationes*.

Thirdly, and finally, if the two criteria above fail, interpreters should resort to the substantive, axiological criterion of "the intrinsic value of the content resulting from interpretation": the intrinsically most valuable among the several competing interpretations of a same law (norm-formulation) is to be preferred.

Due to the danger that interpreters, by using this criterion, may "trespass into the field of the legislator," Savigny suggests limiting its application to the laws with an indeterminate expression (see Savigny 1840, vol. 1, 223).

Directive 5. Varieties of corrective interpretation. There are—Savigny claims—two different kinds of corrective interpretation (*interpretatio correctiva*) of the

laws that are flawed by erroneous expression: corrective interpretation proper, and spurious corrective interpretation. The former is a genuine form of interpretation, purporting to correct a defective law by making its expression to fit for its true thought. Contrariwise, the latter is an underhanded way to change the law. Interpreters should only perform corrective interpretations proper.

Unfortunately, due to the overall fuzziness of Savigny's interpretive directives, the distinction between true and spurious corrective interpretation, though conceptually clear, seems by no means easy to apply in practice. Indeed, all things considered, we have no sound benchmark by which to distinguish the true thought of the law from the false—even though, in juristic opinion, the two may be seriously at odds.

The exegetical jurists demonstrate a shallow interpretive cognitivism, openly and consciously betrayed by their methodological avowals. Savigny, by contrast, shows no sign of uncertainty whatsoever as to his cognitivist creed. The methodology he sets forth, however, presents serious fissures, casting a gloomy light on the soundness of his bold attitude.

21.3.1.3. Interpreting Legal Sources as a Whole: Antinomies and Gaps

In Savigny's view, the task of a (good) interpreter is by no means exhausted by textual interpretation of single laws and their formulations. The sources of law should also be "interpreted" as a whole, so as to make the law appear as it is, namely, "a whole […] meant to provide a solution to any question that comes up in the field of law"; a whole that must necessarily possess ("negative") "unity" and "completeness" ("positive unity") (Savigny 1840, vol. 1, par. 46; my translation).

Savigny apparently distinguishes the "ordinary" interpretation of the sources of an objective law as a whole from the activities of metatextual interpretation specifically dealing with antinomies and gaps. His views in this regard may likewise be accounted for in the form of a few methodological directives.

Directive 6. Ordinary interpretation of the sources as a whole (systematization). The ordinary process of metatextual interpretation is tantamount to the systematization of legal materials: Interpreters should derive "a system of law" from the set of sources which, to that end, may even be regarded as a "single law." This means, more precisely, that they should dig out the inner relations that hold between legal institutes, rules, and relations, even by resorting to *ratio legis*, and bringing to bear all the organizing power of legal science (see Savigny 1840, vol. 1, par. 42).

Directive 7. Establishing the negative unity of the legal system (solving normative conflicts). On its way to scientific systematization, the law may appear to be riddled with "antinomies" or "contradictions" ("lack of negative unity"). In such an event, Savigny suggests that interpreters should proceed as follows.

First, they should try to solve the normative conflict by means of interpretation: in the same may as for Demante, by making it disappear through a convenient corrective re-interpretation of the relevant formulations of law.

Secondly, whenever corrective re-interpretation is not viable, they should overcome the normative conflict by resorting, in turn, to the "systemic unity," the "historical unity," and the "organic unity" of objective law.

From the standpoint of the systemic unity of law, the basic criterion for solving an antinomy is the criterion of exceptionality (sometimes improperly referred to as the *lex specialis* criterion): The exception prevails over the rule.

From the standpoint of the historical unity of law, the basic criterion for solving an antinomy is the chronological criterion: *Lex posterior derogat legi priori*.

Finally, from the standpoint of the organic unity of law, the basic criterion to be used is (what may be called) the axiological criterion: The rule that is most fitting to the fundamental principles of law prevails. This criterion is to be used if, and only if, the two former criteria are not viable (see Savigny 1840, vol. 1, pars. 42, 44, 45).

Directive 8. Establishing the positive unity of the legal system (filling normative gaps). Whenever the legal norms established by means of legislation or custom leave some case unregulated, Savigny suggests that interpreters should proceed as follows: (*a*) They ought not to resort to natural law or natural equity, as a pretended universal law governing human actions, for there is no such thing; contrariwise, as representatives of popular law, they ought to instead resort, (*b*) analogical reasoning from established legal norms (*analogia legis*) and (*c*) the fundamental principles of objective law. In so doing, they have to exploit the "organic," "inner force" of objective law, by which it may "fill itself out" (principle of organic self-integration) (see Savigny 1840, vol. 1, par. 46).

Notice that, in this way, all gaps come to belong to the shallow level of legislation and custom, and the filling of such *explicit* gaps by jurists—and judges duly instructed by the former—is tantamount to bringing to light, and developing, the inner potential of objective law as an organic entity with its "inner system." The dogma of methodological cognitivism is accordingly being preserved in regard to meta-textual interpretation as well.

21.4. Legal Interpretation in the Heaven of Concepts

In the heaven of legal conceptualism (*Begriffsjurisprudenz*), so the story goes, dwelled two very mighty deities: Jhering and Windscheid—even though one of them one day left it to found a new, more earthly enterprise. The present section is devoted in turn to their respective theories of interpretation and legal method.

21.4.1. Rudolf von Jhering

It is usual to distinguish two stages in the work of Jhering: the so-called "first" Jhering, advocating the method of juridical construction, until about 1861, on one side; the so-called "second" Jhering, defending an instrumentalist conception of law and anticipating the Continental and American anti-formalist movements, from about 1861 onwards, on the other side. Here, I shall focus on the first Jhering: the author of the celebrated, four-volume *Geist des römischen Rechts auf die verschiedenen Stufen seiner Entwicklung* (The spirit of Roman law through the different stages of its development: Jhering 1873–1877), published from 1852, and the founder, with Carl Friedrich von Gerber, in the year 1857, of the *Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts* (Yearbooks for the dogmatics of current Roman and German private law) (see ibid., pars. 3, 43, 46).[39]

In a nutshell, Jhering's legal methodology may be summed up as follows.

1. The starting point, the one that identifies the subject matter of legal method, is a *Savignyan concept of positive law*.

> The law […] is an objective organism of human liberty […] the law is by no means […] an exterior aggregate of arbitrary provisions, owing its origin to the legislator's thought; it is, like the language of a people, the inner and regulated output of history. (see Jhering 1873–1877, vol. 1, par. 3; my translation)[40]

Furthermore, as in Savigny, the law contains both a visible and an invisible part. The visible part is made of the formulated rules of law, of those rules that have already been expressed by means of legislation, custom, and juristic writings. They make up the "formulated law." The invisible part is instead made of the "latent rules" of law, waiting to be discovered and duly formulated for everyone's use. They make up the "real law," of which the formulated law is always a tentative, approximate, perfectible representation (see Jhering 1873–1877, vol. 1, par. 3).

2. As to the nature of legal method, Jhering endorses a position of *methodological naturalism*. Methodological directives are not necessarily the arbitrary,

[39] On Jhering see, e.g., Wilhelm 1958, chap. 3; Lazzaro 1965, chap. 1. Incidentally, in what is regarded as the first document of his second period, Jhering attempts a unitary interpretation of his work, claiming that, unlike many colleagues living in the dark, rarefied Heaven of Legal Concepts, he always thought that legal technique and juridical constructions were never to be severed from the practical necessities of ordinary life the law must cope with. See Jhering 1891a, n. 5. A continuity is also stressed in the very first page of *Der Zweck im Recht* (Purpose in law), the most celebrated work of the "second Jhering," three different editions of which appeared between 1877–1883 and 1898.

[40] Later on, we also read that "The law, as a real, objective creation that manifests itself in the form and movement of life and external commerce, may be considered as an organism: It is this standpoint that we will assume in making the whole of our study" (see Jhering 1873–1877, vol. 1, par. 3; my translation).

external outputs of the methodologists' own reflection. There are in fact *true* methodological directives: They are those "provided by the law itself, in virtue of a necessity contained in its very essence, the necessity of regulating in a firmly established manner the way in which the law is to proceed in the field of practice" (Jhering 1873–1877, vol. 3, par. 42; my translation). Consequently, the proper task of a (good) methodologist is to bring to light, and provide with an adequate formulation, the true directives of legal method. In this way, Jhering presents the following methodological instructions not as his own's invention, but as dictated by the law itself, for whatever legal experience.

3. The study of law comes in two basic varieties: the historical study of law (legal history), on one side, and the doctrinal or dogmatic study of law (legal dogmatics, legal science, *Jurisprudenz*), on the other side. Both disciplines are genuinely scientific enterprises. The natural sciences represent the universal standard of scientificity. Like the natural sciences, legal history and legal dogmatics combine a "receptive" side with a "productive" side. On the receptive side, they discover the substance of a—historical or present—positive law. On the productive side, they arrange the substance in the proper scientific form in keeping with the systematic-classificatory method of the natural sciences (the "method of natural history," in Jhering's own words) (see Jhering 1873–1877, vol. 1, par. 3; Jhering 1857, 2).

4. As concerns legal dogmatics, where the "opposition" between receptive and productive inquiry holds "true" in a "much greater measure" than for the method of legal history, the receptive side is entrusted to the "lower," or "inferior" doctrinal study of law (inferior legal science: *niedrieger Jurisprudenz*); its productive side to the "higher," or "superior" doctrinal study of law (superior legal science: *höher Jurisprudenz*) (see Jhering 1873–1877, vol. 1, par. 3, see also n. 11).[41]

5. The inferior doctrinal study of law is devoted to performing those interpretive tasks that *ius commune* jurists were used to considering under the label of *comprehensio legum*.

Indeed, according to Jhering, here the jurists should proceed by means of "interpretation," a multifarious activity concerning "the raw legislative material" and including "explaining the matter," "getting rid of apparent contradictions," "overcoming obscurities and imprecisions," "bringing to light the whole content of the legislator's will" by "deducing" from isolated provisions the principles making up their foundation, and drawing from these principles the consequences that follow from them (see Jhering 1873–1877, vol. 3, par. 46).[42]

[41] Later on, Jhering himself provided a concise, but vividly critical, account of his own view of legal science in the first part of Jhering 1891a, the essay usually regarded as marking the passage to his second period.

[42] "*Interpretation*, here you have in one word the field of activity of inferior legal science"

Interpretation "establishes the *true meaning of legislation*, and opposes it either to a too narrow, or to a too broad, drafting." Corrective interpretation is accordingly one of the major tasks Jhering assigns to textual interpretation, on the basis of the dichotomy between formulated law and latent (and real) law, and from a clear-cut cognitivist interpretive outlook: Pieces of legislation *do have* true meanings, and these *can* be discovered by jurists through interpretation.[43]

In Jhering's view, the inferior doctrinal study of law is—and should be—throughly conservative. It does not change the content of the law, nor even its "*immediate practical* form," namely, the imperative form of commands and prohibitions, that is, "the regular form under which the law appears in the statutes." Interpretation simply identifies the content of the law more accurately in its "inferior forms" as a set of norms of which there are two basic kinds: provisions or maxims (detailed rules of conduct), and general legal principles (see Jhering 1857, 6ff.).

6. The superior doctrinal study of law is aimed at gaining an intellectual mastery over positive law. It is not simply a way of casting light on the law. Rather, it turns the law into a systematic set of juridical "institutes" or "bodies," this by a process of "perfecting the form of the legal matter" through a "quantitative and qualitative simplification" of the "mass of [legal] materials" (see Jhering 1873–1877, vol. 3, pars. 43, 46).[44]

In that process lies the core of "legal technique." Indeed, without a duly performed *formal transfiguration* of the law, the other main concern of legal technique, that is, "make certain and ease up the application of abstract law to concrete cases," would not be viable (see Jhering 1873–1877, vol. 3, par. 43).[45]

(see Jhering 1873–1877, vol. 3, par. 46; my translation). From this broad view of the proper tasks of interpretation, analogical reasoning (analogical extension) would seem to belong to inferior legal science. As we shall see in a moment, however, Jhering somehow contradictorily assigns it to the quantitative simplification stage of superior legal science. See Jhering 1857, 4–5; 1873–1877, vol. 1, par. 3 and n. 11; ibid., vol. 3, par. 46.

[43] "What legal science brings to light in doing this job [interpretation] is never *specifically* new. It is nothing but the original, albeit explained, legal content" (von Jhering 1873–1877, vol. 3, par. 46; my translation). In his 1884 satirical essay *Im Begriffshimmel* (In the heaven of concepts: Jhering 1891b), one of the most celebrated of the second Jhering's writings, Jhering depicted interpretation as something not so innocent, carried out by means of a "dialectic-hydraulic press" through which interpreters may both "inject" into the texts of the laws "concepts, presuppositions, and limits that are totally outside the author's thought," on one side, and "eliminate" any (for them) unwelcome expression the laws may contain, on the other side.

[44] In a telling passage, Jhering claims that the effect of superior legal science on the law is "by no means like that of a light that simply lights up the [juridical] bodies; it is rather like the heat that turns them from a solid state into a fluid, condensable state. Rigid at its primitive state, and reducing the art of the jurists to the narrowest proportions, legal matter is somehow liquefied; in this state, it makes its being moulded and shaped possible; its latent forces and qualities, which lay dormant, are awakened and set into action. The method of natural history transforms and elevates legal matter in its very essence" (Jhering 1873–1877, vol. 3, pars. 43, 46; my translation).

[45] Here is the way Jhering characterizes the basic question of "legal technique," as a matter of "pure form": "How should the law—making abstraction from its content—be organized and es-

To sum up: Inferior legal science provides superior legal science with legal materials in their imperative form. It identifies the tentative, surface extension of a positive law as a set of norms. This is the normative basis from which the simplificatory job making up the peculiar scientificity of legal science starts.[46] This simplificatory job is, according to Jhering, twofold: quantitative and qualitative.

Quantitative simplification. Quantitative simplification is aimed at

> reducing the mass of [legal] materials, of course *without* affecting the results to be obtained. Making the most that is possible with the minimum possible elements, this is its law: The more the material is limited, the easier it is to manage (*law of economicality*). (Jhering 1873–1877, vol. 3, par. 43; my translation)[47]

According to Jhering, quantitative simplification is to be obtained by means of four basic "technical operations": the "analysis of the matter"; the "logical concentration of the matter"; the "systematic ordering of the matter"; and the fixing up of a "juridical terminology."

Analysis of the matter. In Jhering's metaphorical thinking, informed by the natural sciences, the analysis of the matter is tantamount to the "chemistry of law." Its subject matter consists of legal relations regulated by positive legal provisions and principles. Its goal consists in identifying their shared normative content, if any, e.g., the "general ideas" that are common to all contracts, and/or obligations, and/or torts, and/or ways of acquiring property, separating them from the "local" or "particular" parts. The basic tool of analysis is "abstraction": By means of it, specific, separate legal relations that come into being in the course of time may be discovered to be as many "points of historical irruption" of some general backstage idea. From Jhering's perspective, analogical inquiry ("extension by analogy") is again—though counter-intuitively—a tool of analysis and quantitative simplification. Indeed, by identifying the common general idea behind some regulated and some unregulated case, legal science spares the legislator from making a new, pointless, *ad hoc* rule for the not yet expressly regulated case (see Jhering 1873–1877, vol. 1, par. 3; ibid.,

tablished so that its mechanism may simplify, promote, and enable as much as possible the application of the rules of law to the concrete cases?" (Jhering 1873–1877, vol. 3, par. 43; my translation).

[46] "In order to proceed to construction, it has to first interpret; inferior legal science is the first, necessary step to superior legal science. It is, however, only a first step, and legal science should not abide there any longer than necessary. It is not until the higher level is reached that its task and method become specifically legal, that it attains a specific scientific character, making of it something different from all the other sciences" (Jhering 1873–1877, vol. 3, pars. 43, 51; my translation).

[47] "This law requires that legal science should never create new means and principles for accomplishing what it can carry out by using the means and principles it masters" (Jhering 1873–1877, vol. 3, par. 43; my translation). This is what Jhering calls "the art of skillfully using what already exists" (ibid., vol. 3, par. 66; my translation).

vol. 3, par. 44; Jhering 1857, 4–5). It is worth emphasizing that Jhering considers abstraction and analogical extension as purely scientific, cognitive, technical processes.[48]

Logical concentration. The logical concentration of the matter consists in "concentration," or reduction, of the "external volume of a mass of legal matter that positive law has created for this or that legal situation." It is apparently aimed at eliminating any redundancy from positive legal norms. Here again, the basic tool is abstraction: "the universal logical mode of proceeding that consists in abstracting a principle from a given set of species and expressing it by means of a new and more energetic logical formulation" (Jhering 1873–1877, vol. 3, par. 45; my translation).[49]

Systematic ordering. The systematic ordering of the matter is the arrangement of the juridical bodies into an ordered set of classes. This order is neither casual nor arbitrary. There is a true systematic classification waiting to be discovered by legal science through an exact perception of the objects and their relationship with other objects (see Jhering 1873–1877, vol. 3, pars. 44, 46).

Juridical terminology. The fixing up of a juridical terminology concerns the development of a technical vocabulary made of rigorously defined terms replacing fuzzy and longer ordinary-language expressions. It is related to the definition of the notion of a juridical institute or juridical body, which in turn is one of the key jobs in juridical construction (see Jhering 1873–1877, vol. 3, par. 43 and n. 1).

Qualitative simplification. The "qualitative" side of a matter—says Jhering— is tantamount to its "inner order," "symmetry," and "unity." The law is "qualitatively simple" whenever its several parts, though "exactly delimited and separated" from one another, nonetheless harmoniously join into a single

[48] "In so doing, legal science does not exceed beyond its powers, does not trespass into the role of the legislator; it does not create anything, but it exercises a critical function; it adopts an interpretation of a higher character: one that concerns not the words but the ideas of the legislator. This operation requires a greater faculty of abstraction, a finer discernment than ordinary interpretation; mistakes are possible in both directions, either by not going far enough or by going too far, that is to say, either by erroneously considering as abstract ideas elements that are essentially and exclusively peculiar to a particular species or, contrariwise, by perceiving abstract ideas as specific elements" (Jhering 1873–1877, vol. 3, par. 44; my translation).

[49] In the contemporary terminology of Alchourrón and Bulygin's systematization theory, Jhering's logical contraction is tantamount to the conservative contraction of the normative basis (see Alchourrón and Bulygin 1971). Here again, however, Jhering emphasizes how the "final discovery of the principle [behind a set of statutory provisions] by no means has for science, the sole importance of concentrating the already existing matter, but also has the advantage that the principle, once found and recognized, in turn becomes the source of new legal rules" (Jhering 1873–1877, vol. 3, par. 45; my translation)—"new," as will be pointed out later, not as to substance, but in virtue of expressing latent contents and energies of positive law. On Alchourrón and Bulygin, see also Section 24.2.2 in this tome and Section 26.2.1.3 in Tome 1 of this volume.

unity, "of which the eye may perceive the whole as easily as its parts" (Jhering 1873–1877, vol. 3, par. 43; my translation).

Qualitative simplification depends on one basic technical operation: juridical construction (*juristische Konstruktion*), "the application to the legal matter of the method of natural history," "the plastic art of legal science," "a work of art," "creation," "invention," "organization," aiming at the working out of juridical *institutes* as juridical *bodies* (*Körper*)—the latter word being used to emphasize the organic, living nature of juridical institutes—the fact that, like any living organism, they are created and grow up, expand, retreat, develop, change, interact with other bodies, and perish.

A (good) theory of juridical institutes (legal bodies) should accordingly perform the following tasks:

(1) conveying the essence of each juridical body into an adequate *concept* or *notion*, by way of a suitable "ontological definition" (e.g., a suitable definition of property, contract, tort, sale, bill of exchange);

(2) providing a suitable account of the "structure," or "anatomic elements," of each body—for instance, if the body is property, legal science should provide a rational explanation of the legal right to property, focussing on its subjects, objects, content, effects and the actions pertaining to its protection;

(3) providing a suitable account of "qualities," "forces," and "events in the life" of each juridical body;

(4) providing a systematic classification of the several juridical bodies, grouping them into a coherent whole (see Jhering 1873–1877, vol. 3, pars. 43, 46).

In working out juridical bodies from legal principles and provisions, jurists should follow three "laws of juridical construction": the law of fitness, or content-preservation; the law of systemic unity; the law of juridical aesthetic (concerning "the legal beautiful").

According to the first law of juridical construction—the law of fitness, "the law of concordance between doctrinal construction and positive legal matter"—the construction "should be exactly applicable to positive law." It should pay the utmost respect to the "content" or "practical force" of positive legal norms, while being totally free as to its *form*. In fact, in Jhering's view, legal science may even contradict the constructions—the notions and definitions—provided by the legislator, if there are any, since the legislator has no "authority," no "legislative power," in matters of "theory."

According to the second law of juridical construction—the law of systematic unity, or the law of the "absence of contradictions"—legal science should avoid establishing "what is juridically impossible." This law imposes on juridical constructions a double coherence (and consistency) requirement. On the one hand, the requirement of *internal coherence*: Each juridical construction should be made of mutually coherent elements. On the other hand, the requirement of *external coherence*: The set of juridical constructions worked out by jurists should form a coherent whole. External coherence is, above

all, historical, or diachronic, coherence: New and old juridical constructions should fit.

The benchmark for the "legitimacy and truth" of any juridical construction lies in its successful working: both in itself, and in combination with other juridical creations.[50]

The third law of juridical construction—the law of the juridical beautiful—sets out the aesthetic requirements for properly worked out juridical bodies: The juridical constructions should be *clear* (making the essence of legal relationships easily accessible to the understanding), *natural* (in tune with the phenomena of the physical and intellectual world), *transparent* as to their legal consequences, and *simple*.

Jhering regards the first two laws as setting as many conditions for the truth and legitimacy of juridical construction. Contrariwise, the third law simply states an aesthetic ideal that may not always be accomplished.[51]

There appears to be a fourth law in Jhering's methodology of juridical construction: a law we could call the *law of systemic self-development*.

The outcome of a properly performed job of juridical construction, says Jhering, is the "system" of a given positive law: "We shall call *system* the law as it results from construction in the sense of the method of natural history" (Jhering 1873–1877, vol. 3, par. 46; my translation).

Now, in Jhering's view, the (properly built) system of positive law has two basic virtues. First, it is the most convenient "practical form" for any given positive legal matter. It is the most "visible" and "plastic" form for positive legal norms. Secondly, it is the "source of new legal matter," though in a way that is always in line with the essence of positive legal norms. Indeed, by means of "juridical speculation," jurists may fill any legislative gap by resorting to a matter that "is partly provided by the different [juridical] bodies in themselves, by their nature and internal dialectics, and partly by the general theory of juridical bodies."[52] Such gap filling, Jhering claims, far from being abusive,

[50] "The *proof of the juridical construction* consists, for legal science, in placing the doctrinal creation in any imaginable position, in combining it in all possible different ways with other creations, and in making it agree with each of its fundamental principles" (Jhering 1873–1877, vol. 3, par. 46; my translation).

[51] In the totally different context of a logical positivism, roughly the same requirement is set forth by Alchourrón and Bulygin for "rational reconstructions" of juristic and legal-theoretical concepts (see Alchourrón and Bulygin 1971).

[52] "The system […] discloses to legal science an incommensurable field of activity, an inexhaustible quarry of investigations and discoveries, and a source of a most lively intellectual enjoyment. The narrow limits of the positive laws do not work as borders around its domain; the purely practical questions do not mark the paths it should follow. Free and unhampered, the spirit, as in philosophy, may wander and inquire without the least fear of getting lost. The practical nature of the world it dwells in will always take it back to the reality of things. But while coming back to it, it will have the satisfaction of having done more than to satisfy a purely individual need for knowledge: It will bring out […] something precious for the world and for mankind. The ideas it

is something practical life cannot do without; something jurists ought to perform, whenever the occasion arises.

The heaven of legal concepts is indeed a paradise for jurists. In that realm those jurists are granted an absolute right to act as a substantive legal source, through the definition and ordering of living juridical bodies, though under the pretence of sheer legal knowledge and pure legal technique.

21.4.2. Bernhard Windscheid

Bernhard Windscheid, the last great representative of German Pandecticism, published the first edition of his masterwork, *Lehrbuch des Pandektenrechts* (Handbook of the law of Pandects: Windscheid 1886), in the years 1862–1870. In the first volume, he devotes a chapter to interpretation and scientific treatment of the law (see Windscheid 1886, chap. 2, pars. 20–6).

Like the jurists of the exegetical school, Savigny and Jhering, Windscheid adopts, as a starting point, a cognitivist notion of interpretation. Interpretation, Windscheid says, consists in the "declaration [*Erklärung*] of the content of the law." Furthermore, he distinguishes, along with Savigny, between "true" interpretation, which is a free intellectual inquiry, on the one hand, and the spurious "interpretation" by the legislator, being in fact the production of a new, retroactive positive law, on the other hand. Finally, like Laurent, Savigny and Jhering, Windscheid suggests that (true) interpretation is a necessary task for anyone wishing to know what the law is, for scientific or practical purposes alike. The content of the law may be more or less clear: In the first case, interpretation is likewise at work, though its "task" is less "important" than in cases where the content of the law is unclear.

So far, Windscheid seems to be playing the genuine interpretation theorist. In a few lines, however, the initial notion of interpretation discloses its character as a stipulation making up the conceptual cornerstone of a concise, well-ordered, prescriptive methodology concerning the "art" of true interpretation: Windscheid's own proposed interpretive code.[53] If you will learn to follow the directives of this code properly—Windscheid seems to suggest—your outcomes, whatever they be, will be as many (correct) declarations of the true content of law.

Let us have a closer look at Windscheid's code for statutory interpretation, providing an account of it in the (by now familiar) form of a set of interpretive directives.

will have found will not exist as simple ideas; they will become practical powers" (Jhering 1873–1877, vol. 3, par. 46; my translation).

[53] True interpretation "is not so much a science, which can be taught; it is rather an art to be learned; the theory cannot but draw attention upon directive viewpoints" (Windscheid 1886, vol.1: par. 20; my translation).

Directive 1. Declaring the true content of a single legal norm. To declare the true content of a single law (norm-formulation), interpreters should perform *in any case* a threefold interpretive inquiry: *first*, they should proceed to "grammatical interpretation"; *secondly*, they should proceed to (what might be qualified as) actual-thought-oriented "logical interpretation"; *thirdly*, they should proceed to (what might be called) counterfactual-thought-oriented logical interpretation.

Directive 2. Grammatical interpretation. Grammatical interpretation consists in ascertaining the meaning expressed by the words used by the legislator in formulating a legal norm: This is to be done on the basis of "linguistic rules." These are the general rules of current ordinary language, but also the specific forms of expression in use at the time and circumstances when the law was enacted.

The output of grammatical interpretation—though Windscheid does not use this expression—is the literal meaning of a norm-formulation. The literal meaning may be indeterminate (obscure or ambiguous) or even flawed (erroneous). That is why further interpretive inquiries are called for in any case.

Directive 3. Actual-thought-oriented logical interpretation. "Logical interpretation" is meant to identify what the legislator *actually* did and *deliberately* wanted to say in enacting a certain norm-formulation. Its goal is the actual, deliberate thought (spirit, will, thinking, mind) of the legislator. That is why this form of logical interpretation may more properly be called *actual-thought*-oriented logical interpretation, to distinguish it from the third form of interpretive inquiry envisaged by Windscheid, which, as we shall see in a moment, is a counterfactual form of logical interpretation aimed at the legislator's *conjectural* thought.

Actual-thought-oriented logical interpretation "goes beyond the outcome obtained by applying linguistic rules." It does the job of overcoming obscure literal meanings by turning them into clear, applicable ones; selecting the correct literal meaning among the several alternative meanings brought to light by grammatical interpretation; amending the clear literal meaning of a norm-formulation whenever it is at odds with the legislator's actual and conscious thought; and providing a *corrective* (re)*interpretation* of the norm-formulation.

In what is one of the most original points of his methodology, Windscheid distinguishes three modes of corrective interpretation: *quantitative extension*, which is needed whenever the legislator has said less than what it consciously wanted to say; *quantitative restriction*, which is needed, contrariwise, whenever the legislator has said more than what he deliberately wanted to say; and, finally, *qualitative modification*, which is needed whenever the legislator has said something qualitatively different from what he consciously wanted to say.

As to the techniques for discovering the legislator's actual, conscious thought ("penetrating as completely as possible into the spirit of the legislator"), Windscheid recalls the following:

(*a*) *systemic interpretation*, where the "system" is made up of "other undisputed parts of the same law," and/or "other laws of the same legislator," and/

or "other laws of different legislators," if connected to the one to be interpreted by "intentional unity";

(*b*) *historical interpretation*, to be grounded in the state of positive law at the time of the enactment of the law to be interpreted ("for one should assume that such a state was present to the legislator");

(*c*) *teleological interpretation*, to be grounded in "the goal that the legislator intended to achieve" by means of the enacted law;

(*d*) *consequentialist interpretation*, to be grounded in "the value of the outcome," presuming the legislator wanted to say something meaningful and convenient, rather than something meaningless and inconvenient.

Where the techniques above do not point to a single certain outcome, interpreters should settle for plausible outcomes, with the aid of default interpretive criteria like "Prefer the narrowest departure from existing law" or "Prefer the milder view" (see Windscheid 1886, vol. 1, par. 21; my translation).

Directive 4. Counterfactual-thought-oriented logical interpretation. This kind of interpretation, for which Windscheid provides no name, is grounded in the idea that the legislator may not have had a clear and full perception of what it wanted to express; that the legislator was not (totally) aware of some points, but, *had* it been aware of them, he would have expressly taken them into account while enacting a law. Hence, the ("highest and noblest") task of interpreters becomes that of giving effect to the legislator's true and full thought, to his "true concept" and true "will," as against his "expressed will," by inferring this true concept from the meaning the legislator wished to actually express.[54]

Counterfactual-thought-oriented logical interpretation is a means of corrective interpretation—basically in the form of quantitative extension and quantitative restriction of the laws. Its tools are the same as those of actual-thought-oriented logical interpretation.

Directive 5. Gaps. Gaps, Windscheid suggests, are basically legislative gaps: They are situations the legislator did not expressly consider in his enacted laws. Accordingly, the position of jurists and judges confronted with a gap is pretty much the same as where there is a gap between the legislator's actual thought as to the content of a law, on the one hand, and his true concept of that law, on the other hand: "It is a matter of *knowing the true concept of the legal whole*, like earlier it was a matter of knowing the true concept of the sin-

[54] "It may happen, and it often happens, that the legislator self did not have a completely clear perception of this concept, and stopped at a form of manifestation of that concept that does not fully correspond to its true scope. It is the highest and the noblest task of interpretation to come to the rescue of the legislator, and in light of the will he expressed, to give effect to the will he really had. In so doing [interpretation] does not exceed beyond its powers: It acts in a way that is perfectly in tune with legislative intent; it does *nothing but express what the legislator itself would have expressed if it had paid attention to the points in regard to which it had no awareness*" (Windscheid 1886, vol. 1, par. 22; my translation and italics added).

gle legal norm" (Windscheid 1886, vol. 1, par. 23; my translation and italics added). On that presupposition, Windscheid provides two prescriptions for properly coping with statutory gaps: *First*, gaps should *not* be filled by resorting to "so-called natural law"; indeed, from Windscheid's posivist-historicist position, that is an entirely discredited entity; *second*, gaps should instead be filled by resorting to "the spirit of the legal whole self"—from this perspective, the "correct decision" is the one that is supported by analogy from enacted norms and the body of legal concepts they presuppose.

Directive 6. Contradictions. Due to the combined pull of legal tradition, the historical school, and Jhering's natural history jurisprudence, Windscheid tends to consider normative conflicts ("contradictions," "antinomies") as mostly apparent. He nonetheless also entertains the extreme, rare situation where a real contradiction comes out and is here to stay. In any case, Windscheid's directives for coping with antinomies are meant—as usual—to show interpreters the right way to discover the true answer.

Seeming contradictions should first of all be carefully examined to see whether they are apparent. A contradiction is apparent in two different situations. First, the seeming contradictory norms actually concern different situations—what may be discovered, in light of Windscheid's code, by means of both types of logical interpretation, leading to suitable corrective (re)interpretations of the relevant formulations of law (see Directives 3 and 4, above). Second, the seeming contradictory norms, though they concern the same situation, do belong to different legal "levels." This, in turn, may happen in two different cases: One of the norms belongs to the *ius commune*, while the other belongs to the *ius singulare*; or one norm is older than the other. In the first situation, there is no real contradiction, for the conflict is settled by the *lex specialis* criterion (*lex specialis derogat legi generali*); in the second situation, there is no real contradiction, either, for the conflict is settled by the *lex posterior* criterion (*lex posterior derogat legi priori*).

Whenever a normative conflict cannot be solved in the above-mentioned ways, interpreters should resort to (what we could call) a *logical-axiological criterion*: The norm that is "provable" to be more in keeping with "the legislator's true thought" prevails over the other.

Finally, if the normative conflict "is not apparent (being instead unsolvable)," in that even the logical-axiological criterion fails, interpreters should conclude that, since the two conflicting norms "have exactly the same value," each one derogates the other, and hence "it is to be decided as if neither existed" (see Windscheid 1886, vol. 1, par. 23; my translation).

Chapter 22

THE AGE OF DISCONTENT: THE REVOLT AGAINST INTERPRETIVE COGNITIVISM

by Pierluigi Chiassoni

22.1. Foreword

By the end of the 21th century, the disparate cognitivist views endorsed by the exegetical jurists, Savigny, the "first" Jhering, Windscheid, and their fellows began to be perceived, and severely criticized, as false and obnoxious to the legal culture and the legal profession by a generation of jurists and legal theorists who, following the lead of the revolutionary instrumentalist turn advocated by the "second" Jhering, brought into the law the general spirit of derogation and impatient *ennui* for the *long siècle* that was finally drawing to a close—though they had to wait until 1914 for its final, ominous, demise.[1]

On the Continent, the torchbearers of the revolt—a quite nuanced set, by no means amenable to simple generalizations—came from four main quarters: the Free Scientific Research view, advocated in France by François Gény; the free law movement, championed in Austria and Germany by Eugen Ehrlich and Hermann U. Kantorowicz; the jurisprudence of interests, launched in Germany by Philip Heck; the pure theory of law, developed by Hans Kelsen and his disciple Adolf Merkl in the so-called *Wiener Rechtstheoretische* School.[2]

22.2. François Gény: *Critique de la méthode traditionnelle* and *libre recherche scientifique*

François Gény (1861–1959) developed his methodological views in two major works: *Méthode d'interprétation et sources en droit privé positif: Essai critique* (Method of interpretation and sources in positive private law: Critical essay, Gény 1919), published in 1899, with a second, final, expanded edition in two

[1] The basic ideas of the "second" Jhering—*Der Kampf um's Recht*; *Der Zweck im Recht*; *Scherz und Ernst in die Jurisprudenz* (see Section 21.4.1 in this tome)—boil down to the following: (1) an instrumental conception of law—the law (legal norms, institutes, bodies and concepts) is not an end in itself, but a means to ends ("Purpose is the creator of the whole law"); (2) a non-cognitivist conception of interpretation and legal dogmatics; (3) the distinction between legal theory and normative ethics as concerns the law; (4) the claim in normative ethics that peace and justice are the basic goals the law should serve, by means of a necessarily relentless struggle against oppression and injustice.

[2] On Gény see also Section 12.5 in Tome 1 of this volume. On Ehrlich and Kantorowicz see also Chapter 3 in Tome 1 of this volume. On Kelsen and Merkl see also Chapter 2 in Tome 1 of this volume.

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volumes appearing in 1919; *Science et technique en droit privé positif: Nouvelle contribution à la critique de la méthode juridique* (Science and technique in positive private law: New contribution to the critique of juridical method, Gény 1914–1924), in four volumes, published between 1914 and 1924, which was meant as a complementary essay to the former.[3]

In accounting for Gény's pivotal ideas about interpretation, the distinction between *is* and *ought*—between how legal phenomena are in fact, on the one hand, and what interpreters should do, to do their job properly, on the other; between theoretical or descriptive methodology, on one side, and normative methodology, on the other—is to be given pride of place, for it represents the tacit cornerstone of Gény's investigations.

Two conspiring theses represent the core of Gény's theoretical methodology: the former about the nature of legal interpretation, the latter concerning legal sources.

The limited discretion thesis. As a matter of fact, statutory interpretation is not, and cannot be, a matter of pure discovery of the "absolute and categorical rule" to be mechanically applied to the facts at hand. On the contrary, it is an activity unavoidably marked by the "subjectivity" of interpreters: by their necessary evaluations (*appréciations*) and discretionary judgments. Interpretive discretion is not necessarily tantamount to sheer arbitrariness, though. For it is, and can be, limited by two factors: legal sources (once we go beyond legislation, as we shall see in a moment) and institutional arrangements, like the work of a supreme *Cour de cassation* carrying out a centralized review on trial judges in matters of law and seeing to the uniform interpretation and application of the law.

The limits-of-written-law thesis. As a matter of fact, the law is not, and cannot be, exhausted by written law (codes, statutes, decrees, orders, etc.). Besides legislation (*la loi écrite*), its "formal sources" (*sources formelles*) also include custom (*la coutume*), case-law (*la jurisprudence*), and the output of the doctrinal study of law (*la science du droit*), the latter two making up between them the traditional or authoritative source (*la Tradition ou les Autorités*). These are *formal* sources, Gény claims, for they are all materials endowed with authority, though different in kind and legal force, as is evidenced by their "actual life" (*vie actuelle*), from which interpreters may draw instructions on how to decide a case (see Gény 1919, vol. 1, 237).[4]

[3] On the work of Gény, see, for bibliographical references as well: Halpérin 2008b, Bernuz Beneitez 2006, Grossi 1991. For a biographical sketch, see Kayser 1991.

[4] "By formal sources of positive law I mean authoritative injunctions, external to the interpreter and endowed with the property of commanding his judgment, when these injunctions are formed according to competence and have as a proper and immediate purpose the revelation of a rule, serving to direct legal life." Legislation and custom come first in the hierarchical order of sources, that is "designed by the very facts"; furthermore, the tradition-authority source is not an "independent," "sui generis," legal source, like the former; it is contrariwise *parasitic* on them:

Gény's insistence on the plurality of legal sources was intended as a direct criticism of what was regarded as the pillar of traditional juristic thinking: the legalistic credo according to which the law is tantamount to legislation, it is (almost) completely exhausted by legislation, and the regulation of every corner of social life may be found in, and constructed out of, it. This credo Gény criticizes on two grounds.

As a theoretical claim, he suggests, it is plainly false: Judges and jurists, when solving a legal problem, make use not only of legislation but also of customs and, above all, tradition and authorities, which work as standard supplements to legislation.

As a practical, normative claim, it is not viable: It prescribes a course of action that paradoxically runs contrary to the presumed, paramount goal of absolute legal certainty. Absolute legal certainty does not belong to this world; and relying exclusively on legislation has the baffling, paradoxical outcome of underhandedly transferring lawmaking power to the interpreters, under the pretence of adhering to objective laws. If we are seriously concerned with legal certainty, there is only one path available: recognizing that we can only get close to it, but never achieve it completely, and that the more sources we take into account, the more interpretive discretion finds itself hemmed in.

This theoretical core, for which Gény deploys a detailed argument, sets the background for the basic problem that normative methodology should face and settle: Once we give up the utopian, fanciful pretense to absolute legal certainty (by means of legislation), how is any viable, reasonable level of legal certainty to be obtained? What should judges and jurists *do* in order to promote and serve that goal?

The recipe Gény offers turns on the following notions and prescriptions.

1. Written law—or "legislation" (*la loi*, *la loi écrite*) in a broad sense of the term—is the output of the will of legal-political authorities, and consists of linguistic formulations conveying legal rules or precepts:

> What characterizes the written law is that, in relation to the rule it establishes, it represents the will of a given social organ cast in a verbal formula that fixes its limits and defines its content in order to impose that will on everybody. Whence comes perfect information about, and also something like a perfect integration of, the legal idea, which without definiteness and consistency floated in the vast chaos of the nature of things. That idea becomes a clear precept, and at the same time clearly binding, by virtue both of the formula that expresses it and the power of the authority that stamped it with its seal. (see Gény 1919, vol. 1, 241; my translation; see also Gény 1919, vol. 1, 243, 248, 267).

> "They [authority and tradition] can only pave the way for the written law, by inspiring its provisions, and above all they can contribute to the creation of customs, providing the basis, among the interested people, for uses supported by a legal sentiment. In themselves, they are like torches which light up the interpreter's path, without imposing any direction, and like precedents, which will aid his reason, without destroying every activity that is proper to it" (Gény 1919, vol. 2, 72–3; my translation).

2. On the *pars destruens* side, two interpretive attitudes have to be rejected beforehand, while considering the proper "directive principles" for statutory interpretation: on the one hand, the traditional approach ("la méthode traditionnelle"), as exemplified by the exegetical jurists; on the other hand, the social-evolutionary approach.

The traditional approach should be rejected on three grounds: It endorses the dogma of legislator's omnipotence, the false idea that statutory law is capable of providing a discipline for whatever case is at hand (the idea of the "logical completeness," or "logical closure," of written law); it pretends to *make* it true by way of an interpretive effort assumed to be a matter of pure logic, totally blind to consequence and good sense; it assumes, on that basis, that whatever jurists and judges do with statutes, in order to get to the right answer for any case at hand, properly belongs to the realm of "interpretation."[5]

The evolutionist approach should be rejected for the opposite reason: Far from extolling legislation by the ascription of the magic virtue of logical completeness, it is guilty of contempt, for it requires us to consider statutes as vehicles for prescriptions totally detached from their author and context, and bound to serve, at any time, the felt necessities of society.

3. Both approaches fly in the face of the very nature of legislation: its being the product of the will of an historically situated legislator. Accordingly, on the *pars construens* side, Gény conceives methodological investigation into the "principles of interpretation" as

> the search for ways of proceeding that will make it possible to draw from the legal text the whole complex of the legal rules it contains, in view of an adaptation, as perfect as possible, to the circumstances of social life […] it is a matter […] of knowing by what means the interpreter (the necessary middleman between the legal formula and legal life) […] will be able to discover and connect, from actual life, both the conditions implied by the text and the solution it attaches to them. (Gény 1919, vol. 1, 253–4; my translation)

Following this path of critical reflection, Gény comes to a set of methodological instructions that may be presented in the form of the following directives, making up Gény's "interpretive code."

Directive 1. Presumption of meaningful content. In interpreting any piece of legislation, interpreters should adopt, as the only suitable attitude, the presumption that the legislator

> has filled with his thought and will, for otherwise it would be possible to see the legal text as an empty vessel, which anybody will fill at pleasure. (Gény 1919, vol. 1, 263; my translation)

[5] We know from Chapter 21 that the traditional approach, expecially as far as some exegetical jurists are concerned, was not exactly like that. Gény is here taking sides against it in its worst, most extremely cognitivist version.

Directive 2. Statutory interpretation proper defined. On the basis of the previous presumption, statutory interpretation proper is to be conceived as the "search for the content of legislative will, aided by the formula expressing it," the search "for what its authors wished and were able to express in its enactment" (Gény 1919, vol. 1, 265, 268; my translation).

Directive 3. The principle of critical originalism. Interpreters should look for the original meaning of statutory clauses, i.e., for the meaning the legislators were willing and able to attach to them in the context of enactment,

> without any preconceived idea, either about the more or less ideal perfection of the rule to be discovered or about its more or less complete fit with the social context in which it ought to be applied. (Gény 1919, vol. 1, 265; my translation)

Directive 4. The principle of limited evolutionism. Interpreters are allowed to depart from the search for the original meaning of statutory clauses and proceed to an evolutionary interpretation providing them with a "new meaning," grounded in the "ideas that govern at the moment of their application," but only if:

(*a*) the clauses contain deliberately vague or open ("general") clauses, like *ordre public* (public order), *bonne foi* (good faith), *diligence du bon pêre de famille* (due diligence), etc.;

(*b*) the conditions of the statutory prescriptions have totally disappeared or lost their original relevance (see Gény 1919, vol. 1, 272–4).

Directive 5. Realizing interpretive originalism. To give the maximum effect to the original-content-original-context principle, Gény suggests the adoption of the following interpretive directives.

(*i*) Grammatical and logical interpretation ("le texte et l'esprit": the text and the spirit), far from being considered at odds with each other or hierarchically ordered, ought to be regarded as necessary complements. On this basis, it is useful to distinguish two intertwined activities, within the unitary process of interpretation: *intrinsic interpretation*, or interpretation through the statutory-clause formulation ("par *la formule du texte*," or within "la ligne de ses éléments strictement intrinsèques," i.e., "in line with its strictly intrinsic elements"); *extrinsic interpretation*, or interpretation on the basis of external elements ("à l'aide d'*éléments étrangers à la formule*"); the former considers statutes as "psychological" phenomena, the latter as "social" phenomena (see Gény 1919, vol. 1, 276, 287).

(*ii*) Whenever the outcome of the intrinsic interpretation of a norm-formulation—the will-content identified from the formulation itself—is not at odds with its extrinsic interpretation, that will-content ought to be regarded as controlling interpreter's judgement and discretion.[6]

[6] "[I]t will dictate the interpreter's decision, suppressing any hesitation" (Gény 1919, vol. 1, 277; my translation).

(*iii*) While doing textual interpretation, interpreters should look for the widest possible scope and content, within the presumed bounds of the original meaning. On this score, interpreters should reject the doctrine according to which the only, proper, will-content of statutory clauses, binding upon interpreters' decisions, lies general and abstract prescriptions (*préceptes juridiques*, *Rechtssätze*), while definitions and other "theoretical" contents, if any, belong to the realm of nonbinding "simples et pures conceptions" ("pure and simple conceptions"). Once included in a statutory clause, such conceptions ought instead to be regarded as fully binding law, like any piece of legal prescription. On the same ground, whenever a general term has been employed, the extension of which is now wider than it was originally, the extension ought to be considered *within* the limits of a "strict interpretation of the written law" (see Gény 1919, vol. 1, 278–83; my translation).

(*iv*) The meaning of a statutory clause, the *pensée voulue du législateur* (the thought the legislator has willed), to be completely identified by way of *intrinsic interpretation*, should also be determined by means of (what might be called) a *logical-systemic* interpretation, paying attention, first, to the logical consequences of the statutory formulation considered in itself ("the natural laws of the human mind command one to suppose, in every reflective volition, the sequence of rational deductions implied by the psychological act": Gény 1919, vol. 1, 286; my translation)[7]; second, to the will-content of the other related clauses belonging to the *same* piece of legislation; and third, to the joint logical consequences of the interpreted clause and other related clauses—according, one might say, to the technique of so-called *combinato disposto*.[8]

(*v*) Turning to *extrinsic interpretation*, it should look at those data, external to the statutory formulation, that make up the social environment which the legislative will (presumably) took into account and/or was affected by. Among the resources of extrinsic interpretation, interpreters should count the facts which the statutory provision was meant to regulate; the moral, political, social, economic, or technical needs to be satisfied by means of the provision making up its goal or *ratio legis*, "which, without revealing in and of itself the means which the legislator resorts to in order to realize it, at least makes it possible to better understand them and develop them in their detail" (Gény 1919, vol. 1, 288; my translation)[9]; the social and legal environment of the statutory provision, i.e., its historical precedents, the *occasio legis*, the outlooks supposed to have informed the mind or the spirit of the legislators, for-

[7] The French original: "les lois naturelles de l'esprit humain commandent de supposer, dans toute volition réfléchie, la suite des déductions rationnelles, que comporte l'acte psychologique."

[8] See Gény 1919, vol. 1, 286; see also ibid., 284–5. *Combinato disposto* means what is prescribed by the combined directive import of two or more legal norms.

[9] The French original: "qui, sans révéler, par lui-même et à lui seul, les moyens, que le législateur met en oeuvre pour le réaliser, permet, du moins, de mieux comprendre ces moyens et d'en développer les details."

eign legislation; the *travaux préparatoires*, as a "formal element, that expands the text, and sometimes explicates it" ("comme élément formel, amplifiant le texte, et parfois l'expliquant"); "purely logical elements," like the *principles* the drafters considered as objectively true and absolutely valuable, and any related provision "casting light and completing those to be interpreted" ("éclairant ou complétant celle qui est à interpréter": Gény 1919, vol. 1, 288; my translation).

The fatal outcome of such an interpretive approach—according to Gény the *only* approach suitable to the very nature of legislation as the will-product of a historical legislator—is the *limited scope* of statutory norms relative to the variety of facts and cases in any society at any time: the fatal incompleteness of legislation, its being structurally, unavoidably rife with gaps.

Against the broad traditional conception of "interpretation" Gény sets the view that interpretation properly so called merely consists in finding out the clear meaning, *if any*, that the legislator intended for his statutory clauses; in this way, whenever such a task proves impossible, for there may be no clear meaning or even no relevant statute at all, what jurists do is no longer *interpretation* but rather consists in appealing to other formal legal sources (custom and tradition) and performing the delicate task of *free scientific research* on the data ("le donné") out of which the right legal answer ought to be worked out—data that Gény identifies with the laws concerning the nature of things and social reality, which, in his view, are in turn as many pieces of a theological and teleological natural law.[10]

Against the idea of the logical completeness of written law Gény sets the idea of its necessary incompleteness. This is due both to the complex and dynamic character of the social reality the written law is intended to regulate, and to the fact that the tools traditionally supposed to carry out the "logical" completeness of legislation are in fact either unviable (*deduction* presupposes that a rule is already *there*, but in case of gaps there is precisely no law out there to be applied), or ineffective, as in the case of so-called *inductive* forms of reasoning (by analogy, *a fortiori*, *a contrario*). For, as a whole, they make up a mutinous set, by itself not capable of dictating any single answer for a gap situation, unless a discretionary judgment by judges or jurists intervenes to establish the path to be followed (see Gény 1919, vol. 1, par. 81 *bis*).

The last basic directive of Gény's interpretive code mirrors these ideas.

Directive 6. Properly dealing with gaps. Statutory gaps ought to be filled up not according to the principle of the hermetic or "logical" completeness of legislation, i.e., by reasoning from analogy, *a fortiori*, *a contrario*, or from the gen-

[10] In his two-stage view of the doctrinal study of law, Gény sets these scientific inquiries into law (*science*) in contrast to the technical elaboration of law (*technique*), which constructs its concepts and proposals (*le construit*) from the data discovered at the scientific stage. Clearly, the background model for Gény's theory of legal science is Jhering's two-level legal dogmatics.

eral principles of law, but by resorting to custom, case-law, and doctrinal opinions, and, whenever these sources have run out, to "free scientific research" on law (see Gény 1919, vol. 1, 267).

Free scientific research is not tantamount to purely sociological, empirical investigations, though. It also involves *intuition* and whatever the *moral conscience* the jurist may *feel* and *grasp*. Accordingly, the "free scientific research" of law, its name notwithstanding, is not a totally rational, modern mode of inquiry, bearing contrariwise the deep marks of an irrationalist, pre-modern, mysterious, conception of human "knowledge."[11]

In this way, the presumed objectivity of law's *data* is combined with the necessary discretion and subjectivity of legal jobs, in a picture where the century-old idea of a natural law is bundled together with ideas and idiom of the newborn sociology (Emile Durkheim) and the philosophy of French contemporary irrationalism (Henry Bergson and spiritualists like Léon Ollé-Laprune and Maurice Blondel).[12]

22.3. The Free Law Movement

The free law movement—*Freirechtsbewegung*—is a German-language movement, the foremost representatives of which are Eugen Ehrlich (1862–1922) and Hermann U. Kantorowicz (1877–1940). They share with Gény the fundamentals of the criticism addressed to traditional legal methodology: Legislation does not exhaust the whole law (law is more than legislation); codes and statutes do not make up a complete, "logically closed" system ("the doctrine of closure and completeness of the legal system"), for it is not true that "within the law in force, any legal question that may arise finds its own answer, provided one knows how to look for it" (see Ehrlich 1987, Introduction and pars. 1–2; my translation; see also Ehrlich 1929, chap. 1, par. 4); the judicial

[11] "In my view—Gény writes in his 1910 lecture *Les procédés d'élaboration du droit civil* (The modes of elaboration of civil law)—the data of the natural legal order require, if they are to be fully penetrated, further means than those of strictly scientific procedure, and necessitate […] an appeal to *the obscure forces of moral conscience*" (quoted in Grossi 1991, 26; my translation and italics added). The French original: "le *donné* de l'ordre juridique naturel exige, pour être pleinement pénétré, d'autres moyens que ceux de la procédure strictement scientifique, et nécessite […] un appel aux *forces obscures de la conscience morale*."

[12] "To sum up, writes Gény, within the limits of such authoritative rules as govern it, and in front of which any individual will must back down, legal interpretation appears to us as the necessary mistress of its decisions, being subject only, by virtue of the very purpose of its mission, to draw inspiration from the great sources of justice and social utility, nourishing the organic life of the law" (Gény 1919, vol. 1, 207; my translation). The French original: "En somme, sous la réserve de ces règles d'autorité qui la dominent, et devant lesquelles toute volonté individuelle doit baisser pavillon, l'interprétation juridique nous apparaît maîtresse nécessaire de ses décisions, n'étant assujettie, que par le but même de sa mission, à puiser ses inspirations dans le grand fonds de justice et d'utilité sociale, qui alimente la vie organique du droit."

application of law is not tantamount to the logical deduction of individual decisions from statements about the facts of the case and given general normative premisses, being rather at bottom discretionary; the proper method for the doctrinal study of law ("legal science") is not the mere combination of abstraction and deduction. Their views, with historical hindsight, not only stoked further the revolt against methodological unawareness, *naïveté*, but also self-interestedly beguiled mainstream late-19th-to-early-20th-century-jurists, aptly couched in powerful battle cries that were bound to stay: *living law*, *free law*, *free legal science, free judicial law-finding*.[13]

22.3.1. Back to the Future: Ehrlich's Vindication of Free Judicial Law-Finding

The revolution in legal methodology advocated by Eugen Ehrlich is a combination of progress and retrieval. With the aid of newborn (legal) sociology, to the rise of which he directly contributed, Ehrlich vindicated *free law-finding*—representing the core of classical Roman law, German pre-Reception medieval law, and the English common law, the noblest components of Western legal culture—against modernity ("modern law," "modern lawyers," modern jurisprudence), urging a dramatic change in the contemporary theory and practice of law, adjudication, and legal science (see Ehrlich 1987, 1929, 1966).

Looking at the law from a sociological-historical viewpoint, Ehrlich criticized the dominant "state-conception of the law" (*staatliche Rechtsauffassung*) by insisting on the theoretical relevance of two distinctions: between *legal norms* and *legal propositions*, and between *living law* and *apparent law* (the latter term is mine).

Legal norms (*Rechtsnormen*) are *decision-making norms*: abstract commands and prohibitions establishing which of two or more conflicting interests ought to prevail in any given case. Indeed, Ehrlich claims, the basic function of the law is to be seen to identify and settle conflicts of interest between the members of a society, by way of a purportedly proper (correct, just) balancing (*Interessenabwägung*), in light of the proper ultimate principles of justice. *Legal propositions* (*Rechtssätze*), by contrast, are decision-making norms provided with an authoritative formulation in words.[14] Legal propositions are the out-

[13] Ehrlich claims to have been the first to draw attention to the necessity, and advantage, of judicial *freie Rechtsfindung*, before Gény 1919 and von Bülow 1885, who simply cast light on the fact that "judicial activity is law-creating by its very nature, even when consisting in the pure application of law" (see Ehrlich 1888, 1987).

[14] Legal propositions "decide over generally determined conflicts of interest […]. A legal proposition establishes which of the conflicting interests, from the standpoint of the state or society, is to be regarded as higher, and so ought to be protected by means of the judiciary or of administrative agencies […]. A legal prescription that does not protect an interest against an attack is not a legal proposition, or at least is not a complete, full-fledged legal proposition" (Ehrlich 1966, 186; my translation).

puts of legislation, the only kind of law the state can really make, usually on the basis of pre-existing legal norms produced by social interaction (usages, relationships of dominion and possession, family relationships, declarations of will in testaments, contracts, associations, corporations, etc.), and with the aid of jurists and legal experts. Legal norms may be expressed by, and also derived from, legal propositions, but they do not correspond exactly to them. In fact, the positive law of any society is usually made partly by legal propositions (state law proper), partly by legal norms that are not legal propositions (nonstate law, law beyond legislation).[15]

Living law (*lebendes Recht*)—the American realists' *law in action*—is made of those decision-making norms that, at any time, are actually followed and applied in any given society. It is to be carefully set in opposition to what is mere *apparent law* (the American realists' *law in books*): the complex of legal propositions, legal norms, doctrines, theories, and dogmas that do not in fact regulate or concern what is really going on in society.

The sociological view of the law suggests that the modern theory of adjudication and legal science—which is part of the state conception of the law—is false and practically noxious.

From the standpoint of the state conception of the law, where judges are seen as a collectivity of anonymous civil servants, adjudication is tantamount to a purely legal-proposition-applying, non-law-making venture. That view however, Ehrlich claims, is wrong on many counts. To begin with, legal propositions, even those that do not contain any deliberately indeterminate expression, "do not automatically produce" judicial opinions. Between legal propositions, on the one hand, and the facts of the case and their proper judicial decision, on the other, there is a gap requiring what might be called a *semantic leap*: Facts need to be classified in terms not of the legal proposition itself, but of an intermediate, concrete decision-making norm derived from the former by way of interpretation. This, in turn, means that the connection between legal propositions and concrete decision-making norms is by no means logical or necessary, being instead discretionary, deeply affected by the personality of the judge and, through it, by the *evolutionary pressure* in virtue of which "even the decision-making norms already established must be continuously refined in light of social evolution" (Ehrlich 1987, par. 2; see also Ehrlich 1929, chap. 15). Furthermore, there are plenty of cases for which no legal proposition holds:

> no theory concerning the [judicial] application of law may get around the fact that any system of fixed legal rules is, by its very nature, riddled with gaps; that at the very moment of its being established it is born outdated, and hence it will perhaps be able to regulate the present, but nothing can be said about the future. (Ehrlich 1987, par. 2; my translation)

[15] "Even in the present age, as in any other age, the centre of gravity in the development of the law is to be found neither in legislation, nor in legal science, nor in case-law, but in society itself" (Ehrlich 1929, "Vorwort," my translation; see also Ehrlich 1987, par. 4).

The need for semantic leaps, the working of evolutionary pressures, and the existence of gaps all show that adjudication is not a matter of purely logical subsumption of cases under clear legal propositions, and, what is more, that between adjudication in case of gaps and adjudication in normal situations of interpretation there is only a difference of degree, not in kind.[16] The state conception of law tries to hide these data under the idea of a *technical* judicial law-finding under the aegis of the unity and completeness of a legislation embodying the almighty and all-knowing will of the lawgiver. In so doing, however, judicial law-finding gives itself over to *fictions and constructions*.

Moving from theory (descriptive methodology) to prescription (normative methodology), Ehrlich advocates free judicial law-finding (*freie Rechtsfindung*) as perhaps the most valuable factor in the working of legal systems—since, as Ehrlich suggests, human societies can do without legislation, but they cannot do without law.

Unlike *technical* law-finding, free judicial law-finding is *free* from fictions, abstract constructions, and the faith in the existence of miraculous interpretive techniques (like so-called *legal deduction* and the traditional methods of *legis comprehensio*; the traditional techniques of *legis extensio* like *analogia legis* and *analogia iuris*; and juristic construction). Accordingly, it comes with the methodological awareness that "law-finding" is really, and also, law-*making*, the creation of law, an activity that fatally engages each judge's own moral and political responsibility ("since freedom means responsibility"). Free law-finding is not tantamount to arbitrary judicial lawmaking, though: "The judge is actually bound by legislation, custom, tradition, and the principles embodied in previous judicial decisions, but these do not provide the ground for his decisions; rather they represent the limits to which the freedom of the judge extends." And indeed, if properly conceived, "free [judicial] law-finding adopts the legal tradition as a starting point and aims at the *right Law* (*richtiges Recht*), in Stammler's sense," i.e., to decision-making norms informed by the principles of justice that social interactions are supposed to embody (Ehrlich 1987, pars. 2–4; my translation).

Turning to legal science, Ehrlich distinguishes *theoretical* legal science, or legal science proper (*Rechtswissenschaft*), which he conceives as legal sociology, or the empirical study of law in ongoing societies, on one side, and *practical* legal science (*Jurisprudenz*), on the other (see Ehrlich 1929, chap. 14, par. 5; chap. 15). In his view, the practical legal science suited to the future of human societies should display a host of properties that may be described as follows.

[16] "[T]he judge is never totally bound by the legal proposition, never completely deprived of his own will, and the more general the legal proposition, the greater the freedom of the judge" (Ehrlich 1929, chap. 15; my translation); "every decision adds something to the law in force […] it is not simply a piece of evidence for it, but may also be a source of new law" (Ehrlich 1987, par. 1; my translation).

It should be "organically connected to tradition," i.e., to the best examples of laws, case-law, and juristic writings in the history of Western law.

It should gain its "scientific foundation" from "the sociological science of law." This would provide it with information about the living law of a society by the "study [of] social relations even when they are not the subject of any judicial decision or official order"; it would also make clear that "There is no justice that is given once and for all and forever," that "like positive law, justice is the outcome of historical evolution," and, accordingly, that "the most genuine task of free juridical investigation consists in decision-making norms that, being derived from the nature of social relationships, change their content in accord with them" (Ehrlich 1987, par. 4; my translation).

It should get rid of the "ridiculous masquerade of abstract constructions and conceptual frameworks" worked out by *Begriffsjurisprudenz*, at least as far as its worst representatives are concerned.

It should get rid of traditional juristic logic, with its false claims of being able to *discover* the right answer to any legal question whatsoever.

It should understand the activity of free law-finding as entailing, not "freedom from the laws, but freedom from useless and idle abstractions and constructions," as a process involving the balancing of conflicting interests, informed by an instrumentalist conception of the law in light of which juristic disputes about "what the law is" are to be read, more correctly, as disputes about "which decision is the most suited to justice, most adequate" to worthwhile social goals (Ehrlich 1987, par. 5; my translation).

It should be placing "high expectations in the outcomes of the creative thinking of great individualities" among judges and jurists.

It should be committed to an *evolutionary* and *consequentialist interpretation* of legal propositions and legal norms in general, viewing them not as "rigid dogmas" but, rather, as "living forces," whose meaning is continuously in flux and should be tested against the benchmark of its likely social effects.

It should be committed to a thorough, in-depth study of case-law, not limited to a shallow evaluation of judicial *dicta*, but primarily devoted to digging out and bringing to the fore the ideologies that, at any time, make the machinery of justice work:

> Case-law is always the output of different *forces* operating upon the judge: The wording and literal meaning of a legal norm is *one* such force, but not the only one. Every judicial decision is the expression of some social view existing in fact: Even the most abstract scholasticism, the most evident mistake, the most self-conscious prevarication have a scientific value, if only because they are tokens of social aspirations. It becomes the task of legal science to identify the aspirations which every day affect case-law, their origins, their effects, which type they are, what their value, and, in such a way, to provide an account of what is going on in case-law and why. (Ehrlich 1987, par. 5; my translation)

Finally, it should be committed to providing judges with the conceptual tools needed to understand "the great social, economic, and political issues" on

which the proper solution to "new problems" depends, in order to prevent judicial "mistakes" and promote correct decision-making (Ehrlich 1987, par. 5).

22.3.2. Down with "the Last Strongholds of Scholasticism": Kantorowicz's Free Legal Science

What is unanimously recognized as the *manifesto* of the free law movement—*Der Kampf um die Rechtswissenschaft* (The struggle for legal science: Kantorowicz 1962), a title bearing evident homage to Jhering's celebrated 1872 *Der Kampf um's Recht* (The fight for legal science)—appeared in 1906 under the disguised authorship of Gnaeus Flavius, but soon every lawyer familiar with Continental legal culture knew it was written by the fine legal historian and philosopher Hermann U. Kantorowicz.[17]

In the course of relatively few, terse, and witty pages, Kantorowicz outlines his own, radically realistic version of "the new conception" (*die neue Auffassung*) of law, legal science, and adjudication, exposing the many shortcomings of the old 19th-century "positivistic" *Rechtsanschauung* (the legal dogmatics of which is "Scholasticism"), but also criticizing, though tacitly, the fellow free law jurists who did not completely follow through with the new way.

The law of every advanced society, Kantorowicz claims, is made up of two ingredients: *state law* (*formal law*) and *free law*. State law, whose basic source is legislation, is the outcome of political processes and legal institutions. Free law comes instead into existence out of people's beliefs, attitudes, and daily actions and relationships ("the free law of women, retailers, workers," etc.), independently of state action and state coercion. This makes free law the "natural law of the 20th century," though the analogy stops here (a "resurrection of natural law in a different form"). Indeed, unlike the natural law of traditional natural law theory, free law makes no claim to absolute, universal, eternal existence and validity, what incidentally Kantororowicz regards as a "metaphysical mistake" ("our philosophy of law has little to do with that of Pufendorf and Wolff"). It is, contrariwise, "positive" law, like state law, its existence being a contingent *fact* in the history of a human society; its validity resting on force (*Macht*), will (*Wille*), and recognition (*Anerkennung*). The legal positivists of the 19th century pretended the whole law to be formal, or state, law, and claimed state law to be a gapless system of norms. But they were wrong. To begin with, state law gets its contents from free law; furthermore, it is riddled with gaps ("in legislation, gaps are not fewer than the words" themselves). Whenever a gap in legislation comes up in a lawsuit, judges fill it up by resorting to free law. This is why free law is *law* on a par with state law, for it is one, and the most extensive, of the two basic sources for judicial decisions. One should not replace an idealized, fictional view of state law with an idealized, fictional view of free law,

[17] Also of interest for the present account are Kantorowicz 1928, 1934.

though. Like state law, free law is no *system*, no gapless and consistent set of legal norms, providing one right answer for any case where legislation may fail. On the contrary, free law too, being the historical, spontaneous product of human conscience, sentiments, and actions, is at any moment a set of norms from different times and contexts, created either by (and for) individuals or by (and for) communities, conflicting among themselves and gappy, so that there will always be cases where, whatever decision is made—be it either in the course of adjudication or out of court—it cannot but ultimately depend on the decision maker's own options and discretion (see Kantorowicz 1962, 13–21; see also Kantorowicz 1928, 692ff.).[18]

The free law view of law—which Kantorowicz presents as the only genuine, realistic theory we may entertain—provides the theoretical basis for the free law view of legal science and adjudication.

As to legal science, in the *pars destruens* of his theory Kantorowicz attacks the positivistic "dogmatic legal science" (*dogmatische Jurisprudenz*), "this paper legal science" ("diese papierene Jurisprudenz"), this "bounded dogmatics" ("gebundene Dogmatik"), with its cognitivist views about interpretation, fictions, logic, analogy, *ratio legis*, and the so-called "spirit of the law" (in fact, "the spirit of their Lordships the jurists [is] nothing but the spirit of those who would like to find in the laws what suits to their own personal taste [*Geschmack*]": Kantorowicz 1962, 21ff.; my translation), showing they are all tools and procedures by means of which a variety of competing solutions may be argued for, at any moment, for the *same* legal problem, according to the outcome each interpreter desires to achieve (see Kantorowicz 1962, 21–33).

The traditional conception of legal science, with its claim to be a pure, absolute (rational and/or historical) objective knowledge of law, is to be rejected as empirically false. A new model of legal science should be practiced in its place, the free law model. This model, in Kantorowicz's view, sees the following basic features in a legal science properly conceived: *voluntariness*, a *relativistic method*, the *repudiation of autonomy*, and the *repudiation of the spirit of orthodox theology*.

[18] "The free law doctrine teaches (if we may sum up an elaborate system in a few words): The traditional sources of the law, the 'formal' law, statutes, and precedents, have gaps which must be filled up, must be filled up with law if the decision is to be a judicial decision, and this law must have a general character if equality before the law is to be maintained; the gap-filling material must therefore consist of rules, rules of law. These are 'free' law in the sense that they are not formal law: They have not been formalized but are still in a state of transition like bills, principles of policy, business customs, inarticulate convictions, emotional preferences. Many of them are formulated for the purpose of a concrete judicial decision by the courts, acting within their discretion, through acts of will and value-judgments, and constitute therefore judge-made law. Their validity is far less than that of the formal law and sometimes nil, but their practical importance is even greater, because, where the formal law is clear and complete, litigation is not likely to occur. This free law thesis has been exaggerated by those realists who teach that law consists of judicial decisions alone, and therefore of facts" (Kantorowicz 1934, 1241).

Voluntariness. Once we realize how the social phenomenon of law is in fact, we must also realize that legal science cannot but play the active, albeit complementary, role of "a source of law," providing "definitions of the notions" mirroring the "characteristic notes" of the free law norms, showing how to "fill gaps" in legislation, being neither an abstract "construction" nor a mere "knowledge of what is known," but "free law-finding" (*freie Rechtsfindung*), "where it reveals and brings to application the [free] law of the community," and "free law-creation" (*freie Rechtsshöpfung*), "where it produces and gives validity to the [free] law of individuals" (Kantorowicz 1962, 21; my translation), building up *systems* of law out of state law and free law materials. Such a legal science, free legal science, being a legal source, cannot but partake of the basic character of legal sources in general: *voluntariness* ("It is itself a source of law, so it must have the same nature as all sources, and like the law itself, it must be *will*": Kantorowicz 1962, 21; my translation). From this point of view, Kantorowicz suggests, the life of the law is *neither* logic *nor* experience, to echo and partly reverse O. W. Holmes's well-known saying, *but* will. Of course, the good jurist takes into account both (juristic) logic and experience, but he doesn't expect them to do the whole job for him, for they simply *cannot* do that: Logic and experience can only point to a frame of possible solutions to legal questions, among which the will must decide ("it is always the will that by the leash leads the understanding": ibid.; my translation).

The relativistic method. Once we adopt the scientific standpoint advocated by the free law movement and see the law in the way it suggests, we must realize that there are, in the free law of any society, different sets of norms, as there are "different *Weltauffassungen*, different characters, different interests," from which those normative sets ultimately come. Accordingly, the proper stance for legal science is neither objectivism nor subjectivism, but relativism. Objectivism pretends there to be just one right normative viewpoint outside legislation, and maintains it should win the day, if necessary by decree; subjectivism tries to carry out its normative viewpoint, without paying attention to different ones; relativism, by contrast, accounts for "the different possible [normative] viewpoints" and identifies "the different interpretations" corresponding to each one of them, which are all "*relatively* correct […] insofar as they are compatible with the laws" (Kantorowicz 1908, 112–3; my translation).[19]

[19] No reference to a "relativistic method" can be found in the German edition of *Der Kampf*. Apparently, it was added by Kantorowicz to the 1908 Italian translation, by A. Majetti (see Kantorowicz 1908, 112–3). According to the translator, Kantorowicz, who wrote *Der Kampf* while in Bologna and was familiar with Italy where he did research on the Glossators, "amended, added, explained, conferring new original value to my [translation]" (see Kantorowicz 1908, 25; my translation). These ideas, by the way, are also clearly formulated in the later Kantorowicz (1928, 683–6, 705). As we shall see in a moment with the idea that jurists, in looking for the "objective meaning" of statutes, "must content themselves with ambiguous results (e.g., with several equally valid interpretations)," Kantorowicz extends the relativistic method ("juristic relativism") to ad-

Repudiating autonomy. Free legal science repudiates the isolationist, impoverishing ideal of the autonomy of legal science preached by traditional legal dogmatics. Taking stock of the first principles of the historical school of law, which were paradoxically neglected by its own followers, free legal science regards historical, psychological, and sociological inquiries as necessary to know the law and play its law-finding and law-creating role (see Kantorowicz 1962, 27–8).[20]

Repudiating the spirit of orthodox theology. The basic flaws of traditional legal dogmatics—the fictional claim to objective legal knowledge covering subjective, self-interested, value-laden, opportunistic uses of interpretive techniques *bonnes à tout faire*—were somehow legitimized by the like ways of thinking, reasoning, and interpreting adopted by orthodox theology. Free legal science should accordingly rid itself of such a dishonest theological spirit, bringing instead to the law the liberating, honest spirit of reformation (see Kantorowicz 1962, 30–3).

Turning to adjudication (*Rechtsprechung*), Kantorowicz makes an inventory of the basic tenets of the traditional, cognitivist outlook: (1) "Foundation of every judicial decision on the law (*Gesetz*)!"; (2) "The judge ought to be the servant of the law (*Gesetz*)!"; (3) "Every imaginable case ought to be decided, and this (can be done) on the sole ground of the law (*Gesetz*)!"; (4) "Judicial decisions should be predictable!"; (5) "The judgment (*Urteil*) ought to be objective; it cannot be subjective (*persönlich*)!"; (6) "The judgment ought to be a strictly scientific performance!"; (7) "Adjudication ought to be free from affections!"—showing them, in turn, to be either unviable (3, 4, 5, 6, 7) or not worth pursuing (1, 2) from the standpoint of what the free law theory of law and legal science suggest.[21]

In discussing the second tenet, Kantorowicz sets forth, by way of proposal, his own code concerning the judicial interpretation of law:

1) to begin with, judges ought to decide cases according to the *clear letter of the law*, if any;

2) if there is no law or the law is unclear, judges ought to decide by applying the norm that, according to their own firm persuasion, corroborated by historical and sociological inquiries, the legislator himself would have enacted

judication as well (Kantorowicz 1962, 33–6; 1928, 699–700), in such a way that the whole construction may be regarded as a forerunner of Merkl's and Kelsen's idea of *scientific interpretation* (see Section 22.5 below).

[20] The first principles of the historical school are described by Kantorowicz as follows: (1) all law is *positive* law: There is law if, and only if, there is "a *reality* (force, will, recognition) behind the legal proposition"; (2) a legal proposition can be fully understood only by he who has a full knowledge of its historical evolution.

[21] "[…] the ideals of legality, passivity, foundation, scientificity, legal certainty, objectivity appear to be at odds with the new movement. But, fortunately, it may be shown that those postulates are partly unviable, partly not worth realizing" (Kantorowicz 1962, 33–6; my translation).

now for the case at hand—in other words, judges ought to decide on the basis of an *open* counterfactual intentional interpretation or gap-filling;

3) if judges do not come to any firm persuasion about the counterfactual will of the legislator, they ought to decide according to free legal dogmatics and free law ("customary law in its different forms," "nascent law," "desired law," explicit or implicit); finally, failing that;

4) judges ought to *make* the law to be applied to the case at hand, according to their own good legal sentiment (*Rechtsgefühl*), seeing to it in every case that their decision, though necessarily *praeter legem*, not also be *contra legem*.

That interpretive code is in turn an example of a normative free-law conception of adjudication, characterized by *popularity* (judges should give full play to the popular, living free law), *specialization* (judges should reject legal magic and dilettantism, and be learned instead in psychology, history, sociology, and economics), *impartiality* (judges should resort to the relativistic method, as a necessary step in their decision-making), *restoration of the authority of legislation* (by the honest and open recognition of its limits by faithful, scrupulous, responsible judges), and *justice* (judges should provide the most adequate judgment for any case at hand, making a proper use of their freedom, personality, and wisdom) (see Kantorowicz 1962, 36–8).

In a later essay, Kantorowicz makes clear a few points of his free law methodology that are worth mentioning, since they bring to light his teleological-instrumentalist commitment:

1) The most widespread vehicle by which free law connects to formal state law, and indeed combines with it in judicial decision-making, is statutory and case-law *interpretation*. This makes up what Kantorowicz calls *interpretative free law*:

> The bulk of what the continent considers "interpretations" of the codes is *free law*, namely, *desired explicit law* in disguise. The bulk of what in Anglo-Saxon countries is deemed mere application of established case law is again *"free law,"* namely, *desired implicit law* in disguise. The fact that the construction of a statutory rule or the interpretation of a judicial opinion is dubious, is a proof that *a logically stringent decision is impossible*; and the assertion that the case before the court is "similar" to a certain precedent, generally implies *a subjective evaluation* that the differences between the two cases are insignificant and an admission that there is no established rule governing the case in question in its full individuality. So the lawyer is, in fact, always faced with "gaps" in the law. (see Kantorowicz 1928, 698–9; italics added)

2) There are two sorts of gaps: "material gaps" and "textual gaps."

3) Textual gaps are present whenever "an adequate textual expression" of the "purpose" of a formulated rule is lacking;

4) Textual gaps ought to be filled by means of a purposive-consequentialist

> "free interpretation," *i.e.*, an interpretation which, by understanding the law in a broader or in a narrower sense (the broader sense including the process of analogy), *adapts the law to its own*

purpose. This purpose must [ought] *not* [to] be identified with *the subjective intentions* of the legislator [the investigation thereof is doomed to be a "pseudo-historical interpretation"], *nor* with *the interests which are protected by the law* [presumably, at the time of its enactment, from the standpoint of its effects], *nor* with *the abstract principle* governing the respective rule of law. The purpose must [ought to] be found in the *present social effects* of the application of the rule in so far as they are *desirable*, *i.e.*, as they would *justify the making* of that rule *today*. This of course cannot be ascertained without sociological, economic, psychological, etc., reflections and investigations. (Kantorowicz 1928, 699–700; italics added)

5) In dealing with textual gaps, judges ought to proceed according to the method of "juristic relativism,"

where different interpretations of the statute are possible, *all of them*, in so far as they are compatible with the purpose of the statute, *have to be systematically collected* and then alternatively applied: one time, one interpretation and another time, the other interpretation, according as the one or the other allows the realization of the purpose of the statute. *If* this *purpose cannot be ascertained*, then the judicial ideal of the interpreter takes its place. This method alone, although the contrary seems to be true, is capable of *giving a scientific character* to *juristic theories*, of *diminishing the uncertainty of judicial practice*, and of *abolishing its arbitrariness*. (Kantorowicz 1928, 699–700; italics added)

6) Material gaps are present whenever "the rule of law itself is lacking"; they ought to be filled by resorting to the several materials that make up the formal law (state law) and the free law of a society, in keeping with counterfactual hypotheses geared toward desirable social effects and with juristic relativism.

On the whole, Kantorowicz's directives make up an interpretive code whose understanding and application may require a bit of charitable interpretation. But its core is clear. First, value options are widespread and paramount in the law's life: They bear on law's determinacy or indeterminacy, they come into play when establishing the counterfactual intentions of legislators, and they ultimately determine what the purpose of any piece of law is. Second, they cannot be wiped off, being instead part and parcel of law, adjudication, and legal science. Third, what a good prescriptive methodology should aim at is accordingly to make them explicit, bringing them to the fore of public evaluation and criticism. Candour, transparency, and responsibility are the sole remedies reason can suggest against uncertainty, arbitrariness, and partisanship.

22.4. The Jurisprudence of Interests

In the bibliographical appendix to his *The Struggle for Legal Science*, Kantorowicz includes Philip Heck (1858–1943), the leading figure of *Interessenjurisprudenz*, among the jurists who sided with the "free law doctrine." In fact, Heck shares many ideas of the free law movement, such as the wholesale repudiation of *Begriffsjurisprudenz* and considering the social sciences a necessary helpmate to legal science. Nonetheless, Heck claims that his own version of a "jurisprudence of interests in a narrow sense" is theoretically and meth-

odologically sharper than mainstream "Teleological jurisprudence," and also takes a more conservative attitude, as he charges the "so called School of Free Law"—unwarrantly, as far as Ehrlich and Kantorowicz are concerned—with striving "to liberate judges from the fetters of statutory law" (Heck 1948, 35; my translation).[22]

The gist of Heck's jurisprudence of interests may be described, in a nutshell, as follows.

1. *Methodology, not philosophy*. The Jurisprudence of interests claims to be what we would now call a *prescriptive* methodology, "designed to serve the practical ends of law," and aimed at "finding those principles that judges should follow in deciding cases." It is neither a comprehensive "general philosophy" nor a "legal philosophy," though it obviously presupposes one, along the lines of "modern" legal theory.

2. *The law as it is: Causal connection between law and interests.* The paramount notion in the jurisprudence of interests is not *purpose* but, as one would expect, *interests*. This word should be understood "according to its widest connotation," so as to embrace "all things that man holds dear and all ideals which guide man's life" (Heck 1948, 33; my translation).

That is so because, contrary to Jhering's well-known saying, the creator of all law is—Heck claims—not purpose but interests. Law consists of commands. *Begriffsjurisprudenz* claims that commands derive from general, "classificatory" legal concepts ("obligation," "contract," "will," etc.); but this is a mistake, since legal concepts, far from *causing* legal rules to exist, are nothing but "subsequent condensations of legal rules." Indeed, from a causal, genealogical standpoint, the law—as a set of commands and definitions—is properly to be regarded as "the product of interests":

> Each command of the law determines a conflict of interests; it originates from a struggle between opposing interests and represents, as it were, the resultant of these opposing forces. The protection of interests never occurs in a vacuum. It operates in a world full of competing interests, and therefore always works at the expense of some interests. This holds true without exception. (Heck 1948, 35; my translation)

3. *The need for ("the maxim" of) interests-analysis*. The presence, in any society, of competing and conflicting interests is of the utmost importance for legal science and adjudication alike. It suggests why the mainstream teleological-instrumentalist approach taken by Jhering and his free law followers is "crude"; why the focus should be moved away from purpose; and why interests-analysis—that powerful "legal microscope"—should play a pivotal role in legal scholarship and legal practice:

[22] A futher unwarranted charge is made against Hans Kelsen, who would be an "old conceptualist" as regards "part" of his "methodological theory." See Heck 1948, 31; 1932a, 1914, 1932b.

If we confine ourselves to an examination of the *purpose of a law*, we see only the interest that has prevailed. But *the concrete content of the legal rule, the degree to which its purpose is achieved, depends on the weight of those interests that were vanquished* […]. Therefore, Jhering's teleological jurisprudence is not sufficient. It needs to be deepened with the aid of an analysis of interests, or, […] the theory of conflicts. *For each rule of law* [expressing a command], *the conflict of interests which underlies it must be analyzed*. (Heck 1948, 36, 47; my translation and italics added)[23]

4. *The judicial process as it is*. The jurisprudence of concepts sees the judicial process through "the dogma of cognition." It takes a cognitivist view of adjudication, centred on subsumption ("the laws of logic," "the judge […] as an automaton") and "the filling of gaps *by construction* […] or [the] 'method of inversion' […], first distilling a concept out of existing legal rules, and then deriving new rules from this concept" (Heck 1948, 37–8; my translation). It does not pay any attention to the social effects of judicial decisions. In so doing, however, it flies in the face, at once, of both empirical, sound legal theory and the needs of legal practice and social life in general (see Heck 1948, 37–8).

There is a "sham," "crypto-sociology" variant of "conceptualistic reasoning," contemplating the possibility that gap filling by construction may point to a plurality of competing outcomes and prescribing, in such cases, that the "most satisfactory solution from the practical point of view" be preferred. But even that variant—Heck claims—should be rejected, especially for normative reasons: The judge is allowed to provide a *sham* motivation, not "the true reasons of his judgment," depending on his own evaluation of interests; and his "sense of responsibility" is weakened, since he can again pretend his decision to be "Not his own fault, but […] the fault of the concepts."

A wholly new approach has to be adopted instead, following "the modern trend in legal thinking," according to which adjudication cannot be a purely cognitive enterprise, since, among other things, it

is pre-eminently through judicial decisions that law affects human affairs […]. Not until the law has been embodied in a judicial decision does it become *a living reality*. (Heck 1948, 37, 40; my translation)

5. *What judges ought to do*: *Heck's interpretive code*. The kernel of Heck's "methodology," the "principles" judges should follow in properly performing their function, boil down to the following directives.

[23] See also Heck 1948, 47–8, where the connection between interests-analysis and legal scholarship is considered: "The subject of a modern treatise is not a system of legal concepts, with some discussion of their practical application [as in Windscheid's celebrated *Lehrbuch*], but rather life itself, its demands and problems. It is only as a means for the solution of those problems that legal commands, and the value judgments of the legal community which these commands embody, are applied […]. It has been said that the jurisprudence of interests eliminates the necessity of scholarly research in the law. This is a grave error […]. The study of social life and the value ideals to be pursued is an almost infinite task […]. Discussion of definitions, controversies about concepts, and the whole cult of concepts are receding into the background. Factual research and evaluation of social interests take their place" (my translation).

a) *Legality*. Under "the Constitution, the judge is bound to abide by the law." This in turn means that "the judge" ought to "adjust interests, deciding conflicts of interests *in the same way* as the legislator." The legislator's own "evaluation of interests" ought to have "precedence over the individual evaluation of the judge, and is binding on the judge."

b) *Collaboration*. Positive laws are doomed to be "inadequate, incomplete, and sometimes contradictory by comparison with the wealth and variety of actual problems which keep arising in daily life." Accordingly, it is to be presumed that the "modern legislator" *authorizes* ("expects") judges *not* to "obey the law literally," but to apply it "in accordance with the interests involved," to frame "new rules where the law is silent," and even "to correct deficient rules."

The proper institutional function of the judge is neither defer to passive literalism nor "to freely create a new legal order," but is "rather to collaborate, within a given legal order, in the realization of recognized ideals […] the judge [ought] not only [to] apply a particular command, but he [ought to] also protect the totality of interests which the legislator has deemed worthy of protection."

c) *Interests-geared statutory interpretation*. Judges ought to interpret statutory clauses by taking into account the outcome of a legislator-abiding interests-analysis, and decide on the basis of their own evaluation whenever such analysis points to a plurality of competing meanings. The judicial evaluation of competing interests is also in order in cases of express delegation of law making power and legislator's intentional resort to indeterminate expressions and general clauses, like "important ground" and "sufficient basis." In any case, judges ought to take into account not only the several competing interests involved, but also the likely practical effects of each of the alternative readings they deem viable.

d) *Interests-geared gap filling*. The filling of gaps, where, "too, the maxim of analysis of interests […] must apply," should be performed as follows: *First*, judges should "envisage the conflict of interests which underlies the dispute"; *second*, they should "examine whether or not the same conflict of interests underlies other factual situations which have been expressly regulated by legislation," and, if so, apply the express rule to the unregulated case by analogy; and *third*, if interests-analogy is not viable, such that the legal system as a whole appears "entirely lacking," or if "contradictory statutory evaluations," judges should "render the decision he would propose if he were the legislator [by paying attention to interests and the practical effects of each of the viable gap filling ways]. This is the rule […] in the famous Article 1 of the Swiss Civil Code [i]n its substance […] valid for the German judge as well."[24]

[24] All quotations in this part are from Heck 1948, 31, 40–4; my translation and italics added. Art. 1 of the Swiss 1907 Civil Code says that: "The Law must be applied in all cases which come within the letter or the spirit of any of its provisions. Where no provision is applicable, the judge

Interests-geared legality and collaboration are regulative interpretive ideals, setting goals which can only be approximated, never totally attained, if only because of the normally elusive character of the legislator's interests-evaluations. Their carrying out, so far as possible, is committed to judicial—and juristic—allegiance and skills. Here again, as in Kantorowicz, the new methodology sets judicial reasoning in a disenchanted landscape, where correctness ultimately rests on candour, transparency, wisdom, and personal responsibility to a lively, alert juridical public opinion.

From the late 1970s, this point will be taken seriously by Robert Alexy, the leading figure of the so-called standard theory of legal reasoning. He will set forth a code of the rules and forms of practical and legal discourse; he will retrieve Heck's idea of interests-analysis in his "formulas of weight" for the judicial balancing of fundamental rights.[25]

22.5. The Pure Theory of Law

In the same spirit of Kantorowicz's theoretical revolution, the ideas on interpretation entertained by the *Reine Rechtslehre* theorists—notably, by Hans Kelsen (1881–1973) and Adolf Merkl (1890–1970)—represent the most radical attempt to develop a genuine, radically realistic *theory* of interpretation. The other "theorists" of the antiformalist front were in fact, above all, jurists concerned with legal policy issues, committed to promoting some politics of judicial interpretation. That is why their "theories" usually combine a genuinely descriptive and theoretical side with bits of prescriptive methodology, with recipes for legal interpreters—jurists and judges—about what they should do if they are to do their job properly. With Kelsen and Merkl, however, we apparently find ourselves in a totally different world. Here the core and point of the matter is to disclose the nature of the mysterious phenomenon that jurists are used to calling "interpretation," without any bias or prejudice, and to set it in a proper conceptual framework. In a sense, their ideas are Kantorowicz's ideas; but they express them in a clearer way, and, furthermore—what makes a difference worth considering—they tie them up with a brand-new theory about the overall *dynamic character* and *gradual structure* of positive legal orders.

The central ideas of the Pure Theory of legal interpretation may be described as follows.[26]

shall decide according to the existing customary law and, in default thereof, according to the rule which he would lay down if he had himself to act as legislator. Herein he must be guided by approved legal doctrine and case-law." It is perhaps the most celebrated interpretive directive ever enacted, a veritable cult provision of anti-formalist jurists, who saw in it a candid authoritative recognition of formalism's mistakes. See, e.g., Gény 1919, 2, 308–29.

[25] On Alexy's theory of legal reasoning see Section 25.4 in this tome.

[26] Following is a selection of works or passages by Merkl and Kelsen devoted to the Pure Theory of legal interpretation: Merkl 1916, 1918, 1927, 211; Kelsen 1934a, 1934b. chap. 6;

1. *The place of interpretation in the working of positive legal orders*. Positive legal orders are *dynamic* normative orders: They regulate their own production by means of competence norms. Legal orders consequently have a *multilevel structure*: Legal norms sit on different levels, from the highest level of constitutional norms, regulating the production and content of ordinary legislation and general customs, down to executive decrees, local regulations, local customs and statutes, judicial decisions, administrative orders, and contracts and wills. The working of a legal order is tantamount to a very large set of acts of law-creation and law-application. Except for the extreme cases of pure law-creation (the creation of the first historical constitution) and pure law-application (the material execution of judicial and administrative orders), every act of law-creation is at the same time an act of law-application. The creation of a new statute by Parliament is at the same time an application of the relevant constitutional provisions; the creation of a judicial decision is at the same time an application of substantive and procedural norms (e.g., the norms of the codes of civil and criminal procedure). Interpretation is closely connected to law-application: Any act of law-application presupposes an interpretation of the higher norms applied in view of the creation, or production, of some lower norm. Accordingly, interpretation—by legislators, judges, and public officials in general—is the intellectual activity that accompanies "the process of law production, as it proceeds from a higher to a lower level of the *Stufenbau*."

2. *The nature of interpretation by state organs*. From the viewpoint of law-making and law-applying, legal interpretation, be it performed by legislators, judges, or other officials, is an *act of will*, one by which authorized interpreters establish in an authoritative way, at least for the case at hand, the interpretation of the general norms they contextually apply. In that sense, *every* authoritative interpretation, not just those by legislators interpreting their own laws, is *authentic interpretation* ("autentische Interpretation"), which "creates law" ("Sie schafft Recht").

3. *The multiplying effect of interpretive methods*. Legal interpretation is usually justified by appealing to some established interpretive method. Unfortunately, these interpretive methods (including the ones proposed by the free law school and the jurisprudence of interests), far from being a set of convergent selective devices pointing to one interpretive solution ("the true meaning of a statutory clause") for any situation, are instead entropic, meaning-multiplying devices, if only because positive legal orders never regulate their content and hierarchy effectively. The momentous theoretical import of this point receives an unprecedented emphasis in the *Stufenbau* theory and dynamic conception of law. From the dynamic standpoint of law-application (*a*) any general norm whatsoever is not really *one* norm, but a *frame* of several, alternative

1945a, 143–62; 1950, 1957, 2000, 15–6, 209–12, 251–5, 271–80, chap. 8; 1979, chaps. 29, 31, 50 (n. 125, 127, 128, 129), 57, 58 (pars. 3–4), 61 (n. 183).

norms competing for interpreters' selection and (*b*) there is not *one* legal order, but *as many* legal orders as are the alternative outcomes of the possible combinations of viable interpretive methods.

4. *Scientific interpretation*. In legal experiences as we know them, there is room also for genuinely *scientific interpretation* (*erkenntnismäßige Interpretation*). As a genuine "act of knowledge," as a pure and true act of science, however, scientific interpretation cannot go beyond the worthwhile task of identifying the frame of meanings corresponding to each general norm, and lay it down both as an aid to adjudication ("in the service of law-application") and as a vehicle in the technical criticism of legislation and legislative drafting.

5. *The bounds of interpretation*. Authentic interpretation by judges and officials is still to be regarded as *interpretation*, even though its outcome points to a meaning lying outside of the frame identified by scientific interpretation.

6. *Juristic interpretation*. Legal interpretation by legal scholars, whenever it is not confined to scientific interpretation, is an exercise in *legal politics* (*Rechtspolitik*): It is *political interpretation* (*politische Interpretation*), setting forth value-laden, interests-driven proposals about the "proper" judicial reading and application of some law.

7. *The myth of legal gaps*. Contrary to the almost unanimous view of old and new jurists alike, there are no *real* gaps in modern legal orders characterized by specialized judicial bodies having the duty to provide a decision for any case submitted to them (*non liquet-Verbot*). That is so, according to Kelsen, since the legal order *as a whole* can *always* be applied to any case whatsoever, on the basis of the principle that *either* (the judge decides that) the defendant or indicted person has violated a legal duty, and so ought to be convicted or (the judge decides that) he did not violate any legal duty, and so ought to be acquitted. In these terms, the denial of the existence of real gaps, far from conspiring with some cognitivist view of adjudication, is grounded in the ordinary working of legal orders, with their built-in judicial lawmaking (all judicial decisions are not *declarative*, but *constitutive*, in character).

8. *Ideological gaps*. Since there are no real gaps, all the gaps that jurists, judges, and even legislators regard as unavoidable, embarrassing glitches in legal orders are in fact *ideological* gaps: situations where (what is usually regarded as) the plain legal answer to the case at hand is *at odds* with what the judge thinks the law *ought to* be. From this standpoint, gap-filling is always a complex activity by which the judge, far from *filling* an imaginary space left empty by the norms of the legal order, *replaces* the answer provided so far by the legal system with a different and, in his opinion, better one. On this basis, express legislative authorization of judicial lawmaking to fill gaps ("where no express law provides for a case") may be read, Kelsen suggests, as a fictional device by which legislators try to hide from judges that they can *always* make law "as delegated legislators" and "in substitution of the legislator."

9. *The proper connection between gaps and interpretation*. Interpretation is traditionally considered as the means by which gaps in the law are both *discovered* and *fixed*. But that view is wrong. First, judicial interpretation never amounts to *discovery*, to a pure *act of cognition*. Second, the role interpretation can in fact play as regards gaps is exactly the opposite one: Interpretation is in fact a means for *creating* gaps. Third, once so created, gaps cannot be resolved through interpretation; only an act of judicial lawmaking can fix them.

10. *Why jurists like mythology*. All these points are usually overlooked by traditional juristic thinking, since they are eager to uphold the comfortable mythology allowing legal politics to be done, by jurists and judges alike, under the pretence of pure science and value-neutrality.

11. *The pure jurist and normative conflicts (antinomies)*. Legal norms are liable to conflict. Antinomies are a common feature of legal orders. If considered with the cold eye of the pure theory of law, however, such normative conflicts do not have disruptive effects on the working of legal orders, since legal orders usually provide explicit and/or implicit ("tacit") criteria of resolution. As far as conflicts between two norms on the same level of the *Stufenbau* are concerned (e.g., between two statutory norms), *lex posterior*, *lex specialis*, and the default criterion of commitment to judicial discretion usually govern. Likewise, conflicts between norms on different levels of the *Stufenbau* (e.g., between a piece of ordinary legislation and the constitution, between the norms of the civil code and a judicial decision) are resolved by the explicit or tacit enactment of the *lex superior* criterion. The pure jurist, *qua* legal scientist, cannot but bring these criteria to the fore and show their likely working and their limits.[27]

[27] The view that the *lex posterior* criterion is not a "logical principle," whose presence in a legal order is not a matter of positive law, as many traditional jurists maintained, but is instead a principle of positive law, was first advocated by Merkl. For a while, Kelsen regarded the *lex posterior* principle not only as a principle of positive law, but also as an epistemic device in a Kantian constructivist conception of pure legal science, the use of which was to be deemed necessary by the epistemic presupposition of the *Grundnorm* as the scientific ("logical") basis of "a meaningful order" (see Kelsen 1945b, 401–4; see also Kelsen 2000, chap. 5, par. 34; 1979, chap. 57).

Chapter 23

TAKING STOCK OF THE PAST: RHETORIC, TOPICS, HERMENEUTICS

by Pierluigi Chiassoni, Eveline Feteris, and Hanna Maria Kreuzbauer

23.1. Foreword (*by Pierluigi Chiassoni*)

In the second half of the 20th century, a "revolt against formalism" as sketched in the previous section can be distinguished also in the study of legal argumentation. As a reaction to the traditional, formal, logical approach and the emphasis it places on the formal aspects of legal argumentation ("logicism"), various authors proposed a different approach to legal argumentation that emphasizes the content of arguments and the context-dependent aspects of the acceptability of legal argumentation. A common characteristic of the authors that can be regarded as representatives of this approach is that they have used insights from the classical studies of argumentation to develop their theories of legal argumentation and interpretation. Prominent representatives of this approach are Chaïm Perelman, with his new rhetoric, and Theodor Viehweg, with his topics.

Another approach that likewise proceeds by taking stock of the past is legal hermeneutics, represented by such authors as Emilio Betti, Hans-Georg Gadamer, and Joseph Esser.

In what follows, we start with a discussion of Perelman's new rhetoric (Section 23.2). Then we discuss Viehweg's topics (Section 23.3). Finally, an overview of the basic points of hermeneutical theories is provided (Section 23.4).[1]

23.2. The Rediscovery of Rhetoric (*by Eveline Feteris*)

23.2.1. Perelman's New Rhetoric

In his *New Rhetoric*, Chaïm Perelman (1912–1984) introduces a model to describe how arguers try to convince others of the acceptability of their views. Perelman is of the opinion that the logical criterion of formal validity is not an adequate basis for evaluating arguments in everyday language, and he develops an alternative criterion of validity. On his approach, based on insights from classical rhetoric, argumentation is sound if it is acceptable to the *audience* addressed by the arguer. Perelman describes the argumentative techniques a

[1] On Viehweg's topics, Gadamer, and legal hermeneutics see also Sections 10.3.2.2 and 10.3.5 in Tome 1 of this volume.

E. Pattaro, C. Roversi (eds.), *A Treatise of Legal Philosophy and General Jurisprudence*,
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Chaïm Perelman (1912–1984)

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speaker can use to convince an audience. In *La Nouvelle Rhétorique. Traité de l'Argumentation* (*The New Rhetoric: A Treatise on Argumentation*, Perelman and Olbrechts-Tyteca 1958), he, together with Lucy Olbrechts-Tyteca, describes the *starting points* and *argumentation schemes* that can be effective in defending a standpoint.

According to Perelman, the law is an important example for the new rhetoric. Therefore, he pays special attention to the practice of legal argumentation. In *Logique juridique: Nouvelle Rhétorique* (*Legal Logic: New Rhetoric*, Perelman 1976), he describes the starting points and argumentation schemes used to convince a legal audience.

In the following sections we will explain in more detail how these central topics are specified in Perelman's general and legal argumentation theory. Section 23.2.2 describes Perelman's general argumentation theory. Section 23.2.3 specifies how these ideas of his general theory are applied in his legal argumentation theory.

23.2.2. Perelman's General Argumentation Theory

Perelman opposes the view that factual statements can be assessed as to their acceptability to the view that value judgements cannot. He challenges the view that no rational consensus is possible about the acceptability of value judgements.

Perelman is of the opinion that value judgements play an important role in everyday communication and can be assessed as to their acceptability. Lawyers, for example, seldom give formal proof. Rather, they justify their standpoint by putting forward supporting arguments. According to Perelman, such a justification can be considered rational if the arguer succeeds in gaining acceptance of his standpoint from the audience he addresses.

In Perelman's view, argumentation is always addressed to a certain (real or imaginary) *audience*. The audience may be composed of a concrete group of people, such as the members of a court or a parliamentary committee. If the arguer addresses such a concrete group, which Perelman calls a *particular audience*, the argumentation is aimed at *persuading* this audience. The audience may also be composed of all human beings that are considered reasonable. Argumentation which lays claim to approval of such a *universal audience* is called *convincing*. According to Perelman, argumentation is reasonable if it gains the approval of the universal audience—entirely composed of rational human beings. However, the universal audience must not be seen as a concrete, actually existing group of people. It is a construction of the arguer concerning an idea that rational people would accept in a particular case. Because the conception of an arguer of the universal audience depends on his perception of what is considered generally accepted at a particular moment, the conception of the universal audience always depends on historical, cultural, and social factors.

To gain the approval of an audience an arguer must attune the argumentation to the preferences of the audience. An arguer will have to begin with certain *starting points* which are considered common points of departure. Beginning from such starting points, the arguer can use certain *argumentation schemes* to transfer approval of the starting points to the claim he wants to make. In the *New Rhetoric*, together with Olbrechts-Tyteca, Perelman describes the starting points and argumentation schemes which prove to be successful in gaining the approval of an audience.

23.2.3. Perelman's Legal Argumentation Theory

In his legal argumentation theory, Perelman describes the argumentative techniques that are used in law. Which forms of legal argument are used and what are the specific legal starting points and argumentation schemes? What is a lawyer's audience and which standards of reasonableness are applied?

According to Perelman, the justification of a decision in law is not formal proof. The view that the judge only has to give a formal logical proof in which he subsumes the facts of the case under a general rule is out of date. In modern legal theory, there is a consensus that the decision-making process does not consist solely of an automatic application of the law to the facts. If the meaning of a rule in a concrete case is unclear, the judge must interpret the rule. The choice of a particular interpretation is never compelling but is always based on a weighing of values, a weighing of what is the most fair and legally correct decision.

Because legal decisions are based on choices, the judge must justify the choices by establishing that they are correct and that the decision is right. He must show that the decision is fair and in accordance with valid law. Perelman draws attention to the fact that the judge must show that the choices he has made—and the values he has used to justify his decision—are not based on a subjective choice. He must show that the choice is well-founded and can be justified as intersubjectively acceptable. He must offer reasons for his decision, and, in doing so, he must convince the parties that the decision is not based on an arbitrarily chosen position.

In justifying the decision, various argumentative techniques play a role. By showing that the decision is in accordance with the shared legal starting points and forms of reasoning, the judge can try to gain the approval of the legal audience.

In a legal context, it is important that the arguer, for example the judge, uses starting points that are accepted by the legal audience. To gain approval for his standpoint, he will have to use starting points which are accepted in the legal community.

According to Perelman, *loci* play an important role as starting points in law. To gain the approval of the legal audience, he can use generally accepted legal values which can be considered as *loci*. The advantage of such general values is

that they are mostly vague and can be interpreted in various ways in concrete cases. An example of such a general value is the principle that all individuals are considered to be equal. However, that principle does not prevent one from making a distinction between two categories of persons.

General legal principles play an important role as *loci*. Because there is a certain consensus on general legal principles in postwar continental law, they can be used as common starting points in legal argumentation. Starting from an accepted principle, the judge can try to gain approval for a concrete, but still controversial, standpoint.

The use of general legal principles is often necessary when the judge chooses a certain solution which is fair in the concrete case but cannot be defended on the basis of valid law. By referring to a general legal principle, the judge can show that the decision is in accordance with generally accepted legal starting points.

According to Perelman, there are specific legal argumentation schemes by which to transfer approval of the starting points to the proposed conclusion. To justify a legal decision, it is important that the judge explain why a legal rule has been interpreted in a certain way. Perelman describes the various forms of argument used in interpreting legal rules, which he bases on the list of such forms proposed by Tarello (1972). Tarello distinguishes the following forms of argument: *argumentum a contrario*, *argumentum a simili*, the analogical argument, *argumentum a fortiori*, *argumentum a completudine*, *argumentum a coherentia*, the psychological argument, the teleological argument, the *argumentum ab exemplo*, and the systematic argument.

According to Perelman, the view about the way in which the judge should justify his decision depends on the underlying conception of law. If one starts from a teleological conception of law, an interpretation will be preferred which takes into account the goals of a particular statute. Starting from this conception, the justification focuses on the question of whether the interpretation furthers these goals. If one starts from a functional conception of law, the law is considered to be a means of attaining certain goals intended by the legislator. Starting from this conception, the justification will focus on the considerations which take into account the will of the legislator.

23.3. Arguing by Topics (*by Hanna Maria Kreuzbauer*)

The 20th century's rediscovery of topical legal argumentation and reasoning is mainly the merit of the German legal scholar Theodor Viehweg (1907–1988), who in 1953 published *Topik und Jurisprudenz: Ein Beitrag zur rechtswissenschaftlichen Grundlagenforschung* (Topics and jurisprudence: A contribution to basic research in legal science; Viehweg 1974; for his later works, see Viehweg 1995).[2] In the 1960s and 1970s, Viehweg's book occasioned a heavy dispute

[2] So coincidently the 1950s saw the advent of three major traditions of rhetoric and argu-

about legal reasoning within legal science, but as the English translation was published only in 1993 (cf. Viehweg 1993) this was mainly limited to the German speaking countries.[3] Viehweg's topics is meant to be a revival of classical topics, so it goes without saying that Viehweg extensively refers to Aristotle and Cicero (cf. Aristotle's *Topics* and Cicero's *Topics*), the authors of the most important ancient topics. But he also puts a lot of his own ideas under the classical headline.

As Viehweg writes not only as a philosopher but also as a legal scholar, his sources are not only the works of philosophy but also of ancient legal science, above all Roman civil law with all its application-oriented and pragmatic character.

23.3.1. Theodor Viehweg's Topics

Viehweg formulates his ideas most prominently in the already mentioned 1953 book, *Topik und Jurisprudenz.* Despite its thinness this treatise is no easy text, which is mainly due to the fact that Viehweg discusses his basic ideas on very different places, spread around all over the book and because he remains ambiguous about his understanding of topical reasoning.

Viehweg's attempt to revive topical reasoning is based on three ideas: (1) There are two styles of scientific reasoning, i.e., *topical reasoning* and *deductive-systematic reasoning*[4] (Viehweg 1974, 16), and unlike the latter topical reasoning is problem-oriented thinking (Viehweg 1974, 31), (2) deductive-systematic reasoning is not suitable for legal science, although in his view legal science has tried to adopt this style of reasoning for a long period, and (3) legal reasoning requires a reform that shifts it from deductive-systematic to topical reasoning.

23.3.2. The Two Styles of Reasoning: Topical and Deductive-Systematic Reasoning

Viehweg's first idea shows the very basis of his theory, i.e., the sharp distinction between topical and deductive-systematic reasoning. This is a perspective he adopted from Vico, a famous opponent of René Descartes. Vico consid-

mentation theory, i.e., the new rhetoric, founded by Chaïm Perelman and Lucie Olbrechts-Tyteca (see Perelman and Olbrechts-Tyteca 1958), the model of argument introduced by Steven E. Toulmin (see Toulmin 1958), and topics reinvented by Theodor Viehweg (see Viehweg 1953).

[3] When Viehweg wrote the first edition of his book, the notion "legal argumentation" was not commonly used in German legal terminology, because this concept was popularized not before the 1970s. In these days all phenomena that we call "legal argumentation" today, were subsumed under the notion "legal reasoning." Therefore, anything said about legal reasoning in this context applies to legal argumentation as well.

[4] This is Viehweg's first naming, and since he is not completely consistent on this, we will follow it for the purpose of this text.

ered Descartes as the main inventor of the rationalist method of reasoning (cf. Goldmann 1998, 1282), which he—and following him also Viehweg—regarded as the prototype of deductive-systematic reasoning (cf. Viehweg 1974, 81–94). To understand topical reasoning one must first understand deductive-systematic reasoning as its most important counterpart. For this type of reasoning sometimes also the phrase "*more geometrico*" is used (cf. Viehweg 1974, 17), a concept not very common in our time but perfectly showing the essential idea. Here, Viehweg cites Vico, who writes:

> The starting point [of deductive-systematic reasoning] is a *primum verum*, which cannot be destroyed by any doubt. Then, the further development takes place following the *style of geometry*, i.e., in accordance with the first science based on proving, namely, in chains of inferences (sorites) as long as possible. (Viehweg 1974, 17, my translation and italics added)

This obviously refers to the method of proof used in Euclidian geometry. Euclid built his system of geometry upon five postulates, i.e., axioms that seem to be intuitively evident but remain unproven in fact. All other sentences of his system—the theorems—are derived from these axioms by way of deduction. Consequently, Euclidian geometry can be seen as a system of sentences with a very small stock of preliminary accepted sentences and a huge number of derived sentences, gained by rather long chains of deductive operations. Therefore, Viehweg's name, "deductive-systematic reasoning" (Viehweg 1974, 14; my translation) is quite plausible. Unlike Euclid, who used this method of reasoning for abstract mathematical entities, Descartes applied it to philosophy. In his most famous piece of reasoning the *primum verum*, i.e., his axiomatic basis, is the statement that the self (seen form the perspective of an individual person) exists, which is proven by his famous "Cogito ergo sum." All following insights in this context are derived from this statement by way of deduction.

23.3.3. Legal Reasoning Should Become Topical Reasoning

Viehweg concludes that all concepts and sentences of jurisprudence must be linked to the specific problem and that legal reasoning can be understood only from the direction of the problem (Viehweg 1974, 97). As just mentioned above, Viehweg finds this type of reasoning in the Roman lawyers' non-systematic way of thinking (Viehweg 1974, 51) and he concludes that also contemporary legal reasoning should develop in this direction. Viehweg actually provides some more detailed ideas about how topical reasoning should be implemented in legal science and generally distinguishes between two kinds of topics (Viehweg 1974, 35): first-level topics and second-level topics. The first is topical reasoning based on an implicit leading point of view; the second uses catalogues of such leading points of view. According to Viehweg, lawyers work with second-level topics, i.e., with *tópoi* catalogues (Viehweg 1974, 56), but he himself does neither quote nor provide any example. So this was up to his suc-

cessors, and an important step was the *tópoi* catalogue presented in 1971 by Gerhard Struck. This catalogue consisted of 64 legal *tópoi*, including such diverse items as *Lex posterior derogat legi priori* (The later law supersedes the earlier one: *tópos* 1), *Nemo plus iuris transferre potest quam ipse habet* (No one can transfer to another more rights than he himself possesses: *tópos* 16), purpose (*tópos* 57), interest (*tópos* 58), etc. (see Struck 1971, 20–34).

23.3.4. Critique

Viehweg's idea that legal reasoning should shift towards topical reasoning is not a theoretical statement but rather a scientific program. It caught an extraordinary amount of attention (Larenz 1991, 147) and, as mentioned above, it caused some dispute about legal methodology (for the scientific discussion about Viehweg's topics cf. Horn 1967, Otte 1970). That is because the topical approach was a serious attack on the established standard model of continental legal science, which Bertea also calls "the traditional approach" (Bertea 2004, 467). By "standard model" we mean the still dominant model of legal methodology, used in legal science but also in legal practice, which has been established at least since the early 19th century and basically says (1) that legal reasoning is a style of rational reasoning but not deductive-systematic reasoning in Viehweg's sense, (2) that its most important goal is to figure out the "real" law by interpretation of the code books, (3) that interpretation is the most important method within legal methodology.[5] Therefore the so called *canones* of interpretation have been developed, but beside this also *tópos*-like fundamental principles of law and other figures are in use although only playing an inconsiderable role. Viehweg's model received some critique from the adherents of the standard model. One of the prominent adherents of this is Larenz, who does not generally deny that lawyers might apply topical reasoning (Larenz 1991, 145–55, and in particular 147). But, legal arguments, he argues, stands in a certain (non-problem-oriented but methodological) system, which is completely neglected by topics (see ibid.). So, he concludes that topics as a collection of argumentative tools would not offer any better alternative (see ibid.).

From the perspective of legal argumentation theory also Robert Alexy writes about topics (Alexy 1991, 39–43). Some of his points of criticism concern the vagueness of topics (Alexy 1991, 40) and its incapability to incorporate legal argumentation into the institutional framework of legal dogmatics and the use of precedents (Alexy 1991, 41).

Critique also came from the side of legal logic, most prominently expressed by Ota Weinberger (cf. Weinberger 1973 and Weinberger 1989, 400), who considers the theory of logical structures to be really fundamental for legal meth-

[5] It has to be emphasized that all of these claims are based on scientific fictions.

odology (Weinberger 1973, 34), neither the standard model, nor topics. Weinberger sees logic and topics not as conflicting but complementary (Weinberger 1973, 34). His main critique on Viehweg's topics is that topics does not provide any guidance for selecting the relevant *tópoi* out of all possible *tópoi* (Weinberger 1989, 400). The essence of this critique is that topical reasoning is not sufficiently systematic, along the same line of the just mentioned critique by Larenz.

23.3.5. Conclusion

Viehweg's topics not only influenced continental legal methodology but it also played an important role in the development of legal rhetoric in Germany. As his successors one may name scholars like Ottmar Ballweg, Hubert Rodingen, Katharina von Schlieffen, Thomas-Michael Seibert, and Waldemar Schreckenberger (cf. von Schlieffen 2007, 206–12). Viehweg was probably (but also trivially) right in the diagnosis, that legal reasoning includes an essential part of problem-oriented reasoning and cannot be systematized like some fields of physics, but not in the therapy, because he himself was not able to offer any better solution. As his opponents rightly pointed out, that is because topical reasoning in Viehweg's sense leads to a completely unsystematic play with equally relevant *tópoi*, and conflicts between arguments based on such *tópoi* are almost insolvable. So, if legal reasoning were but based on topics, it would get vaguer and the predictability of legal decisions would decrease. Since legal logic, which provides precision at the cost of an extensive increase of complexity, offers no alternative either, the standard model is still in use. Consequently, Viehweg's reform plan has to be counted as a failure.

Nevertheless, Viehweg's critique of the standard model was the first, the most radical and the most the influential one, so far as German 1950s legal culture is concerned. Due to his work the standard model was seen differently and this gave rise to an increased scientific interest in the linguistic, semiotic and rhetorical aspects of legal reasoning, a development that would have been unthinkable without Viehweg's contribution.

23.4. Legal Interpretation and Hermeneutics (*by Pierluigi Chiassoni*)

It seems useful distinguishing between hermeneutics as a social phenomenon, hermeneutics as a methodology, and hermeneutics as philosophy.

As a very widespread *social phenomenon*, *hermeneutics* (interpretation) consists of a variety of linguistic performances: a variety of acts performed *with* (some) language and usually *in relation to* language, including such things as expressing someone else's hitherto unarticulated thoughts, will, desires, emotions, etc.; translating from one language to another; translating notes into sounds, scripts into plays; bringing to the fore, explaining, and making understandable the hidden, deep, meanings of an obscure, or only apparently plain, text; understanding words, texts, acts, and pieces of human communication in

general; unveiling the real meanings of words and deeds to their very authors, making them aware of them; etc.

As a *methodology*, *hermeneutics* is tantamount to *hermeneutiké téchne*, *ars interpretationis*, *Kunst der Interpretation*, the *art of interpretation*; in its central meaning, it consists in an inquiry on the proper tools needed, either in general or, more often, in some specific field of practice or learning, in order to play some interpretation game correctly, be it the game of expressing someone else's thoughts, will, or desires, or the game of giving *names* to things and thoughts (as in the Aristotelian treatise *Perí hermenéia* [On interpretation]), or the game of explaining the meaning of some obscure text, or the game of ascribing meanings to authoritative legal or religious texts; etc.

Finally, as *philosophy*, *hermeneutics* is tantamount to the philosophical views, developed in the 20th century from Heidegger's 1927 *Sein und Zeit* (*Being and Time*) onwards, according to which views the multifarious, universal, social phenomenon of hermeneutics (interpretation), with its core of understanding and explication, is considered a paramount feature of the human condition ("examination," "hearing," and "answering" being the ontological key-notes of humankind), and perhaps even *the* fundamental issue philosophy should deal with (see Ferraris 1988, 1999).

From the late 1940s on, the methodological and philosophical relevance of hermeneutics (as the widespread social phenomenon of interpretation) afforded the possibility for pathbreaking double-crossings.

On the one hand, some jurists and legal philosophers who were investigating legal interpretation deemed it important to look for a general hermeneutical philosophy that would provide the foundations for their local theories and methodologies.

On the other hand, some philosophers—notably, Hans-Georg Gadamer and Paul Ricoeur—deemed it important to take legal interpretation into account as a source of evidence supporting their philosophical hermeneutics.

In the following sections, only a few pages from that complex history will be recounted.

23.4.1. The Legal Hermeneutics of Emilio Betti

Emilio Betti (1890–1968) is one of the leading figures in legal hermeneutics. In fact, as a jurist deeply learned in the civilian tradition, he did not just go into philosophy looking for the foundations of his own legal methodology; instead, he built up a general philosophy of interpretation (*allgemeine Auslegungslehre*) of his own—starting from the pre-Heideggerian hermeneutical thought of scholars like Friedrich Schleiermacher and Wilhelm Dilthey—where legal interpretation was assigned a well-carved pigeonhole.[6]

[6] The sources of Betti's hermeutics are actually broader, including the bulk of 19th-century

The basic points of Betti's hermeneutics are as follows (see Betti 1971; 1955, esp. chaps. 1–3, 8; 1959; 1961; 1965).

1. *Notion*. *Interpretation*, whichever field that activity is being performed in, consists in *understanding* (*intendere*) the *meaning* of the *representative forms* (*forme rappresentative*, *forme sensibili*) in which somebody else's "mind" (*spirito*, *spiritualità*) has been "objectified" in order to communicate with other "minds." In semiotic terms, Betti adopts a *triadic*, *communicative* model of interpretation understood as a "process" that comes into being in situations structurally characterized by the presence of *sender* ("objectified sense and spirit"), *message* (representative form), *addressee* ("interpreting spirit"):

> At one end of the process, there is the living and thinking spirit of the interpreter; at the other end, there is a spirituality that has objectified itself into representative forms. These two terms do not come immediately into touch with each other; rather, they meet through the middleman of those representative forms in which the spirituality [of the author] stands against the interpreting subject as something that is *other than* and *independent* from the latter, as an *irremovable objectivity*. (Betti 1965, 239; my translation)

The interpretive process is furthermore a *dialectical process* characterized by the structural *opposition* ("antinomy") between "(postulated) objectivity" and "(unavoidable) subjectivity," an opposition to be dealt with, and overcome by, proper interpretive canons, as we shall see in a moment.

2. *Kinds*. There are three different "kinds" of interpretation:

a) *purely recognitory interpretation*, or interpretation with a "purely recognitory function," the goal of which is "pure understanding," understanding for understanding's sake;

b) *reproductive interpretation*, or interpretation with a "reproductive or representative function," the goal of which is "making" somebody else "understand";

c) *normative interpretation*, or interpretation with a "normative" or "directive" function," the goal of which lies in "understanding in order to act," understanding "in view of the aim of regulating behaviour (*l'agire*) on the basis of maxims derived from norms or dogmas, from moral evaluations or psychological situations to be taken into account" (Betti 1955, vol. 2, 790; my translation).

Philology and history usually proceed by means of purely recognitory interpretation. Translations, concert halls, and theatres are all places where reproductive or representative interpretation is performed. Law and religion, as well as legal science and theology, are the areas where normative interpretation is paramount.

3. *Epistemic nature*. Whatever the goal, interpretation is always an *epistemic* process: It is a form of *knowledge*—along with logical inference and

Continental philosophy and epistemology, with particular attention paid to the philosophy and methodology of the moral sciences (*Geisteswissenschaften*) and social sciences.

causal explanation—by means of which interpreters get to *know* the meaning of some representative, sensible form. Accordingly, the view of those legal theorists who, like Kelsen and Merkl, claim interpretation to be an *act of will* (when performed by judges and legal authorities, and also by jurists stepping outside the frame of scientific interpretation: See Section 22.5 in this tome) is to be rejected, since it overlooks the fact that, even in those cases, interpretation is still at bottom a process of cognition—an exercise in retrieval, recognition, and reconstruction—where different "theoretical moments" combine: the "philological moment," concerning the "reconstruction" of "the grammatical and logical nexus" of the interpreted "discourse"; the "critical moment," concerning the elimination of any apparent "inconsistency, incoherence, and contradiction," on the basis of what we would now call the principle of charitable interpretation; the "psychological moment," where the interpreter "moves into the spirit" of the person who created the representative form, in order to "recognise" the acts and thought processes behind it; the "technical moment," concerning the ascertainment of those "ideal instances and powers" which dominated, albeit unconsciously, in the mind of the authors, and which the authors served with their inventive, speculative, constructive activity, in order to contribute to the solution of some "problem" in those instances and powers posed in a given field of learning or practice. The psychological and technical moments in turn confer on the process of interpretation a Janus-like structure: For it should consider its object both retrospectively (as a past experience) and prospectively (as a ring in an ongoing chain of cultural events) (see Betti 1955, chaps. 2, 9).

4. *The standard of correctness*. The standard of epistemic correctness of any piece of interpretive output may be termed *procedural*: It is a matter of *method*, depending on the proper play of the proper interpretive "canons"—which, by the way, is never an automatic, slot-machine process, but always requires interpreter's commitment and effort (the deeper and stronger, the better).

5. *The four fundamental canons*. Identifying the proper interpretive canons is the task of a branch of inquiry in the general theory of interpretation called *hermeneutical deontology* or *hermeneutical methodology*. Taking into account the nature of interpretation as characterized above and its practice, hermeneutical methodology "discovers" four "fundamental canons," which are universal since they hold, and should hold, for any kind of interpretation whatsoever, including legal interpretation: (*a*) the canon of "autonomy and [the] immanent character of the hermeneutic criterion"; (*b*) the canon of "totality and consistency of hermeneutic consideration"; (*c*) the canon of "actuality of the understanding"; and (*d*) the canon of "adequacy of the understanding" or "correspondence of senses and hermeneutical congeniality" (Betti 1955, chap. 9; 1971). The first two canons are *objective*: They pertain to the "object" of interpretation, to what is being interpreted, as well as to the representative forms and their authors. Contrariwise, the latter two canons are *subjective*: They per-

tain to the interpreting "subjects," with the goal of ensuring their "efficient collaboration" in the enterprise.

Autonomy. The first canon prescribes respect for the authors' own mind, spirit, meaning, and purpose that are behind the representative forms, read in such a way as to avoid reading extraneous meanings into them. It is expressed by the saying *Sensus non est inferendus sed efferendus* (we might say "Meaning should not be *up*loaded, but *down*loaded"). It is mirrored by topical distinctions between letter and spirit (*litera enim occidit, spiritus autem vivificat*), expression and will (*vox dicentis* vs. *mens dicentis*), words and energetic meaning-content (*verba* vs. *vis ac potestas*), and words and purposeful thought (*verba* vs. *sententia*), where the latter term should always be given precedence whenever it should find itself at odds with the former. It bears pointing out that respect for author's mind also requires abiding by the canons of interpretation ("criterion"), which is "immanent" in any representative form coming from an author's spirit.

Totality. The second canon, well-known to jurists since the time of Celsus, who worded it for eternity ("*Incivile est, nisi tota lege perspecta, una aliqua particula eius proposita iudicare vel respondere*": "It is against the civil law, without having considered the whole of a law, to adjudicate or counsel only on the basis of some part of it"), prescribes that any representative form be interpreted in a *systematic way*, bringing it back, and tying it, to its several *contexts* as a part, or element, of such unitary wholes. For instance, any statutory clause—besides being itself a micro-system where each word should be read in light of the whole sentence, and viceversa—should be interpreted in light of such contexts as (*a*) the whole legal text it belongs to, (*b*) the system of the language in which it was formulated, (*c*) the intention of its author (in the objective sense we shall see in a moment), (*d*) the system of legal norms as a whole, or any relevant part thereof, (*e*) the set of practical problems and goals it may be regarded as originally dealing with, etc. The canon of totality may be expressed by the following motto: The unity of the whole should be understood by means of its single component parts and, reciprocally, the sense of each of its component parts should be understood as a function of the unity of the whole. The canon may also be called the *principle of hermeneutical reciprocity*, or *principle of reciprocal illumination*, since it mirrors the idea, brought to the fore by Schleiermacher, of a "circle of hermeneutical reciprocity."

Actuality. The third canon requires interpreters to be aware that they understand the meaning of representative forms through their own, present conceptual framework, and on the basis of their own collaborative attitude and "noetic" interest. There is no "naked objectivity" simply to be picked up from the ground; no objective meaning that representative forms simply convey to interpreters, in a passive and mechanical way, like transferring a liquid from one vessel to another. It is Betti's claim that by bringing to the fore the *actuality* canon, or, as we might also say, the *self-awareness* canon,

we do not mean to overlook the autonomy, historicality, and otherness of the object of interpretation as regards the subject […]. It is just a matter of recognizing the *spontaneity* of the interpreting subject, his historicality […], his spiritual totality […], being well aware of the essential *contribution* which the *living spirituality* and the *mental categories* of the interpreting subject do, and should, bring to the interpretive process. (Betti 1955, vol. 1, 317; my translation and italics added)

Adequacy. The fourth, and last, canon—*adequacy of understanding*, *proper hermeneutical correspondence or consonance*—prescribes that the unavoidable spontaneity of the interpreting subject should never "supersede, or impose itself from the outside on, the object of interpretation," for this would undermine its autonomy and "the congenial assimilation of the object on the part of the subject" (Betti 1955, vol. 1, 317ff.; my translation). Accordingly, interpreters ought to make an effort to bring "their own living actuality to an intimate adherence to, and harmony with, the message […] coming from the object, in such a way that both vibrate in perfect *unison*." Open-mindedness, the ability to dominate one's prejudices, humility, abnegation, and a fraternal and congenial disposition to collaborate are all among the basic virtues interpreters should practice in performing their complex and delicate task (see Betti 1955, vol. 1, 317ff.).[7]

6. *Interpretation and integration*. Schleiermacher maintained that interpretation should be conceived as a *two-step* process: *First*, interpreters should come to understand an object *no less than* its author did; *second*, interpreters should come to understand that object *better than* its author did. The latter step Betti calls *hermeneutical integration*, whose necessity and legitimacy would come from the fact that the authors of representative forms usually lack a full and clear awareness of their meanings. In such very common cases, interpreters should step in:

Interpretation is here called to the task of making explicit what was not [explicitly] said but only meant or understood to be implicit, explaining and completing the expressions which have been left fragmentary, gappy, or incomplete [by its authors]; casting light on the motives which were left in the shadow or depicted by a few passages only; developing the discourse or work according to its logical and stylistic coherence; realizing what the law of formation was which the genetic process obeyed, reconstructing its connexions and concatenations: [This is the task] of becoming aware […] of the spiritual totality in which the work was generated and where it finds its historical setting. Now, such a hermeneutical integration has the effect of making the interpreter's understanding more powerful, and providing it with a degree of depth and awareness the author himself could not have reached, given his historical situation and perspective, as well as the limited horizon of interests by which he was moved. (Betti 1955, vol. 1, 338; my translation)

A few points are worth stressing before we move on. First, Betti himself seems to be aware that the epistemic, cognitive nature of the interpretive process is,

[7] And quoting Schleiermacher: "Everybody should be understood according to *his own* thoughts. If that would be unworthwhile, then there would be no sense in dealing with the hermeneutical problem" (Betti 1955, vol. 1, 325; my translation).

at most, a regulative ideal working as an epistemic fiction. Interpreters should proceed *as if* their activity consisted in recognizing and reconstructing ("postulated") objectified meanings. Interpreters should as far as possible abide by the adequacy canon. Second, and unfortunately, the four canons do not seem able to ensure the methodological guidance needed even only to come close to the regulative ideal. They are phrased in such generic, elusive, and metaphorical terms, their interplay is amenable to such a wide variety of competing combinations of more specific directives and interpretive resources that the operative instructions one may pull out of them seem to boil down to an invitation to be honest, careful, reflective interpreters. However, the very standards of honesty, carefulness, and reflection, except for the extreme cases of open, Humpty-Dumpty-style interpretive despotism, are operatively misty, since no bright line may be identified between compliance and violation of the fundamental canons. This I take to be a very serious charge for a methodology purporting to be *prescriptive*. Its import, however, goes beyond ineffective prescription, for it also casts doubt on the theoretical ground of Betti's hermeneutics, suggesting that a different view of the notion of legal interpretation is on the whole preferable. This view gives up the triadic communication model, focussing instead on the *dual* relationship between representative forms and interpreters: Interpretation is, at bottom, a *two*-legged game; furthermore, the *will*-dimension of interpretation is here fully and openly recognized, and any attempt at depicting it in terms of cognition, though in more sophisticated ways, is definitively rejected. This view, which was anticipated by the disenchanted *Wiener* theorists (see Section 22.5 in this tome), will be retrieved and strengthened by the realist side of analytical theories of interpretation (see Sections 24.2 and 24.4 in this tome).

7. *Legal interpretation*. Turning to law, Betti sets forth a methodology where he combines his hermeneutical outlook with ideas from Savigny (see Section 21.3 in this tome) with the jurisprudence of interests (see Section 22.4 in this tome). Legal interpretation is defined as

> an activity aimed at recognizing and reconstructing the meaning to be ascribed, within a legal order, to representative forms which are either the sources of legal evaluations [e.g., statutes, decrees, executive orders], or the matter of such evaluations [e.g., contracts, wills, marriages]. (Betti 1971, 91; my translation; cf. also Betti 1955, vol. 2, 801–2)

It should be conceived, and performed, as a *normative*, *neutral*, *evolutionary integrative* activity geared toward social interests.

For expository purposes, these features may be regarded as casting light on, and corresponding to, as many *principles* in Betti's interpretive code.

The principle of weak normativity. Interpretation should establish which are the proper (right, correct) legal norms expressed by a given legal source (confining the discussion to this side of the issue). In so doing, it is to be regarded as *lawmaking*, in the weak, craftsman-like, and Kantian constructivist sense

of what might be termed *nomopoiesis*. It is not—or at least not necessarily—also *nomothésis*, i.e., the authoritative production of generally binding norms, which is a purely contingent feature, depending on each legal order's system of legal sources.

The principle of hermeneutical neutrality. The nomopoietic function of legal interpretation should be performed according to the *principle of hermeneutical neutrality*, which is a specification for law of the autonomy-of-understanding canon. Interpreters ought not to resort to

> metajuridical instances, [be they] ethical, religious, social, or economic, according to his personal preferences, but ought to *keep to the normative evaluations* which determine the positive legal regulation of human transactions and are *immanent in the legal order*. (Betti 1955, vol. 2, 795; my translation and italics added)

The principle of evolutionary integration. Legal interpretation, as a kind of normative interpretation, should be not only recognitory and reproductive, but also an activity that continuously updates by way of an *evolutionary integration* of the original meaning of norm-formulations, which surely should always be retrieved and recognized in any case:

> In order to be effectively implemented as to the behaviour it means to regulate, any piece of legislation needs to undergo operations—like adaptation, adequation, and complementary integration and development—which, in a continuous renewal, prevent the norm from turning into a dead letter, and keep it alive and in force in the legal order. (Betti 1955, vol. 2, 795; my translation)

In such a way, legal interpretation performs "the function of keeping in *perennial efficiency* as to the *life* of a society the norms, precepts, and normative evaluations which are destined to regulate it and provide it with orientation" (see Betti 1955, vol. 2, 803; my translation and italics added).

To keep within the limits set by the principles of hermeneutical neutrality and weak normativity, however, evolutionary integration and updating should be performed under a (presumed) double constraint: (*a*) the constraint of *systematic interpretation*, i.e., in light of the whole legal system to which the updated norm-formulation belongs, to be regarded, following Savigny (see Section 21.3 in this tome), as a "productive concatenation" and an "organic totality"; (*b*) the constraint of *consequentialist interpretation*, i.e., taking into account the likely "reactions and practical effects" of interpretive outputs (see Betti 1955, vol. 2, 803–4, 806, 817).

The principle of interests-identification. Following Heck, Betti sees the law's basic function as that of providing determinations for conflicts among the interests present in a society, so as to make social life possible and worthwhile. From this standpoint, legislation should be regarded as a device for the resolution of social conflicts on the basis of legislative evaluations and balancings. This view comes immediately to bear on statutory interpretation, which should be conceived as a two-step process. In the first step, statutory interpretation is

historical interpretation (sociological, historico-teleological): It should identify the conflicts of interests and the evaluative criteria by which to resolve them in light of the original sense of the norm-formulation; in the second step, it is a piece of *evolutionary, social interpretation*, since it should identify which conflicts of interests the norm-formulation is to be taken to consider *now*, and how it evaluates and resolves those conflicts (Betti 1955, vol. 2, 819ff.). The latter step, in keeping with the idea of interpretation as a *knowing* activity, is to be performed as a "complementary operation, carrying on with the process of norm-production [*nomogenesi*], subject to previously identified legislative evaluations" (ibid., vol. 2, 824; my translation).

In such a process, *legislative intent* should be considered in a totally *de-psychologized* way: not as "a fiction bringing to life some myth or psychological phantom," but rather as tantamount to "the practical problem to be solved and to those typical interests of the community that get their protection from legislative resolution" (Betti 1955, vol. 2, 824; my translation). By this token, however, legislative intent collapses into the *ratio iuris* of the legislative norm-formulation. Indeed, this is "the original evaluation that is immanent and latent in the letter of the law," liable to *modifications* as time goes by, in the way of *expansion* (embracing "further categories of interests beyond the ones originally considered"), *restriction*, or even complete *annihilation* and *replacement*, due to supervening social changes or new directions taken by the legal order. Starting from the properly identified *ratio iuris*, Betti claims, "it is lawful to proceed to an adaptation and transposition of the legal text in the lively actuality, and to properly [*giustamente*] balance the static interest in stability, conservation, and certainty with the dynamic need for renewal in the way of social evolution" (ibid., vol. 2, 818–9, 824–5, 833; my translation).

In fact, what the "normative power of legislation," i.e., the power of historical, flesh-and-blood legislators, can fully "pervade and grasp" is just the *letter* of the law; but that is only an element in the perennial, non-psychological, socially objective, organicistic, holistic, evolutionary spirit of the law.

8. *Legal gaps*. Legal positivists are used to assuming that legal orders are *complete* ("logically closed") and *consistent* normative systems. But, Betti claims, they are wrong. A careful historical and sociological inquiry suggests that legal orders should properly be regarded as characterized by a *single* fundamental principle. This is the principle of (dynamic) totality (coherence, consistency). Completeness, from the standpoint of that principle, can only be a regulative ideal, "an ideal goal."

There can be three basic kinds of gaps in a law: prediction gaps, evaluation gaps, and collision gaps. *Prediction gaps* (*lacune di previsione*) exist whenever new cases come up that are partly or totally unregulated. *Evaluation gaps* (*lacune di valutazione*) are instead due to the inadequacy of past, express evaluations of conflicts of interests. *Collision gaps* (*lacune di collisione*) come out whenever there is a conflict between incompatible diachronic legislative evaluations.

Collision gaps (antinomies, normative conflicts, as we could also say) should be filled by applying the principle of totality and its traditional specifications: *lex posterior*, *lex specialis*, *lex posterior generalis non derogat priori speciali*, *cessante ratione legis cessat ipsa lex*, etc. Evaluation gaps should be filled, again, by the principle of totality as a tool of corrective (re)interpretation. Prediction gaps should be filled, whenever *a contrario* reasoning seems at odds with the law, by means of *analogy* (*analogia legis*) or, failing that, by appealing to the *general principles of law* (*analogia iuris*), and, more specifically, to their typical "*excess of deontological or axiological content*," to their "*expansive* virtue or force, which is not logical or dogmatic in nature, but rather evaluative and axiological," not "a force of "truth" and theoretical reason, but "[a force] of ethical values and evaluations, gradually maturing and becoming established in relation to contingent historical situations" (Betti 1955, vol. 2, 831ff., 841, 844, 850; my translation).

Due to the evolutionary and integrative nature of interpretation, there is no difference in kind, according to Betti, between interpretation and the filling up of prediction gaps (integration proper): They are both epistemic processes, by means of which interpreters come to know either the correct meaning of a norm-formulation or the correct way of filling a gap. As to the latter activity, updating an old view of the historical school of law, Betti vindicates the epistemological virtue of legal science ("theoretical jurisprudence") and adjudication ("practical jurisprudence"), for they would provide a machinery of collective, public, monitorable discovery of the general legal principles "immanent in the legal order" and the ethical-social values they presuppose and instantiate (see Betti 1955, vol. 2, 854ff.).

23.4.2. Betti vs. Gadamer

As I mentioned earlier, the roots of Betti's hermeneutics are to be found in pre-Heideggerian hermeneutics, historicism, and philosophy. This heritage Betti proudly vindicates both against Heidegger himself ("*maestro dell'arzigogolo e dell'espressione ermetica*" ["master of pointless embellishing and hermetic expression"]: Betti 1955, vol. 1, 243) and against Hans Georg Gadamer, the "classical Heidelberg philologist" and Heideggerian existentialist, universally recognized as the father of the new "philosophical hermeneutics." In 1960, Gadamer published *Wahrheit und Methode* (*Truth and Method*: Gadamer 1960), the manifesto of new hermeneutics. In 1961, Betti wrote a critical review of it: *L'ermeneutica storica e la storicità dell'intendere* (Historical hermeneutics and the historical character of understanding: Betti 1961, see in particular 3, 13ff.). Gadamer replied to Betti in the same year: *Hermeneutik und Historismus* (Hermeneutics and historicism: Gadamer 1961). The basic points of the Betti-Gadamer dispute, as far as they are relevant to a survey of contemporary legal methodologies, may be summed up as follows.

Gadamer claims his philosophical hermeneutics to be a (descriptive) phenomenology of (legal) interpretation, aimed at "the *recognition* of *what is*" (Betti 1961, 3). Now, the "what is" of (legal) interpretation—which Gadamer regards reductively as basically concerned with the application of legal norms to individual cases ("The jurist grasps the meaning of a law on the basis of a given specific case, and in view of it": Betti 1961, 13; my translation)—amounts to the following: (*a*) The practice of (legal) interpretation stresses that everything in it turns on the *historicality of the understanding*—every understanding is determined by the interpreters' own historical conditions, by the historical tradition which they necessarily belong to, and by which they are necessarily affected; (*b*) interpretation is the circular, part-whole process by which interpreters find out which of their initial *Vorurteile* (prejudices)—sense-expectations, or sense-anticipations about the proper meaning of a text—are sound ("true") and which ones are not ("false"); (*c*) the basic interpretive criterion that is, and may be, applied to that end is *anticipation of perfection* (*Vorgriff der Vollkommenheit*), which apparently corresponds to the presumption of sound and reasonable meaning-content, a criterion that in the analytical tradition goes by the name of the principle of *charitable interpretation*; (*d*) (legal) interpretation is a form of *knowledge* ("Even in his case [of a judge], his understanding and interpreting is tantamount to his knowing a meaning and recognizing its validity": Betti 1961, 13–4; my translation), but such knowledge is basically a matter of what might be called intuition within the limits and data offered by the relevant tradition.

Betti regards Gadamer's hermeneutics as heresy, since by its over-insistence on the "historicality" of interpretation, it would undermine "the objectivity of those results which can be achieved by following" the four fundamental canons of "historical hermeneutics."

Betti's criticism is off the mark, insofar as Gadamer sets forth a purportedly hermeneutical *description* of the interpretive process, while Betti (is primarily interested in and) sets forth a *prescriptive* legal methodology. Nonetheless, Betti's concerns are understandable, for Gadamer's view seems to suggest that, among Betti's four fundamental interpretive canons, the paramount one, the one that is likely to be truly effective, is something like the canon of the actuality of understanding.

If looked at through the cold eye of a lawyer disenchanted by over fifty years of anti-formalism (see Sections 22.2 through 22.5 in this tome), the Betti-Gadamer controversy reveals the overall limits of the two hermeneutical approaches to *legal* interpretation: on the one hand, their being affected by wishful thinking in their vindication of interpretive cognitivism, though under the banner of an "anti-intellectualistic," constructivist epistemology (Betti); on the other hand, their being rather shallow on the whole, their concerning at most, and unwarily, the structure of the interpretive process as a psychological, intellectual activity, their taking interpretive cognitivism for granted (Gadamer).

23.4.3. Esser and the German Hermeneutical Movement

Gadamer's ideas contributed to the development of an hermeneutical approach to interpretation in German legal culture. Betti dressed up interpretive cognitivism with an hermeneutical methodology presented as successful in ensuring the objectivity, autonomy, and adequacy of legal interpretation. German hermeneutical legal theorists, by contrast, resorted to Gadamer's view to build a theory of the structure of the interpretive process more in line with interpretive noncognitivism. Josef Esser (1910–1999) paved the way. Arthur Kaufmann (1923–2001) is one of the leading figures. Their basic ideas on legal interpretation will be concisely outlined below.

In his seminal 1972 book *Vorverständnis und Methodenwahl in der Rechtsfindung* (Pre-understanding and the choice of method in law-finding: Esser 1972), Josef Esser forcefully denounced the failure of traditional legal methodology and legal dogmatics, satisfied with canons and construction utterly detached from the reality, and needs, of the practice of interpretation, application, and law-finding. He claimed that the hermeneutical standpoint would provide the theoretical ground needed for a new foundation of legal methodology, laying open the unavoidable dimension of judicial discretion. He worked out a theory of the *structure* of the interpretive process as an intellectual process in the mind of judges and jurists, centred on *pre-understanding* and *hermeneutical circles*.

Pre-understanding is the determinant factor in interpretation. It depends on *legal education* ("conceptual categories" and other notions within the legal tradition), *linguistic knowledge and know-how* (as to both ordinary and technical language), and *social and judicial ideologies* (values and evaluations). It leads to the pre-identification of the optimal solution for the case at hand in terms of its social and moral correctness: In technical terms, it leads to the formulation of *sense-anticipations* or *sense-expectations* about the meaning of the legal source to be interpreted. Interpretive canons come in, in the psychological process of interpretation, right at this moment—*after* some sense-anticipation has been laid down, and in order to test its arguability, reasonableness, and argumentative plausibility, not "in theory," but in terms of the probability of its gaining the consent of the relevant interpretive community. Interpretive canons are put to work, at this stage, within three different but related *hermeneutical circles*: the anticipated-sense/norm-formulation circle (where canons like literal interpretation and legislative intent are usually employed), the legal-norm/legal-system circle (where systematic canons are in order), and the legal-norm/individual-case circle (where equity and substantive justice canons are usually in order).

Arthur Kaufmann put Esser's ideas in a clearer and sounder form.

1. Hermeneutics is *not* a *methodology* but a *philosophy* of legal interpretation.

2. It is, more precisely, a "transcendental philosophy," setting out the conditions that make legal interpretation possible.

3. These conditions boil down to the *pre-understanding* factor introduced by Josef Esser on the basis of Gadamer's philosophical hermeneutics, which amounts to the whole, dynamic, tradition-dependent set of beliefs, attitudes, preferences, ideologies, commitments, etc., making up each interpreter's *personality* and bearing on the way he approaches legal sources to extracting from them the solution to the practical problem at hand.

4. Objectivist conceptions of legal knowledge, claiming a clear-cut subject-object divide affording the possibility of objective interpretive knowledge, are to be rejected as untrue to facts.

5. Every human society is a universe of co-existing and conflicting agents, where the law cannot be anything but an "open system," made not by *objective norms* existing out there, but rather by *intersubjective relations*.

6. Consequently, the central problem for legal interpretation is the problem of *argumentation* and *justification*. But this is a problem for juristic logic and rhetoric, provided one is aware that "legal method" is "irrational, subjective, unscientific" ("not strictly rational, exact, and determinate"), that the only boundaries are the flexible ones provided by "tradition" ("the common ground of the public world in which we find ourselves, of the ensured endurance of public institutions in virtue of which we live": Kaufmann 2007, 106; my translation):

> Only when the interpreter, carrying with him the whole tradition, participates in the horizon of understanding, will he be able to argumentatively ground the interpretive output he had tentatively anticipated (the "hermeneutical circle" or "spiral"). Hermeneutics is not a theory of [legal] argumentation, but it needs one. (Kaufmann 2007, 94; my translation)

In summary, then, "instead of pretending to an ambitious and fictitious objectivity, "the hermeneutical standpoint"contents itself with an honest intersubjectivity" (Kaufmann 2007, 106; my translation).

7. The "principle of honest intersubjectivity" (as we are calling it) should also characterize an hermeneutically inspired *prescriptive methodology* according to which (*a*) statutory interpretation (text-oriented interpretation) and the qualification of individual facts (fact-oriented interpretation) should always be performed *in a related way*, as suggested by the hermeneutical circles, and considering "facts" and "norms" as "brute materials" (Kaufmann 2007, 104; my translation) and (*b*) the judicial justification of interpretive decisions should always avoid any pretense of holding itself out as value-neutral, purely objective, knowledge (see Kaufmann 1975, 1993, 2007).

Chapter 24

THE AGE OF ANALYSIS: LOGICAL EMPIRICISM, ORDINARY LANGUAGE, AND THE SIMPLE TRUTH OF THE MATTER

by Pierluigi Chiassoni

24.1. Foreword

The Age of Analysis, from the 1950s onward, is characterized by theories of legal interpretation and argumentation in which some variety of analytical philosophy is employed to find and develop tools for properly performing philosophical inquiries on those subjects.

Among the "dogmas" which characterize analytical approaches, the following are usually mentioned: (*a*) the pragmatic and logical distinction between descriptive and prescriptive (evaluative, normative) discourse, between is and ought, and what is called Hume's Law; (*b*) the idea of language levels and the language/meta-language distinction; (*c*) the distinction between analytic and synthetic statements, between statements about words and statements about (non-linguistic) facts; (*d*) the distinction between the context of discovery and the context of justification (verification, control); (*e*) the distinction between lexical and stipulative definitions; (*f*) a conventionalist and pragmaticist conception of concepts.

These dogmas will be seen at work, though in different ways and with different emphasis, in the theories of Norberto Bobbio, Alf Ross, Eugenio Bulygin, Jerzy Wróblewski, Giovanni Tarello, and Genoese legal realism, all of which will be considered below.[1]

24.2. The Spell of Logical Positivism

24.2.1. Norberto Bobbio's Linguistic Turn

In Italy analytical legal philosophy is associated with Norberto Bobbio (1909–2004) and his Turin School. The starting point is conventionally considered to be an essay—*Scienza del diritto e analisi del linguaggio* (Legal science and language analysis: Bobbio 1950)—that Bobbio published in 1950. Here, Bobbio transplanted to the field of law the basic ideas the logical empiricists had

[1] On Bobbio see also Section 3.2.3 in this tome, and Section 11.4 in Tome 1 of this volume. On Ross see also Chapter 16 in this tome. On Bulygin see also Section 11.1 in this tome and Section 26.2.1.3 in Tome 1 of this volume. On Wróblewski see also Section 16.3.3 in Tome 1 of this volume. Finally, on Tarello and Genoese legal realism see also Section 11.6 in Tome 1 of this volume.

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worked out in their epistemological inquiries on the language of the natural and formal sciences, in order to provide a positive solution to the persistent, embarrassing question of the scientific nature of the doctrinal study of law (legal science, legal dogmatics).

In hindsight, the whole attempt may seem odd; and Bobbio changed his mind later on. But it is worth laying out its basic points, insofar as they are relevant to a history of Continental contemporary theories of interpretation.

The law, Bobbio claims, is a linguistic entity: It is, more precisely, a discourse, namely, the authoritative discourse of the legislator. From this theoretical starting point, endorsing a revolutionary legal ontology, at least as far as the European legal culture of the time is concerned, Bobbio proceeds to reframe the basic tasks of the traditional doctrinal study of law in terms borrowed from logical empiricism's meta-philosophy.

According to logical empiricism, the proper task of philosophy is to analyze and reconstruct the language of natural and formal sciences, in order to make it a perfect, ideal language.

By way of philosophical mimicry, Bobbio applies the same frame to the relation between law and legal science, claiming the proper task of *legal science* to be the analysis and reconstruction of *legislative language*, in order to make it as precise, determinate, and rigorous as possible. The task should be performed in three stages: purifying, completing, and ordering.

The *purification* stage is basically a matter of interpreting legislative norm-formulations. Its point, however, lies in *definition*: Jurists should redefine legislative technical terms whenever their meanings prove indeterminate, imprecise, or sloppy, and make them determinate, precise, and accurate. In so doing, they should keep two points in mind. *First*, legal interpretation (and definition, as an exercise in what might be called one-word interpretation) is an activity totally exhausted within the horizons of language; it consists in passing from one language (the legislator's language) to another language (that of legal science), it consists in explaining and purifying language *by means of* language, it is an activity that cannot really go beyond ("transcend") language, even when it pretends to deal with non-linguistic objects. *Second*, the (re)definitions of technical legal terms in legal science are neither true nor false, but more or less convenient to purposes at hand.

The *completing* stage concerns the filling of legal gaps. This task should be performed by means of the integration techniques—which are *rules for transforming* legislative language—understood by legal scientists to be set, explicitly or tacitly, by positive law.

The *ordering* stage concerns normative conflicts. This task should be performed by means of criteria of conflict resolution, which are another class of rules for transforming legislative language.

It is by now clear why Bobbio's attempt to show the doctrinal study of law to be a real science, based as it was on a pretended analogy with the relation between

science and the philosophy of science, is to be regarded as a failure. Nonetheless, the details of his analysis were—and still are—rich with theoretical insight.

Bobbio himself, in the later essay *Essere e dover essere nella scienza giuridica* (Is and ought in legal science: Bobbio 1970), reaped some benefit from his linguistic conception of law and legal interpretation. In this essay, he sets forth the following theoretical claims (in his terminology, claims of descriptive metalegal science, *metagiurisprudenza descrittiva*):

a) interpretation is a *necessary* step in any use of any piece of legislation whatsoever;

b) interpretation is *not* a *purely cognitive task* but a task involving *ethical value judgements*, which are pervasive in the life of the law—and that is because the language of law is "an imperfect tool, leaving a lot of room for the inventiveness of those who use it";

c) jurists are used to keep *de iure condito* and *de iure condendo* considerations separate, assuming the former to be a matter of pure, neutral, objective knowledge, but they are wrong: *de iure condito* considerations, depending as they do on interpretation, are value-laden and value-committed, too, so there is really no difference in kind from *de iure condendo* considerations;

d) far from being activities purely devoted to the "logical" application and neutral explication of positive law, adjudication and legal science are *sources* of law, if only in a material, sociological, not formal, way.

24.2.2. Eugenio Bulygin's Two-Tier Model

The analytical theory of interpretation advanced by Norberto Bobbio stands on the realistic side of the theoretical spectrum.

In a series of essays, some of them coauthored with Carlos Alchourrón (1931–1996), Eugenio Bulygin (1931–) worked out a purportedly more moderate conception of legal interpretation: This he did against the philosophical background of logical empiricism, while also taking into account the ordinary-language views developed by H. L. A. Hart and Genaro Carrió (see Hart 1961, chap. 7; Carrió 1965), and presenting that conception as a virtuous midpoint between the unwise extremes of interpretive formalism (cognitivism) and interpretive scepticism (realism, non-cognitivism) (see Alchourrón and Bulygin 1971; Bulygin 1986; Alchourrón and Bulygin 1991b; Bulygin 1995a; 1995b; 1995c; 1999; 2006, par. 6.2).

Formalists claim interpretation to be a matter of cognition. Realists claim interpretation to be a matter of decision ("invention," "creation"). But they are both wrong, since legal interpretation is *sometimes* a matter of knowledge, and *sometimes* a matter of decision.

Such a middle-ground, assumedly wise conclusion is argued for on the basis of a two-tier model of the *structure* of interpretive processes, the central points of which run as follows.

1. Jurists use the word *interpretation* to refer, mostly unwarily and confusedly, to four different sets of activities, which should instead be carefully kept separate, namely:

a) activities of *systematization*, or *building of axiomatic-deductive systems*, starting from a previously identified closed set of norms, and consisting in deriving from them their normative consequences as to a given set of generic cases ("universe of cases");

b) activities of *modification of a normative system*, consisting in the filling of its gaps and the resolution of its antinomies, which involve modifications, since they add new norms to the previous set and/or eliminate some of the old ones;

c) activities of *abstract* norm-oriented *interpretation;*

d) activities of *concrete* case-oriented *interpretation*.

Only (*c*) and (*d*) correspond to legal interpretation proper, while (*a*) and (*b*) in fact consist of activities that are different from, and actually do presuppose, interpretation proper.

2. *Abstract interpretation* consists in translating authoritative norm-formulations (provisions, legal sources) into norms ("passing" from sources to norms), usually expressing them in their theoretically appropriate logical form (for instance, in the form of conditional sentences connecting a given normative consequence to the description of some generic case: "If M (murder), then OS (obligatory sanction of twenty years in prison)," or, in symbolic language, "OS/M," "$M \rightarrow OS$," "(x) $(Mx \rightarrow OSx)$"). Abstract interpretation leads to the identification of abstract norms, i.e., of norms considered independently of any individual, concrete case to which they may apply. Abstract norms may work either as the normative premises of judicial decisions or as axioms from which jurists proceed to the systematization and modification of normative sets (see Bulygin 1986; 1995b, 34).

3. *The abstract interpretation* of a provision may be puzzling. Provisions may be *syntactically* and/or *semantically ambiguous*, such that two or more alternative meanings, two or more alternative norms, may be identified in them. In such cases, abstract interpretation fatally involves a *choice* by the interpreter, favouring the one or the other of the available alternative meanings.

4. The ambiguity of provisions is a *given*, something interpreters cannot but recognize by an act of knowledge, for it is a linguistic flaw, a linguistic indeterminacy, dependent on the very syntactical structure and semantics of provisions.

5. Whenever a choice is necessary, interpreters do not usually decide in a totally arbitrary way, though; rather, taking into account the *rational* ideals of law's consistency and completeness, they tend to select the meaning on the basis of which the law comes out as a gapless and consistent normative set (see Bulygin 1995a).

6. *Concrete* fact-oriented *interpretation* presupposes the prior identification of an abstract norm by means of abstract norm-oriented interpretation, and consists in establishing whether or not an individual case is liable to be subsumed within the generic case to which the abstract norm connects a given normative consequence.

It consists, for instance, in establishing whether or not, given the abstract norm "if M (murder), then OS (obligatory sanction of twenty years in prison)" ("(x) ($Mx \rightarrow OSx$)"), the individual case *a* (Mr. A killing Mr. B by unwittingly pushing into the sea the car where Mr. B was asleep) is a case of "murder," i.e., can be subsumed within the class of behaviours that constitute murder.

7. *Concrete* fact-oriented *interpretation* may likewise be puzzling. This happens whenever the terms by which the generic case is described in the abstract norm (the "descriptive terms" like "murder") prove to be *semantically indeterminate* relative to the individual case at hand because of their actual or potential *vagueness* (open texture). Again, from the standpoint of interpreters, this kind of linguistic indeterminacy is a matter of *discovery*; it usually depends on three different factors: (*a*) the semantic rules governing the uses of the term in ordinary or specialized language, mirrored by its *lexical definition*; (*b*) the semantic rules stipulated for the term by the legislator by means of a *legislative definition*; (*c*) the will of the legislator regarding the meaning of the term, such as that meaning may be ascertained, for example, in light of *travaux préparatoires*.

8. Vagueness is linguistic indeterminacy at the margins. This means that, as to the reference of any descriptive term, we may distinguish between a *core* area of clearly included cases (easy cases), an area of clearly *not included* cases (easy cases), and a penumbra of doubtful cases (hard cases). Accordingly, while performing concrete fact-oriented interpretation, it may happen that the case at hand proves to be either easy or hard. In the former kinds of situations, concrete interpretation is a matter of *knowledge*: Interpreters simply discover the meaning of the relevant descriptive term. In the latter situation, contrariwise, concrete interpretation is a matter of *decision*: Interpreters must *stipulate* the meaning (the semantic rules) of the relevant descriptive term, and so decide whether or not it is applicable to the case at hand.[2]

9. Both abstract and concrete interpretation, as described above, show that there is nothing peculiar about legal interpretation that can make it a special case, substantially different from ordinary language interpretation. On the contrary, they work exactly in the same way as our understanding of ordinary sentences. Sometimes it is a matter of discovery; sometimes it is a matter of decision and stipulation.

Bulygin's model is two-tiered in that he distinguishes, in the ordinary process of interpretation, the two stages of abstract interpretation (identification

[2] "The judge either discovers a preexisting semantic rule or stipulates the rule" (Bulygin 1995a).

of the norm) and concrete interpretation (concretization of the norm by reference to individual facts: fact-qualification). In so doing, he sets forth a model that is more sophisticated than the one-tiered ones proposed by Hart and Carrió, focussing instead exclusively on the concrete interpretation stage.

Unfortunately, Bulygin's model cannot be accepted as a good model for legal interpretation, for the following reasons.

a) It is a syntactic-semantic model of legal interpretation. As such, it overlooks what is perhaps the most important ingredient both in the working of language and in the practice of interpretation, even the interpretation of ordinary sentences: *pragmatics*.

b) From a pragmatic point of view, the use of language is always a commitment-laden activity. It is a game where the participants' performances and moves depend on their *decision* to either cooperate (up to some established point) or not cooperate with others in view of their purposes and interests.

c) Turning to the law, the pragmatic dimension of legal language and legal interpretation appears even more evident. Norm-formulations are devices for settling conflicts among interests; their interpretation is of paramount importance in determining exactly who gets what, and how, and in what measure. Accordingly, it is misleading to portray legal interpreters as creatures dwelling in the heaven of semantic and syntactical rules. It is misleading to suggest—as Bulygin's model does—that, in the law, giving paramount importance to literal (grammatical) interpretation is not a matter of a methodological *choice*, which should be duly justified, but is a simple matter of course. And that is because, as soon as one takes into account the real practice of legal interpretation (as Bobbio, Wróblewski, Ross, and Tarello suggest), what Bulygin depicts as cases in which interpreters have simply *discovered* the abstract and/or concrete meaning of a norm-formulation are as many cases in which they really have *decided* to adhere to the plain, literal, semantic meaning of a norm-formulation; they are cases where judges decided to be *conformist*: to conform to the literal meaning instead of deciding for a different one.

The pretended virtuous middle conception is no middle at all: It is in fact an impoverished, misleading view of legal interpretation, and should be abandoned.

24.3. Analysis as a Plain Tool: Wróblewski's Way

Jerzy Wróblewski (1926–1990) was a pathbreaking pioneer in applying analytical philosophy, basically in an ordinary language version, to legal interpretation, and a master for the generation of legal theorists—like Aulis Aarnio, Robert Alexy, and Aleksander Peczenik (see Sections 25.4 and 25.6 in this tome)—who from the late 1970s developed the so-called "standard theory of legal reasoning."

The core of Wróblewski's theory—which he worked out from the early 1960s until his untimely death—lies in *operative interpretation*: the kind of

interpretation that judges perform whenever the norm-formulation to be applied to the case at hand has a doubtful meaning; whenever the judge is in a *situation of interpretation*, which Wróblewski, adopting a distinction by K. Makkonen, opposes to those *situations of isomorphy*, where the norm is considered applicable to the case in its plain, isomorphic meaning (here the applied norm can be said to be identical with the corresponding norm-formulation: see Wróblewski 1983, 1985, 1992).

The distinction may suggest that Wróblewski, like Bulygin, opts for a virtuous middle conception about the nature of legal (and judicial) interpretation (sometimes cognition, sometimes decision). That suggestion, however, must be rejected. The focus of Wróblewski's theory is on the *discursive side* of interpretation, on interpretation *as discourse*: as an activity whose output is a set of sentences making up judicial opinions, where interpretive sentences (whose usual form is "Norm *N* means *S*," or, in our vocabulary, "Provision *D* means *N*") are formulated along with other sentences providing arguments in support of them. Accordingly, a situation of isomorphy is where the judge deems the case to be so clear-cut, from the standpoint of the legal order and legal culture, that it is possible to apply the relevant norm-formulation without any need to provide arguments. The game is played by being conformist, deciding to be conformist. Contrariwise, situations of interpretation are the doubtful interpretive situations where arguments should be provided.

Focussing on the discursive side of interpretation, on interpretation as reasoning and argumentation, and unlike the hermeneutical theorists (see Section 23.4 in this tome), Wróblewski is not interested in the *structure* of the interpretive process, understood as an intellectual process in the mind of interpreters; rather, he is interested in the *tools* of interpretive reasoning. These tools—methods, canons, arguments, techniques—he chooses to call *directives*. Interpretive reasoning, the reasoning we usually find in judicial opinions, is argumentative, justificatory discourse informed by two ingredients: a given set of *interpretive directives* and a related set of *value judgments*.

There are two kinds of interpretive directives: *first-level* and *second-level* directives.

First-level directives prescribe how interpreters should proceed in order to "ascribe a meaning" to a norm-formulation. Any norm-formulation belongs at once to three different contexts: *first*, as a *linguistic entity*—a norm-formulation is a sentence in a natural language—it belongs to a linguistic system, to a language with its grammar and lexicon; *second*, as a *normative entity*, a norm-formulation belongs to a normative system; *third*, as a *functional entity*—a norm-formulation is a move in the game of law and politics—it belongs to the universe of law's and/or the legislator's goals, purposes, aims, etc. First-level directives are, accordingly, of three different kinds.

Linguistic directives prescribe that norm-formulations be interpreted by taking into account their linguistic nature. For instance: (*a*) norm-formulations

should be given the meaning corresponding to the ordinary meaning of their words, unless there are sufficient reasons for preferring a technical meaning; (*b*) the same term, being used in different norm-formulations, should be given the same meaning, unless there are sufficient reasons to the contrary; (*c*) different terms should be given different meanings, unless there are sufficient reasons to the contrary; (*d*) no part of a norm-formulation should ever be interpreted in such a way to appear idle; (*e*) legislators should be presumed to have used ordinary grammar, unless there are sufficient reasons to the contrary.

Systemic directives prescribe that norm-formulations be interpreted by taking into account their membership in a legal system. For instance: (*a*) norm-formulations should *not* be given a meaning that is as inconsistent with other norms or principles of the system; (*b*) norm-formulations should *not* be given a meaning that is incoherent with other norms or principles of the system; (*c*) norm-formulations should be given a meaning that is as coherent as possible with other norms or principles of the system; (*d*) norm-formulations should not be given a meaning that makes the legal system gappy as to a case at hand.

Functional directives prescribe that norm-formulations be interpreted by taking their functional nature into account. For instance: (*a*) norm-formulations should be given the meaning corresponding to the subjective purpose of the historical legislator; (*b*) norm-formulations should be given the meaning corresponding to their own objective purpose; (*c*) norm-formulations should be given the meaning corresponding to the objective purpose of the relevant legal institute; (*d*) norm-formulations should be given the meaning corresponding to the purpose embedded in their underlying ethical values.

There are two kinds of *second-level* directives: *procedural* and *preferential* directives. *Procedural directives* prescribe to interpreters *how* they should use first-level directives, whenever the use of a plurality of such directives is in order, as when interpreters assume they have the power or the duty to do so. For instance, they may prescribe using linguistic directives first, then functional directives, and finally systemic directives. *Preferential directives* establish an order of preference between the outputs of the linguistic, systemic, and functional interpretation of the same norm-formulation, whenever these outputs do not converge, being instead different and at odds. For instance, they may prescribe the output of functional interpretation to always take precedence over the output of linguistic interpretation.

As Wróblewski makes clear, the selection and use of interpretive directives is not a matter of cognition: It does not, as Betti and Gadamer claimed, costitute a process leading to the objective knowledge of the correct legal meaning of norm-formulations. It is, contrariwise, a process rife with ethical value judgments—as is apparent from the very formulation of some directives (think of the "save for sufficient reasons to the contrary" clause). Indeed, the whole game of legal interpretation is informed by the competition between two fundamental "ideologies." On one side, there is the *static ideology* favouring the

goal of legal certainty, and so the use of those interpretive directives likely to be in accord with it; on the other side, there is the *dynamic ideology*, favouring the goal of substantive justice, and so the use of those interpretive directives likely to be in accord with it.

The whole of Wróblewski's theory of interpretation boils down to, and is summed up in, his reconstruction of the proper logical form of interpretive sentences. That is not "Provision *D* means *N*" but, rather "Provision *D* means *N* in legal language *LL* and/or in context *C*, according to (*a*) the first-level directives DI^1-1, DI^1-2 … DI^1-*n*; (*b*) the second-level procedural and preferential directives DI^2-1, DI^2-2 … DI^2-*n*; and (c) value judgements V_1, V_2, …, V_n that had a bearing on the selection and use of the aforesaid interpretive directives." Perhaps, a better, conceptually clearer arrangement of notions and types of interpretive directives may be set forth.[3] Nonetheless, Wróblewski's theory shows the degree to which an analytical approach can contribute to clear and precise thinking in the misty swamp of legal interpretation, and to the getting rid of worn-out expressions and misleading modes of thought.

24.4. Analysis and Realism

Two self-proclaimed analytical and realist (sceptical, non-cognitivistic) theories of legal interpretation will be considered in turn: the theory of Alf Ross and Genoese realism.

24.4.1. Alf Ross's Fundamental Break

Alf Ross (1899–1979) is to be credited with the first, sophisticated analytical-realistic theory of interpretation in post-WWII Continental jurisprudence. He sets it forth in Chapter 4 of *On Law and Justice* (Ross 1958), perhaps his major jurisprudential work, by which he intended "to carry, in the field of law, the empirical principles to their ultimate conclusions," showing both to fellow legal theorists and to jurists involved in the doctrinal study of law the way of satisfying

> the *methodological demand* that the study of law must follow the traditional patterns of observation and verification which animate all modern empirical science; and the *analytical demand* that the fundamental legal notions must be interpreted as conceptions of social reality, the behaviour of man in society, and as nothing else. (Ross 1958, 9)

A survey of the basic point of Ross's general theory of interpretation ("general theory of legal method") will bring to the fore the powerful insights he was capable of, including by recourse to semiotics and linguistic theory.

[3] For an attempt, see Chiassoni 2007, chap. 2, where the idea of interpretive codes is explored.

1. As an empirical inquiry on "a specific legal system," the *doctrinal study* of interpretation focuses on the "method" actually "followed by the courts." A *general theory* of interpretation, by contrast, aims at working out (*a*) an inventory of interpretive problems, i.e., of those puzzles which typically beset judicial interpretation and their "factual presuppositions"; and (*b*) a classification of the several interpretive styles "that are actually to be found" in a legal culture.

2. *Interpretation* is, in general, the "activity" aimed at "determining" or "expounding the meaning of an utterance," considering it as a component in a process of communication, and usually, but not necessarily, taking into account what "a person," "the author," and "the writer" "intended to communicate" by it.

Such a determination cannot be simply a matter of knowing the language in which the utterance has been formulated (*linguistic interpretation*); it must also be a matter of *interpretation by connection*, which requires (*a*) taking into account the several *connections* of the utterance, its *co-text* and *textual context at large* ("context"), as well as its "nonlinguistic" context ("situation"), "the most important factors in the determination of meaning"; and (*b*) *deciding* which, out of all the possible connections, should be considered relevant to the task. Far from being a passive process of utterance-meaning assimilation, interpretation necessarily involves the interpreters' commitment and cooperation ("the desire to find "good" or "reasonable" meaning in relation to a given situation).

The need for a combination of linguistic interpretation and interpretation by connection is mirrored by what Ross claims should be regarded as "the guiding principle for all interpretation," namely, "the principle of primary meaning-determinative function of the utterance as an entity and the connections in which it occurs" (Ross 1958, 117–23).[4]

3. Interpretation is characterized by *indeterminacy*. Indeed, interpretation by language, context, and situation may point not to a single, determinate meaning, but to several alternative meanings among which interpreters, if they are to get the job done, must *decide*, and must do so on the basis of extra-interpretive considerations. This is usually the case "in the interpretation of directives," such as statutory clauses (see Ross 1958, 120).

4. It is commonly assumed that *subjective interpretation* is different from *objective interpretation*, since the latter purportedly does not pay attention to intention. But that is wrong: "All interpretation starts with the communication [utterance, text] and attempts to arrive at the intention" (Ross 1958, 121). Interpretation is *subjective* when *intention* is understood as the meaning intend-

[4] "Interpretation by connection goes to work with all the facts, hypotheses, and experiences which can throw light on what a person intended to communicate. Interpretation by connection is a study of the circumstantial evidence reminscent of the work of a detective investigating a crime […] it must be decided what according to the circumstances can be accepted as being context and situation" (Ross 1958, 116).

ed by the historical, flesh-and-blood author of the text; when it "studies the way the work [utterance, text] came into being," and looks for "meaning as an historical-psychological fact" (ibid., 122). Subjective interpretation can be described as *genealogical*. Contrariwise, interpretation is *objective* when *intention* is understood in a totally de-psychologised way, and interpreters look for it by means of data which do not take genealogy into account. In this way, objective interpretation looks for the "hypothetical-ideal meaning" of a text (work, utterance) (see ibid., 121–3).

5. Legal interpretation, as the activity aimed "at determining the meaning" of some "enacted law," of some "text" or "written linguistic formula" representing an authoritative legal source, is typically beset by three kinds of problems: *syntactic* problems, generated, e.g., by the use of commas and adjectival phrases; *logical* problems, generated by the presence of a plurality of authoritative norm-formulations, like the problems of *incompatibility* (antinomies, normative conflicts), *redundancy*, and *presupposition* (uncertain reference from one clause to one or more other clauses); and *semantic* problems in a narrow sense, generated by the doubtful meaning of the terms employed in a clause. Furthermore, it is thoroughly dominated by *pragmatic factors*: "considerations based on an evaluation of the practical reasonableness of the result judged in relation to certain presupposed fundamental evaluations" (Ross 1958, 145). The latter point suggests that legal interpretation is a complex activity, where it is worth distinguishing between linguistic interpretation and "pragmatic interpretation." *Linguistic interpretation* is concerned with determining the literal meaning of statutory clauses. It is usually assumed to be totally detached from *pragmatic interpretation* (a position known in contemporary philosophy of language as *literalism*), but that is a sheer mistake. Linguistic interpretation *never* walks alone; rather, it is always accompanied, and dominated, by pragmatic interpretation (a position known in contemporary philosophy of language as *contextualism*). In those very cases where the literal meaning apparently wins the day, linguistic interpretation is nonetheless "co-determined by pragmatic considerations in the form of 'common sense'" (ibid., 146). In other cases, pragmatic interpretation steps in to support *restrictive*, *extensive*, or *specifying* interpretations of statutory clauses, which either fly in the face of their "natural linguistic meanings" or fail to overcome their hopeless ambiguity. Among the typical "evaluations" affecting "pragmatic interpretation" are "foreseeable social effects," "technical acuity," and "harmony" with the legal system and its founding ideologies ("cultural ideas") (see ibid., 148).

6. By means of ever-present, dominating pragmatic interpretation in "the administration of justice," judges necessarily play the "constructive part […] to define more precisely or to correct the directive of the statute" (Ross 1958, 153), even though such a role is "only rarely manifest," being usually performed under the pretence of discovering the objective, true meaning of legal "directives," by means of the proper interpretive principles. However, the il-

lusory, fictional nature of that claim becomes apparent as soon as one realizes that traditional interpretive canons make up a disordered set *bon à tout faire*: an "unsystematic sets of catch phrases (often couched in proverbial forms) and so imprecise in meaning that they can be easily operated in a way that leads to conflicting results" (ibid., 153).

The way interpretive canons actually do work, Ross claims, should not be regarded as a "weakness" but, rather, as an index to a "fundamental truth":

> the maxims of interpretation are not actual rules, but implements of a technique which—within certain limits—enables the judge to reach the conclusion he finds desirable in the circumstances, and at the same time to uphold the fiction that he is only adhering to the statute and objective principles of interpretation. (Ross 1958, 154)

In the title of this section, I mentioned Ross's "Fundamental Break." To achieve it was no exaggeration, and to see that, we need only cast a glance at the theories of interpretation afoot in the early 1950s, and also later on, both within and without the analytical tradition—think, for example, of the hermeneutical theories of Betti and Gadamer or of Bulygin's two-tier model.

24.4.2. Giovanni Tarello and Genoese Analytical Realism

In a 1966 essay, *"Il problema dell'interpretazione": Una formulazione ambigua* ("The problem of interpretation": An ambiguous formulation, Tarello 1974c), Giovanni Tarello, the founder of what will later be known as *realismo genovese* (Genoese realism), outlined a program of investigation he and his disciples were to follow in the years to come (see Tarello 1974a; 1980; 1988c; Guastini 2004, 2008; Comanducci 2010, chaps. 6–10; Chiassoni 1998, 2007). The program ran roughly as follows.

1. The phenomenon of interpretation makes up the core of the everyday working of advanced legal systems, like contemporary Continental ones.

2. Unfortunately—and paradoxically—with only a few notable exceptions, that is widely misunderstood by jurists and neglected by legal theorists.

3. The jurists' misunderstanding may of course be considered a side effect of the legal theorists' neglect. But that would not be the whole story: The reason they misunderstand interpretation is above all that they are the willing and interested executors of a cumbersome assemblage of worn-out ideas from the exegetical school, the historical school, and *Begriffsjurisprudenz*, confusedly mixed up with a few spicy strokes from *Frei Recht*, *Interessenjurisprudenz*, idealistic legal philosophies, and hermeneutical suggestions—*anything*, we could say, *but* the deprecated Kelsenian "formalism."

4. The legal theorists' neglect may in turn be considered the effect of an outdated conception of their task, which rests on a *normativistic prejudice*. It is this prejudice that, for instance, suggests devoting one chapter of their manuals to interpretation alongside other chapters where they deal unrelatedly with

other subjects like the definition of (the concept of) law, the legal norm, the legal system, and the validity and efficacy of legal norms.

5. The normativistic prejudice must be discarded. Interpretation must become a central theoretical concern: Now peripheral, it must instead become a matter of constant concern in the working out of the whole conceptual framework through which we see and act under the law.

Taking account of the American realists, Bobbio, Ross, Scarpelli, Perelman, the analytical philosophy of language, analytical meta-ethics, the history of legal culture (a field in which too he was a master), Tarello carried out a big part of his program in two moves. First, by working out an interpretation-dependent concept of legal norms; second, by working out a realistic theory of interpretation along the lines of Ross's seminal contribution. In the following, I will say a few words on both points. Then I will add an example of an interpretation-dependent theory of gaps, illustrating what Tarello had in mind.

a) *A realistic, interpretation-dependent concept of legal norms*. The first move can be easily explained. It rests on a sharp conceptual and terminological distinction between *provisions* ("disposizioni," "enunciati normativi," authoritative norm-formulations) and *norms*, weaving together a conceptual web of interrelated definitions. *Norms* should properly be regarded as the outputs of the interpretation of provisions. *Provisions* are, in turn, those texts whose meanings, as determined by interpretation, are norms. Interpretation, as a narrowly and properly conceived activity, consists in the ascription of meaning to provisions, so as to determine which norms they do express.

Riccardo Guastini will add to this picture the notion of *implicit* or *tacit norms*: These are the norms that (*a*) cannot be regarded as the meaning of any given provision, and (*b*) are identified by means of logical inference or rhetorical ways of reasoning from previously identified norms.

b) *A realistic theory of interpretation*. Two aspects of Tarello's theory of interpretation are worth considering: his view of the nature of interpretation and his view of the tools of interpretation.

As to the *nature* of interpretation, Tarello remarks that very different activities may go under that name, sometimes unwittingly. *First*, by *interpretation* one could mean the activity consisting in the sheer *recording* of the interpretation-outputs that have been provided by some interpreter in some context. *Second*, by *interpretation* one could mean the activity consisting in the *making of predictions* about the way a certain provision will in fact be interpreted by some interpreter in some context. *Third*, by *interpretation* one could mean the activity consisting in *deciding* the meaning of the provision at hand. *Fourth*, by *interpretation* one could mean the activity consisting in actually *prescribing* the meaning that should be given to the provision at hand. Among these meanings, however, only the third one—interpretation-decision—is to be regarded as providing the proper theoretical notion of interpretation. Only in this case does someone ac-

tually interprets a provision. All other cases, by contrast, are activities which presuppose or anticipate some interpretation-decision and its output.

Turning to the *tools* of interpretation as a justificatory discourse pertaining to interpretation outputs, Tarello makes an inventory of the *interpretive arguments* actually employed in the Civilian tradition, where fifteen different items are included: (1) the argument from analogy (*analogia legis*); (2) the argument *a contrario*; (3) the *a fortiori* argument; (4) the argument from the completeness of the legal order; (5) the argument from the consistency of the legal order; (6) the psychological argument; (7) the historical argument; (8) the teleological argument; (9) the argument *ab exemplo* or from authority; (10) the argument *ab absurdo*; (11) the economic or non-redundancy argument; (12) the systematic argument (where three different arguments are considered in turn); (13) the argument from equity; (14) the naturalistic argument, or from the nature of things; (15) the argument from the general principles of law (*analogia iuris*).

These arguments, Tarello suggests, come in a toolbox from which interpreters may take what suits their present purposes and needs. They may be *strictly interpretive*, when they can be used to argue for a given ascription of meaning to a given provision, or they may instead have an *integrative* function, when they can be used to identify a "new" norm for the case at hand, filling a presumed gap in the law.

c) *A realistic, interpretation-dependent theory of legal gaps.* The several analytical theories of gaps worked out in contemporary jurisprudence by theorists in the civil law tradition appear to converge on the following points.

1. The *existence* of gaps is neither a necessary nor an impossible feature of positive legal orders. It is, on the contrary, a mere *possibility* for every given legal order, or any part thereof (*Contingent existence thesis*).[5]

2. There is no necessary, universal way of filling gaps in the Western legal tradition. On the contrary, whenever a judge thinks there is a gap in the law, she may usually choose among a set of alternative gap-filling techniques, which are likely to lead to different outcomes (*Optional filling-up thesis*).

3. The identification of a gap in the law, by a judge or a jurist, is not the outcome of a purely mechanical or logical operation. On the contrary, it depends—directly or at least indirectly—on empirical and/or interpretive activities. These activities are in turn value-laden and decision-dependent, or at least they may be so in some cases (*optional-identification thesis*).

4. From the perspective of a practice-sensitive and practice-oriented theory, it is worth distinguishing several different concepts of a gap, so as to cast light on, and impart an order to, the fuzzy, everyday intuitions that legal practitioners entertain on the matter (*conceptual-pluralism thesis*).

[5] For instance, in the case of *normative gaps proper*, their existence as to a given set of norms depends (*a*) on the content of the norms in the set and (*b*) on the (explicit or implicit) criteria concerning the legal relevance of cases, neither of which usually varies depending on time and place.

The major differences among the several analytical theories of gaps in the civil law tradition concern the optional-identification thesis and the conceptual-pluralism thesis, respectively.

As to the *optional-identification thesis*, a basic distinction may be drawn between three kinds of theories.

First of all, there are theories that simply *presuppose* the optional-identification thesis, without giving it any due, express consideration (e.g., Bobbio's theory).

Secondly, there are theories that regard the identification of gaps as being *directly* the outcome of a *logical process* consisting in the determination of the solutions provided by previously identified, limited sets of norms for previously identified, limited sets of cases. These theories consider interpretation as an empirical (non-logical) activity which identifies gaps only *in an indirect way*, and which, furthermore, involves decision-making in hard cases only (an example is Alchourrón and Bulygin's theory).

Thirdly, and finally, there are theories that, on the contrary, emphasize the interpretation-dependence of gap-identification and, furthermore, regard interpretation as a necessarily value-laden, decision-involving activity (examples are the theories developed by representatives of the Genoese realistic school).

As to the conceptual-pluralism thesis, provided legal theory should supply legal practice with a set of carefully defined concepts of a gap, several such sets compete in the market.

Taking into account the most influential set of concepts of a gap so far worked out—i.e., the one developed by Alchourrón and Bulygin—, if one adopts the Genoese realism program, with its central point of bringing interpretation to bear on theoretical legal concepts, it is possible to distinguish three basic concepts of a normative gap (i.e., of a gap as a situation where, generally speaking, some norm is assumed to be "missing" for a given case), namely, normative gaps proper, switchover gaps, and adding-up gaps, along the following lines.[6]

d) *Normative Gaps Proper.* A normative gap proper may be characterized as *the absence, from a given set of legal materials* LM_i*, of a norm* N_j *regulating a legally relevant case* C_j *as to a pertinent question of law* QL_j. This characterization makes clear that the absence of a norm is a gap relative to

(*i*) a *given* set of *legal materials* (i.e., materials making up some part of the law; I will make clear this point in a moment);

[6] Though with some changes, the distinction between "normative gaps proper" and "switchover gaps" mirrors a distinction found both in Bobbio ("normative gaps proper" / "ideological gaps") and in Alchourrón and Bulygin ("normative gaps" / "axiological gaps"). The idea of an "adding-up gap" is somehow a new entry, purporting to complement the main distinction above. For a more complex and detailed account of the typology of normative gaps I outline here, see Chiassoni 2007, chap. 3. For an earlier version, see Chiassoni 2004.

(*ii*) a *legally relevant case*, i.e., a class of individual cases for which it is assumed that a legally justified claim to some form of substantive legal regulation may be made in front of a judge; and

(*iii*) a given question of law (*quaestio iuris*) on which depends the specific *content* of the legal regulation that is being brought up in court.

The characterization above, however, is to be regarded as a mere starting point: It is a general notion, needing to be made more precise as to a few relevant points.

Indeed, much confusion about gaps—and the related claims concerning their necessary, impossible, or merely possible existence—may be dispelled, though only in part, by distinguishing carefully between two basic types of normative gaps proper, namely, *explicit* gaps and *implicit* gaps.

An *explicit gap* may be characterized as *the absence*, *from a given set of norm-formulations* NF_i, and *from a set of interpretive directives* ID_k, *of an* explicit *norm* EN_j *regulating a legally relevant case* C_j *as to a question of law QL*.

Contrariwise, an *implicit gap* may be characterized as *the absence, from a given set of norms* SN_y, and *from a set of filling-up directives* FUD_x, *of an* implicit *norm* IN_j *regulating a legally relevant case* C_w, *as to a pertinent question of law* QL_j. By definition, explicit norms are *meanings*: and, more precisely, they are the meanings of norm-formulations.

Accordingly, their identification depends on two basic factors:

(*i*) a norm-formulation, i.e., a sentence enacted by a normative authority, with its syntactic structure and words;

(*ii*) some set of interpretive directives the interpreter uses to translate the norm-formulation into one or more explicit norms.

Accordingly, an explicit gap occurs when, for a given case, no suitable meaning may be ascribed to a given set of norm-formulations on the basis of a given set of interpretive directives.

By definition, implicit norms are derived from previously identified (explicit and/or implicit) norms by means of some norm-creating technique, like analogical, *a contrario* or *a fortiori* reasoning (in their productive versions), so-called legal induction, and appeal to general or fundamental principles of law.

Accordingly, an implicit gap occurs when, for a given case, no suitable implicit norm may be derived from a given set of norms on the basis of a given set of norm-creating directives.

While explicit gaps are usually considered almost a matter of course, implicit gaps are considered to be very rare, if not impossible, events.

A further distinction which it may be useful to make, aside from the one just mentioned between explicit and implicit gaps, is that between *ordinary gaps* and *methodological gaps*.

Very roughly speaking, or*dinary gaps* occur whenever what is (apparently) missing, and needed for, is an *ordinary legal norm*, a norm concerning a person's rights, duties, powers, liberties, etc.

Methodological gaps, by contrast, occur whenever what is (apparently) missing, and needed for, is a *methodological norm*, i.e., some higher-order interpretive, gap-filling, or conflict-resolution directive, establishing which interpretation of a norm-formulation, which way of filling an explicit gap, or which way out of a normative conflict ought to the followed in a given case.

e) *Switchover Gaps*. A switchover gap may be characterized as follows: *The absence*, *from a set of norms* SN_y, *of the* first-best norm FBN_w *which, for reasons of justice and/or public policy, ought to regulate a legally relevant case* C_w *as to a pertinent question of law* QL_w in place of the *second*-best norm SBN_w *which, at least prima facie, regulates it*. Normative gaps proper occur whenever, for a legally relevant case, the law provides no norm whatsoever, whether implicit or explicit.

Contrariwise, switchover gaps occur when, for a legally relevant case, the law provides a norm that it *ought not* to provide (the second-best norm) and, *at the same time*, does *not* provide the norm it *ought* to provide (the first-best norm).

Accordingly, the problem interpreters apparently face, when a switchover gap turns up, is to *replace* the second-best norm (somehow getting rid of it) with the first-best one.

Alchourrón and Bulygin—and many other theorists following in their footsteps—call these gaps *axiological gaps*, so as to emphasize that their existence depends on some pretended value-unfitness of some part of a legal order (Kelsen and Bobbio used the name *ideological gaps* for roughly the same situations).

Such value-unfitness may be either *internal* or *external*.

It is *internal* whenever, by hypothesis, a norm's axiological unfitness is being measured against (higher) principles (or values) that belong to the *same* legal order (e.g., constitutional principles and fundamental rights).

By contrast, a norm's value-unfitness is *external*, whenever, by hypothesis, it is being measured against (higher) principles (or values) that belong to a *different* normative order the interpreter is committed to, such as some natural law system or any other given system of morals.

There are good reasons, I think, to maintain that switchover gaps ("axiological gaps") are nothing but a particular kind of *normative conflict*, though in a disguised form. This latter point, however, would carry us too far afield.[7]

f) *Adding-Up Gaps.* Finally, an adding-up gap may be characterized as *the absence, from a given set of norms* SN_y, *and as concerns a substantive, practical issue* PI_c, *of a norm* for a legally irrelevant, *substantive case* C_w. A case is legally irrelevant when, by hypothesis, it cannot be brought to court making a legally

[7] For further details, see Chiassoni 2007, chap. 3, par. 8, where a more precise definition is provided.

justified claim about its substantive regulation by the law—think, for instance, of those situations that fall within the *de minimis non curat Praetor* rule.

Accordingly, in order to fill an adding-up gap, some change in the criteria for the legal relevance of the case at issue needs to be made first. Adding-up gaps are axiological gaps, where the presence of the missing norm within a given legal order is required by some *external* principle (or value) the interpreter is committed to.

Chapter 25

ADVANCING REASON TO ITS FURTHER BORDERS

by Eveline Feteris

25.1. Introduction

One of the most influential approaches in the theory of legal argumentation of the second half of the 20th century is the approach that conceives legal argumentation as part of a rational discussion in which a legal position is justified according to certain rules for rational discourse. The rationality of the argumentation depends on whether the procedure meets certain formal and material standards of acceptability. Prominent representatives of this approach in legal theory are Aarnio 1977, 1987, Alexy 1989, Peczenik 1983, 1989a, MacCormick 1978, 2005. The idea of approaching legal argumentation from the perspective of rational discourse is based on Habermas' theory of communicative rationality. Starting from this assumption, Aarnio, Alexy, and Peczenik as well as MacCormick integrate ideas from analytical philosophy, speech act theory, hermeneutics, legal theory and legal methodology in a theory of legal argumentation as a theory of rational discourse. In what follows, in Section 25.2, we start with a discussion of MacCormick's institutional theory of legal justification. Then we discuss in Section 25.3 Habermas' theory of rational discourse and the application of his ideas to legal discourse. Then we discuss the theories of Alexy (Section 25.4), Aarnio (Section 25.5) and Peczenik (Section 25.6). After that, the pragma-dialectical approach to the theory of legal argumentation will be discussed (Section 25.7).[1]

25.2. MacCormick's Institutional Theory of Legal Reasoning and Legal Justification

25.2.1. Introduction

In his institutional theory of legal justification Neil MacCormick (1941–2009) tries to formulate a solution for one of the central problems in modern legal theory, the problem of how, in so-called hard cases in which a judge cannot rely on a generally accepted existing rule, a legal decision can be justified rationally. MacCormick specifies the forms of argument a judge must employ when

[1] On Habermas see also Section 10.4 in this tome and Sections 10.3.5 and 10.4.3.2 in Tome 1 of this volume. On Alexy see also Sections 1.4.5.1 and 10.3 in this tome and Sections 10.3.2.2 and 10.4.3.1 in Tome 1 of this volume. On Peczenik see also Section 21.4.2.2 in Tome 1 of this volume.

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formulating a new rule or when interpreting an existing rule drawn form statute or precedent. MacCormick locates the solution of this problem in the more general context of an institutional theory of the rationality of legal decision-making and legal justification and attempts to answer the question which general and which specific legal requirements of rationality play a role in the justification of legal decisions from the perspective of the law as an institutional normative order.

In the justification of legal decisions, MacCormick distinguishes two levels. On the first level, the decision is defended in the *deductive justification* by means of a legal rule and the facts of the case. In clear cases where there is no discussion about the meaning of the legal rule and the classification of the facts, a deductive justification of the first level may qualify as a sufficient justification. In hard cases, the legal rule requires interpretation and deductive justification is possible only after the interpretation problems have been solved. For this reason, a second-order justification is required that shows that the given interpretation can be justified from the perspective of its consequences and the coherence with the rules and values underlying the legal system.

From the perspective of the rationality of the justification the requirement of deductive justification is connected with the rule of law and the requirement of universalization. Since a legal decision must always be based on a universal rule, a rational justification of a legal decision always implies the use of a deductively valid argument. The requirement of a second-order justification is based on the requirement that application of the rule in the concrete case must have acceptable consequences and that it is coherent with the relevant rules and with the legal principles and values these rules.

MacCormick has developed his institutional theory of law and legal reasoning in various books and articles. His most important books in which he develops his ideas that are relevant from the perspective of legal argumentation and justification are *Legal Reasoning and Legal Theory* (MacCormick 1978) and *Rhetoric and the Rule of Law. A Theory of Legal Reasoning* (MacCormick 2005). Furthermore he has collaborated with other authors in developing ideas that also include legal justification: together with Ota Weinberger he has written *Institutional Theory of Law. New Approaches to Legal Positivism* (MacCormick and Weinberger 1986) and together with Robert Summers (1922–2012) he had edited the book *Interpreting Statutes* (Mac Cormick and Summers 1991).

In the following sections we will explain in some detail how these insights are developed in MacCormick's institutional theory of legal justification. In Section 25.2.2 we address the institutional context of legal justification. In Section 25.2.3 we examine the deductive mode of justification, in Section 25.2.4 problems with deductive justification and in Section 25.2.5 the second-order mode of justification.

25.2.2. An Institutional Approach to Law and Legal Justification

In MacCormick's view, the different forms of argumentation to be used in the justification of a legal decision and the criteria of rationality are based on the fundamental values of a particular legal order. The basic value in this context is the rule of law: the requirement that there are properly published and prospective laws, that there is equality of citizens before these laws, and that there is a limitation of official power with respect to them (see MacCormick 2005, 2).

MacCormick considers the law as an institutional normative order which has, as its characteristic features that there is a "legal order" and a "legal system." The legal order as a specific, institutionalized form of normative order implies in his view that

> life proceeds in a given society in an orderly way with reasonable security of mutual expectations among people, on the grounds of reasonable conformity by most people to applicable norms of conduct. This presupposes a conception of law as in some degree systematic and orderly, a body of norms orderly and systematic in character. If people believe in, and orient their conduct toward, a body of norms regarded as a system of law, this is one way of achieving a measure of order and security among them. (MacCormick 2005, 2–3)

This model of a conception of a legal order and a legal system is an "ideal construct" that can only be approximately be realized in the real social world. However, it functions as a standard from which actual legal practices can be judged.

An essential element of the rule of law and the model of law as a legal order and a legal system in the modern liberal-democratic state is the idea of the separation of powers between those who create new norms and those who apply existing norms. In MacCormick's (2005, 5) view, "[t]hose who apply the law, interpreting and developing it as they go along, should be different people from those who enact it." This separation of powers obliges those who apply the law by interpreting and developing it to account for the way in which they use their discretionary space by justifying their decisions according to certain standards of acceptability.

The model based on the idea of an institutional normative order forms the basis for a theory of legal argumentation that must specify the requirements for the way in which judges must apply and interpret the law in cases of dispute or controversy about the meaning of a norm in a practical context and about the way in which the norm must be applied to a particular case, upholding the standard of the rule of law. In his view, the standards of rationality that apply from the perspective of the rule of law implemented in the institutional context of legal justification are the requirements of universalizability and deductive justification, the evaluation of consequences in light of certain relevant legal values, and the coherence with the rules and principles underlying the legal system.

25.2.3. Universalizability and Deductive Justification

The requirement of deductive justification is, in MacCormick's view, based on the requirement of *universalization*. As MacCormick (2005, 99ff.) argues, justification always implies universalization because for particular facts to be justifying reasons they must be subsumable under a relevant principle of action universally stated, even if the universal is acknowledged to be defeasible.[2]

On the first level, *in the deductive justification*, a legal decision is justified by means of a legal rule and the facts of the case. If the facts can be considered as fulfilling the conditions of the rule, the argument underlying the decision is reconstructed by MacCormick as in the form of the legal syllogism as a deductively valid argument. An argument is deductively valid if its form is such that the premises imply (or entail) the conclusion, despite the content of the premises and the conclusion. In MacCormick's view, a legal rule can always be reconstructed as the premise "if p then q," if certain facts obtain ("p"), a certain legal consequence follows ("q"). When the meaning of the rule "if p then q" is clear in a given context and requires no interpretation, and the facts "p" form an unproblematic instantiation of "p" in the rule, we have a *clear case*. The conclusion "q" (the decision) follows clearly from the premises.

An argument of this form is equally valid, whatever the content of its premises. That the argument is valid, however, does not imply that the conclusion is true. It implies only that the conclusion is true (or acceptable) if the premises are both true. If all premises of the argument can be considered true by legal standards, the final conclusion of such a valid argument, the final decision, is also true, that is, legally true. The soundness of the justification is, of course, dependent on the implicit assumption that there are certain "criteria of recognition" on the basis of which a legal rule that functions as the premise "if p then q" can be considered as legally valid. Again, such criteria depend on criteria based on legal sources which can be identified as such. According to MacCormick (1978, 139), deductive justifications are always brought forward within a framework of values which form the "underpinning reasons" for the justification to be sufficient (see also MacCormick 1978, 63–5, 240–1). The other premises are proven "primary facts," or conclusions about "secondary facts" which have been derived deductively from the primary facts together with a premise which is a legal rule.

On the first level of legal justification, the structure of every argument is the same. A justification of the first level always contains a general rule of the form "if p then q" which is applied to certain facts "p" to derive a legal consequence "q." In logical terms, this is a deductively valid argument. The requirement of logical validity is justified by the requirement of formal justice, that similar cases

[2] Cf. Robert Alexy's requirement of universalization for general practical and legal argumentation discussed in Section 25.4.4 below.

should be treated alike. A legal decision must always be based on a general rule of the form "if p then q." A rational justification of a legal decision, therefore, always implies the use of a deductively valid argument. The requirement of deductive validity is a general requirement for every form of rational argument. In fact, according to MacCormick, legal reasoning can be considered as a special, highly institutionalized and formalized type of moral reasoning, owing to the presence of a presupposed framework of values (see MacCormick 1978, 272).

A deductive justification can be sufficient in clear cases in which a judge can appeal to an existing and non-ambiguous legal rule. In such cases a deductive justification of the first level may qualify as a sufficient justification. Often, however, the meaning of an existing rule is not clear in relation to the facts of the case or there is no existing rule applicable. If there is a rule, but its meaning is not clear, it must be interpreted. If there is no legal rule, a new rule can be formulated. In such *hard cases*, a deductive justification is possible only after a new rule has been formulated or if an interpretation of the existing rule has been given. To make the new rule or the interpretation acceptable, further justification is required.

25.2.4. Problems with Deductive Justification

One of the central questions which must be answered in a theory of legal argumentation is: how can the choice or interpretation of a legal rule be justified rationally. When applying a legal rule, several types of problems can occur: *problems of interpretation*, *problems of relevance*, and *problems of classification* (see MacCormick 1978, 73–99).

A *problem of interpretation* occurs when it is unclear whether a certain rule is applicable to certain facts. Rules often prove to be ambiguous or unclear in relation to some disputed or disputable context of litigation. Rules are formulated in language and are bound to be open-textured and vague in relation to at least some contexts. Resolving the ambiguity requires choosing between the two possible interpretations. Once the interpretation has been established, the decision can be justified by means of a deductive justification. But a complete justification is based on the question of how a choice between the two rival interpretations can be defended. According to MacCormick, this choice cannot be defended by means of a deductive justification.

A problem of *relevance* occurs when there is no rule applicable to the facts. For instance, the plaintiff takes the position that a certain decision "q" should be taken on the basis of the facts "p." There is no recognized rule which says that when the facts "p" occur, the legal consequence "q" should follow. In MacCormick's terms, the plaintiff implicitly says that in this case, the rule "if p, then q" should, in effect, be proclaimed. Because there is no existing rule relevant to the present case, the judge must decide whether acknowledgement of this rule can be justified within the overall legal system. Because the judge has

to decide whether the facts are legally relevant, MacComick calls this a problem of relevance. When a problem of relevance occurs, there are two possible rules. The first rule (A) is that the facts justify the required legal remedy, and the second rule (B) is that the facts do not justify the required legal remedy. The party who asserts (A) claims that he ought to be granted a remedy given those facts, implicitly asserts that there is some legal warrant for granting that remedy given those facts. and any such norm can be recast in the form "if (facts) p, then (legal consequence) q." Here again, once the necessary "legal warrant" is established, the given conclusion can be justified by simple deduction therefrom. According to MacCormick it is equally obvious that the argument which justifies the establishment of that legal warrant cannot in turn be similarly deductive in form, because the choice is not based on a generally accepted rule (see MacCormick 1978, 72).

The problem of *classification* arises when it is not clear whether certain "primary facts" (r) which have occurred, can be considered as a substitution of certain legally qualified "secondary facts" "p" in the rule "if p, then q." In the case of a classification problem, the question is how the facts should be translated in legal terms. In MacCormick's view, the problem of classification resembles the abovementioned problem of interpretation, but for technical legal reasons concerning cases of appeal, it is necessary to distinguish the two problems. In certain cases of appeal, only legal questions can be subject of discussion; factual questions cannot be considered. Because a question of classification is considered as a factual question, cases concerning these questions cannot be appealed.

25.2.5. Consequentialist Argumentation and Argumentation from Coherence

When a judge chooses between two possible interpretations of a rule or between two rules of which one is applicable to the case at hand, and the other is not, he must put forward second-order justification. The elements of a second-order justification involve considerations which play a role in the interpretation, relevance-choice, or classification. These considerations differ from the legal rule used in the deductive justification. While a legal rule, which is derived from an accepted legal source, can be considered as an existing valid rule and, therefore, as an acceptable premise, considerations underlying an interpretation or relevance must be justified.

To justify the acceptability of the preferred ruling, the judge is required to test the ruling in the light of its consequences and in the light of its coherence and consistence with accepted legal starting points. First, he must show that the decision can be justified as deducible from a rule which has better consequences than any possible alternative rule. He does this by means of what MacCormick calls a *consequentialist* argument. Second, in weighing the desirability of the consequences of the preferred interpretation of the rule, the

judge must show that the ruling is consistent with such norms (by "explaining" and "distinguishing" unfavourable precedents) and is supported by analogies from existing case law (or statute law) or by "general principles" of the law, preferably authoritatively stated by judges in *obiter dicta*, or by respectable legal writers. In other words, the judge must show that the decision is *consistent* with existing legal norms and *coherent* with general legal principles.

Consequentialist argumentation. The first criterion of acceptability of legal reasoning concerns the requirement that the consequences of the decision must be tested against certain standards of soundness. MacCormick calls the form of justification used to test the consequences of the decision *consequentialist argumentation* by means of which a judge indicates the logical consequences of the rule, especially the consequences in hypothetical cases which could occur when the rule is applied in similar cases. According to MacCormick (2005, 101ff.), consequentialist argumentation concerns the consequences of a universal rule underlying the decision, and not the specific consequences of the decision for the individual parties. According to the rule of formal justice, individual cases should be treated in a way which can also be justified in similar future cases. For this reason, consequentialist argumentation is concerned with the consequences of the choice between rival interpretations of a rule in relation to the law.

The foreseeable legally relevant consequences of a particular ruling have to be evaluated on the basis of certain criteria. According to MacCormick (2005, 112ff.), the standards of evaluation often used in such a context are "justice," "public policy," "common good of the community," "legal expedience," "convenience," and "common sense." In his view, these different criteria make clear that in the evaluation a plurality of standards are applied. Moreover, the standards themselves may be interpreted in different ways. Different branches of law focus on different values or clusters of values. For this reason judges must explain the values against which the consequences are evaluated and why these values are relevant for a specific branch of law.

In MacCormick's (2005, 119) view, the way in which judges must refer to consequences and the way in which they evaluate them also incorporates taking into account what Dworkin calls "the protection of rights." The use of consequentialist argumentation does not necessarily imply that the consequences are only related to certain policies. In using consequentialist argumentation judges evaluate the outcome in relation to fundamental values of the legal order, which also include the consideration of rights. In his view, this coheres with the view that consequentialist argumentation also incorporates what Summers (1978) calls "goal reasons" and "rightness reasons" in the sense that consequentialist arguments refer to legal values (rightness reasons) considered as relevant goals to be pursued by the law.

The need to refer to consequences can also be explained by viewing the law as a goal-oriented enterprise in which governments promote and enact rules

of law in order to repair certain defects in the law or to cure a particular "mischief," or more generally speaking, in order to realize certain socially relevant values. When judges apply and interpret the law they will favour that interpretation of the law that favours the legal value that is supposed to be realized by the rule. In MacCormick's 2005, 132ff. legislation is a teleological purposive activity and for that reason a judge interpreting the law must be oriented at implementing the goals and values that underlie the legal rules. For this reason consequentialist arguments can also be considered as teleological-evaluative arguments in the sense that they refer to the goals and values underlying the rule (see MacCormick 2005, 132–7; MacCormick and Summers 1991, 518–21).

Arguments from coherence. The second criterion of acceptability is the requirement that the justification be coherent as a whole.[3] In MacCormick's view there are two types of test for coherence: The *normative coherence* test checks the coherence of the justification in the context of the legal system conceived as a normative order and the *narrative coherence* test checks the coherence of the narrative inferences from the evidence (see MacCormick 2005, 189).[4] From the perspective of the law as an institutionalized normative order for our purposes the requirement of normative coherence is relevant here. In MacCormick's (2005, 192–3) view, the idea that a set of norms is coherent implies that the norms "make sense" as a rationally related set of norms that are supposed to be instrumental to the realization of a particular common value or can be considered as fulfilling a more or less clearly articulated common principle.[5]

When using *arguments of coherence*, a judge attempts to demonstrate that the decision conforms with legal values embodied in general legal principles. MacCormick (1978, 152ff; 2005, 205ff.) distinguishes two types of argument by means of which coherence can be established: arguments on the basis of legal principles and arguments from analogy. An argument based on a legal principle shows that a ruling is justified by its coherence with a generally accepted legal principle. In situations in which two (or more) legal principles apply, an argument based on a principle might not be sufficient. A choice between the principles has to be made and justified by, for example, a consequentialist argument which shows that the solution would also be acceptable in similar future cases.

In arguments from analogy a ruling is justified by showing that the rule is similar to a rule expressed in another legal decision. To argue that this same rule should be applied, it must first be indicated that the facts are similar to

[3] In MacCormick's (2005, 189, 203) opinion, coherence is related to the requirement of consistency in the sense that the elements of a coherent whole must not be contradictory. However, consistency is not a necessary condition of coherence. For the relation between coherence and consistency see also MacCormick 1978, 220ff.

[4] For a further discussion of narrative coherence see MacCormick 2005, 214ff.

[5] As MacCormick (2005, 193) states, the values and principles together constitute what Aarnio calls a "form of life."

the facts of the previous decision, and second, that the proposed rule and the rule expressed in the earlier case are based on the same legal principle (see MacCormick 1978, 192).

In MacCormick's conception, a well-justified decision meets the different criteria of acceptability. A well-justified decision shows that it does not contradict validly established rules of law, that it is supported by established legal principles or by reasonably close analogy with established rules of law, and it is supported by an argument about the consequences of the decision in relation to the relevant legal values.

25.3. Habermas's Discourse Theory and the Rationality of Legal Discourse

25.3.1. Introduction

In his discourse theory the German philosopher Jürgen Habermas (1929–) (see Habermas 1988, 1990, 1996) has approached the question of the rationality of legal discourse from the perspective of a general theory of rational discourse. In his view, the rationality of legal discourse and the rationality of discourse in everyday life is complementary: On the one hand, legal procedures can promote the rational quality of legal discourse on moral issues in relation to idealized requirements of rational discussion; on the other hand, these idealized requirements should function as a standard for the rationality of legal procedures.

In his *Theory of Communicative Action* (Habermas 1984–1987), he develops a discourse theory that elaborates the rational-discursive elements implicit in social interaction as a form of verbal communication. His analysis depends on the core thesis that such communication involves the exchange of speech acts, through which social actors try to coordinate action by linguistic means. On this view, communicative action depends on the use of language as oriented to mutual understanding. Consequently, only speech acts that are verbally expressed and aimed at mutual understanding can have a function in a rational discussion aimed at rational consensus. His *Moral Consciousness and Communicative Action* (Habermas 1990) further specifies the requirements of rational moral-practical discussions aimed at rational consensus. In this section, we first describe Habermas's ideas about the requirement of a rational consensus developed in his discourse theory and then go on to address the relation between the rationality of moral and legal discourse.

25.3.2. The Theory of Rational Practical Discourse and the Communicative Character of the Rational Acceptability of Moral Claims

To characterize the various ways in which social actors can argue about claims in a rational discussion, Habermas distinguishes the ways in which people can

argue about speech acts. When people exchange information, they presuppose that they meet the normal conditions of verbal communication. Normally such assumptions, in Habermas's terms "claims to validity', are not made the subject of discussion, but information is exchanged against a shared background. The accepted norms for communication are the starting points that form the basis of this common background.[6] If a claim to validity is questioned, the interlocutors can try to restore the consensus by opening a discussion or discourse (*Diskurs*) in which they try to reach a rational agreement about the acceptability of the claim on the basis of arguments. Habermas conceives argumentation as a dialogical process by means of which a proponent tries to convince the opponent of the acceptability of the validity claim. In his view, putting forward a validity claim presupposes an obligation to justify this claim if asked to do so. If the issue concerns a practical matter—one that involves a concrete course of action, general norm, or evaluation rather than a question of empirical truth—then the interlocutors engage in a *practical discourse* with the aim of reaching consensus on the question of whether the relevant normative or evaluative validity claim is justified.

Thus a central question of Habermas's discourse theory is how one can rationally justify moral commands, norms of action, ethical evaluations and the like through practical discussion. Starting from the perspective of communicative rationality, he develops a theory in which the rational acceptability of validity claims (e.g., moral commands, norms of action) depends on the way social actors coordinate their action by reaching agreement on the claim at issue. The bulk of Habermas's efforts to articulate standards for practical discourse have focused on practical discourses concerned with the justification of norms (whether a norm is moral, institutional, legal, etc.). The various forms of such discourses of justification are subject to the following abstract discourse principle (D), which states the general requirement for the validity, or rational justification, of a norm in general:

(D) Only those norms can claim to be valid that meet (or could meet) with the approval of all affected in their capacity *as participants in a practical discourse*. (Habermas 1990, 66; see also Habermas 1996, 107)

For moral discourses of justification, this general procedural principle is supplemented, or further specified, by a moral universalizability principle (U):

(U) *All* affected can accept the consequences and the side effects (the norm's) *general* observance can be anticipated to have for the satisfaction of *everyone's* interests (and these consequences are preferred to those of known alternative possibilities for regulation). (Habermas 1990, 65)

[6] For a discussion of the concept of the "lifeworld" see Habermas 1987, 119–52; 1998, chap. 4.

In order to be valid, every moral norm that claims rational acceptability has to fulfil this condition. Thus (U) functions as a rule of moral argumentation that makes agreement in practical discourses possible whenever matters of concern to all are open to regulation in the equal interest of everyone. Habermas emphasizes that (U) presupposes a communicative context in which social actors need to coordinate their actions by discussing normative validity claims in everyday life. By entering into a process of moral argumentation, the participants can continue their communicative action with the aim of restoring a consensus that has been disrupted. Thus moral argumentation in the context of a practical discourse serves to settle conflicts of action by consensual means.

Participation in a practical discourse in accordance with (D) implies various presuppositions on various levels. Habermas (1990, 87ff.) distinguishes three levels of presuppositions of argumentation: the *logical* level of products, the *dialectical* level of procedures, and the *rhetorical* level of processes. The presuppositions on the logical-semantical level concern the rules of a "minimal logic" and the consistency requirements proposed by Hare and others. These presuppositions have no ethical content. Drawing on Robert Alexy's analysis, Habermas formulates several logical rules concerning the prohibition of contradiction, the requirement of universalizability and the requirement of a consistent use of expressions (see Alexy 1989a). On the procedural level, argumentation involves a process in which proponents and opponents strive to reach an understanding. This level is defined by certain pragmatic presuppositions regarding the sincerity of the speakers and the obligation to provide reasons when attacking a norm not under discussion.[7] On the rhetorical process level, argumentation involves a process of communication aimed at reaching rationality motivated agreement. For this level, Habermas spells out the requirements of a speech situation immune to repression and inequality—thus a form of communication that approximates ideal conditions. These presuppositions (which he originally described as the presuppositions of an "ideal speech situation") specify "the general symmetry conditions that every competent speaker who believes he is engaging in argumentation must presuppose as adequately fulfilled" (Habermas 1990, 88). Again the formulation of these presuppositions are based on Alexy's rationality rules (see Section 25.4.2) which specify the requirements of rational practical discourse. Habermas considers these conditions as more than a potentially question-begging definition in favour of an ideal form of communication. Rather, they articulate inescapable presuppositions of every form of rational practical discourse. Anyone who seriously engages in discourse as a process of rational argumentation aims to *convince* an opponent of the acceptability of a problematic validity claim by producing arguments in a practical discussion that satisfies the aforementioned

[7] Habermas bases the formulation of these presuppositions on the formulation by Alexy 1989a.

pragmatic presuppositions. To be sure, real discussions can, at most, approximate these conditions. However, the ideal of communicative rationality is not a mere theoretical construction or a utopian ideal. According to Habermas, the ideal of communicative rationality is presupposed in every discussion in which the participants try to convince each other with arguments. Furthermore, the ideal functions as a critical instrument for evaluating discussions conducted in everyday life.

25.3.3. The Rationality and Legitimacy of Legal Discourse

Habermas (1990, 92) maintains that discourses take place in particular social contexts and are subject to limitations of time and space. The participants are real human beings driven by other motives in addition to the single permissible motive of the search of truth. Particularly in legal-political domains real discourse is not so pure. For one, the outcome is typically some legal norm or decision binding on a particular group of citizens, with their own particular history and values. Thus Habermas (1996) is of the opinion that meeting the requirements of moral justification is not a sufficient condition for a rational outcome of legal discourses. Outcomes should also cohere with the existing legal order—its structure and decision-making procedures—as well as with various ethical-political and pragmatic standards that form part of the self-understanding and capabilities of a particular society.[8] As Habermas (1996, 233–7; 1988) argues, the law is not subordinate to morality, and therefore legal discourse is not subordinate to moral discourse but is rather intertwined with it. Although legal procedures limit and enable moral argumentation in various ways, legal discourse is not a subset of moral discourse *per se*, but rather implements the broader discourse principle (D) for various legal-political contexts (see Habermas 1988, 247; 1996, 230–7).

With respect to the institutionalization of practical discourse in a legal setting it is important to distinguish idealized rules of discourse (such as those illustrated above) from conventions serving the institutionalization of discourses, conventions that help to actualize the ideal content of the presuppositions of argumentation under empirical conditions. This institutionalization raises the question of how we should regard the rationality or legitimacy of the law and legal processes. Insofar as the law institutionalizes moral discourse, in what respects can legal processes still be considered rational, and what are the implications for the legitimacy of law? Habermas tries to solve the problem of the legitimacy of law by approaching the question of the justification of le-

[8] See Rehg 1994, 219, 222–3, who argues that the legitimacy of law must be measured against a range of idealizations in addition to the moral principle (U), for example the technical-pragmatic assessment of efficient means and strategies and the non-discursive ideals of fair compromise formation.

gal outcomes from the perspective of the communicative rationality of moral-practical discourse. He holds that the relation between law and communicative rationality is a complementary relationship. On the one hand, law institutionalizes moral discourse as a form of conflict resolution within a polity as a legal community, thus complementing the limitations of everyday moral discourse with an impartial procedure for the decisive resolution of legal disputes. On the other hand, because the ideal of rational discussion offers a critical instrument for testing the adequacy of decision-making in constitutional democracies, communicative rationality functions as a methodical tool for determining the legitimacy of law.

25.3.4. Law, Morality, and the Relation between Legal Discourse and Moral Discourse

In approaching the rationality of law from the perspective of discourse theory, Habermas redefines the validity of law in terms of discursive justification: Valid legal norms must be rationally acceptable in the sense defined by the principle of rational discourse (D) and, insofar as justice issues are at stake, by the moral principle of universalizability (U). Thus he rejects the legal positivism that separates law and morality as two unrelated spheres. In opposition to Weber's positivism, Habermas opts for an account that integrates formal-procedural and substantive modes of rationality—such that both the formal and the substantive aspects of law have an implicit moral dimension. On this view, legality derives its legitimacy from a procedural rationality that is based on the idea that legal process should yield impartial solutions that can claim validity for all concerned. This form of rationality consists of an interlocking of moral-practical and institutional legal discourse: Processes of moral-practical argumentation are institutionalized by means of legal procedures (see Habermas 1988, 220, 228).

Following H. L. A. Hart and others, Habermas contends that the law consists of substantive or "primary" norms on the one hand and, on the other hand, procedural or "secondary" norms that serve to institutionalize processes of legislation, adjudication, and administration. These secondary norms institutionalize legal discourse, which operates "not only under the external constraints of legal procedure but also under the internal constraints of a logic of argumentation for producing good reasons" (Habermas 1988, 229).

From this perspective, legal discourse must meet the conditions of communicative rationality for discourse in general; therefore legal discourse is related to moral discourse. As already noted, law is not subordinate to morality but rather constitutes a specific institutionalization of morality defined by legal rules and procedures. But the moral principle becomes relevant for legal discourse insofar as such discourse involves moral reasons. Modern law consists of both legal rules and general legal principles. As Habermas notes, many of

these principles are both legal and moral, as for example in constitutional law, where we find moral principles of natural law reproduced as positive law.

On Habermas's approach, both moral and legal discourses are subject to criteria of discursive rationality captured in the discourse principle (D). In taking this stance he (Habermas 1996, 229ff.) opposes Alexy's (1989a, 212–20) thesis that legal discourse can be considered to be a "special case" or subset of moral discourse. Habermas directs his criticism especially at Alexy's view that the rules of discourse are not selective enough to necessitate single right decisions (at which moral and legal discourses aim), and at his idea that the rationality of legal discourse is relative to the rationality of legislation. In Habermas's opinion Alexy does not explain adequately how what the rules and argument forms taken from actual legal practice can be justified from the perspective of communicative rationality. Habermas argues that Alexy's "special thesis" has "the unpleasant consequence not only of relativizing the rightness of legal decision, but of calling it into question as such" (Habermas 1996, 232). More specifically, Alexy's analysis, as Habermas reads it, loses sight of the deontological character of legal norms and decisions.

Habermas conceives rational discourse as an abstract formulation of the conditions for the rationality of discourse on different kinds of action norms. Moral argumentation and legal-political discourse are both forms of rational discourse subject to the discourse principle (D). For various forms of legal discourse, such as democratic procedures in the area of legislation and court procedures, specific rules of procedure must compensate for the fact that moral discourse cannot guarantee an impartial and decisive solution (Habermas 1996, 234). In his view, procedural law does not regulate normative-legal discourse as such but "secures," in the temporal, social, and substantive dimensions, the institutional framework that clears the way for processes of communication governed by the logic of application discourses (see Habermas 1996, 235).[9] Codes of procedure define the bounds within which parties can deal with the law strategically.

Because law and morality are both governed by discursive criteria of rationality, legal discourses can be conceived as rational discussions that are institutionalized through legal procedures and governed by the same principles of rational discourse as other forms of practical discourse, including moral discourse.

[9] To illustrate this point, he refers to the German Code of Civil Procedure and Code of Criminal Procedure.

25.4. Alexy's Theory of Legal Discourse as a Theory of Rational Practical Discourse in a Legal Context

25.4.1. Introduction

The central question in the work of Robert Alexy is how normative statements, such as legal decisions, can be justified in a rational way. Alexy considers the process of justification of normative statements as a practical discussion or "practical discourse" and the process of justification of legal decisions as "legal discourse." Since a legal discussion in which legal norms are defended is a specific form of general practical discourse, a theory of legal argumentation should be founded on a general theory of this kind.

According to Alexy, a normative statement is true or acceptable if the judgement could be the result of rational discourse. The basic idea is that the rationality of the justification of legal decisions depends on the quality of procedures followed in the justification process. Because the acceptability of normative statements is connected to a certain procedure, he calls his theory a normative procedural theory. Alexy considers legal argumentation as a specific form of practical argumentation and starts out developing a general theory of rational practical discourse that can be implemented further for legal argumentation. The theory of rational practical discourse gives a specification of a procedure for a rational discussion as an ideal model that forms the normative standard to be used in assessing the quality of actual discourses as they occur in everyday practice. On the basis of this general model, in his legal theory Alexy specifies the specific legal implementations, adaptations, limitations, and extensions that are necessary for a theory of rational legal discourse.

Alexy develops his theory of general practical discourse and his theory of legal discourse in Alexy 1989a. In later works, Alexy elaborates on various parts of his theory. In his *Theorie der Grundrechte* (A theory of fundamental rights: Alexy 1986) Alexy elaborates on the distinction between rules and principles, and on weighing and balancing in the context of legal justification.

In the following sections Alexy's theory will be discussed. In Section 25.4.2 we describe the theory of general practical discourse, in Sction 25.4.3 the theory of legal discourse and in Section 25.4.4 the relation between legal and general practical discourse. In Section 25.5.5 we will discuss the role of rules and legal principles in the justification of legal decisions.

25.4.2. The Theory of Rational Practical Discourse

A theory of rational legal discourse requires, according to Alexy, a theory of general practical discourse about the rational justification of normative statements. In order to develop such a theory, in the first part of Alexy 1989a, Alexy investigates theories about the justification of norms and discusses insights from

analytic moral philosophy (including Stevenson, Wittgenstein, Austin, Hare, Toulmin, and Baier); Habermas' consensus theory of truth; the theory of practical deliberation of the Erlangen School; and Perelman's theory of argumentation. In the second part the results of this discussion are integrated into a theory of general practical discourse, consisting of rules and argument forms. In the third part Alexy presents his theory of legal justification, and describes how the general rules and forms can be adapted to the requirements of legal argument.

In the *theory of general rational practical discourse* Alexy formulates five groups of criteria for the rationality of practical discourse, containing a total of twenty two rules and six argument forms. In the first group, the *Basic rules*, the fundamental conditions for the rationality of verbal communication concerned with the correctness of normative statements are formulated. These rules concern adaptations of the logical requirement of non-contradiction, the sincerity condition of speech acts, Hare's principle of *universalisability* and the *Vernunftprinzip* from the Erlangen school concerning the common use of language. In the second group, the *Rationality rules*, the maximum requirements are formulated, derived from Habermas's conditions for the ideal speech situation. As has been explained in Section 25.3.2, Habermas considers a speech situation as ideal if the speakers are not hindered by force in participating in the discussion. In the third group, the *Rules for allocating the burden of argument*, the allocation of the burden of proof is regulated. These rules form expressions of the principle of universalizability that obliges a person to justify treating person A different from person B, Perelman's *principle of inertia* which provides that an accepted opinion should not be abandoned without good reasons. The fourth group contains the *Argument forms* for the justification of singular normative statements and for the justification of rules. These argument forms form a specification of the practical syllogism for the justification of normative statements (see Alexy 1991, 412–7). The rules of the fifth group, the *Justification rules*, describe the forms of criticism the justification of normative statements should be able to stand. These rules specify the requirements for the content of the argument forms. The rules are based on Hare's principle of *universalizability*, Habermas' principle of universalizability and Baier's principle of *universal teachability*. The rules of the sixth group, the *Transition rules*, regulate a transition to other forms of discourse.

The general theory of practical discourse distinguishes three levels of rationality. On the first level, the general idea of practical rationality is formulated. On the second level, this very vague idea is given a more precise interpretation by means of principles of practical rationality. On the third level, the relatively vague and often conflicting principles are defined and co-ordinated into a system of rules (see Aarnio, Alexy, and Peczenik 1981, 267).[10] The theory of general practical discourse is based on six principles formulated on the second

[10] For the distinction between rules and principles see Alexy 1979, 1986, chap. 3.

level: consistency, efficiency, testability, coherence, generalizability, and sincerity. These principles underlie the rules discussed above. A principle can support several rules. Similarly, a rule can be supported by several principles.

The rules of general practical discussions do not guarantee that agreement can be reached on every subject or that any agreement obtained will be final and irreversible. One reason for this is that the rationality rules can only be partially fulfilled. A second reason is that the steps in the argument are not all fixed steps. A third reason is that every discourse must invoke historically given, and hence changeable, normative preconceptions. Critics have remarked that one of the disadvantages of Alexy's theory is that it does not guarantee a final result. According to Alexy, the fact that the theory does not secure a result is one of its advantages. In response to his critics Alexy (1991) observes that a distinction should be made between ideal discussions in which the participants communicate under ideal circumstances, and real discussions in which these circumstances are absent. In an ideal situation practical problems are resolved without time limits and other restrictions affecting the participants. They are also characterized by complete clarity regarding the use of language, participants who are fully informed on factual questions, and participants who are capable and prepared to exchange roles. In real discussions on practical questions, there are usually more than two right answers. However, in real discussions, participants raise claims concerning correctness (irrespective of the question of whether one right answer is indeed possible). Otherwise, their justification would be pointless.

Because there is, in principle, more than one right answer to a practical question, a practical discussion conforming to the rules of general practical discourse can yield two incompatible normative statements N and not-N. This happens when N and not-N are justified on the basis of different value systems. Such an outcome is possible as long as the justifications of the participants who defend N and not-N do not contain contradictions. The prohibition of incompatibility does not guarantee the exclusion of incompatible value systems of different speakers. It implies only that when someone argues that there is one right answer (on the basis of the prohibition of incompatibility), he or she confuses truth with the possibility of proving that something is acceptable from the perspective of a particular value system (see Alexy 1991, 413). Although the rules do not guarantee one right outcome, the theory is not useless for the evaluation of real discussions. The rules can prevent irrational behaviour because they constitute an instrument for a critical assessment of discussions conducted in everyday practice.

25.4.3. The Theory of Legal Argumentation (*by Eveline Feteris and Harm Kloosterhuis*)

As we already indicated, one of the strengths of the theory of general practical discourse is that it leaves the task of shaping the discussion with respect to

the content of the arguments to potential discussants, and that it sets up only requirements to the rationality of the procedure. Legal disputes require a final and clear outcome. Therefore, in law there is a special procedure with legal norms. When a final decision is necessary it is rational to agree on rules which limit the area of what is "discursively possible." Examples of such rules are rules of parliamentary legislation and various rules of legal procedure. In his theory of legal argumentation, Alexy formulates specific legal rules which are designed to guarantee that a rational result can be achieved. In addition to the general requirements of rationality, these rules should also meet such specific legal requirements as legal security, justice, and legitimacy.

In the justification of legal decisions, Alexy distinguishes two aspects. In accordance with an accepted distinction in legal theory (see Wróblewski 1974) he distinguishes between an *internal justification* and an *external justification*. An internal justification is concerned with whether the decision follows logically from the premises adduced as justifying it. In an external justification, the acceptability of these premises is defended.[11] According to Alexy, the external justification is the central focus of legal arguments, and therefore forms the central topic of a theory of legal argumentation. The central question in the external justification is whether the arguments used in the internal justification are acceptable according to legal standards.

The basic form of the internal justification that Alexy formulates for legal discourse is a specific implementation of the so-called legal syllogism in which the decision, the normative statement about the legal consequences (3), is justified by referring to a universal norm (1) and a description of the factual conditions (2) for application of the legal consequences described in the norm:

(J.1.1) (1) (x) (Tx — ORx)
(2) Ta
(3) ORa (1), (2)

This basic form of internal justification is applicable only when it is not in question that the universal norm is applicable to the facts. Often it is not clear whether the norm is applicable, because it can be interpreted in several ways. There are three kinds of reasons as to why the universal norm might be unclear. First, an expression used in the norm may prove to be ambiguous. Second, an expression can be vague so that it is unclear whether a particular form of behaviour may be considered as for instance a tort. Third, an expression used in the norm may be evaluatively open. The meaning of such evaluatively open terms should be established in relation to the context in which they are used. In more complex forms of internal justification these problems must be solved by formulating a semantic rule.

[11] See MacCormick's (1978) distinction between deductive and second-order justification.

The rules of internal justification specify the requirement that every legal decision must contain at least one universal norm (J.2.1) and that every decision must follow logically from a universal norm, together with other premises in which, for example, a semantic rule is formulated (J.2.2).[12] They prescribe that as many decompositional steps should be articulated as are necessary to make it possible to use expressions whose application to a given case admit no further dispute (J.2.4) and that the argument must be made complete (J.2.5). The rules of the internal justification guarantee a certain degree of rationality, because they require that assumptions that otherwise would remain implicit should be make explicit. However, the rationality of the justification as a whole is dependent on the acceptability of the premises. The decision about the rationality of the final judgement is therefore dependent on the external justification.

In the external justification the premises of the internal justification are defended. Because these premises can be of quite different kinds, different modes of justification should be distinguished. Justification of a rule of positive law takes place by showing that it meets the criteria of validity of the legal order. A wide variety of procedures can be brought into play in the justification of empirical premises. These range from the methods of empirical science through maxims of rational presumption to rules on the burden of proof in a trial. Finally, what can be called *legal argumentation* or *legal reasoning* serves to justify those premises which are neither empirical statements nor rules of positive law, such as the semantic rules used in the internal justification.

The rules and argument forms of the external justification can be divided into six groups. The first group contains rules for the use of the legal interpretative argument forms. The other groups contain rules for the use of dogmatic argumentation, the use of precedents, and the use of the so-called special legal argument forms such as analogy, *argumentum a contrario*, and *argumentum a fortiori*.[13]

The first and most important group of rules of external justification pertains to argument forms used in the *interpretation* of legal norms (J.3-J.5). These argument forms are based on such *canons of interpretation*, that is the semantic, genetic, teleological, historical and systematic methods of interpretation. The rules relate to the justification of statements used in the internal justification. If the expressions used in the universal norm allow more than one interpretation, the chosen interpretation should be justified by means of one of the forms of external justification.

Since an argument of a particular form is complete only if it contains all the premises belonging to its form, Alexy formulates a "saturation rule" requiring

[12] In what follows, I will refer to Alexy's rules by using his own numbering.

[13] For empirical arguments and general practical arguments Alexy adds no specific rules, but refers to the rules of general practical discourse.

that a full statement of reasons is required in every argument which belongs to the canons of interpretation (J.6). In order to ensure that arguments that express a link with the legal order take precedence over non-legal arguments, Alexy formulates several rules concerning the use of the canons of interpretation. The rule prescribe that arguments that are based on the canons of interpretation must be given due consideration (J.9), that arguments referring to the actual words of the law or the will of the historical legislator take precedence over other arguments unless rational grounds can be given to act differently (J.7), and that the determination of the relative weight of arguments different in form must conform to weighting rules (J.8) (see also section 18.16.6.).

The second group of rules of the external justification concerns the use of propositions from legal dogmatics. The propositions from legal dogmatics may consist of definitions of legal concepts, definitions of other concepts occurring in legal norms, formulations of principles, etc. When justifying an interpretation, propositions taken from legal dogmatics should, if available, be used (J.12). The dogmatic propositions themselves must be justified by recourse to general practical arguments (J.10) and must be consistent with other dogmatic propositions and positive norms (J.11).

The third group of rules relates to the use of precedent, prescribing that a precedent must be cited if this is available (J.13). The basic reason for following precedents is the principle of universalizability, the requirement that we treat like cases alike. If someone wants to make an exception, the burden of argument lies with him or her (J.14). He or she will have to show why the concrete case differs from that decided upon in an earlier decision.

The fourth group of rules contains the rules for special argument forms which are used in legal methodology for the interpretation of legal rules such as *argumentum a contrario* (J.15), analogy argumentation (J.16), *argumentum ad absurdum* (J.17). Also here the "saturation requirement" applies implying that the special legal argument forms must have the reasons stated in full (J.18). These forms of argumentation are a specific implementation of the general argument forms of practical argumentation. (J.15) is a logically valid argument, (J.16) is an application of the principle of universalizability, and (J.17) is a form of argumentation from consequences.

Finally, Alexy discusses the role of general practical arguments in legal argumentation. General (moral) arguments are necessary if no legal arguments are available, they may be used in justifying a choice between two interpretations or in justifying arguments used to complete the interpretative argumentation schemes. Practical arguments may also be used in justifying propositions taken from legal dogmatics. An important function of practical argumentation lies in the justification of a choice between different weighting rules in situations admitting the application of rules which lead to different results. Practical arguments may also be employed in justifying statements used in internal justifications.

25.4.4. Legal and General Practical Discourse

Alexy takes legal argumentation to be a special case of general practical argumentation. This implies, firstly, that the rules and forms of general practical discourse should be implemented in a specific way so as to guarantee a final decision. Secondly, it implies that the legal claim to rationality is weaker than the general claim to rationality: In a legal discussion, the central question is how a normative statement can be justified in a rational way within the framework of the valid legal order (see Alexy 1989a, 289). Thirdly, it implies that legal argumentation is always based on general practical argumentation, but within the limits of the legal order. General practical argumentation is always necessary to justify choices between statements used to complete various legal argument forms (see J.7).

Alexy indicates that various forms of legal discussion exist, and that some differ more from general practical discussions than others. Discussions between legal students, between lawyers and their clients, and debates on legal matters in the media have fewer restrictions than a discussion in legal science (legal dogmatics). A discussion in science is in turn less constrained than a judicial deliberation or a debate in a court of law.

Within the different forms, the extent and kinds of constraint are very different. The freest or least constrained is a discussion of a legal scientific kind. Constraints are greatest in the context of a trial. According to Alexy, however, this does not imply that legal proceedings should be considered as a strategic undertaking. The various forms of legal procedure can be considered as an intermediate form of discussion coming between a rational practical discussion and a strategic undertaking.

According to Alexy, the claim to correctness of a normative statement raised in a legal proceeding can best be characterized by means of the notion "rational discussion'. Participants in legal proceedings claim to be arguing rationally. Parties and their lawyers make claims to correctness even if they are only following their own subjective interests. Although the parties do not try to convince each other, they claim that every rational being should agree with them. They at least claim that in an ideal situation, everyone would agree with them. So, in legal proceedings parties advance claims to correctness in the same way that parties to a rational practical discussion do (see Alexy 1989a, 218–20).

Alexy remarks that whether today's procedural structures of process are to be regarded as rational is a different question. This must not be answered in the negative simply by alluding to the fact that the freedom of the participants in the discussion is limited. Rather more decisive is whether, in view of the need for a decision, the limitations set down by the rules of legal process offer a sufficient chance of arriving at the outcomes which would have resulted under ideal conditions. According to Alexy, it would be possible to discover

which of the various forms of process best satisfy the conditions of a rational discussion only through extensive empirical investigation.

In legal proceedings, there are specific rules which limit the area of what is "discursively possible" left open by the rules of legal discussions. The rules of procedure for legal proceedings (Pg) ensure that only one possibility remains once Pg is finished. In legal proceedings, besides legal arguments legal decisions are required. The necessity of a legal decision does not imply a farewell to reason, though. That a decision is made in the course of a procedure is reasonable, considering the structure of the procedures of general practical discourse, the procedures for establishing legal rules, and the procedures for legal argumentation (see Alexy 1981, 187–8). By making reference to the procedures of general practical discourse and legal argumentation, a rational justification of legal decisions can be offered.

25.5. Aarnio's Theory of the Justification of Legal Interpretations

25.5.1. Introduction

Aulis Aarnio (1937–) addresses the question of how legal interpretations should be justified. Aarnio considers a justification to be rational only if the justification process has been conducted in a rational way, and if the final result of this process is acceptable to the legal community. According to Aarnio, a theory concerning the justification of legal interpretation should contain a *procedural* component specifying the conditions of rationality for legal discussions, and a *substantial* component specifying the material conditions of acceptability for the final result. The procedural component of Aarnio's theory formulates rules for the *rationality* of legal discussions. The substantial component specifies when the result of a legal interpretation can be called acceptable. Aarnio considers such a result acceptable if it is acceptable to a particular legal community in which there is consensus with respect to certain norms and values.

In his first book *On Legal Reasoning* (Aarnio 1977), Aarnio tries to link the rationality of legal interpretations to ideas from Wittgenstein concerning the ordinary use of linguistic expressions. Correspondingly, Aarnio emphasizes the importance of the role of a common use of language and common values in the interpretation of legal rules. In later publications, in *Legal point of view* (Aarnio 1978) and *Denkweisen der Rechtswissenschaft* (The point of view of legal science: Aarnio 1979), and in various articles, he develops an elaborated version of the theory of legal interpretations. In *The Rational as Reasonable. A Treatise of Legal Justification* (Aarnio 1987), he brings together the insights developed in his earlier work.

As a further introduction to Aarnio's conceptual framework, Section 25.5.2 will deal with the concept of an interpretation standpoint, and Section 25.5.3

will show how such a standpoint is justified. The topic of Section 25.5.4 is the distinction between the rationality and acceptability of legal interpretations. Sections 25.5.5 and 25.5.6 examine the role in Aarnio's theory of the concepts rationality and acceptability.

25.5.2. The Interpretation of Legal Norms

In determining the content of a legal norm, it is often necessary to establish the meaning of the text of the law, or of a certain term used in the text of the law, by interpreting this text or term. A statement about the meaning content of a particular expression is in Aarnio's terms called an *interpretation statement* (for example "The expression 'unlawful act' in clause X of statute Y means Z"). A claim expressing an interpretation of a legal rule is called an *interpretation standpoint* (for example "It is rational and correct to accept the statement Z as an interpretation of the expression 'unlawful act' in clause X of statute Y"). When a judge decides what the correct interpretation is of a certain legal norm, he has chosen between several alternative interpretations of this norm. The discretionary power of a judge to choose one of several interpretations is, however, limited. The decision must be in accordance with the requirement of legal certainty. According to Aarnio, this means that the decision must be reached in a proper manner, and should be in accordance with valid law and social norms. To show that he or she has acted in accordance with the requirements of legal certainty, the judge has an obligation to justify his decision, by showing that he has used his discretionary power in an acceptable way.

Because the interpretation of legal norms plays an important role in the legal decision process, Aarnio takes it to be one of the central tasks of legal theory to develop a theory concerning the justification of the interpretation of legal norms. To meet the requirement of legal certainty, the justification process should be conducted in a rational way and the final result should be acceptable to the parties. In his theory of legal interpretations, Aarnio tries to specify the requirements a justification should meet in order to be called rational and acceptable.

Aarnio's theory concerning the justification of legal interpretations forms an analytical proposal in which he develops an idealized model of legal argumentation. It is intended for people who want to meet the requirement of legal certainty. The aim of the idealized model is to provide insight into the language game of legal interpretations, and to make it possible to criticize the way in which this game is played (see Aarnio 1987, 75–6).

Aarnio considers his theory of legal interpretations as an analytical-normative theory. It is analytical because the various concepts used in the justification are analysed, and it is normative because it seeks to formulate the norms for a justification of legal interpretations which meets the requirement of legal certainty.

25.5.3. The Justification of an Interpretation Standpoint

Aarnio considers the justification of an interpretation standpoint as a dialogue (see Aarnio 1987, 108). The starting point of an interpretation dialogue is a disagreement between a person A and a person (or group of persons) B who disagree on the correct interpretation of an expression Li$ and therefore adopt different standpoints with respect to the correct interpretation. A's arguments are aimed at convincing B in a rational way of the acceptability of his standpoint. If A and B agree on rational grounds, the justification has succeeded. Depending on the amount of counter arguments that are brought forward by B, the pro-argumentation of A may consist of different levels of argumentation.

The content of the argumentation depends on the nature of the arguments that A puts forward in defence of his interpretative standpoint. Aarnio distinguishes various ways of justifying an interpretation by using various types of warrants: so-called preparatory material, a systematic interpretation, court decisions, the doctrinal opinion, and practical reasons. When using the legal warrants such as the reference to interpretation methods, jurisprudence, and doctrinal opinions as an argument, the interpreter saying that a certain legal source can be adduced as a support of the interpretation.

Reference to practical reasons is normally presented as the consideration of consequences. This type of reasoning involves the clarification of possible consequences concerning the interpretative alternatives at hand, and placing these consequences in a certain order of preference. Using this type of argument, the interpreter is saying that consequences Ci of Interpretation I1 is the best justified when compared to the consequences Cj of interpretation I2. According to Aarnio, arguments referring to consequences should always be complemented by other arguments citing legal sources, because an interpretation can be justified only when based on legal sources.

The type of argument used and t he way in which the various arguments are combined depend on the type of legal question, the legal sources available, and on the rules of interpretation of the legal system.

25.5.4. Internal and External Justification

Following Wróblewski 1974 and Alexy 1989, Aarnio distinguishes between an *internal* and an *external* justification of an interpretation standpoint. In an internal justification, an interpretation is derived from certain premises in accordance with accepted rules of inference. The validity of the premises and rules of inference is taken for granted. In an external justification, the validity of the premises and the rules of inference are justified.

The central problems of legal justification are concerned with this external justification. The question of whether or not the interpretation follows logi-

cally, or in Aarnio's terms internally, from the material premises and rules of inference and values is, n his view, trivial. The premises, the rules and values, can always be reconstructed afterwards. The central problem of the interpretation of legal norms is the choice and content of the premises, and the way in which the suitable principles of inference of basic values are chosen. The problem of legal discourse is thus concentrated upon the external justification.

25.5.5. The Rationality and Acceptability of Legal Interpretations

Aarnio claims that the justification of a legal interpretation is sound only if the discussion in which it is defended has been conducted in a rational way, and if the final result is acceptable to the legal community. The requirement of *rationality* concerns the discussion procedure. The justification of a legal interpretation is a dialogue between an interpreter and an addressee, and is therefore a form of communication. Following Habermas, Aarnio calls the rationality of an interpretative discussion *communicative rationality*. Communicative rationality is related to two aspects of discursive rationality.

First, rationality is related to the *form* of an argument. An internal justification in which the conclusion follows logically from the premises is rational with respect to its form. This form of logical rationality Aarnio calls *L-rationality.* Second, rationality is related to the discussion *procedure* . A legal external justification is a form of practical discussion, which should be conducted in accordance with certain rules. The rationality of such a discussion is called *D-rationality*. In Aarnio's theory, rationality concerns the logical form of the argument (L-rationality) and the discussion procedure in which the premises are justified (D-rationality).

The requirement of *acceptability* is related to the result of the interpretation (the conclusion of the syllogism), i.e., the content of the interpretation. The result of the interpretation process is acceptable if it is in accordance with the value system of the legal community. A theory of the rational acceptability of legal interpretations should therefore consist of a *procedural* theory of argumentative discussions and a *substantial* theory of material acceptability. In the procedural theory, the general conditions of rational discussions should be formulated. In the substantial theory, it should be specified when the result of a discussion is acceptable to a certain legal community.

25.5.5.1. The Procedural Component of the Theory: The Rationality of Discussions about Legal Interpretations

In the procedural component of his theory, Aarnio follows Alexy in distinguishing five kinds of conditions for a rational discussion: consistency, efficiency, sincerity, generalizability, and support. On the basis of these five conditions Aarnio distinguishes five groups of rules for legal and non-legal discussions.

He also distinguishes two groups of rules for the burden of proof, which are specific for legal discussions.

The rules concerning the rationality of discussions can be divided into five groups of rules. In the first group of rules, the *consistency rules*, the requirement is that each step in the discussion should meet the condition of logical consistency (and therefore, in Aarnio's terms, the requirement of L-rationality). The requirement of logical consistency implies that there be no internal contradictions, that no assertion and its negation can occur within the same justification. According to the prohibition of internal contradiction, it is prohibited to say that X has property P and that X does not have property P at the same time.

In the second group, the *efficiency rules*, the participants in the discussion must use language in the same way. A material difference of opinion can only be resolved rationally if linguistic differences of opinion are removed. According to Aarnio, a linguistic difference of opinion occurs when two participants use the same term to refer to different objects, or when they use different terms to refer to the same object.

In the third group, the *sincerity rules*, various requirements are formulated. First, the demand of honesty, that a discussant may not employ a justification that he knows is defective. A person who consciously makes use of non-valid justifications is not attempting to influence the result on material grounds, but through persuasion. Second is the requirement that everyone who speaks the language in question has a right to participate in the discussion, and that every discussant has the right to question a presented statement. There should be no psychological or physical coercion preventing someone from putting forward his or opinion, and no subject should be excluded from the discussion. Third is the demand of impartiality and objectivity. This means that the interpreter must not only present his or her own views but also arguments that go against his reasoning. In law, this requirement is referred to as *audiatur et altera pars*.

The fourth group, the *generalization rules*, require that a discussant refers only to value judgements that he or she is prepared to generalize in order to cover other similar cases. Violation of the rule of generalization results in *ad hoc* arguments, whose justificatory power may not extend beyond a particular situation. The rule of generalizability implies firstly that one must accept the consequences of a norm one accepts, even if they adversely affect one's own position, and secondly that the consequences of a norm satisfying a given person's interests must be acceptable to everybody else: You must behave in such a way that your act can be generalized.[14]

The fifth group, the *support rules*, contain the requirement that every proposition must be justified on demand.[15] The most important condition for

[14] Cf. Alexy's justification rules discussed in Section 25.4.2.

[15] Cf. Alexy's rationality rules discussed in Section 25.4.2.

a justification is the requirement of coherence. For the justification of a legal interpretation, this implies that the statement should be coherent with the legal sources which are put forward in support. According to Aarnio, coherence implies firstly that statements are not logically contradictory. No individual source of law can be both a pro and a counter argument. Also, a source of law Si% and its opposite -Si% cannot be used as justification. Second, it is required that the justification be relevant to the interpretation . According to Aarnio, a legal source is not relevant to a certain interpretation if it is possible to justify the interpretation without making reference to the legal source.

The rules concerning the burden of proof can be divided in two main groups. The first group includes the procedural rules of justification, which are related to conditions under which someone has the burden of proof. The second group includes rules concerning the burden of proof which relate to the content of the justification.

Aarnio's procedural rules are based on some of Alexy's rules for the burden of proof discussed in Section 25.4.2. They specify that the burden of proof lies with a person who criticizes the prevailing situation and wants a change, that a person who has presented a justification is only obliged to present additional justification if asked to do so, and that a person who refers to a proposition or standpoint that is not relevant to the justification has the burden of proof.

Aarnio's first material rule for the burden of proof is based on Alexy's first rule for the burden of proof. They specify that someone who violates the principle of equal treatment is obliged to present a justification why A and B should be treated differently in similar situations. Furthermore he formulates rules that are based on the Finnish tradition in legal dogmatics for the use of legal sources. These rules specify that if preparatory material is bypassed, the person who does this must justify his behaviour, and that if a person does not refer to the court praxis on the matter in question, he or she must justify such a course of action.

25.5.5.2. The Substantial Component of the Theory: The Acceptability of Legal Interpretations

In the foregoing it was explained how a legal interpretation can be justified in a rational way. Even if the justification process has been conducted rationally, it does not imply that the content of the interpretation is acceptable. In the *substantial* part of his theory dedicated to the *acceptability* of the *result* of an interpretation discussion, Aarnio focuses on when the interpretation is acceptable to a certain legal community.

For a legal interpretation to be acceptable, the interpretation should be *coherent* with legal sources and with interpretation methods which are generally accepted in the legal community. The question of whether an interpretation is coherent with accepted legal sources and interpretation methods is in its turn

dependent on the *consensu*s on starting points, norms, and values within a given legal community.

Aarnio borrows Wittgenstein's notion of "forms of life" and Perelman's notion of "audience" to make clear how the acceptability of an interpretation standpoint is connected to consensus in a certain legal community.

To connect the acceptability of a legal interpretation to the concept of a "form of life," Aarnio makes a link with Wittgenstein's concept of a language game. In Aarnio's view, argumentation always takes place within a certain framework, a *language game*, which has been constructed on a basis which is not called into question. The basis is formed by a "nest" of propositions, which Wittgenstein calls the "picture of the world" (*Weltbild*). This picture of the world, again, is based on a form of life which is formed by the acts which are carried out in the communication between members of the community. A form of life consists of the whole set of values and norms shared by the social community. People belonging to the same form of life share the same norms and values, and people belonging to different forms of life have different norms and values.

According to Aarnio, a rational justification of a legal interpretation is only possible within a form of life. An interpreter can convince an addressee in a rational way only if the addressee belongs to the same form of life. If both the interpreter and the addressee belong to the same form of life, they can understand each other and it should be possible, in principle, to reach rational agreement. If they belong to different forms of life with "family resemblances," they can understand each other, but will not be able to reach agreement on a rational basis.

In principle, there are as many acceptable interpretations of a legal norm as there are forms of life. However, the acceptability of an interpretation is not arbitrary. There is a relation of family resemblances between various forms of life. There are parts of different forms of life which overlap. If there are sufficient family resemblances between two or more forms of life, the members can reach consensus with respect to evaluation criteria. When there is such a consensus, the participants in the discussion not only understand each other, but can also accept each other's opinions, although the acceptance is not based on rational considerations. In such cases Aarnio speaks of a compromise (see Aarnio 1987, 212–3).

To explain how the acceptability of an interpretation standpoint is connected to consensus in a legal community, Aarnio links Wittgenstein's concept of the form of life to Perelman's concept of the audience. A legal interpretation is always directed to a certain addressee. In a legal context, this addressee is the legal community. Following Perelman, Aarnio calls the addressee of a legal interpretation the *audience*. The audience consists of individuals who share a common form of life. Aarnio extends Perelman's concept of the audience as norm for argument acceptability.

In Aarnio's view, the concept of what he calls a *particular ideal audience* a useful elaboration of the idea that the rational acceptability of a justification of an interpretation is both dependent on the general conditions of rationality and on the norms and values shared by the members of a legal community.[16] The audience is particular because it consists of a group of persons who share particular norms and values within a particular form of life. The audience is ideal because it consists of individuals who are able and prepared to evaluate the interpretation in the context of a discussion conducted in accordance with the rules of rational discussion.

It is Aarnio's opinion that the rational acceptability of an interpretation to a particular ideal audience has a social meaning. If the majority of the members of a legal community thinks, in accordance with the requirements of D-rationality, that it is rational and reasonable to accept a certain standpoint, then this standpoint has a greater social relevance in that legal community than an alternative standpoint. The social relevance, however, is not based on persuasion, the use of power or authority, but on the rational force of the justification.

The idea of the acceptance by the majority as a norm for rational acceptability should not be taken to mean that people should have the opportunity to vote on a normative standpoint, or that a standpoint counts as true in a society if the majority votes for it. The majority referred to here is not an ideal concept, but it is composed of the rational persons sharing certain values with respect to a certain legal question. The more rational members of an ideal audience who accept a standpoint, the greater the social relevance of the standpoint.

To sum up, in Aarnio's theory, the form of life has to functions. First, it is a necessary condition for a rational discussion. A rational discussion about values is possible only among people who share certain basic values. Second, it defines the framework within which a rational discussion is possible. Between members of two different forms of life no rational discussion is possible, because a rational discussion is dependent on certain commonly shared values. People belonging to different audiences can persuade each other, but cannot convince each other on rational grounds.

25.6. Peczenik's Theory of Legal Reasoning and Legal Justification

25.6.1. Introduction

In his work on legal argumentation, Aleksander Peczenik (1937–2005) has developed a normative theory of legal reasoning. He has done this by specifying

[16] See Alexy (1989a, 102) in his discussion of Habermas's consensus theory of truth, who remarks that the acceptability of a standpoint is connected with the opinion of people who can enter a discussion; a condition for the truth of an utterance is the potential agreement of all people.

the criteria that must be used in assessing the rationality of legal justification. He analyses the foundations of the legal method by clarifying the implicit underlying assumptions that characterize the process of legal reasoning and legal decision-making as a method for the rational justification of practical decisions in law. He has done this with the aim of clarifying the structure of legal justification by analysing the different stages of the process of legal decision-making. This analysis provides insight into the underlying levels of justification, and in the operations that are carried out on these different levels.

In what follows we will discuss the key components of Peczenik's theory of legal reasoning and justification as developed in Peczenik 1983 and Peczenik 1989 as well as in other publications. We will do this by concentrating on the two components of his theory that are important from the perspective of the rationality of legal justification. The first component, which can be considered as the analytical-reconstructive component, concerns the different levels of the process of legal justification and the operations that underlie the reasoning process on these levels of justification. In this component he reconstructs the underlying structure of the process of legal justification. The importance of this reconstruction lies in the fact that it clarifies the different choices and value judgements that are underlying the decision that a particular legal rule should be applied to a concrete case.

The second component, which can be considered as the normative-evaluative component, concerns the different criteria of rationality and standards of acceptability that should be met for a legal justification to count as a rational justification. The importance of the distinction between the different forms and criteria of rationality lies in the fact that it makes clear that for different aspects of the argumentation different criteria of rationality apply.

25.6.2. The Analytical-Reconstructive Component: The Reconstruction of the Different Levels of the Process of the Justification of Legal Decisions

One of the central problems of the legal method in general, and the theory of legal interpretation and argumentation in particular, is the problem that when applying the law, a judge has a certain discretionary space in selecting legal sources and interpreting these legal sources. For the rationality of legal justification this problem raises the question how in "hard cases" in which the justification is based on a certain discretionary space, a legal decision can be justified in a rational way. In Peczenik's view in hard cases in which a legal rule must be interpreted or a new rule must be created, from a logical perspective there is a "gap" in the reasoning process from the premises to the conclusion. In his terms, a *jump* is made from the facts and the legal material to the decision. To make this jump into a deductively valid argument, a *transformation* must be performed. When the judge interprets the rule, the transformation implies that the legal rule changes; and when the judge creates a new rule,

the transformation implies that a new rule is added. The general idea is that a transformation is performed if the step from the legal rule and the description of the facts can be made deductively valid only by adding a premise that is not generally accepted. A transformation serves to make the relation between the decision, the conclusion of the argument, and the facts, the premises, which normally remains implicit, explicit. In legal reasoning, different forms of such transformations are performed. The nature of the transformations depends on the different levels of the justification on which they are carried out. On the different levels, different forms of inference rules are necessary and for this reason different forms of justification are required. The different levels of justification concern the transformation into the law and the transformation inside the law.

25.6.3. The Various Transformations in the Justification of Legal Decisions

25.6.3.1. The Transformation into the Law

On the first level, the *transformation into the law* is performed. This transformation implies that, starting from a set of non-legal social facts and values, the conclusion is drawn that a particular system of rules is a legal system of valid norms that ought to be observed. With the explanation of the structure of the transformation into the law Peczenik tries to explain which reasoning process is underlying the decision that a system of norms is a legal system that should be obeyed. The reasoning process starts with certain observations about the existence of a certain norm-system and then assigns legal validity to this norm-system as a whole, to the constitution and perhaps to other legal sources. In this process, according to Peczenik, a transformation into the law is performed. The transformation into the law consists of two subtransformations: the *criteria transformation* and the *category transformation*.

The transformation into the law normally remains implicit. In their everyday communication lawyers presuppose that the legal norms which they apply are valid law and thus ought to be observed. However, it is necessary to make all of the steps that normally remain implicit, explicit if the following question arises in a discussion in the context of legal philosophy: "why are legal norms valid law and why must they be observed?"

The criteria transformation and the category transformation are the two sides of the transformation into the law, which are only distinguished because of analytical reasons. The criteria transformation is concerned with the legal "validity" and the stress is on the non-deductive step from the criteria identifying a norm as valid law to the conclusion that this norm N is valid law. The category transformation is concerned with the legal "should."

The first transformation, the *criteria transformation*, implies that particular legal sources are considered to be sources of valid law. This transformation

concerns the "jump" from certain social facts (concerning the legal organization of society) and non-legal values (concerning the minimal moral conditions that must be met for a normative system to be a legal system) to the conclusion that the constitution is a source of valid law. The underlying inference rule that has to be made explicit concerns the assumptions that constitute in Hart's terms the "rule of recognition" that should be reconstructed as an inference rule that makes the argument complete and valid.

The criteria to be fulfilled consist of certain *social facts*, relating to the legal organization of society. They relate to the way in which statutes and other legal rules are created, interpreted, observed and enforced. Furthermore the criteria consist of certain *evaluative and/or normative requirements*, relating to the minimal moral conditions that must be met for a normative system to be a legal system (for example legal certainty and the consideration that the system does not contain or generate too many grossly immoral norms and practices).

The second transformation, the *category transformation,* concerns the jump from the fact that a normative system is considered to be a legal system of valid legal norms to the conclusion that this system of legal norms ought to be observed. The underlying inference rule that has to be made explicit concerns the assumptions that constitute the basic norm, in Kelsen's terms the *Grundnorm,* that must be reconstructed as an inference rule that makes the argument complete and valid.

The *Grundnorm* is considered as an inference rule or transformation rule because the conclusion that certain rules belong to a particular normative system and should be observed from a legal point of view does not follow deductively from the assertion that there are certain social facts and non-legal values. This process of drawing the conclusion that the constitution should be observed, from a set of social facts and non-legal values, is called the *category-transformation*. This transformation is based on an inference rule that if certain criteria are fulfilled, a particular norm N ought to be observed from a legal point of view.

25.6.3.2. The Transformation inside the Law

On the second level, a *transformation inside the law* is performed. This transformation assigns legal validity to the lower legal sources and to concrete decisions. The transformation inside the law consists of three sub-transformations. The first transformation, the *source transformation*, attaches a legal "ought" to a lower legal source by reconstructing the underlying inference rule that explains why the legal source can be considered as valid law. The second transformation, the *general norm transformation*, reconstructs the underlying inference rule on the basis of which the conclusion is drawn that a general legal rule taken from a particular legal source has a particular meaning. Finally, the *decision transformation* reconstructs the underlying inference rule on the basis

of which the conclusion is drawn that, given a particular legal source and certain legal facts, a particular decision is justified.

The *source transformation* attaches a legal "should" to a particular legal source. In easy cases, the legal "should" can be applied to the source by means of a reasoning process which involves no other secondary sources. However, in hard cases the legal source can only be identified and provided with a legal "ought" via a reasoning process that involves secondary sources.

Each legal system has a particular hierarchy of legal sources: must sources, should sources, and may sources. When using a must-source, a lawyer does not need to refer to another legal source, so no further transformation is required. When using should or may sources, a lawyer must refer to other sources. Use of these sources requires justification. This means that a transformation must be performed in which the step from the secondary legal source to the decision is justified. This transformation specifies how legal validity can be assigned to the secondary sources by using certain criteria that are derived from the doctrine of the legal sources of a particular legal system.

The *general norm transformation* is concerned with the question of what the exact meaning is of a general rule taken from a legal source. There are two ways in which a general norm transformation can be performed. First, certain legal sources, for instance parts of a statute, can be adapted by taking away inconsistencies, thus making them more coherent than they were originally. Second, the legal sources can be adapted to certain moral value judgements.

The *decision transformation* implies that on the basis of at least one legal norm taken from a legal source, a transformation is carried out so that the judgement follows deductively from the already established legal source together with a description of the case.

Various decision transformations can be distinguished:

(a) Precise interpretation and subsumption (this transformation is based on Alexy's formulation of the basic form of internal justification): The precise interpretation transformation adds one or more premises to make the argument complete and deductively valid.
(b) Reduction and elimination: These are transformations that change an existing norm such that the norm is not applicable to the concrete case.
(c) Creating a new norm: In the absence of an applicable norm, a more general new norm can be formulated by means of analogy, *argumentum a contrario*, and *argumentum a fortiori*.
(d) Solution of a "collision": With this transformation the conflict between two norms or principles is resolved by formulating a conditional preference formula that resolves the conflict.

25.6.4. Different Levels of Justification and Transformation

The idea of the reconstruction of the various transformations underlying the different levels of the process of legal justification is that all relevant elements in justifying a decision must be made explicit. Normally, only the surface structure is visible: the step from the facts to the decision, sometimes supplemented by a rule. In order to be able to establish whether the assumptions underlying this decision are acceptable from the perspective of legal and general standards of rationality, the complete process of justification, consisting of two levels, must be made explicit. Only in this way legal justification can be submitted to rational critique.

Traditionally, in legal theory only attention was paid to the legal syllogism on the level of the concrete decision, and how this syllogism could be completed and made logically valid. In line with ideas from other authors such as Jerzy Wróblewski, Aulis Aarnio, Robert Alexy, and Neil MacCormick, Peczenik explains that in the justification of legal decisions different levels of justification must be distinguished. The problem of logical validity is not the central problem of legal rationality. By making the so-called *internal justification* complete, every argument can be made into a deductively valid argument. The problem lies in the so-called *external justification* (or second-order justification) in which the acceptability of the premises of the internal justification must be established. In hard cases, in the external justification a judge must specify why the premises of the internal justification can considered to be acceptable from a legal point of view.

Peczenik's claim is that both the internal and external justification are based on inference rules that must be made explicit in the various transformations carried out in the context of the *transformation into the law and inside the law*. He has made clear that under the "surface" level, different implicit transformations are carried out that need to be made explicit from the perspective of a complete justification. For the internal and external justification, for the different inference rules that are made explicit, different forms of justification must be used, and that for these different forms of justification different standards of acceptability apply.

Normally, in the context of legal justification legal theorists are only concerned with what Peczenik calls the transformation inside the law. By also adding the level of the transformation *into the law*, he still has gone a step further and has explained that further forms of justification are required to make the justification complete. In doing so, he has clarified how central important assumptions about the validity of law and the obligation to obey the law, that are central topics of discussion in legal philosophy, underlie the process of legal justification and how they must be made explicit in a complete justification.

25.6.5. The Normative-Evaluative Component: The Deep Justification of Legal Reasoning

In Peczenik's view, normally, legal argumentation occurs within the framework of the starting points that are tacitly accepted in a legal community. In the "contextually sufficient legal justification" legal sources, construction rules, interpretation rules, and argumentation rules are used which are considered to be generally accepted. To justify the use of these legal starting points in the justification, the choice of the starting points must be defended in the *deep justification*.

This deep justification must begin by demonstrating that the legal justification meets the general requirements of rationality. But meeting the requirements of rationality is not sufficient: The decision must also be in keeping with the starting points of the legal community.

To explain what the deep justification amounts to, Peczenik has integrated insights from legal theory and legal philosophy concerning the different standards of rationality of law. Also here his co-operation with Aulis Aarnio and Robert Alexy has been important, because he has integrated insights from these two authors in his ideas about the deep justification of legal justification. In doing so, he has shown how a coherent and systematic foundation of a theory of legal justification can be developed.

25.6.5.1. The Rationality of Legal Argumentation

To clarify the function and role of different forms and standards of rationality developed in different traditions in legal theory, following Aarnio, Peczenik distinguishes three forms of rationality: logical rationality (L-rationality), supportive rationality (S-rationality), and discursive rationality (D-rationality). The importance of the distinction between these different forms of rationality is that it makes clear to what aspects of the justification process the different standards apply.

The standard of *logical rationality* implies that the conclusion of a legal argument follows logically from a set of premises that are logically consistent and linguistically correct. This standard of rationality applies to the formal aspect of the reasoning process, that is, the way in which a conclusion is drawn from certain premises. The transformation of a jump into a deductively valid argument is aimed at meeting the standard of logical rationality on the different levels of the justification process. In comparison with traditional approaches of legal reasoning that concentrated only on the legal syllogism, Peczenik has explained that the justification process incorporates more levels of justification to which the standard of logical rationality applies. With this approach he accords with a tradition in legal theory in which legal reasoning is considered as a special form of rational practical reasoning.

The standard of *supportive rationality* concerns the support of a legal decision by a coherent set of arguments. Coherence is the degree to which a set of statements constitutes a support for a standpoint. The degree to which a set of statements constitutes a support depends on various criteria. These criteria are: the number of supportive relations, the length of the supportive chains, the amount of strongly supported statements, the amount of relations between the supported chains, the amount of preference-relations between the various principles, the amount of support-relations between the statements, and the degree of generality of the arguments and concepts used in the justification.

The standard of *discursive rationality* concerns the procedural rationality of legal reasoning.

The requirement of coherence only relates to the material aspects of legal argumentation, but does not guarantee procedural rationality of legal reasoning. Therefore, the justification of a legal decision must also satisfy the requirements of procedural rationality. The idea that the rationality of legal argumentation is also dependent on procedural criteria of rationality is a new development in legal theory in the 1970's initiated by authors such as Aulis Aarnio, Robert Alexy, and Peczenik. This development fits in a more general tradition in general argumentation theory and philosophy in which practical argumentation is considered as part of a practical discussion aimed at a rational consensus.[17] The idea is that the rationality of argumentation is not only dependent on logical and material criteria of acceptability regarding the product of the argumentation process, but also on the question whether the discussion procedure in which the argumentation occurs meets certain standards of procedural rationality.

In Peczenik's view, a legal decision meets these requirements of discursive rationality if the justification aims at reasonable consensus, which implies that the rules formulated by Alexy 1989 for general practical and legal discussions are observed. A discussion in accordance with Alexy's rules is a discussion in which decisions are grounded on a coherent set of arguments. Thus a discussion that meets the requirements of D-rationality, also meets the requirement of S-rationality.

25.6.5.2. The Legal Ideology

Apart from satisfying the requirements of rationality, a legal decision must also be in keeping with the starting points of a legal community. Using Ludwig Wittgenstein's and Aulis Aarnio's terminlogy, Peczenik is of the opinion that what people consider to be acceptable is dependent on their *form of life*. This form of life is the ultimate basis for a legal justification and cannot be justified in its turn.

[17] For philosophy see Habermas's (1990, 1996) theory of rational discourse. For argumentation theory see the pragma-dialectical theory of van Eemeren and Grootendorst (1992, 2004).

This basis, the *legal ideology*, consists of a set of (often tacitly) accepted starting points. The "degree of acceptance" of the components of the legal ideology may vary. Some parts are explicitly formulated in statutes and other legal sources. Another part is implicit and can be derived from the practice of judges, legal authorities, and lawyers. This part can be considered as a set of generally accepted source norms and argumentation norms, which every lawyer would accept under the ideal conditions of a rational discussion. A third part consists of the basic norms, source norms, and argumentation norms which some lawyers would accept under the ideal conditions of a rational discussion. A fourth part consists of basic norms, source norms, and argumentation norms, which some lawyers would accept under non-ideal conditions of a rational discussion.

The legal ideology is not a static whole, but changes under the influence of legal practice. The legal ideology is not a coherent system, but a collection of normative and cognitive convictions that one tries to organize coherently. The ideology consists of various, mutually incoherent, sub-systems. What belongs to the legal ideology depends on the *audience*. Using Aarnio's terminology, what is considered to be a part of the legal ideology is dependent on the form of life to which the members of a legal community belong.

In Peczenik's theory, the methodological function of the legal ideology is to offer a theoretical construction that is designed to transform the actions and internalized norms of lawyers and laymen into a coherent whole. Lawyers and laymen act as if they have accepted the legal ideology.

25.7. The Pragma-Dialectical Theory of Legal Argumentation in the Context of a Critical Discussion

25.7.1. Introduction

In a pragma-dialectical perspective, legal argumentation is considered part of a rational critical discussion aimed at the resolution of a dispute. The aim of this approach is to develop a model for the analysis and evaluation of legal argumentation as a specific, institutionalized form of argumentation. The pragma-dialectical approach to legal argumentation is based on the ideas of van Eemeren and Grootendorst developed in their pragma-dialectical theory of argumentation in various book and articles, among which Eemeren and Grootendorst 1992, Eemeren 2010.

Starting from the general theory, various authors such as Feteris, Jansen, Kloosterhuis, and Plug have applied the theory to the context of legal argumentation. Feteris has analysed the legal process as a specific implementation of a critical discussion and has described how the different stages of a critical discussion are represented in a legal discussion in a legal process. Feteris, Jansen, Kloosterhuis, and Plug have further developed models for the rational

reconstruction of various forms of complex argumentation that are based on methods of legal interpretation and on the application of specific legal argument forms such as analogy argumentation, *a contrario* argumentation, teleological-evaluative argumentation and argumentation from unacceptable consequences, and arguments based on *obiter dicta*.

In this chapter, in Section 25.7.2, we will describe the basic ideas of the general theory of argumentation. Sections 25.7.3 and 25.7.4 will discuss the legal theory of argumentation and the pragma-dialectical analysis and evaluation of legal argumentation.

25.7.2. The General Theory of Argumentation as Part of a Critical Discussion

The pragma-dialectical theory of argumentation is based on an approach that combines a pragmatic and a dialectical perspective on argumentation. The pragmatic perspective regards argumentation as a goal-oriented form of language and analyses the discussion-moves in a critical discussion as speech acts which have a certain function in the resolution of the dispute. The dialectical perspective implies that argumentation is considered to be part of a critical exchange of discussion moves aimed at subjecting the point of view under discussion to a critical test. A resolution in a critical discussion of this nature means that a decision is reached as to whether the protagonist has defended successfully his point of view on the basis of shared rules and starting points against the critical reactions of the antagonist, or whether the antagonist has attacked it successfully.

The core of the pragma-dialectical theory consists of an ideal model for critical discussions and a code of conduct for rational discussants. The *ideal model* specifies the stages which must be passed through to facilitate the resolution of a dispute, and the various speech acts which contribute to the process. In the *confrontation stage* the exact subject of dispute is established; in the *opening stage* the participants reach agreement concerning the discussion rules, starting points and evaluation methods; in the *argumentation stage* the initial point of view is defended against critical reactions and the argumentation is evaluated; and in the *concluding stage* the final result is determined.

The *code of conduct for rational discussants* specifies rules for the resolution of disputes in accordance with the ideal model. These rules acknowledge the right to put forward and cast doubt on a standpoint, the right and the obligation to defend a standpoint by means of argumentation, the right to maintain a standpoint which is successfully defended in accordance with shared starting points and evaluation methods, and the obligation to accept a standpoint which is defended in this way.[18]

[18] For a full exposition of the pragma-dialectical rules, see van Eemeren and Grootendorst 1984, 151–75.

The model for critical discussion provides a theoretical instrument for the analysis and evaluation of argumentative discourse that specifies the elements which play a role in the resolution of a difference of opinion. The model forms a *heuristic tool* in finding the elements which serve a function in the resolution process and thus identifies the elements relevant for the resolution of a dispute. The model also forms a *critical tool* for determining whether the discussion has been conducive to the resolution of the dispute and for identifying the factors in the discussion process which offer a positive and a negative contribution. Thanks to these characteristics, the pragma-dialectical theory provides a suitable theoretical instrument for the analysis and evaluation of argumentation.

To establish whether the argumentation put forward in defence of a standpoint is sound, an analysis must first be made of the elements which are important to the evaluation of the argumentation. In the evaluation based on this analysis, an answer must be found to the question whether the arguments can withstand rational critique. In an analytical overview (that can be compared to a rational reconstruction) an analysis of the argumentation is made in which the elements which are relevant for a rational evaluation are represented.[19]

In the analysis and evaluation of argumentative discourse the following points that are crucial for the resolution of the difference of opinion need to be addressed:

(1) the standpoints at issue in the difference of opinion and the positions adopted by the parties;
(2) the arguments adduced by the parties;
(3) the argumentation structure of the arguments;
(4) the argumentation schemes used in the argumentation;
(5) observation of the rules for critical discussion.

In the analysis it is established what the points at issue in the discourse are and which positions are adopted with respect to these issues; which arguments are adduced explicitly, implicitly, or indirectly; which relations exist between the arguments advanced in favour of a standpoint; which argumentation schemes (symptomatic argumentation, analogical argumentation, causal argumentation) are underlying the argumentation.

In the evaluation of the content of the argumentation it is established whether the different parts of the argumentation are successfully defended against the relevant points of critique. It is first established whether the argumentation schemes have been correctly chosen and applied. For each argumentation scheme, there is a set of critical questions which must be answered

[19] See MacComick and Summers 1991, 21–3 about the rational reconstruction of legal argumentation.

satisfactorily for the argumentation to be acceptable.[20]In the evaluation of the procedure of the discussion it is established to what extent all rules for critical discussion have been observed. This amounts to checking whether one or more participants have committed a *fallacy*, which is considered as a violation of a discussion rule, and to what extent the resolution of the dispute has been hindered by this violation.[21]

In order to establish how people in actual argumentative practice try to persuade others of the acceptability of their standpoint, a dialectical analysis of the discourse must be combined with a rhetorical analysis. Arguers not only try to achieve the dialectical goal of resolving a difference of opinion in a reasonable way, they also try to achieve the rhetorical goal of winning adherence from the intended audience. The way in which arguers try to reconcile these goals van Eemeren (2010) considers as *strategic manoeuvring* which implies that arguers try to adept the choice from the topical potential of argumentation schemes and starting points that are acceptable from a dialectical perspective to their rhetorical ends of convincing the audience.

The technique of strategic manoeuvring as described by van Eemeren amounts to an attempt to reconcile the dialectical goal of defending a standpoint in light of the relevant forms of critique on the basis of argumentation schemes and starting points that belong to the common commitments, with the rhetorical goal of winning the adherence from the audience. As long as the choice made to win the adherence of the audience is in keeping with the dialectical requirements the strategic manoeuvring can be considered as a constructive contribution to a critical discussion. However, if the arguer chooses to let the rhetorical aims of gaining the adherence by the audience have preference over the dialectical aims, the strategic manoeuvring derails and constitutes a violation of the rules of critical discussion.

25.7.3. Legal Argumentation as Part of a Critical Discussion

In the legal part of the pragma-dialectical theory, the aim is to develop an application of the pragma-dialectical theory for the analysis and evaluation of argumentation in a legal context. In a pragma-dialectical approach, legal argumentation is considered as a specific institutionalized form of argumentation, and legal discussions are considered as specific, institutionalized forms of argumentative discussion. In this conception, legal argumentation is considered as part of a critical discussion aimed at the resolution of a dispute.[22] The

[20] For a more extensive discussion of the evaluation on the basis of argumentation schemes see van Eemeren and Grootendorst 1992, 94–102.

[21] For a more extensive treatment of fallacies as violations of the discussion rules see van Eemeren and Grootendorst 1992, 102–217.

[22] For a more extensive account of the analysis of a legal process in terms of a critical discussion see Feteris 1990, 1991, 1993.

behaviour of the parties and the judge is viewed as an attempt to resolve a difference of opinion. In a legal process (for example a civil process and a criminal process) between two parties and a judge the argumentation is part of an explicit or implicit discussion. The parties react to or anticipate certain forms of critical doubt. A characteristic specific to a legal process is that in addition to the discussion between the parties, there is an (implicit) discussion between the parties and the judge, which is aimed at checking whether the protagonist's claim can be defended against the critical reactions that the judge puts forward in his official capacity as an institutional antagonist. The judge must check whether the claim is acceptable in the light of the critical reactions of the other party and whether it is acceptable in the light of certain legal starting points and evaluation rules which must be taken into account when evaluating arguments in a legal process. These institutional critical questions which the judge must apply in the evaluation, can be considered as institutional forms of doubt put forward by the judge in his official capacity. In the defence of their standpoints, the parties anticipate these possible critical questions of the party and the judge.

When the decision is presented by the judge, it is submitted to a critical test by the audience to whom it is addressed. This multiple audience consists of the parties, higher judges, other lawyers, and the legal community as a whole. Therefore, the judge must present arguments in support of his decision in order to justify it. He must specify the facts, the legal rule(s), and further considerations (such as interpretation methods, priority rules, legal principles, etc.) underlying his decision. From a pragma-dialectical perspective, the justification forms part of the discussion between the judge and possible antagonists (the party who may want to appeal the decision and the judge in appeal). In his justification the judge anticipates various forms of critical reactions which may be put forward by these antagonists.

The resolution process in a legal process can be regarded as a critical discussion in which the five stages which have to be passed through in a pragma-dialectical critical discussion, are represented. The first stage of a legal process in which the parties advance their points of view can be considered as the *confrontation stage*. Here the judge remains passive. The second stage, the *opening stage*, in which the participants reach agreement on shared starting points and discussion rules, is largely implicit in a legal process. This stage is represented by the institutionalized system of discussion rules that are laid down in codes of procedure and starting points that consist of material legal rules, legal principles, propositions of legal dogmatics, etc. In the third stage, the *argumentation* stage, the parties defend their standpoints in accordance with the rules of procedure and provide proof if asked to do so. In this stage the judge (or jury) evaluates the quality of the argumentation and the proof. In the final stage of the process, the *concluding stage*, the judge has to decide whether the claim has been successfully defended against the critical counter arguments. If the facts

can be considered as proven and if the judge decides that there is a legal rule which connects them to the claim, he will grant the claim. If the facts cannot be considered as established according to legal standards of proof, or if there is not a legal rule applicable, the judge will reject the claim.

In a legal process, the way in which the stages of a pragma-dialectical critical discussion are represented and the way in which the discussion is conducted can be regarded as a process of dispute resolution by means of critically testing a standpoint in the light of certain forms of critical doubt. However, there are some crucial differences which require attention. In a critical discussion the parties jointly ensure that the discussion rules are being observed and they jointly decide on the result of the evaluation and the outcome of the discussion. In a legal process, for reasons of impartiality, it is the task of the judge to ensure that the rules of procedure are observed. It is also the task of the judge to evaluate the argumentation and to render a decision on the final outcome. So, in a legal process the judge does alone what the parties to a critical discussion do jointly. Because of specific legal goals, such as legal certainty, legal security, and equity, there are some procedures in law which differ in certain respects from the rules and procedures of a critical discussion. These rules and procedures must guarantee that the conflict can be resolved by a neutral third party within a certain time limit.[23]

25.7.4. The Analysis and Evaluation of Legal Argumentation in the Context of a Critical Discussion

The first step in the analysis of the argumentation involves establishing the nature and content of the difference of opinion and the standpoints adopted by the participants. Compared with a dispute in the standard form of a critical discussion, the difference of opinion in a legal process is more complex because it always consists of various disputes: one between the participants and one between the party who initiates the proceedings and the judge. From a pragma-dialectical perspective, the participants adopt various positions with respect to the claim put forward by the party who initiates the proceedings. The judge is obliged to adopt a neutral standpoint with respect to the statements of the parties and thus, in pragma-dialectical terms, adopts a neutral standpoint.

The second step in the analysis must determine the arguments put forward in reaction to various forms of critical doubt and the relations between these arguments. In a legal context, the argumentation put forward as a justification of a legal decision may consist of different levels, depending on the forms of critique the judge must react to.

[23] Cf. the discussion of the relation between legal discourse and moral discourse in Habermas's theory in Section 25.3.4.

On the first level, the justification implies that the decision (1) is defended by showing that the facts (1.1) can be considered as a concrete implementation of the conditions which are required for applying the legal rule (1.1').[24] In clear cases, such a single argumentation may suffice as a justification of the decision. Often, the argumentation is more complex because one of the elements of the main argumentation of the first level must be supported by further argumentation. The supporting may consist of proof for the facts (1.1) or a justification of the applicability of the legal rule (1.1'). In pragma-dialectical terms, a second-order justification supporting the classification of the facts or the interpretation of a legal rule can be considered as complex subordinate argumentation.[25]

In the second-order justification the interpretation decision about the legal rule (1.1) is justified by second-order argumentation consisting of a justification in which the judge uses one or more interpretation methods. This argumentation may be more or less complex, depending on the choices a judge makes and on the argumentative steps that are required to make the justification complete. The judge may, for example choose to weigh certain interpretations on the basis of the consequences of the different solutions, which implies that the argumentation must be reconstructed as complex argumentation consisting of different horizontally linked lines of argumentation: the two interpretations, the weighing rule, as well as subordinate argumentation supporting the different lines of argument (see Feteris 2005, 2008a, 2008b, 2008c, 2008d for a discussion of this complex form of argumentation).

For different forms of argumentation used in the second-order argumentation authors have described which argumentative steps are required for a sufficient justification. Feteris 2005 develops a model for the rational reconstruction of teleological argumentation, teleological-evaluative argumentation, and consequentialist argumentation and describes the interaction between the various elements of the justification, Jansen (see Jansen 2005, 2008, 2009) develops a model for different forms of *a contrario* argumentation and *reductio ad absurdum*, Kloosterhuis (see Kloosterhuis 2005, 2006) develops a model for different forms of analogy argumentation and reductio ad absurdum, and Plug (see Plug 1994, 1995, 1996) develops a model for various forms of complex argumentation, among which argumentation on the basis of *obiter dicta*.

The last step concerns the evaluation of the argumentation. Regarding the evaluation of the content of the argumentation, in pragma-dialectical terms it is established whether the argumentation schemes used in the argumentation have been correctly chosen and applied. For various implementations of

[24] See Kloosterhuis 2006, 28ff. for a further description of the elements of the argumentation on the first level of a legal justification and the logical analysis.

[25] For a more extensive description of the pragma-dialectical analysis of the second-order justification see Feteris 1999, 176ff.; Kloosterhuis 2006, 41ff.

the basic forms of argumentation schemes (symptomatic, analogy, and causal argumentation) in a legal context such as analogy argumentation, teleological argumentation, consequentialist argumentation, etc. which are used for justifying the interpretation of a legal rule it must be established whether this form of argumentation is correctly chosen (for example in Dutch criminal law analogical interpretation of statutory rules is not allowed) and whether the form of argumentation is applied correctly (for example whether an analogy relates to relevant similarities). Feteris, Jansen, and Kloosterhuis have developed criteria for the evaluation of different forms of legal argumentation such as analogy argumentation, teleological argumentation, consequentialist argumentation.

25.7.5. Strategic Manoeuvring in Legal Argumentation

In the presentation of the justification of their decision, judges often try to present their decision as a self-evident result of the application of the law to the facts of the case. However, this application is often less self-evident than it is presented. In their justification judges often make use of what is in pragma-dialectical terms called *strategic manoeuvring* by trying to reconcile dialectical and rhetorical goals. The way in which judges present their justification can be analysed and evaluated from the perspective of the strategic manoeuvring in a critical discussion. The advantage of such an analysis is that it can be clarified how judges make an expedient choice from the options that constitute the starting points of a legal discussion in a particular context, how they to exploit certain presentational devices, and to what extent their justification can still be considered a constructive contribution to a rational discussion or whether the contribution "derails" and must be considered as a fallacy.

Feteris (2008c, 2009 and Kloosterhuis 2009 describe for the legal context how such strategic manoeuvring can be analysed and evaluated. A form of strategic manoeuvring often used in a legal context consist of the weighing of a literal interpretation of a legal rule with an interpretation that is based on teleological-evaluative considerations. From the perspective of legal certainty it is important that the judge applies the law as it is formulated by the legislator. This implies that, when he wants to depart from the literal application of a legal rule, it is important that the judge shows that his interpretation is still in line with the intention of the legislator. For different forms of legal justification Feteris and Kloosterhuis explain what it implies that judges try to reconcile dialectical and rhetorical goals and which techniques of strategic manoeuvring are used in the choice of argumentation schemes, starting points, and presentational devices. They show when judges remain within the limits of a rational discussion and when the attempt to manoeuvre strategically constitute a move that cannot be considered as a constructive contribution to a resolution of the dispute and must, for that reason, be considered as a fallacious move.

Chapter 26

LAW AND LOGIC IN THE 20TH CENTURY

by Jan Woleński

26.1. Introduction

Law and legal practice are commonly regarded as highly regular and logically ordered. So the problem arises of how legal phenomena are related to logic. Legal systems are said to be consistent or inconsistent; logical interpretation is one of the fundamental strategies in establishing the content of legal prescriptions, and the nature of legal definitions is constantly being discussed by jurists. The three issues just mentioned are all typical logical questions pertaining to law and its life. Although various conceptual and methodological aspects of the relation between law and logic have always occupied legal theoreticians to some extent, the enormous development of logic over the last 150 years has perhaps made them more vivid now than in past centuries. Yet there is controversy over whether legal logic is peculiar or is a kind of universal logic that can be applied to special fields. For example, some jurists say that, owing to the peculiarities of law force, legal logic has its own rules or standards. It is claimed in particular that law uses some presumptions that deliberately go against facts. For instance, if two or more persons die in the same airplane accident, it is assumed that they lost their lives at the same time, even though that may be empirically false. However, other lawyers maintain that counterfactual assumptions are made everywhere and are not peculiar to law. This chapter discusses legal logic from a historical perspective. I will review formal attempts at giving some answers to theoretical issues stemming from the alleged peculiarities of legal discourse and arguments, and I will also review exemplary ways of applying logic to juristic matters. But let me start by making some preliminary stipulations and explanations.

26.2. Logic and Legal Logic

I will understand legal logic as the logic that underlies legal systems and legal practice. By legal system I understand any system of valid legal obligations, prohibitions, and permissions. The concept of legal validity is here taken for granted. I will not draw a distinction between legal systems created by enacting statutes and ones that evolve out of concrete judicial decisions. Otherwise stated, I will not attribute any special importance to the distinction between

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continental and common law. Legal practices comprise statements based on law, as well as acts of legal interpretation. In order to simplify the discussion that follows, I will not take account of jurisprudence, that is, its general part (legal theory) and the so-called doctrinal study of law (or *Rechtsdogmatik*, in the German tradition).[1] Consequently, I will assume that there is no problem employing logic in the study of law (logic as an element external to law), but, on the other hand, everything interesting in the relation between law and logic is internal to law.

Although I took a simplified account of law, this model cannot also be applied to logic. I should therefore be more explicit about logic itself. Listed below are the most important views that constantly recur in the history of logic (I will keep some German words here, too):[2]

(1) dialectic (analysis and synthesis of concepts; Plato);
(2) analytic (deduction; Aristotle);
(3) *organon* (methods of reasoning; Aristotle);
(4) canonic (norms for gaining knowledge; Epicurus);
(5) *medicina mentis* (a descriptive and normative account of mental capacities; Cicero);
(6) *Vernuftslehre* (the rules of pure reason; the *philosophia rationalis* tradition);
(7) *Kunstlehre* (the art of arguing; Husserl);
(8) *Wissenschaftslehre* (the theory of science; Petrus Hispanus: *ars artium scientia scientiarum ad omniam aliarum scientiarum methodorum principiam viam habent*);
(9) The theory of thinking (Arnauld, Nicole).

The views listed above express a variety of points. Logic is theoretical or descriptive on some accounts (like the as dialectic and analytic accounts), but practical or normative on others (e.g., *organon* and *Kunstlehre*). Another important distinction is the medieval one between *logica docens* (logic as theory) and *logica utens* (applied logic). In Petrus Hispanus's characterization, the principal feature of logic is its universality. Since Leibniz, logic has typically been connected with projects devoted to a *logica magna* or a *characteristica universalis* as schemes providing a methodological and linguistic framework for the whole of science. The variety of topics covered by logic in its various approaches is aptly illustrated by a well-knwn tripartite division of logical sub-

[1] I should emphatically stress that my stipulations about law and jurisprudence are extremely simplified and made *ad usum* for this chapter. For a more sophisticated and detailed account, the reader should consult the systematic volumes devoted to these questions in this *Treatise*, namely, Pattaro 2005, Peczenik 2005b, Rottleuthner 2005, Sartor 2005, Shiner 2005.

[2] This list is taken from Risse 1980.

jects (logic in a broad sense) into semiotics (the logical theory of language), formal logic (a collection of logical systems, or logic *sensu stricto*), and the methodology of science (this organization of logic is often employed in teaching). From this perspective, the different views of logic are not mutually exclusive. For example, (2) is formal logic, but the rest covers either logic *sensu largo* or its particular branches, mostly semiotics or the methodology of science. All the accounts (1) through (9) are applicable to legal logic as well. Legal logic can be understood as dialectic (the synthesis of legal concepts), analytic (deduction as applied to legal matters), *organon* (a general theory of legal reasoning), canonic (legal epistemology), *medicina mentis* (how jurists should solve the problems pertaining to their discipline), *Vernuftslehre* (the theory of juristic reason), *Kunslehre* (the art of legal argumentation), *Wissenschaftslehre* (like *organon*), or *Denklehre* (the art of legal thinking).

From the contemporary point of view, formal logic is at the centre of all logical topics. It is understood as the investigation of various systems of deduction, methods of proof, or models of demonstrative inference. This study abstracts from the content of arguments and focuses on their form. Otherwise stated, logic is concerned with deductive, correct, or demonstrative inference and investigates it with reference to its structural properties, which is related to its logical form and disregards substantive aspects. Logic in the above sense investigates various logical systems, as well as their syntax and semantics. More particularly, formal logic studies the principles of logical consequence as the relation that holds between sentences or sets of sentences. The most important thing is the link between syntax and semantics, under the principle that if $X \vdash A$ (A is a logical consequence of the set X; B is formally, that is, deductively derivable from X; B is derivable from X according to some definitely prescribed rules of inference), then $X \models A$ must be true (provided that every element of X is true). This principle establishes the soundness (adequacy or correctness) of logical consequence. The $\vdash$ relation is syntactic in its nature and acts in virtue of the form of sentences in abstraction of their content. The $\models$ relation, by contrast, is semantic (and is therefore often called the relation of semantic consequence), because it is explicated by the concept of truth. Informally speaking, (α) establishes that a logical consequence is truth-preserving (infallible), that is, it never leads from truths to falsehoods. The converse property, that is, if $X \models A$, then $X \vdash A$, expresses a system's semantic completeness, or the property that every truth is derivable. The relation between syntax and semantics is in any event of the utmost importance for an understanding of contemporary logic.

The foregoing remarks drastically restrict the scope of logic. Yet some doubts arise in this context. In particular, it is obvious that people derive conclusions in ways that do not fall under any model of deduction. They use induction, analogy, statistics, persuasion, rhetoric, and the like, all of which all are examples of fallible modes of argumentation. These strategies immediately

lead to the problem whether such modes are correct and in which circumstances. Although it is clear that fallible modes of reasoning are not always correct, the question is how to define their correctness, if that is even possible. Even if we say that the fallible models of argument exceed formal logic and should be investigated in semiotics, the philosophy of science, or the methodology of science, the problem remains. Let me add that syntax and semantics as related to the distinction between $\models$ and $\vdash$ are qualified as formal when contrasted with informal (or less formal) approaches in these fields, which are usually included in semiotics. This consideration shows that the distinction between logic in the broad sense and logic in the narrow sense is vital and difficult to avoid. Assuming that informal logic or rhetoric is accepted, we can now consider how it is related to formal logic. One way to frame this relation is to say that informal logic and rhetoric belong to logic broadly construed, but another option consists in maintaining that there is an intimate difference between formal logic and the study of argumentation, because the latter appeals at least in part to content and context. Any discussion about the application of logic to various subjects must be conscious of the distinctions outlined above. Although we can have different views about the relation between informal logic and rhetoric, on the one hand, and formal logic, on the other side, we should recognize that there are two different concepts of logical validity, one clear and attached to deduction, the latter less clear (this is the most optimistic qualification, since it can be regarded as irreparably obscure) and applied to nondeductive modes of reasoning. Many misunderstandings concerning the place of logic in human mental activities stem from a conflation of both kinds of validity with the adjective *logical* added to both.[3]

The foregoing diagnosis, perhaps more than any other, concerns the logical problems that come up in law. As noted, common wisdom suggests that legal activities and their results (legal texts and sentences) are logically regular to a high degree. We say that legal decisions are, or at least should be, rational and justified or that legal codes are, or at least should be, logically correct, that is, consistent, precise, and well-systematized. In general, law has always been held up as a model of logicality and rationality. Lawyers developed special modes of reasoning, like *argumentum a maiori ad minus* (see the list at the beginning of this section), which are regarded as constituting legal logic. We now face the problem of the nature of legal reasoning, that is, of the modes of argument generated by legal logic. Are they inferences falling under the schemata of formal logic? Or are they perhaps modes of rhetorical technique? And what is legal logic? Is it an application of general logic to legal activities or is it a *sui generis* legal *Kunstlehre*, *Denklehre*, or even *Vernuftslehre* aimed at convincing courts, other authorities, or audiences about some statements and decisions?

[3] A particularly important treatment of legal logic from the point of view of informal thinking and rhetoric is offered in Perelman 1979.

Legal logic can thus be seen to be a highly instructive example of the very general problem of the essence of logic and the nature of the application of logic to special subjects. In fact, under items (1) through (8) in the above list of how logic can be understood, the modes of logic can be illustrated by examples taken from the domain of law (see Krawietz 1980). Take Kelsen, for example. As a faithful Kantian scholar, he was influenced by neo-Kantianism and understood legal logic as the *Vernuftslehre*. He looked for transcendental elements in legal thinking, the very principles of legal reason. Clearly, this project came up against enormous difficulties in explaining how we ought to understand the validity of the rules of legal transcendental logic (note that the term *validity* in this context means something entirely different from *legal validity* as the state of affairs when law is in force). Let me add that the dialectic between the formal and informal aspects of logic can depend in a very general sense on peculiar cultures in logic: The former, for example, seem to be more important in the tradition of common law.

Since I will be focusing on the history of formal legal logic, I should devote some remarks to legal logic as an application of formal logic (deductive models of inference) to legal matters.[4] This issue inspires various basic philosophical controversies. One of them concerns the question whether logical relations can hold between normative sentences (as a preliminary example, I will take "ought" sentences: Let us call them normatives) and sentences that have no normative import. Intuitively, we should be inclined to accept without any serious doubt the following inference (*****):

(*a*) Everybody who has committed a crime ought to be punished.
(*b*) A person *x* committed a crime.

(*c*) *x* ought to be punished.

This inference exemplifies a model of the so-called legal syllogism, where (*a*) is a general normative sentence, (*b*) a singular statement asserting what *P* did, and (*c*) a singular normative sentence. The inference coded by (*) can be considered a derivation of a singular normative sentence (*c*) from two premises: a general normative sentence (*a*) and a descriptive statement (*b*). In fact, (*****) looks like an instance of *dictum de omni*, that is, an inference from the general to the particular. Similarly, if we say that no action can be obligatory and non-

[4] A general theoretical account of legal logic based on cognitive science can be found in Sartor 2005, chaps. 14–5, where legal logic is embedded in the broader perspective of legal reasoning. I do not follow Sartor's approach for two reasons. First, the cognitive theory of legal reasoning does not exhaust all the historical attempts to establish a logic for law and, second, I am inclined to draw a sharper contrast than Sartor between the formal and the informal in legal reasoning. See Brkić 1985 for a more logic-oriented treatment and Grabowski 1999 for a pragmatic approach.

obligatory at the same time, we are bringing the principle of non-contradiction into the normative domain, a principle quite analogous to the *metalogical* one of noncontradiction.

If we say that at least some elements of logical schemes such as (*****) are normative, while others are not, we will be confronted with the question of the relation between normatives and declaratives. This is the is/ought problem (**IOP**), one of the most famous in general jurisprudence as well as in theoretical ethics, or metaethics. Another example concerns so-called conditional obligations (as well as that of permissions). We frequently say that if something happens, something else is obligatory; for instance, if person *x* earns income, he or she should (ought to, is obliged to) pay taxes. Now, are (*i*) If *A*, then *OB* (*B* is obligatory) and (*ii*) *O* (If *A*, then *B*) equivalent? One more example may be in order. We are certainly entitled to say (*d*) *A* and *B* are obligatory (it ought to be that *A* and *B*) if, and only if, *A* is obligatory and *B* is obligatory. But how can we justify the equivalence in (*d*)? The following historical survey makes it necessary to review various attempts to build formal theories by which to justify the validity of models like (*****), by solving (**IOP**), answering question concerning the equivalence of (*i*) and (*ii*) or justifying (*d*), or offering preparatory, mostly semantic, considerations about such formal work.[5] Since the question of the nature of normative discourse is common to law and morality, some metaethics will be discussed as well. In order to have a convenient label, I will refer to normative logic (**NL**) as the logic in which normatives occur.

26.3. Notes on Normatives

Grammar distinguishes declaratives sentences (declaratives), questions, and imperatives. This division of all correct sentences (correct on the level of syntax as a part of grammar) takes into account the mood of sentences.[6] Only declaratives are considered true or false, and for this reason logicians count only declaratives as sentences in the logical sense. This means that sentences in the logical sense form a subset of the class of the sentences in the grammatical sense. Consequently, questions and imperatives cannot be assessed as true or false. We have a simple criterion by which to tell whether a sentence is such in the logical sense: Let *A* be a sentence in the grammatical sense; prefix "it is true that" or "it is false that" to *A*; and check whether the resulting expression

[5] Note, however, that I do not pretend this survey to be exhaustive. See Horovitz 1972, Kalinowski 1972, Weinberger 1958, for more extensive information. Lenk 1974 collects a useful bibliography. Huisjes 1981 can also be consulted.

[6] Sometimes *four* moods are distinguished: the indicative (declaratives and questions), the imperative, the subjunctive, and the infinitive. Since the imperative mood is the most important for the discussion that follows, I will stick to the simpler tripartite categorization, which seems more suitable for logic. See Atienza and Manero 1998, Opałek 1986, Kutschera 1973 for more extensive surveys of normatives.

is syntactically correct. Thus, "Snow is white" is a logical sentence, because the expression "It is true (or false) that snow is white" is a correct sentence, but "Close the door!" does not qualify as a logical sentence, because the expression "It is true (or false) that close the door!" doesn't hold up syntactically. Unfortunately, this criterion has no straightforward application to normatives: On the one hand, there is nothing incorrect about the sentence "It is true that nobody ought to use violence," but, on the other hand, philosophers and lawyers have advanced several arguments to demonstrate that normatives are neither true nor false. In broad strokes, some people claim that we have a conflict between grammar and intuition, while others argue that so long as the content is conveyed through the use of correct grammar, normatives should be subsumed under declaratives.

Let us note that legal (and moral) texts do not help very much. Legal codes are very frequently written in the indicative mood. Suppose we are reading the sentence "Anyone who kills another person is punished by such and such penalty." If this sentence should appear in a newspaper, it can be interpreted as a sociological assertion, and someone may even remark that this statement is sometimes true but generally false. On the other hand, if the same sentence is found in a legal code, we will understand it to express a prohibition against killing, coupled with a duty of competent authorities to punish those who kill. As simple as this example may be, it aptly illustrates how we cannot rely on the grammatical form of legal prescriptions in solving our problem. But other cases are more complex. Suppose a statute that is valid in country **C** says that the country's yearly [budget] is passed by its Parliament no later than on the last day of December of the preceding year. We have at least two contents in this rule. First, it states that only the Parliament has a right (is competent) to pass the [budget] and, second, that passage must take place before New Year's Day. This right is to be carefully distinguished from your or my right to go to the cinema, because you or I can go to cinema or abstain from doing so, but Parliament cannot simply say, "Well, we don't have enough time to put together the project for the [budget], we will return to the matter after January 1st." This raises the problem of how many normative moods there are.[7]

At this point I should introduce the term norm, because most of the discussion that follows makes reference to it.[8] Since theories of norms are usually packaged in more or less extensive philosophical boxes, I will also point out some problems of that kind, though without entering being too long. Most general accounts of norms identify them as linguistic entities or their meanings. The simplest theory of norms sees them as explicit or implicit impera-

[7] See Heinze 2003 for a more detailed formal analysis of this question.

[8] The same problems arises with evaluative sentences, such as "*X* is good." There are several other deep problems related to emotivism and cognitivism, an example being the naturalistic fallacy.

tives. In jurisprudence, it is legal positivism that stands behind the imperative account of norms. Like all imperatives, norms have "givers," who can historically be identified by empirical sources or who at least are presumed to have existed. Norms express the will of norm-givers. Although the older imperative theory (J. Bentham, J. Austin) was unclear about the question of the truth or falsity of norms (see below), later versions of this view (notably, logical empiricism) use emotivism as a basis on which to explain why imperatives do not fall under the category of declaratives. In fact, emotivism covers a variety of positions. Radical emotivism, proposed by early logical empiricism (notably, Alfred Ayer: 1910–1989) regarded imperatives as emotive acclamations (such as "Ah!" or "Oh!"), completely devoid of any descriptive function. This view was replaced by moderate emotivism in Charles Stevenson (1908–1979), conceding that imperatives are generated by emotions coupled with some cognitive states. But emotivism is not the only kind of noncognitivism. Another kind sees norms as a special semantic category of sentences. On this view, norms are still neither true nor false, but they have a quite definite and intelligible meaning, or sense (see Weinberger 1974, 2–10). A variant of this idea constructs norms as the senses (meanings) of normative sentences, that is, functioning in a special nonindicative mood (see Wróblewski 1964). This view is certainly modelled by a famous distinction between sentences and propositions. Yet, as the proponents of this theory in its both of its versions insist, we need to carefully distinguish genuine norms—expressions of the form "It ought to be that A"—from norms of the type "It ought to be that A according to a normative system NS," such as the legal system of a given country or a moral code. The normative mood also includes imperatives.

The cognitivist theory of normatives takes truth and falsity as normal logical values of norms. Cognitivism sometimes appeals to Platonism or other forms of objective idealism by regarding norms as assertions of ideal duties, rights, etc. (Kelsen's normativism can be analyzed among these lines), but sometimes the view is based on religion (as in the case of neo-Thomism): Norms are true or false because the obligations and permissions they express are created by God. Even in this context a distinction can be drawn between normative sentences and norms as their meanings, the claim can be made that the difference between genuine and relative norms is substantial (see Kalinowski 1972, 20). Subjective cognitivism analyzes norms as assertions about the inner state of acting subjects; this view was popular in metaethics of the second half of the 19th century (Edvard Westermarck, 1862–1939), but it was almost unknown in legal philosophy. There have also been proposals to reduce all norms to instrumental norms. A rule is instrumental in case it says that if someone wants to achieve goal G, he or she should (ought) perform action B. One could interpret the utilitarian theory of law as reductive in this sense. Since, on the instrumentalist view, instrumental norms are based on social regularities, they inherit their truth or falsehood from more fundamental empiri-

cal assertions. American realism—with its predictive account of obligation: *A* is obligatory if its violation results in a sanction decided by legal authorities—introduces another kind of reductionism, based on philosophical pragmatism. All such cognitive reductions eliminate genuine norms in favour of relative ones.

Another reduction has been proposed by the nonlinguistic theory of norms (see Opałek and Woleński 1987). On this view, norms are neither linguistic expressions nor proposition-like entities but human, individual, or collective decisions, that is, concrete spatiotemporal events. They are expressed by appropriate linguistic devices—such as "I (he, she, we, they) order, permit, etc., that *A*"—that are either first-person or third person singular or plural sentences, which can be considered as primary normative sentences. Such sentences are true or false and inform us about the duties, obligations, permissions, rights, or competences brought into being by norms. Since it is always possible to depersonalize original normative sentences, the content of every normative system can be captured by a suitable set of sentences of the type "It is obligatory, prohibited, permitted, legal, etc., that *A*." Imperatives, on the nonlinguistic theory, are considered abbreviations of first-person normatives. This account assumes the correctness of the von Wright thesis:

> Can all norms be formulated in terms of deontic [i.e., normative] sentences? […] It is reasonable to think that the answer to [this] question is affirmative. One could make a partial definition of "norm" that every norm is to the effect that something ought to or may or must not be or be done. It would then follow, trivially, that every norm can become expressed in a deontic sentence. (Wright 1963, 100)

Although von Wright did not subscribe to the nonlinguistic theory of norms, his thesis is crucial in this account.

An interesting attempt to systematize theories of norms divides them into hyletic and expressive (see Alchourrón and Bulygin 1981). On the former account, norms are language-independent entities expressed by certain utterances understood as normative sentences. Although such sentences serve prescriptive functions, norms are propositions playing a similar role in traditional semantics, in that they are applied to indicative statements. This theory recognizes that there are norms that are not formulated. On the expressive theory of norms, norms originate by a prescriptive use of language. Thus, no norm exists unless it is linguistically formulated, and every norm is grounded in a command. An important aspect of this distinction is that it can be used to treat the problem of the truth or falsity of normatives as a separate issue, which can depend on many further assumptions. For example, the nonlinguistic view proposes that the truth and falsity of normatives be analyzed via conditions for the felicity of performative acts. Although this theory considers normative statements true or false, it does not subscribe to traditional cognitivism, because normatives express noncognitive states. This view also resembles imperativism,

for it assumes that every norm has its source in the decisions of norm-givers. The nonlinguistic account of norms is thus a radicalization of the expressive theory.

Finally, I should indicate some additional problems arising from normatives.[9] As noted, we have a variety of normative moods. This fact is evinced by a considerable amount of words, such as *duty*, *obligation*, *right*, *permission*, *competence*, *ought*, *must*, *should*, *order*, *need*, *can*, *allow*, *may*, and *admit*, as well as by sentences like "It is permitted that *A*" and "*A* must be done." It should be observed, in particular, that the complements of normative verbs can be either nominal, infinitive, or propositional. Are some perhaps equivalent to the others? Unfortunately, ordinary intuitions do not suffice for univocal stipulations. In a logical system, for example, "It ought to be the case that *A*" is replaceable by "It *must* be the case that *A*," but the common usage frequently considers the former somehow weaker than the latter. Another example of a controversial issue is that of permissive norms. One of our earlier examples suggests that there is a norm that permits Parliament to pass [the budget]. On the other hand, if I say that I can go to the cinema, we wouldn't ordinarily be able to claim that there is a norm allowing me to do that. Now, if a father says to his son, "You may go to the cinema" in a situation in which that was previously prohibited, it may be argued that a norm was issued. However, it is still unclear whether the revocation of a prohibition counts as another norm. The next and last example in this section concerns primary and secondary normative moods. For example, it can be argued that obligations and prohibitions are primary, since "*A* is permitted" means, in the simplest case, "*A* is nonobligatory and nonprohibited." On the other hand, Parliament's permission to enact the budget seems to involve a complex of normative moods, specifically, that Parliament may pass the state bill, that it possesses a specific competence, and that no other authority has the competence in question. Hence, the problem arises whether all (or perhaps only some) normative moods are reducible to the primary ones. Clearly also involved here is the problem of negating normatives is. For example, we have external negations, like "It is not the case, that *x* ought to do *A*" and internal negations, like "It ought not to be the case that *A*." The latter expresses a prohibition against doing *A*, but former does not, and it is open to question whether it is a norm at all. On the other hand, the sentence "Do not do *A*" is a prohibition in the imperative mood; in this case, the external negation seems to preserve the imperative status. It is in order to aid the effort of working out such issues that the various **NL** systems have been developed.

[9] For a more detailed analysis, see Alchourrón and Bulygin 1971 and Weinberger 1974.

26.4. The Jörgensen Dilemma

Jörgen Jörgensen (1894–1969), a Danish philosopher and logician, formulated a general dilemma (**JD**) for **NL**.[10] He noted that, on the one hand, according to a generally accepted definition of logical inference, only sentences that are capable of being true or false can function as premises or conclusions in an inference, but, on the other hand, it seems evident that a conclusion in the imperative mood may be drawn from two premises one of which or both of which are in the imperative mood. This second claim (**) is illustrated by Jörgensen with the following example: "Keep your promise; this promise is yours; therefore, keep this promise." So we have here the following sequence of apparently true assertions:

(1) Only true or false sentences can function as premises or conclusions in inferences.
(2) Imperatives are neither true nor false.
(3) Imperatives cannot function as premises or conclusions of inferences.
(4) There are intuitively correct inferences, such as (*) in which imperatives occur.
(5) Imperatives can function as premises or conclusions in inferences.

A simple inspection of the foregoing assertions will show that the sequence (1) through (5) is inconsistent: To see this, one need only compare (3) and (5) or (1) and (4).[11] Clearly, although **JD** was formulated for imperatives, it is easily transformable to norms. Thus (4) becomes the assertion, instantiated by (*), that there are intuitively correct inferences in which norms occur.

Assertion (1) follows from a definition of logical inference (that is, an inference based on the concept of entailment as truth-preserving); let me use the symbol **SL** (standard logic) for a reference. Assertion (2) is dictated by elementary grammar, which distinguishes declaratives, imperatives, and questions and attributes truth and falsity (as logical values) exclusively to items in the first category. Thus imperatives sentences are neither true nor false. Assertion (3) is entailed by (1) and (2). Note that we do not need to add "sound" to "inferences" in (1) and (3), because truths and falsities may form sound or unsound inferences alike. Otherwise stated, sequences of imperatives do not form inferences at all, and that situation cannot be improved by adding declaratives. This means that mixed imperative-declarative sequences cannot be considered inferences, either. Assertion (4) is pointed out by examples such as (*). Since this model is correct, it automatically should be regarded as a genuine inference. Finally, assertion (5) follows from (4).

[10] See Jörgensen 1937–1938. The name "Jörgensen dilemma" was coined by Ross (1941).
[11] See also Weinberger 1958, 66–8.

Although **JD** was formulated not very long ago, it is a very good starting point for a systematic historical analysis, because it points to some solutions for **NL**. In general, most people accept (4), that is, the assertion that there are intuitively correct normative inferences. This suggests several possible solutions to the problem of **NL**.[12] The simplest one is proposed by traditional cognitivism and consists in taking normatives to be regular declaratives and applying **SL** (propositional, predicate, or syllogistic calculus) to them. This position is frequently adopted by textbooks of legal logic (see Klug 1966). Proponents of this strategy seem to be saying, "Don't worry about the peculiarities of normatives and rely on **SL**." Another view sees logic as an abstract syntactic calculus and interprets it by either normatives or declaratives.[13] Thus, **NL** is independent of semantic views about normatives and so is coherent with cognitivism and noncognitivism alike. Both of these solutions have a weak point, in that they ignore relations between normative concepts, such as that permission is entailed by obligation and has no connection with **IOP**. This encourages the construction of more-sophisticated systems, such as deontic logic. If we accept (1) and (4), we will have to look for a special semantic basis of the logic of norms (imperatives). This can lead either to simple counterparts of **SL** or to advanced systems of **NL,** in both cases based on noncognitivism. **IOP** has a straightforward solution if one assumes that normatives are neither true nor false. On this assumption, normatives by definition cannot be inferred from declaratives, and **IOP** simply disappears. This way or otherwise, the crucial problem consists in the semiotic status of (*a*), (*b*), and (*c*) as elements of (*****). Everyone agrees that any normative sentence exhibits the structure expressed by the expression **N***A*, where **N** refers to a normative operator and *A* is its argument; the basic instances of **N** are obligation (denoted by **O**), prohibition (**F**), permission (**P**), and permission not or nonobligation (**P**¬). Since *A* is usually taken as a sentential operator, **N** functions as a unary sentence-forming functor (some deviations from this treatment will be noted in what follows). In order to make for easier comparisons between proposed **NL**s, I will use this unified symbolism without invoking original notations, unless additional symbols are included in such **NL**s. The symbols ¬, ∧, ∨, →, ↔, ∀, ∃ stand for negation, conjunction, disjunction, implication, equivalence, the universal quantifier, and existential quantifier. We will also assume the typical definition of well-formed formulas, but without getting into the details.

[12] As will be illustrated later, these solutions sometimes overlap.

[13] See Weinberger 1974, passim. Note, however, as will be discussed shortly, that this author has some reservations about this relation.

26.5. Prehistory of Normative Logic[14]

Aristotle formulated a definition of sentences in the following way:

> A sentence is a significant portion of speech, some parts of which have an independent meaning, that is to say, as an utterance, though not as the expression of any positive judgment. […]. Every sentence has a meaning, not as being the natural means by which a physical faculty is realized, but, as we have said, by convention. Yet every sentence is not a proposition; only such are propositions as have said, by convention. Yet every sentence is not a proposition; only such are propositions as have in them either truth or falsity. Thus a prayer is a sentence, but is neither true or false.
>
> Let us therefore dismiss all other types of sentence but the proposition, for the last concerns our present inquiry, whereas the investigation of the others belongs rather to the study of rhetoric or poetry. (Aristotle, *De Interpretatione,* 16b, 17a.)

This passage is important because it introduces the distinction between propositions and sentences in the grammatical sense. Aristotle used the term *apofantikos* (proposition, or *oratio enuntiativa*, in Pacius's Latin translation of Aristotle) and *logos* (sentence, speech, or *oratio*, in Pacius's Latin translation of Aristotle). Although imperatives are not mentioned here, one can assume that the Stagirite would classify them as sentences, which are not propositions. His dismissal of "other types of sentences" suggests that he thought they are excluded from formal logic.

Another contribution Aristotle made to **NL** lies in his analysis of practical syllogism (for which he used the term *praxis*, usually translated as "action" or as "syllogism of action," and equivalent in Latin to the Schoolmen's *syllogism operabilis*). The problem was framed by Aristotle as follows:

> Action requires the combination of universal and particular beliefs.
> […]. One belief (a) is universal; the other (b) is about particulars, and because they are particulars perception controls them. And in the cases where these two beliefs result in (c) one belief, it is necessary in purely theoretical beliefs for the soul to affirm what has been concluded, and in beliefs about production (d) to act at once on what has been concluded. If, e.g., (a) everything sweet must be tasted, and (b) this particular thing, is sweet, it is necessary (d) for someone who is able and also unhindered also to act on this at the same time. (Aristotle, *Nicomachean Ethics*, 1047b.)

Clearly, Aristotle was considering a purely logical question in this passage. In particular, he was not formulating any rule concerning the formal validity of the practical syllogism, save for a remark that the major premise must indicate

[14] This section covers material from antiquity to the early 20th century. The reason for including the prehistory of **NL** in this chapter is that the previous historical volumes were rather selective on legal logic. The only exception is Errera 2007, offering an extensive treatment of the syllogistic method in medieval juristic thought. However, the author does not enter into the theoretical problems of normative logic. I should note that my exposition is informal: I am not making any attempt to formalize it.

the purpose of an action in order to make inferences about the action. Interestingly, (c) that is, the statement "this particular sweet thing must be tasted" is not even explicitly formulated. It seems, therefore, that for Aristotle sound actions are based on inferences, and he seems to be more interested in rationality than in logical matters. Yet we have here a model in which normative sentences occur, and it was in Aristotle's writings that this kind of inference was first distilled.

The Stoics explicitly distinguish propositions and imperatives:

> the Stoics maintained that truth and falsity exist in "expression." And they say that "expression" is "that which subsists in conformity with a rational presentation," and that a rational presentation is one in which it is possible to establish by reason the presented object. And of expressions they term some "defective," others "self-complete"; the defective we may now pass over, but of self-complete there are, as they assert, several varieties; for in fact "jussive," such as we utter in giving an injunction, as for example—Come thou hither, O lady dear; others, "declaratory," such as we utter when making a statement, as for example—"Dion is walking about"; and others "interrogations," which we utter when asking a questions, as for instance—"Where does Dion dwell?" (Sextus Empiricus, *Against Logicians*, II, 70–2.)

The fundamental term of Stoic semiotics was *lekton*. Disregarding whether *lekta* should be considered as words (or complexes of words) or as thoughts, we can say that they are meaningful expressions. The Stoics divided *lekta* into complete (autonomous) and incomplete (non-autonomous). This division is not equivalent to that between *categoramata* and *syncategoramata*, because nouns belong not to *categoremata* but to complete expressions. Stoic autonomous *lekta* can be equated with sentences in the grammatical sense and they include propositions, questions, and imperatives, among other types of expressions. It seems that the Stoics were the first to introduce the standard division of grammatical sentences into propositions, questions, and imperatives (injuctions, προστάοσσντα).

An interesting historical issue concerns the problem of whether and how Stoic logic influenced Roman legal thinking. It is well-known that many leading Roman jurists subscribed to Stoicism as the *vera philosophia*. Let me recall Ulpian's definition of jurisprudence (a definition adopted in the Justinianian Code): *Iuris prudentia est divinarum atque humanarum rerum notitia, iusti atque iniusti scientia* (Jurisprudence is concerned with divine and human matters and is conceived as the science of what is just and unjust), which is simply a reiteration of the Stoic definition of philosophy as knowledge of the natural order, in keeping with the pantheism espoused by Chrisippus and his Roman followers. Similarly, the Stoic moral teaching stands behind the view of the function of law as that which helps us *honeste vivere, alterum non laedere, suum quique tribuere* (live honestly, not harm others, and give everyone his own). Much less is known about the influence that Stoic logic and methodology had on legal interpretation in Roman law. However, some principles such as Cicero's *Lex iubet ea, quae facienda sunt, prohibetque contraria* (Law makes obligatory what should be done and prohibits the contrary), seem to

follow some intuitions about obligation and permission as modal concepts and could be motivated by Stoic semiotic ideas. The quoted formula by Cicero is preceded by *Lex est ratio summa* (Law is supreme reason), which certainly also carries Stoic ideas. On the other hand, other rules—such as Cicero's *Lex retro not agit* (The law does not act retroactively)—may instead be informed by the idea of justice. So great care must be exercised in tracing out the logical and ethical aspects of Roman legal thinking. In any event, there is still research to be done before we can have a detailed analysis of the logical and philosophical sources of Roman law, especially as concerns the methods for defining legal terms and the principles of legal interpretation.[15]

Since medieval contributions to **NL** are summarized in a previous volume of this Treatise (see footnote 14), I will offer only few remarks on this period. In principle, the Schoolmen, notably Thomas Aquinas, followed Aristotle, particularly his idea of the practical syllogism as a guide for acting rationally. It has quite recently been discovered that medieval logicians elaborated some rudiments of deontic logic (Knuuttila 1981). Peter Abelard considered necessities (or that which must be done as a matter of necessity) as nature's demands or imperatives. He also observed that conditionals with permitted or obligatory antecedents and prohibited consequents are consistent but irrational. William of Ockham, Robert Holcot, and Roger Rosetus realized that permission (*licitum*) is definable by obligation (*obligatum*) or prohibition (*illicitum*); for example, "It is permitted that *A*" means the same as "It is not obligatory that not-*A*." Rosetus argued for a rule making it possible to derive "If *A* is obligatory, then *B* is obligatory" from "If *A*, then *B*." Medieval deontic logicians also noted some problems with ommisions (abstaining from an action) and kinds of permission. Finally, it should be noted that the Late Middle Ages gave currency to terms such *dialectica legalis* and *topica legalia*.

A significant contribution to **NL** can be found in Leibniz (see Burkhardt 1980, 414–2; Kalinowski 1974; Lenzen 2004, chap. 1), who regarded this field as a part of applied logic. In particular, Leibniz envisaged a formalization of Roman law as a theory in the style of Euclid's geometry; this was part of his program for a *characteristica universalis*. The task that Leibniz set for himself was clearly practical, less theoretical, since he wanted develop exact tools that would be useful in solving controversies between parties of contracts. He also identified formal analogies between five sets of concepts, namely, (*a*) *iustum* (just), *iniustum* (not just), *aequm* (just according to law), and *omissibile* (not required by law); (*b*) *licitum* (permitted), *illicitum* (non-permitted), *debitum* (obligatory), and *indebitum* (non-obligatory); (*c*) *possible*, *impossibile*, *necessarium*, and *contingens*; (*d*) *quidam* (some), *non-quidam* (none), *omnis* (all), and *quidam non* (not all); and (*e*) *potest* (can), *non potest* (cannot), *non potest non* (cannot but, or must), and *potest non* (must not). Technically speaking, these

[15] Some information in this regard is offered in Giaro 2007.

dependencies establish analogies between legal terms, deontic concepts, alethic modalities, and quantifiers (all of them analyzed as elements in categorical sentences and sentences expressing the modalities of action). These analogies generate various definitions, such as "obligatory" being defined as "not permitted not." Leibniz also formulated some principles combining various modalities, such as that *aequm* entails *potest*. Unfortunately, Lebniz's magnificent work on **NL** has until recently been forgotten.

Contrary to the fate of Lebniz's contribution, Hume's treatment of **IOP** became famous and influential. Writes Hume:

> I cannot forbear adding to those reasonings an observation, which may, perhaps, be found of some importance. In every system of morality, which I have hitherto met with, I have always remark'd that the author proceeds for some time in the ordinary way of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when of a sudden I am surpris'd to find, that instead of usual copulations of propositions, *is*, and *no t*, I meet with no proposition that is not connected with an *ought*, or *ought not*. This change is imperceptible; but is, however, of the last consequence. For as this *ought*, or *ought not*, expresses some new relation or affirmation, 'tis necessary that it shou'd be observ'd and explain'd; and at the same time that a reason should be given, for what seems altogether inconceivable, how this new relation can be a deduction from others, which are entirely different from it. (Hume 1888, 469)

Perhaps it is important to note that Hume considered ought-sentences as indicatives. The Hume thesis (or "Hume guillotine," as it is sometimes called)—a thesis according to which is-sentences do not entail ought-sentences—plays a crucial role in all debates around **NL**.[16] This statement was formulated by Hume as a problem for the theory of deduction by observing that normatives introduce a new relation. Yet he did not offer any solution. On the philosophical side, the Hume thesis has been strengthened by Kant and Neo-Kantians with their strong separation between *Sein* and *Sollen*.

The next important contributor to **NL** and its problems was Bernard Bolzano (1781–1848), who used a very broad concept of a proposition:

> In my view, questions, wishes, entreaties, etc. and even mere exclamations, in the sense which they get through their context, must be regarded as genuine, though often obscurely stated, propositions. Take the case of question, e.g. "What is the ratio between the diameter and the circumference of a circle?" Of course, this question asserts nothing about that which is in question, but it nevertheless states something, namely our desire to be instructed about the subject of the question. Hence it may be either true or false. […]. It is true, of course, that we occasionally say "I do not assert this, I merely ask." It would seem that in such a statement we contrast question with assertion or judgment. Upon closer inspection, however, it turns out that the meaning of such a statement is actually this: "I do not *assert* that this or that is the case, but I merely *ask*, i.e. I assert that I desire to know, whether or not it is the case." Hence this case confirms that a question is a complete proposition. Just as something is asserted in every question, so also in every wish, command, etc. Hence they should all be called propositions. (Bolzano 1972, 25)[17]

[16] See Schurz 1997 and Stuhlmann-Laeisz 1983. These books also survey arguments against the Hume thesis.

[17] Originally published in German in 1837 under the title *Wissenschaftslehre*.

Bolzano's general view is as follows. Every indicative propositional content can be asserted, desired, asked, commanded, etc. Hence, we have the general pattern "I (or another pronoun) […] that *A*," where […] may be filled by a verb referring to an attitude or modality. Thus, normatives as imperatives can be fit into a paradigm pattern.

Bolzano also addressed normatives as ought-sentences and the related concept of logical consequence, asking,

> is it probable that for every set of truths from which another follows as consequence from them as ground, there is an infinite number of other sets of truths from which other truths follow in the same way, so that the distinctive character of the very ideas of which these sets of truths are composed never has any influence on the type of ground-consequence relation between them?—The following example seems to me prove the opposite. Anyone who does not deny the existence of a relationship of ground and consequence in general will be inclined to grant that there is a certain practical truth of the form: One ought to do (or will) *A*, which is so constituted that all of the other practical truths, e.g. one should not lie, etc. can be derived from as a consequence from its ground by the addition of some theoretical proposition, For *A* to happen, *X* is necessary. But that first truth (the so-called highest moral law) also appears to have a ground. For if *A* were impossible, there could be no obligation to will it. Consequently the obligation to do *A* is grounded either wholly or partly in the truth that *A* is possible. We may assume, however, that the truth just stated by itself, or a set of truths in which [it] is only one part, is the complete ground of that supreme moral law; then it is clear that it does not follow from its ground by any of the usual rules of inference. "One should do *A*" flows as a consequence from a set of truths in combination, but none of them can already include the concept of should within it (state an obligation, because otherwise it would be a practical truth). Therefore we can see distinctly that none of the usual rules of inference would justify us in accepting it as part of the conclusion. (Bolzano 1973, 271)

For Bolzano, "ought" normatives fall under the general pattern "One ought to do *A*." Bolzano follows Kant here and says that ought implies can. But that is only part of the problem. Let us assume that we have a particular obligation, for example, (*) "One should not lie." There is no special problem with grounding (*) by deriving it from the supreme moral law. Yet we should offer a ground for this supreme law. Bolzano observes a dilemma. The supreme moral law cannot be grounded by an ought-sentence, because in that case it would not be supreme. On the other hand, the supreme moral law cannot be grounded by the usual rules of inference, because these rules concern is-sentences in Hume's sense. Bolzano does not decide whether the supreme moral law should be accepted axiomatically or whether it needs to be supplemented with usual rules of inference, but his analysis seems to add something important to the **IOP** problem in Hume's formulation. In particular, Bolzano delineated ways of solving the question and observed that in some cases it is important to compose sets of premises, because the nature of premises (is-sentences, ought-sentences, etc.) appears relevant.

Gottlob Frege (1848–1925) applied his famous distinction between *Sinn* (sense) and *Bedeutung* (reference) to imperatives as well:

A subordinate clause with "that" after "command," "ask," "forbid," would appear in direct speech as an imperative. Such clause has no reference but only a sense. A command, a request, are indeed not thoughts, yet they stand on the same level as thoughts. Hence in subordinate clauses depending upon "command," "ask," etc., words have their indirect reference. The reference of such a clause is therefore not a true value but a command, a request, and so forth. (Frege 1960, 68.)

Although Frege said nothing about normative inferences, he indicated an important semantic point. He denied that imperatives are thoughts. Consequently, they have no references as truth-values (the True, the False). In fact, imperatives have no references if they function in direct speech, but they do have a sense. For example, the sentence "Close the door!" has a sense but no reference. The situation changes if we consider the utterance "I command that you close the door," because it contains an indirect reference, namely, the imperative demanding that the door be closed. This comports with Frege's general view that the direct sense of sentences used in direct speech becomes the indirect reference of complexes in *oratio obliqua*.

It was Jules Poincaré (1854–1912) who put forward the first explicit logical proposal concerning the structure of normative inferences.[18] According to Poincaré, a correct logical inference with an imperative as its conclusion requires an imperative premise as the major assumption. In his words:

If the premises of a syllogism are both in the indicative mood, the conclusion will also be in the indicative. For the conclusion to have been stated in the imperative, at least one of the premises must itself have been in the imperative. (Poincaré 1913, 103; my translation)

This observation conjures up Aristotle's previously quoted remark about the character of the major premise in a practical syllogism, but Poincaré explicitly refers to imperatives. Otherwise stated, the rule that imperative conclusions require imperative premises can be regarded as a metalogical principle that Poincaré defined for a language in which imperatives and declaratives alike occur. Although it is not explicit in Poincaré, he would probably agree that the same rule holds for the relation of non-normative declaratives and normative declaratives. In any event, Poincaré's rule, broadly interpreted, in a way partly solves the problem raised by Bolzano. If we have any ought-sentence as a conclusion, its derivation is possible by applying the usual rules of inference to a set of premises having at least one ought-sentence. On the other hand, the Poincaré rule says nothing about grounding the supreme normative rules, if any exist. It is fair to say that logic does not solve Kelsen's famous problem concerning the *Grundnorm*.

Alois Höfler (1853–1922)—a member of the Brentano school (he was trained as a mathematician and a physicist but later turned to philosophy—re-

[18] This question is discussed by Poincaré in the context of scientific morality and immoral science, which for grammatical reasons he considers to be impossible.

discovered analogies between normative concepts and alethic modalities (see Höfler 1917).[19] He observed in particular that obligation (*A*), prohibition (*E*), permission (*I*, on non-prohibition), and permission not (*O*, or non-obligation) form a logical square formally analogical to that which describes the dependencies between modal sentences and categoricals. It is interesting that Höfler designated normative sentences by the same letters that are traditionally used in speaking about categorical sentences, namely, *A* (obligation, universal affirmative), *E* (prohibition, universal negative), *I* (permission, particular affirmative), and *O* (permission not, particular negative), though he also employed another notation. He then formulated several laws based on the normative logical square, such as that obligation implies permission or that obligation and non-obligation are inconsistent. Normatives were similarly treated by Höfler as categoricals, for example, he worked with forms such as "Every (some) *S* can be (ought be) *P*," where *can* takes a normative, not an alethic, meaning. Hence Höfler's **NL** contains an amount of normative syllogistic.

Another scheme of normative interrelations was put forward by Wesley Hohfeld (1879–1918) (Hohfeld 1919; see also Moritz 1960), who observed that normative concepts have correlatives and opposites. For example, rights in the strict sense should be distinguished from privileges, because whereas the former have correlates in the duties of other parties, the latter do not have this property. Further, rights cannot be equated with powers, enabling specific persons to make changes in legal relations, or with immunities, legally defending persons against the powers exercised by others. Consequently, Hohfeld introduces two groups of relations involving correlates and opposites. Firstly, a right (or claim) has a duty as its correlative and no-right as its opposite; privilege (liberty) is correlated with a no-right and opposed to duty. We always have here either some action or some omission; for example, if someone has a duty (to do or abstain from doing something), it means that another party has a correlative right. Secondly, power takes liability as its correlative and disability as its opposite, but to have the privilege of not doing something (of a non-doing) is correlative to liability, and an absence of power is opposed to immunity. In the second case, the possibility of doing or not doing something results from powers and immunities. Hohfeld was guided by legal, not logical, intuitions, and this probably explains why he was able to propose a fairly rich table of normative concepts and relations. Hohfeld's account is also interesting because it was the first logical analysis of some logical issues in law related to the legal culture that shaped American common law.

The last author discussed in this section is Edmund Husserl (1859–1938), who considered norms as proper objects of of normative science, but he also formulated some general remarks:

[19] See, in this regard, the previous discussion of medieval logicians and Leibniz.

> We must now ask what is meant by […] "shall be" or "should be" as opposed to what is. The original sense of "shall" or "should," which relates to a certain wish or will, a certain command, is plainly too narrow, e.g. You shall listen to me, *X* should come to me. […]. If we say "A soldier should be brave," this does not mean that we or anyone else are wishing or willing, commanding or requiring this. […] "A soldier should be brave" rather means that only a brave soldier is a "good' soldier," which implies (since the predicates "good" and "bad" divide up the extension of the concept "soldier") that a soldier who is not brave is a "bad" soldier. *Since* this value-judgment holds, everyone is entitled to demand of a soldier that he should be brave […]. We may in general take as identical or at least as equivalent the forms "An *A* should be *B*" and "An *A* that is not *B* is a bad *A*," or "Only an *A* which is a *B* is a good *A*." (Husserl 1901, 34; my translation)

Thus, Husserl's theory of normatives is not imperative, because he clearly contrasts *shall* and *should* with the imperative mood. Although Husserl equates normatives with evaluatives, the most important semantic consequence of his approach lies in the indicative character of the former and so in their being suitable for as truths or falsities.

Husserl makes also some logical observations:

> Negative statements of what should not be are not to be taken as negations of corresponding affirmative statements, as too, in the ordinary sense, the denial of a demand does not amount to a prohibition. […]. The following forms are […] equivalent: "An *A* should not be *B*" and "An *A* which is *B* is in general a bad *B*" or "Only an *A* which is not *B* is a good *A*."
>
> That "should" and "should not" are mutually exclusive follows formally from their interpretations, and the same holds of the propositions that judgements regarding what should be entail no assertion regarding correspondingly is.
>
> The just clarified judgements of normative form are plainly not the only ones that one would allow to count as such, even if the word "shall" does not occur in their expression. It is inessential if, instead of saying "*A* should (or should not) be," we also are able to say "*A* must (or may not) be *B*" and "*A* may be *B*." We touch more substance if we point to the two new formulas "*A* need not be *B*" and "*A* may be *B*," which are in contradictory opposition to the above forms. "May not" is therefore the negation of "should," or, what is the same, of "must"; "may" the negation of "should not," or, what is the same, of "may not," as can readily be seen from the interpreting value-judgments: "An *A* need not be *B*" = "An *A* that is not *B* is not therefore a bad *A*"; "An *A* may be *B*" = "An *A* that is *B* is not therefore a bad *A*." (Husserl 1901, 34–5; my translation)

The logic resulting from this passage is obviously modal, as can similarly be said of Höfler. In particular, Husserl distinguished contraries (e.g., *should* and *should not*) and contradictories (e.g., *may not* and *should*). He is also believed to be the first author to have observed the converse of Hume's guillotine, that is, the lack of entailment from what should be to what is.

26.6. Attempts at NL Construction from 1926 to 1951

It was Ernst Mally (1879–1918), a student of Meinong in Graz, who in 1926 proposed the first formal **NL** system (see Lokhorst and Goble 2004, Mally 1926; cf. Morscher 1998, Woleński 1998a). Roughly speaking, Mally's **NL** is an extension of **SL**; more specifically, it is a classical propositional calculus with quantifiers binding sentential variables and two constants, the *verum* (denoted

by 1) and the *falsum* (denoted by 0), where $0 \leftrightarrow \neg 1$.[20] Mally distinguished "It ought to be the case that A"—or, equivalently, "Let it be that A" (he used the symbol $A!$ for the imperative mood), that is, $\mathbf{O}^{\rightarrow}A$—and $\mathbf{O}A$, the latter being understood as an unconditional obligation. He also introduced the context "A requires B" ($A\mathbf{R}B$) and "A mutually require**s** B" ($A\mathbf{R}^{=}B$). We have the following three definitions: (*i*) $A\mathbf{R}B =^{\text{df}} A \rightarrow \mathbf{O}^{\rightarrow}A$; (*ii*) $A\mathbf{R}^{=}B =^{\text{df}} A\mathbf{R}B \wedge B\mathbf{R}A$; and (*iii*) $\mathbf{F}A =^{\text{df}} \neg\mathbf{O}A$. The last definition indicates that Mally completely neglected permissions. That can be explained by noting that he considered the normative status of a state of affairs as either obligatory or prohibited. Moreover, since his system was conceived as the logic of the will, as well as the logic of oughtness, $\mathbf{O}^{\rightarrow}A$ can be read as "A is desirable" or (in the first-person form) "I want A to be the case." Although this reading is to some extent justified, it is clear that Mally overlooked the modal status of normative operators. On the other hand, he considered the normatives as indicative sentences.

Mally presents his system as an axiomatic construction. Axioms are as follows (verbally and formally):

(I) If A requires B and if B implies C, then A requires C.
$(A\mathbf{R}B \wedge B \rightarrow C) \rightarrow A\mathbf{R}C$*p

(II) If A requires B and if B requires C, then A requires B and C.
$(A\mathbf{R}B \wedge B\mathbf{R}C) \rightarrow A\mathbf{R}B \wedge C$

(III) A requires B if, and only if, it is obligatory that A imply B.
$A\mathbf{R}B \leftrightarrow \mathbf{O}(A \rightarrow B)$

(IV) Something is obligatory.
$\exists A(\mathbf{O}^{\rightarrow}A)$*p

(V) Nothing is obligatory and prohibited.
$\neg(\mathbf{O}A \wedge \mathbf{F}A)$

Mally derives several theorems from (I) through (V), among them $A\mathbf{R}B \rightarrow A\mathbf{R}1$, $A\mathbf{R}B \leftrightarrow \neg B\mathbf{R}\neg A$; $\mathbf{O}^{\rightarrow}A \wedge (A \rightarrow B) \rightarrow \mathbf{O}^{\rightarrow}B$, $\mathbf{O}^{\rightarrow}A \wedge \mathbf{O}^{\rightarrow}B \leftrightarrow \mathbf{O}^{\rightarrow}(A \wedge B)$; and $\forall A(\mathbf{F}A\mathbf{R}\neg A)$. Mally himself found the theorem $\mathbf{O}A \leftrightarrow 1$ highly surprising, because it entails $\mathbf{O}^{\rightarrow}A \leftrightarrow A$. The last formula means that what is factual is obligatory (imperative) and, conversely, it seems to abolish Hume's thesis about the separation of Ought and Is.[21]

Mally's logic was criticized by Karl Menger (1902–1985), an Austrian mathematician and a member of the Vienna Circle. His main point was as follows:

> This result [that is, $\mathbf{O}^{\rightarrow}A \leftrightarrow A$] seems, however, to be detrimental to Mally's theory. It indicates that the introduction of the sign ! [$\mathbf{O}^{\rightarrow}$ in my notation] is superfluous in the sense that it may

[20] I do not follow Mally's original notation.

[21] Let me note that the last difficulty disappears if axiom IV is formulated as above. Mally's original version is unclear, because it can be interpreted as postulating that every factuality ought to be.

cancelled or inserted in any formula at any place we please. But this result (in spite of Mally's philosophical justification) clearly contradicts not only the common use of the word "ought" but also some of Mally's own correct remarks on this concept, for example his comparison of $p \rightarrow (!p$ or $!q)$ and $p \rightarrow (p$ or $q)$. Mally is quite right that these two propositions are not equivalent according to the ordinary use of the word "ought." But by virtue of the equivalence of p and $!p$, they are equivalent in his theory. (Menger 1939, 97)

Leaving aside the question whether this criticism is fully correct or not, I should want to turn to Menger's own proposals.[22] As a devout logical empiricist, Menger denied that logic directly applies to commands, so he proposed that obligations be reduced to conditionals in the form $\neg A \rightarrow \mathbf{S}$, where **S** refers to a sanction. Thus, $\mathbf{O}A$ is read "If not-A, then sanction **S** is performed" or "Unless p, something unpleasant will happen (e.g., you will be punished). Menger's basic observation is that people do not command necessities or inconsistencies. Thus, we have a metarule "If $\mathbf{O}A$, then A is neither tautological nor inconsistent." According to Menger, all propositions that are neither necessary (tautological) nor inconsistent can be divided into asserted, negated, or doubtful (neither asserted nor negated). We have a new metarule, namely, "A is obligatory (commanded) if, and only if, it is doubtful." This suggests that the logic in which the doubtful is involved is three-valued, where the doubtful is associated with the third value. Menger stressed that Mally's critical formula is not valid in his logic, and for this reason the three-valued logic of commands has an obvious advantage over the two-valued logic. Although Menger did not flesh out his account in the form of theorems, he did manage to justify some modal connections, such as $\mathbf{O}A \rightarrow \mathbf{P}A$.

In the 1930s, **NL** became a focus of attention by some philosophers and logicians. Among them was whom the previously mentioned Jörgensen, who justified normative inferences by transforming commands into indicatives [occuring] in the themes of the former and then using **SL**. The same approach was suggested in a more sophisticated manner by Dubislaw (1937), Hofstadter and McKinsey (1939), Rand (1939), and Hofstadter (1944)—all proposals that came out at approximately the same time. These authors shared the previously mentioned view growing out of the Vienna Circle that only indicatives are suitable for logic in the proper sense. So in order for imperatives to be subjected to a logical treatment, they have to be transformed in a way. Once grammatical formulations are found, propositional variables can be substituted by the corresponding translations of the command in question and **NL** tautologies can be generated. The Mally problem disappears, because no admissible substitution yields the formula $\mathbf{O}A \leftrightarrow A$. On the other hand, the weakness of this approach lies in the impossibility of formulating the square of opposition for nor-

[22] I am considering his proposals in Menger 1939, disregarding the ideas expressed in Menger 1939. In fact, Menger was more interested in optative logic (the logic of wishing) than in the calculus of commands.

matives. An improvement was introduced by Albert Hofstadter (1910–1989) and John C. C. McKinsey (1908–1953), who distinguished between normative and non-normative (descriptive) functions of connectives. This step made it possible to define well-formed formulas in **NL**. The same authors introduced some normative axioms, such as a formula expressing the distributivity of **O** over the conjunction.

The first period of the reported development of **NL** was summarized by Ross (1941), and his views became very influential among lawyers. Alf Ross (1899–1979) took Jörgensen's dilemma seriously and outlined ways of solving it:[23]

> It seems only possible to solve the dilemma in one of the two following ways: *either* by showing that the presupposed delimitation of the logical domain is too narrow, and this may well be extended so as to include also the practical inferences […]; or by showing that the examples given of practical syllogism are only apparently logical (pseudo-logical). In connection with the latter possibility it should be recalled that these possibilities of inferences are based solely on a certain feeling of evidence, that is a feeling that what takes place in these inferences is of the same nature as that which takes place in the well-known logical inferences. However, such feeling may be due to an illusion, and on closer investigation facts can appear to be essentially different in reality. (Ross 1941, 34–5)

Clearly, on Ross's proposal for grounding **NL**, its possible foundations, semantic in essence, need to be carefully stated and examined.

Ross outlined three possible ways of constructing the semantics for normatives (imperatives in his language): (*a*) via the concept of objective validity; (*b*) via the concept of satisfaction; and (*c*) via the concept of subjective validity. The first solution consists in replacing truth with objective validity and falsity with objective invalidity. This step is presumably justified because imperatives are not subject to verification and falsification. On the other hand, the process of legitimation can be thought of as leading to "the objective determination of the validity or invalidity" of normatives. However, says Ross, we cannot hope to define validity without reference to a normative authority. This does not suffice for objective validity, because this concept requires an appeal to impersonal norms. Ross concludes that, since any belief in impersonal norms invokes religious-moral metaphysics, it cannot be taken as the foundation for logic. Solution (*b*), adopted by Jörgensen and Dubislaw, consists in assuming that normative OA is satisfied if, and only if, A is true; otherwise, it is not satisfied. Ross says that this approach dodges the problem rather than solves it. The reason is that the correspondence between truth and satisfaction (falsity non-satisfaction) needs to be *justified* rather than adopted *a priori*. Moreover, obvious differences exist between the properties of satisfaction (**S**) and normatives; for example, the equivalence (**) $\mathbf{S}(A \vee B) \leftrightarrow (\mathbf{S}A \vee \mathbf{S}B)$ does not hold for **O**. Finally, if the subjective validity of normatives lies in the existence of

[23] As previously noticed, it was Ross himself who introduced the term "the Jörgensen dilemma." For a general overview of Ross's legal philosophy see Chapter 16 in this tome.

some psychological phenomena, the lack of such phenomena does not account for the distinction between the validity of $\neg \mathbf{O}A$ and the invalidity of $\mathbf{O}\neg A$.

Ross observed a special problem related to the disjunctive connective. If **NL** is parallel to **SL** via validity (objective or subjective or satisfaction), the pattern (**RP**) $\mathbf{O}A \rightarrow \mathbf{O}(A \vee B)$ is logically correct; that is, if $\mathbf{O}A$ is valid (satisfied), then so is $\mathbf{O}(A \vee B)$. In Ross's own example (usually called Ross's paradox), if "Slip the letter into the letterbox!" is valid (satisfied), then "Either slip the letter into the letterbox or burn it! is also valid (satisfied), because, according to (*) and its consequences for $\mathbf{O}(A \vee B)$, the latter formula is (valid) satisfied if either $\mathbf{O}A$ or $\mathbf{O}B$ is valid (satisfied). Ross comments on this example in the following way with reference to satisfaction (but the same comment can be easily extended to validity):

> from the imperative $\mathbf{I}(x)$ we may infer the imperative $\mathbf{I}(x \vee y)$, e.g. from: Slip the letter into the letter-box! we may infer, slip the letter into the letter box or burn it! It will be seen that, interpreted as a satisfaction function, this inference is unimpeachable: If the first imperative is satisfied (if the letter has been slipped into the letter-box), then the other imperative too has been satisfied (it is then true that either has the letter been slipped into the letter-box or it has been burnt). But it is equally obvious that this inference is not immediately conceived to be logically valid. Similar results are arrived at by applying the other truth-function, but I do not find it necessary to pursue this question. (Ross 1941, 38; see also 40–1)

Since Ross's paradox (**RP**) became very popular among logicians and legal philosophers, two remarks seem in order here (though I will return to this paradox and to the similar other ones). First, Ross used the "either/or" connective, that is, exclusive disjunction (the sentence "Either *A* or *B*" is true if, and only if, *A* is true and *B* false or *A* is false and *B* true). However, that is not necessary, since by the same argument (**RP**) can be generated by inclusive disjunction (in fact, contrary to Ross's original version, it was previously formulated in just this way). Second, Ross did not explain why "it is equally obvious" that we have to do with a paradox. A folk interpretation (among legal theorists) is that consistent duties can, via (**RP**), lead to inconsistent duties. The idea is that from any obligation we can infer a conclusion asserting the existence of mutually inconsistent duties.

Ross's ultimate verdict about **NL** is negative:

> Imperatives can be constituent parts of genuine logical inferences, but, if so, it is simply a question of a "translation" of logical inferences concerning indicative sentences about the psychological facts which define the "validity" of an imperative.
>
> Imperatives can in certain cases be constituent parts of pseudo-logical inferences. In those cases the inference assumes the character of a specific practical inference, but actually it will be only pseudo-logical. If the tacitly assumed premise is included, the inference becomes really logical, but the inference then loses its character of being specifically logical. (Ross 1941, 45)

According to Ross, this conclusion falsifies a popular view of the application of law on the basis of the practical syllogism. On this view, legal norms are major

premises and assertions of facts are minor premises. Thus, lawyers and judges, among others, apply law via the practical syllogism by subsuming particular cases under general rules. Ross argues that this view is mistaken, because "minor premises" should be considered not as recognitions of facts but as acts of decision governed by purposes and by linguistic usage. In any event, there is no room for **NL**.

Ross's conclusion was strongly rejected by Kalinowski (1953), who proposed a logic of normatives (a theory of normative propositions) but regarded them as true or false. He justified this view by a cognitivism based on neo-Scholastic philosophy. The scheme **N***xa* is read as "A person *x* stands in a normative relation to action *a*." **N** can be specified by **O**, **F**, **P**, **P**¬, **I** (defined as **P** ∧ **P**¬), and **V** (defined as **O** ∨ **F**), which are the binary propositional functors of two nominal arguments. Actions can be good (v^*), wrong (f^*), or neutral (1/2*); if *a* is good, –*a* (non-*a*) is wrong, and vice versa, and if *a* is neutral, so is non-*a*. Valuations of sentences are defined with respect to valuations of actions. Assume that **O***A* has the form **O***xa* (or forms analogous to it for other functors). Then **O***A* is true for $a = v^*$, and is otherwise false; **F***A* is true for $a = f^*$, and is otherwise false; **P***A* is true for $a = v^*$ or $v^* = ½^*$, and is otherwise false; **P***A* is true for $a = v^*$ or $a = ½^*$, and is otherwise false; **P**¬*A* is true for $a = ½^*$, and is otherwise false; **I***A* is true for $a = ½^*$ or $a = f^*$, and is otherwise, false; and **V***A* is true for $a = v^*$ or $a = f^*$, and is otherwise false. Propositions (normatives) are thus true or false, although actions are three-valued. The system $\mathbf{K}_1$ containing all laws of opposition is axiomatized by propositional calculus plus the formula ¬**P***x-a* → **P***xa*. The addition of relation symbols and quantifiers yields the system $\mathbf{K}_2$, which—together with suitable definitions, as of contract—makes it possible to formalize legal systems and check normative reasoning.

26.7. Deontic Logic: The Standard System

Deontic logic as a legitimate logical theory arose exactly in the mid-20th century.[24] Georg H. von Wright (1916– 2003) was guided by formal analogies between various modalities:

> So-called modal concepts might conveniently be divided into four main groups. There are the alethic modes or modes of truth. These are concepts such as the necessary (the necessarily true), the possible (the possibly true), and the contingent (the contingently true). There are epistemic modes or modes of knowing. There are concepts such as verified (that which is known to be true), the undecided, and the falsified (that which is known to be false). There are the deontic

[24] See Wright 1951. Von Wright informs us that the word *deontic* was suggested by Broad. In fact, Mally used the word *Deontik* as a noun. Von Wright seems not to be aware of this fact, and the quotation that follows suggests that he is similarly unaware of some anticipations of the logical analysis of normative modalities.

modes or modes of obligation. These are concepts such as the obligatory (that which we ought to do), the permitted (that which we are allowed to do), and the forbidden (that which we must not to do). As a fourth main group of modal categories one might add the existential modes or modes of existence. These are concepts such as universality, existence, and emptiness (or properties of classes).

There are essential similarities but also characteristic differences between the various groups of modalities. They deserve, therefore, a special treatment. The treatment of the existential modes is usually known as quantification theory. The treatment of the alethic modes covers most of what is traditionally known as modal logic. The epistemic modes have not to any great extent and the deontic modes hardly at all been treated by logicians.

In the present paper an elementary formal logic of deontic logic will be outlined. (Wright 1951, 58.)

Although affinities between deontic concepts and other modalities or quantifiers had already been noted, von Wright's deontic logic is the first such logic presented in the contemporary modal setting.

This system (usually labelled "old system," or **OS**) is an extension of standard propositional calculus.[25] Von Wright himself was interested in finding a decision procedure for deontic tautologies similar to the matrix method used in propositional calculus. I will disreagard this route and turn straight to the axiomatic approach informally outlined by von Wright. There are three principles he adopts:

(D1) the principle of permission, which says that for any A, either A is permitted or $\neg A$ is permitted; $\mathbf{P}A \vee \mathbf{P}\neg A$;
(D2) permission is distributive over disjunction: $\mathbf{P}A \vee \mathbf{P}B \leftrightarrow \mathbf{P}(A \vee B)$;
(D3) the principle of deontic contingency, under which is not true that tautologies are obligatory and inconsistencies prohibited: $\neg\mathbf{O}(A \vee\neg A)$, $\neg\mathbf{F}(A \wedge \neg A)$.

Provided that we have propositional calculus, **OS** is axiomatized by (D1) and (D2) plus the rule of extensionality: if $A \leftrightarrow B$ is logically valid (A and B are logically equivalent), then $\mathbf{P}A \leftrightarrow PB$ is logically valid ($\mathbf{P}A$ and $\mathbf{P}B$ are logically equivalent), plus definitions $\mathbf{O}A =^{df} \neg\mathbf{P}\neg A$, $\mathbf{F}A =^{df} \mathbf{O}\neg A$, axiomatize **OS**. Every propositional tautology becomes a theorem of **OS** once variables are replaced with deontic formulas, as in $\mathbf{O}A \wedge \mathbf{O}B \rightarrow \mathbf{O}A$. No iterated formulas (such as $\mathbf{PO}A$) or mixed formulas (such as $A \rightarrow \mathbf{O}B$) are admitted.

Deontic logic would very soon become a legitimate part of formal logic,[26] with essential contributions by many leading logicians, among whom Alan

[25] Von Wright interpreted propositional variables as referring to actions and to connectives as forming the so-called performance function. This treatment was later replaced by treating variables as referring to sentences about actions. I will follow the latter interpretation.

[26] Deontic logic is considered a branch of philosophical logic devoted to formal investigations of various philosophically relevant concepts, particularly the modal ones.

Ross Anderson (1925–1973), Jaakko Hintikka (1929–), Stig Kanger (1924–1988), Saul Kripke (1940–), Arthur Prior (1914–1969), and Krister Segerberg (1936–).[27] The basis for further investigations became standard deontic logic (**SDL**), which is an improvement on **OS**.[28] Take any propositional calculus with ¬, ∨, ∧, →, and ↔ as connectives. The deontic formula as such is defined as having the form **O***A*, where *A* is a propositional formula, and ¬*D*, *D* ∧ *E*, *D* ∨ *E*, *D* → *E*, and *D* ↔ *E*, where *D* and *E* are deontic formulas (iterated and mixed formulas are excluded). Take as axioms the formulas (*a*) **O***A* → ¬**O**¬*A*, (*b*) **O***A* ∧ **O***B* ↔ **O**(*A* ∧ *B*), and (*c*) ¬**O**¬T where T is an arbitrary tautology. Add the definitions **P***A* =^{df} ¬**O**¬*A* and **F***A* =^{df} **O**¬*A*. Take propositional inference rules (detachment and substitution, though the latter is redundant for axiomatizations by schemes, as in the present exposition) and reformulate them for deontic formulas (extensionality is provable in **SL**). All these steps generate **SDL**. The axiom can be rewritten as (*a*') **O***A* → **P***A*; note that the square of oppositions for deontic formulas is a part of **SDL**. Axiom (*c*) is a novelty here. It says (via the definition of **O**) that tautologies are permitted. On the other hand, **O**T is not a theorem of **SDL**, though one can prove (*i*) **O***A* → **O**T. This last formula means that if something is obligatory, the same status must be ascribed to tautologies. By definition, if something is obligatory, inconsistencies are prohibited. Analogies between deontic and other modalities, especially alethic ones, are very well illustrated by the fact that **O***A* ∨ **O**B → **O**(*A* ∨ *B*) and **P**(*A* ∧ *B*) →**P***A* ∧ **P***B*, but converse dependencies do not hold, as is the case with necessity and possibility.

Von Wright's approach was syntactic and was eventually supplemented by an intuitive semantic consideration. The situation changed after the semantics of possible worlds were envisaged.[29] Its deontic version can be presented as follows (I will not enter into formal details). Let us assume that we have the ordered triple (the Kripke frame) **S** = <**K**, **W***, **R**>, where **K** is a non-empty set of items called possible worlds, **W*** is a distinguished element of **K** (usually interpreted as the real world), and **R** is a binary relation defined on **K** (the accessibility or alternativeness relation). **S** is a deontic frame if, and only if, **R** is not reflexive, that is, if it is not generally true that **WRW**. In particular, we assume that not-(**W*RW***). This assumption immediately excludes *A* → **O***A* as valid, even if the syntax would allow that; thus, Hume's thesis is immediately justified. Now we offer the following definition: **O***A* is true in **W*** if, and only if, *A* is true in every world **W**, such that **WRW***. Intuitively, the sentence

[27] For more detailed surveys of the various proposals and for historical details, especially as concerns the results achieved by the logicians just mentioned, see Hilpinen 1971 (collecting several seminal articles published after Wright 1951 and before 1971); Conte, Hilpinen, and von Wright 1977 (also a collection of articles); Al-Hibri 1978, Hilpinen 1981, McNamara 2006, Åqvist 1987, 2002.

[28] I am choosing the simplest version of **SDL**, based on **O** as the only deontic primitive.

[29] See Woleński 1990 for a historical account of deontic possible-world semantics.

"It is obligatory that *A*" is true in the real world **W*** if, and only if, *A* is true in every world **W** that is a deontic alternative to **W***, that is, in the world in which all obligations that are valid in the real world are satisfied. Accordingly, the sentence *PA* is true in **W*** if, and only if, there is a world **W** such that **WRW*** and *A* is true in **W**. Under these constraints, the converse of Hume's thesis—namely, the formula $\mathbf{O}A \rightarrow A$—is excluded from the stock of deontic tautologies. Our definition justifies the axiom PT and the axiom $\mathbf{O}A \rightarrow \mathbf{O}$T. These semantics do not exclude anarchistic worlds, meaning worlds in which nothing is obligatory. On the other hand, only non-anarchistic universes are non-trivial. Clearly, this case requires the situation in which some normative order is imposed on the real world. Normative systems can thus be said to generate deontic perspectives.

26.8. The Issues Discussed in Deontic Logic

26.8.1. Paradoxes

Ross's paradox (**RP**), is easily provable in **SDL**, as are its counterparts for permission and prohibition, that is, the formulas (*a*) $\mathbf{P}A\ \mathbf{P}(A \vee \mathrm{B})$ and (*b*) $\mathbf{F}A \rightarrow \mathbf{F}(A \wedge B)$. The latter formula is sometimes called the good Samaritan paradox, because it says that if something is prohibited, for example robbing person *X*, it is also prohibited to rob *X* and help this person (that is, to play the role of the good Samaritan). There are several other puzzles. Prior (1954) formulated the paradox of derived obligation. Note that in **SDL** we can prove the formula (*c*) $\mathbf{O}A \rightarrow \mathbf{O}(A \rightarrow B)$. Up to this point, (*c*) has simply been a special variant of Ross's formula, that is, $\mathbf{O}A \rightarrow \mathbf{O}(A \vee \mathrm{B})$**.** However, think about our intuitions about the concept of commitment, as in the case of the conditional obligation: What ought to be done if something else happens? Assume that it is obligatory to do $\neg A$, for example, to abstain from lying. By (*c*), this entails that it is obligatory to do *B*, provided that one performs *A*, but it is difficult to accept this conclusion. The fourth problem was indicated by Chisholm (1963) and it is called the paradox of the contrary-to-duty imperative. Assume the following sentences as intuitively admissible:

(*) It should be the case that someone, say *X*, is willing to help his or her friends.
(**) It should be the case that if *X* decides to help, *X* will make it known that he or she will be doing so.
(***) If *X* is not willing to help, *X* should not make it known that that is the case.

Now, assume that (*d*) *X* is *not willing to help*. Consider the following formalization: (*) $\mathbf{O}A$; (**) $\mathbf{O}(A \rightarrow B)$; (***) $\neg A \rightarrow \mathbf{O}\neg B$; (d) $\neg A$. Now, (***) and (*d*)

imply $\mathbf{O}\neg B$, but (*) and (***) entail $\mathbf{O}B$. Via $\mathbf{O}A \rightarrow \mathbf{P}A$ and the definition of **P** by **O**), the latter formula leads to $\neg\mathbf{O}\neg A$ and gives rise to a contradiction.

26.8.2. Lessons from Paradoxes[30]

I will offer a separate treatment of **RP** and its versions of permission and prohibition, along with the rest of the puzzles. The simplest response to **RP** is that it amounts to nothing more than the so-called paradoxes of material implication ($A \rightarrow A\ B$, $\neg A \rightarrow (A \rightarrow B)$) (see Woleński 1998b). The argument is as follows. Assume we have an **NS** consisting of an explicitly stated $\mathbf{O}A$ and its logical consequences. Since $\mathbf{O}(A \vee B)$ is a consequence of $\mathbf{O}A$, the former also belongs to **NS**. It can be satisfied by doing either A or B or both. However, **NS** is obeyed only if $\mathbf{O}A$ is satisfied, and this cannot be realized by doing A or B or by doing A and B, unless A is logically equivalent to B or B logically entails B. This reasoning can easily be generalized to any **NS** based on an arbitrary set **NS*** of explicitly stated obligations. The semantics of possible worlds gives an exact justification for this approach. Take an arbitrary consistent $\mathbf{NS}^* = \{\mathbf{O}A_1, \ldots, \mathbf{O}A_n\}$.[31] **NS*** determines a set of deontic alternatives to the real world which are subject to the normative regulation generated by **NS**. Clearly, all $A_1, \ldots, A_n$ must be true in the set of deontic alternatives. In particular, it may happen that, although for some $1 \leq i \leq n$, $\mathbf{O}(A\ B)$ is true in the real world, it is not true in every deontic alternative to it, because its truth appeals to the truth of B, contradicting A. In particular, although burning the letter satisfies "the letter should be either mailed or burnt," the model of the last disjunction is not in this case a deontic alternative. Thus, there is no harm if contradictions or permissions to breach obligations are introduced by Ross's formula.

Not everybody is satisfied with the solution just stated. One of the challenges is as follows (see Wright 1968, 21). In the ordinary meaning, $\mathbf{P}(A \vee B)$ entails or seems to entail $\mathbf{P}(A\ B)$. This kind of permission is called "the free-choice permission." Since $\mathbf{O}A$ implies $\mathbf{O}(A \vee B)$, the former has $\mathbf{P}(A \wedge B)$ as its logical consequence. Hence, we derive $\mathbf{O}A \rightarrow \mathbf{P}A$, and assuming that A is obligatory, we conclude that A is permitted as well. On the other hand, if $\mathbf{P}A$, then $\mathbf{P}\neg A$. Bearing in mind that $\mathbf{O}A$ can be defined as $\neg\mathbf{P}\neg A$, we have a contradiction, because $\mathbf{O}A$ implies $\neg\mathbf{O}A$. Of course, one can say that this argument plays on the ambiguity of **P**. That much is true, but the problem is whether **SDL** formalizes the "proper" notion of permission. Two other explanations of **RP** are that **SDL** does not properly capture the meaning of dis-

[30] The topic is discussed in Al-Hibri 1978, 22–99; Åqvist 1987, 57–69; Nortmann 1989. In fact, every survey of deontic logic contains a discussion of paradoxes.

[31] The consistency requirement excludes trivial cases in which a set of deontic sentences has no models.

junction and that it fails to account for the fact that obligations are sometimes temporally ordered.[32] The same question can be formulated for other paradoxes. How to formalize the concept of commitment? The formula $\mathbf{O}(A \rightarrow B)$ is the only admissible candidate in the standard system. On the other hand, $A \rightarrow \mathbf{O}B$, excluded by the syntax of **SDL**, seems to be more suitable from an intuitive point of view. Unfortunately, its inclusion in deontic logic immediately leads to inconsistencies, that is, to real paradoxes, and not only to ambiguities. Thus, the lessons that can be extracted from deontic puzzles lie in the serious challenges they pose.

26.8.3. Some Problems in Deontic Logic

This subsection collects several problems in deontic logic. Some of them are suggested by paradoxes; others are not. Since I have to be brief, I will restrict this discussion to the most basic elements, without going into detail.[33] I begin with a problem relating to commitment. Although the formula $A \rightarrow \mathbf{O}B$ has some advantages over $\mathbf{O}(A \rightarrow B)$ as a formal rendering of a conditional norm, some doubts remain. Since the implication $A \rightarrow \mathbf{O}B$ is true if A is false, it is hard to consider it a satisfactory account of commitment, because it seems that the falsity of A makes any talk of commitment meaningless. Von Wright (1968) sought to solve this problem by developing a dyadic deontic logic (sometimes called "the new system of deontic logic"). The main idea is as follows. We introduce a new symbol A/B, to be read "A given that B." Thus, the formulas $\mathbf{P}A/B$ and $\mathbf{O}A/B$ have the meaning "It is permitted that A given that B" and "It is obligatory that A given that B," respectively. This machinery makes it possible to distinguish among several kinds of conditional permissions and obligations, for example, "In some possible world in which it is true that B, some possible world is permitted in which it is true that A"; "In every possible world in which it is true that A is such that it is permitted in some possible world"; and "In every possible world in which it is true that A is such that it is permitted in some possible world in which it is true that B." Further, a distinction can be made between "In all possible worlds in which it is true that B, no possible world is permitted in which it is not true that A" and "Some possible world in which it is not true that A is such that A is not permitted in any possible world in which it is true that B." Now, the formula $\mathbf{P}(A \vee B) \rightarrow \mathbf{P}(A \wedge B)$ holds for the second concept of permission but not for the first one. On the other hand, Ross's formula is not provable in the system on the basis of that understanding of permission, and this logic requires the latter meaning of obligation. Thus, **RP** disappears, and free-choice permissions are formalized. Other approaches to normative conditionals are offered in Cornides 1974 (based

[32] See K. Hansen 2001 on disjunction and Segerberg 2006 on duties and time.

[33] For a more comprehensive discussion, see the works cited at footnote 30.

on preference logic), Forrester 1996 (based on causal implication), and Goble 1999 (based on relevant logic).

Permission denoted by **P** signifies non-prohibition and is often described as weak. Another kind of permission is also considered and characterized as strong (**P'**).[34] The minimal constraint is (*) **P'***A* → **P***A* (weak permission implies strong permission). Alchourrón and Bulygin (1984) claim that we should distinguish between the normative and extranormative sphere. The former comprises what is obligatory, prohibited, and strongly permitted, while the latter can be identified with the weakly permitted. Opałek and I have (Opałek and Woleński 1984) argued that a distinction should be drawn between strong and weak normative operators: Obligation or prohibition, or both, should be regarded as strong; whereas standard permission or indifference, or both, should be regarded as weak. The reason is that having a set of obligations, we determine a deontic perspective, but that perspective cannot be achieved by permissions or indifferences. Otherwise stated, if we have a normative system **NS**, its content will not change by adding weak permissions or indifference. The same conclusion seems to hold for strong permission. One should not deny that there is no need to consider the special case of permission, as when an obligation is cancelled or changed. For instance, when an authority says that an exception is introduced to such and such a regulation, it means that a hitherto prohibited action is now permitted. But in this case we can avoid the word *permission* and consequently speak of obligations. There is therefore no need to introduce strong permission as a new deontic operator.

The rise and development of deontic logic has made it possible to shed new light on the problem of the logic of norms. Most specialists seem to subscribe to the following view:

> In my opinion we are now justified in saying that all these attempts to reconcile the atheoretical thesis [i.e., the thesis that natural-language normative and value-sentences are neither true nor false] with adequate systems of deontic and imperative logic fail and, moreover, are doomed to failure: every available evidence supports the view that we must appeal to the notion of *truth in a model* when trying to understand and articulate the logic of normative as well as imperative sentences in normative discourse—the notion is just as indispensable in the present field as it is in others. (Åqvist 1973, 131)

Of course, this verdict concerns **NL** as a specific system different from deontic logic. On several occasions von Wright reiterated his previously mentioned view that the content of ordinary normatives, neither true nor false, can be reproduced by deontic statements (see, e.g., Wright 1991). Ross (1968, 139–84) reiterated his earlier view about the insufficiency of the theoretical foundations of imperative logic, but he also responded to deontic logic. In particular, he

[34] I report here the views expressed in Alchourrón and Bulygin 1984, 1988, Opałek and Woleński 1973, 1984, 1991.

pointed out the problem of negation in the normative sphere.[35] Consider the formulas $\neg \mathbf{N}A$ and $\mathbf{N}\neg A$. The former represents the external deontic negation; the latter, the internal one. The two are equivalent in **SDL** (as well as in other similar systems), but from an intuitive point of view they differ. The reason is that they sometimes yield deontic counterparts of norms (utterances having a directive meaning) deriving from other norms; thus, for example, "It is obligatory that people not rob others" can be derived from "It is prohibited to rob others"; but sometimes that is not so, as in the case of "It is not obligatory to go to the cinema," which can express either a permission not or a prohibition. This shows that although deontic logic can be considered a correct logic of normative indicatives, it cannot cover all the facts that populate the normative discourse. Ross considered the von Wright translation unjustified.

There have been other proposals worth a brief mention. Chellas (1969) tried to build a semantics for imperatives by extending the traditional concept of a model; the resulting system was in effect a kind of deontic logic. Stenius (1963) proposed a compromise solution consisting in a dual interpretation—descriptive and prescriptive—of logical formalism. Weinberger (1991) accepts that parallelism but points out several difficulties connected with it, among them the differences between $\mathbf{O}A \wedge \mathbf{O}A$ and $\mathbf{O}(A \wedge B)$ and between material implication and the normative conditional. For Kalinowski (1972, 202–3), the logic of norms is prior to deontic logic, and the former makes the latter possible, though it must be repeated that in his view norms ought to be constructed as true or false. Attempts to construct a special logic of imperatives have been made by Rescher (1966), with a theory based on the concept of coverage, and Lorenzen (1969), whose theory rests on his idea of operative logic. Anderson (1956, 1958) proposed a reduction of deontic logic to alethic modal logic together with an interpretation of the concept of obligation. This idea is interesting for lawyers because it seems to be related to American realism and the treatment of obligation. For Anderson, $\mathbf{O}A$ can be defined by the formula $(A \rightarrow \mathbf{S})$ to be read as "It is necessary that if A is not realized, then a sanction (bad thing) **S** [ought to happen] (note that this idea was anticipated by Menger). Further, we have the equivalence $\mathbf{P}A \leftrightarrow \Diamond (A \wedge \neg \mathbf{S})$. Thus, A is permitted if it is possible for A to be realized and the sanction does not follow. Anderson assumes a relatively weak system of modal logic (the Feys-von Wright system) and shows that **SDL** is derivable if we add the axiom $\neg \mathbf{S}$, which says that sanctions are avoidable. We can now see that Anderson's definition of obligation is very close to the view of duties as predictions of sanctions. A different way of combining deontic and alethic modalities was attempted by Fenstad (1959) in order to formalize the principle "ought implies can." Several other paths in the development of deontic logic can be mentioned, examples being efforts to fuse deontic logic and the logic of action (see

[35] This question had previously been discussed in Weinberger 1957.

Bailhache 1991, Wright 1963, 1968), develop a deontic syllogistic (see Ziemba 1973), supplement deontic logic with temporal operators (see van Eck 1981), and constructing a defeasible **NL** suited to be applied in artificial intelligence and computer science (see Mayer and Wieringa 1993, Nute 1997).

26.9. Logic and Legal Arguments

Several of the extensions of deontic logic mentioned at the end of the last section were meant to build tools with which to analyze arguments occurring in legal interpretations (see, for example, Hage 1997, 2005, Prakken 1997, Royakkers 1998). Older approaches sought to instead analyze some special juristic procedures by relying on various branches of standard logic, including propositional calculus, predicate logic, the theory of relations, and perhaps other tools, such as the logic of questions (see, for example, Klug 1966, Tammelo and Schreiner 1974–1977, Wagner and Haag 1970, Weinberger 1970, Ziembiński 1973). The older ideas and the more recent ones have something in common by virtue of their rejecting naive deductivism, the view that the interpretation and application of law must be based on the use of the practical syllogism. Another view that has gained some consensus over the last fifty years is that legal arguments are not purely logical schemes but complex principles of applied logic. The problem concerns the formal tools to be used in reasoning about exceptions, the consistency of normative systems, gaps in the law, and derived duties or permissions. Prakken proposes defeasible logic and non-monotonic reasoning, Royakkers recommends a dynamic logic, and Hage works with sets of reasons formalized in predicate logic and serving to check the consistency (coherence) of legal systems.

I will illustrate some elementary problems by taking the *argumentum a majori ad minus* (**ARMA)** and the *argumentum a minori ad majus* (**ARMI**) as examples. Both have a relatively well-defined formal structure. We can easily show that both are mutual transpositions, that is, they fall under the scheme $(A \rightarrow B) \leftrightarrow (\neg A \rightarrow \neg B)$. In fact, the following statement (in which the full caps are intended for emphasis in making the point more explicit)

> (**ARMA**) If MORE of something is permitted, then LESS of it is permitted, too.

is equivalent to the statement

> (**ARMI**) If LESS of something is prohibited (not permitted), then MORE of it is prohibited (not permitted).

Clearly, neither form is deductive in general. The main question is what *MORE* and *LESS* mean. Some cases can be treated logically. For instance, one

can say that "*A* and *B*" is more than *A* or *B*. Since deontic logic warrants the rule $\mathbf{P}(A \wedge B) \rightarrow \mathbf{P}A$, this special instance of (**ARMA**) is originally almost deductive—almost because we decide on extralogical grounds that the conjunction of two or more actions expresses MORE than those actions taken separately. However, neither MORE nor LESS express generally logical concepts, and both always require a special interpretation guided by legal interests. Thus, although the formulas

(**ARMA'**) $(\mathbf{P}A \wedge (A \text{ is MORE than } B)) \rightarrow \mathbf{P}B$
(**ARMI'**) $(\neg\mathbf{P}A \wedge (A \text{ is LESS than } B)) \rightarrow \neg\mathbf{P}B$

are perfectly deductive patterns and fall under the *modus ponens* rule, MORE and LESS must be additionally explained. For example, although, intuitively speaking, playing football on the grass is something more than walking on it (in that it does more damage to the grass), it can happen that playing soccer is permitted but walking is not, as in the example of rules on the use of soccer stadiums during play. This example aptly illustrates how the formal and informal aspects of legal reasoning are interrelated. And that should not come as a surprise. In any application of formal logic, one must decide whether a given mode is not only valid but also materially correct. It seems that—except for trivial cases and the *argumentum a contrario*, which is based on the rule of transposition for implication (or even equivalence)—traditional forms of legal inference are not reducible to pure logic. However, when we add supplementary premises (such as presumptions and exceptions), we are always able to transform specific legal arguments into perfectly constructed deductive patterns. Now, the various proposals for extending pure deontic logic discussed in the foregoing can be said to offer tools for such an analysis of legal arguments.[36]

[36] This point was anticipated in Kalinowski 1959.

Chapter 27

RECENT DEVELOPMENTS IN LEGAL LOGIC

by Davide Grossi and Antonino Rotolo

27.1. Introduction

Studies on legal logic are one of the most cultivated topics in legal theory during the last four decades. This is perhaps due to the fact that logics of norms are now a subject of several efforts driven by different research communities other than the traditional in legal and moral philosophy. In particular ICT scholars (especially in artificial intelligence and law, deontic logic in computer science, and normative multi-agent systems) have intensively worked on many questions relevant for legal reasoning.

In the remainder of the chapter we will briefly offer a survey of major recent achievements of this joint and interdisciplinary effort.[1] Section 27.2 presents some research directions on the concept of obligation that go beyond Standard Deontic Logic. Section 27.3 illustrates attempts that, moving from Alchourrón and Bulygin (1971), connect the logic of obligations to the one governing normative systems. The two subsequent sections deal with crucial questions that have been remarkably discussed especially within the community of artificial intelligence and law: the idea of legal defeasibility (Section 27.4), and the problem of legal dynamics (Section 27.5).

27.2. The Logic of Obligations: Beyond Standard Deontic Logic

27.2.1. Contrary-to-Duty Obligations and Preferences

One of the main research themes of deontic logic in the last four decades is about reasoning with contrary-to-duty (CTD) obligations, i.e., obligations that regulate of the violation of other obligations (see Carmo and Jones 2002). Examples of CTDs are "you ought not to kill, but if you kill you ought to do it in self-defense," or "you ought to return your books to the library on time, but if you do not you ought to pay a fine." Roughly, CTDs have to do with sub-ideal, or reparatory obligations.

As it was previously mentioned, Standard Deontic Logic forces consistency of obligations through the principle $\mathbf{O}A \rightarrow \mathbf{P}A$, which is characterized in Kripke frames by having serial ideality relations, i.e., by imposing the constraint that ideal alternatives always exist for each situation. It soon became

[1] The following sections are a shortened and updated version of parts of Grossi and Rotolo 2011.

E. Pattaro, C. Roversi (eds.), *A Treatise of Legal Philosophy and General Jurisprudence*,
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apparent, however, that this semantics was not able to satisfactorily capture a key notion of CTD. That this notion is impossible to capture in SDL was made manifest in the literature by a number of scenarios—often called, with a stretch, paradoxes (see Hilpinen 2001, Åqvist 1984, Carmo and Jones 2002, Makinson 1999).

A simple workaround the problem was offered by a semantics proposed by Hansson 1969 (see D. Lewis 1974), the first articulated paper on the semantics of deontic concepts. The idea is to substitute the serial ideality relation by a total preorder $\succcurlyeq$, i.e., a reflexive, transitive and total binary relation, with the following intuitive reading: $s \succcurlyeq s'$ means that state s is at least as good/ideal as s'.[2] Now the most ideal states are the maximal of such an order, and sub-ideality can easily be represented by considering the maximals of some subset of states. On this basis, dyadic obligations of the type "it is obligatory that A under condition B" are interpreted in any world s of any model M as follows:

$$M, s \Vdash \mathbf{O}(A \mid B) \text{ IFF } \mathrm{Max}_{\succcurlyeq}(\|B\|_M) \subseteq \|A\|_M \qquad (1)$$

where $\|.\|_M$ denotes the truth-set function of $M = \langle S, \succcurlyeq, V\rangle$ and $\mathrm{Max}_{\succcurlyeq}$ the function extracting the maximals of a given set. A CTD will then be represented by taking condition B to be the violation of some other obligation. Formula 1 gave rise to a whole line of investigation into the so-called preference-based semantics of deontic logic, the value of which is that the semantic structures involved are quite flexible: Depending on the properties of the preference or ideality relation, different deontic logics can be obtained. This semantic approach has been fruitfully renewed in the 1990's for example by Prakken and Sergot (1996) and van der Torre (1997), and most recently by works such as J. Hansen 2005 and Grossi et al. 2014, which have confirmed the vitality of this line of inquiry.[3]

27.2.2. Beyond Obligation and Permission

Obligation and permission are only two of the rich family of concepts that play a role in normative, and in particular legal, reasoning. A first rich source of analysis of related concepts (eminently the notions of right and power) can be found in Hohfeld's (1911) theory. The sort of analysis proposed by Hohfeld is exemplified by what are sometimes called the Hohfeldian squares, of which these are the two main examples:

[2] Other conditions could obviously be imposed on the relation, typically yielding orderings that are weaker than total preorders.

[3] Interestingly, from the end of the 1960's, the very same idea behind Formula 1 has reappeared in many other branches of philosophical logic like, eminently, conditional logic and doxastic logic. In conditional logic, the expression $\max(\|B\|_M) \subseteq \|A\|_M$ has been used to give a semantics for counterfactual conditionals $B \Rightarrow A$ (Stalnaker 1968, D. Lewis 1973), and in doxastic logic, to give a semantics for conditional beliefs $B(A \mid B)$.

Right	—	Duty		Power	—	Liability
‖		‖		‖		‖
No-right	—	Privilege		Disability	—	Immunity

Right and duty (i.e., obligation) are viewed as correlatives: if I (the bearer) has a right against *j* (the counterparty) that A is brought about, then *j* has the obligation toward *i* to bring about *A*. A privilege is the opposite of an obligation, e.g., *j* is not obliged toward *i* to bring about *A*. Similarly is no-right the opposite of right and the correlative of privilege. After the advent of deontic logic, it became clear that these notions could be object of formal analysis. In fact, Hohfeld's line of research has later been systematically pursued within logic in work devoted to the analysis of so-called *directed obligations*, viz. obligations where bearers and counterparties are made explicit in a specially designed deontic logic (cf. Herrestad and Krogh 1995), and by what has come to be known as the Kanger-Lindahl theory of normative positions, which has developed into a rich blend of modal deontic and action logics able to formalize a complex array of deontic and legal concepts.[4]

While the formal analysis of the first square could build on deontic logic as the underlying framework for a logic of obligation, a formal analysis of the second square appeared more problematic. The quest for such analysis was programmatically set by Jones and Sergot (1996) in a paper that sparked an interesting line of research at the interface of logic, philosophy and artificial intelligence in the last fifteen years (see Grossi and Jones 2013).

The issue addressed by Jones and Sergot consists in the formal characterization of a notion of *legal power* as involved in sentences such as "the president has the power to declare a state of emergency." This notion of power is viewed as grounded in the so-called constitutive rules, viz. legal rules such as "18 years of age counts as age of majority" or "the president's signature counts as the enactment of the bill." For instance, the latter rule establishes that the president has the power to enact a legislative bill. As extensively argued for instance in Searle 1995, these rules—often called counts-as conditionals—represent the basic brick of complex institutions such as legal systems, and Jones and Sergot (1996) developed a first logical analysis of them.

27.3. Normative Systems

Another influential formal account of deontic notions, complementary to the (modal) logic-based approaches we discussed in the previous section, is the one sparked by Alchourrón and Bulygin (1971). The key feature of this ap-

[4] See Kanger and Kanger 1966 for an early exposition and Sergot 2001 for a recent version of the theory.

proach is to study norms—viewed as dyadic constructs connecting a fact to a deontic consequence (e.g., Formula 1)—not as formulae in some logical language, but rather as primitive ordered pairs ⟨*condition, consequence*⟩. A large number of such pairs would constitute an interconnected system called a normative system.

Viewed as parts of a bigger system norms are therefore considered to be uninterpretable if taken in isolation—unlike in logical semantics—and they acquire meaning only by relating to other norms in the system. The focus falls then on the problem of normative reasoning and its most characteristic features, such as: defeasibility, to which we will come back in detail in Section 27.4; the validity of closure principles (e.g., *nullum crimen sine lege*); the problem of handling legal gaps.

The basic idea behind normative systems goes hand in hand with the thesis according to which norms do not bear truth-values, and hence that deontic logics do not actually deal with norms, but rather with normative propositions, i.e., statements to the effect that certain norms exist. For instance, in this view, **O***A* would actually mean something like "there exists a norm commanding *A*."[5] In what follows we sketch, very briefly, the basic ideas behind two of the approaches that in recent years have taken up and developed the normative systems approach to the analysis of norms: input/output logics and normative systems algebras.

27.3.1. Input/Output Logic

Input/output logics (henceforth IOL) are a formalism introduced in (Makinson and van der Torre 2000) that has been applied to the study of normative systems in a long series of papers (e.g., Boella and van der Torre 2004) by viewing them as rule-based process of manipulation of inputs (factual premisses) into outputs (normative conclusions).

The key idea behind the application of IOL to the analysis normative systems consists in representing conditional norms simply as ordered pairs (*a*, *b*) where *a* represents the antecedent of the rule, and *b* its consequent: "if *a* then *b*" where a has factual content and b normative content, viz. an obligation or a permission. Typically, both *a* and *b* are taken to be formulae from propositional logic. Each set of such ordered pairs can be seen as an inferential mechanism which, given an input, determines an output based on those connections.

Various definitions can be given of how to produce the output on the basis of a set of pairs, and all consist in ways of closing the given set of pairs by

[5] See Section 26.4 in this tome. The significance of the problem has recently been reemphasized in Hansen et al. 2007, and a new approach to the problem emerged from the view of norms as "dynamic" operators—speech acts—modifying ideality orders. We will briefly come back to this latter point in Section 27.5.

adding new pairs in accordance to some principles, of which we give two very simple examples:

$$SI: \frac{(a, b)}{(a \wedge c, b)} \qquad CT: \frac{(a, b), (a \wedge b, c)}{(a, c)} \tag{2}$$

where *SI* stands for strengthening of the input—essentially an antecedent strengthening property—and *CT* stands for cumulative transitivity. Formally, given a set *NORM* of pairs, a closure operation *C* defined in terms of some of the above principles, and a set of facts *A*, the output of *NORM* given *C* and a set of input formulae *I* is:

$$out_C(NORM, A) = \{b \mid (a, b) \in C(NORM) \text{ and } s \in A\} \tag{3}$$

Intuitively, *NORM* represent the norms of a normative system and *C* the principles according to which the system makes the norms interact with one another. As the reader might have already noticed, this represents a very high-level abstraction of the workings of a normative system. Depending on the (many) ways the output operation is defined, IOL can be used to capture vary different principles for reasoning with norms (among which defeasibility, Section 27.4). This modeling freedom brought IOL to be applied not so much to the study and analysis of normative reasoning in *actual* legal systems, but rather to the specification of artificial normative systems in the field of artificial intelligence (see the aforementioned Boella and van der Torre 2004).

27.3.2. Algebras of Normative Systems

Lindahl and Odelstad (2000) advocate an algebraic analysis of normative systems. The approach is very close in spirit to the one, discussed above, of IOL. However, the formal machinery deployed is not based on logic and hinges on several algebraic and order-theoretical notions. In this section we provide just a brief sketch of the basic technical ideas underpinning the framework.

According to this approach norms can be seen—exactly as in IOL—as simple pairs $\langle a, b\rangle$ connecting (factual) conditions to (normative) consequences. Both conditions *a* and consequences *b* are taken to be elements of a set *X* upon which a Boolean algebra $\langle X, \sqcap, -, \bot\rangle$ is defined. Within such a structure, the normative relation between condition *a* and consequence *b* is given by extending the preorder yielded by the algebra.[6] The idea is that while the preorder—let us call it $\preccurlyeq$—represents some form of logical implication, normative

[6] A preorder can always be associated to a given Boolean algebra in the following way:

$$a \preccurlyeq b \text{ iff } a \sqcap b = a \tag{4}$$

systems add on the top of it the possibility of drawing more conclusions by some form of "legal" implication—let us call it ϱ. In other words, each normative system introduces, by stipulation, a consequence relation which is stronger than the logical one: $\preccurlyeq \subseteq \varrho$. The intuition is that, for instance, the fact that being obliged to pay taxes follows from having a paid job is not a matter of logic, but a matter of stipulation.

Therefore, in Lindahl and Odelstad's view normative systems can be studied as Boolean algebras supplemented by a binary relation ϱ. This is, in a nutshell, the key idea behind the approach. Space limitation prevents us to provide more details. It should be mentioned, however, that Lindahl and Odelstad 2000 was followed by a number of papers developing an extensive theory of normative systems on the ground of the simple intuition we have sketched above.[7]

27.4. Defeasibility in Legal Reasoning

One key idea of most logical accounts of the law is that legal reasoning is defeasible, namely, that we may have reasons to abandon certain legal conclusions even though there was no apparent mistake in previously supporting them (Sartor 2005). In legal theory, H. L. A. Hart (1951, 152) was the first who illustrated this idea by saying, for instance, that "there are positive conditions required for the existence of a valid contract" but there are reasons that can defeat that existence claim, "even though all these conditions are satisfied." The concept of defeasibility may have in the law different connotations.

27.4.1. Meanings of "Defeasibility" in the Law

Consider art. 2051 of the Italian civil code: "A person is liable for damage caused by things in his custody except where he shows evidence of a fortuitous case." This legal provision states that the fault is not required to show the liability of the receiver for damage caused by things in safekeeping, thus highlighting the fact that the applicability conditions of legal norms include both conditions that should be proved and conditions that should not be refuted (in this case, the fact that the receiver is at fault) (Sartor 1995).

Conditions of the latter type can be explicit, like in the above provision, but are most often implicit. In general, the fact is that the statement of a norm can never mention all the relevant issues that might possibly be of relevance for its application, and in particular all its possible exceptions. This "openness" to possible exceptions is a characteristic feature of legal norms and is known to be a peculiar aspect of legal *defeasibility*.

In the literature, defeasibility of legal norms breaks down, roughly, into the following issues:

[7] An interesting recent contribution is, for instance, Lindahl and Odelstad 2008.

(*i*) *Conflicts*. Norms can conflict, namely, they may lead to incompatible legal effects. Conceptually, conflicts can be of different types, according to whether two conflicting norms: (1) are such that one is an exception to the other (i.e., one is more specific than the other); this type of conflict can be solved using the principle *lex specialis*, which gives priority to the more specific norms (i.e., the exceptions); (2) have a different ranking status; this type of conflict can be solved using the principle *lex superior*, which gives priority to the norm from the higher authority; (3) have been enacted at different times; this type of conflict can be solved using the principle *lex posterior*, which gives priority to the norm enacted later.

(*ii*) *Exclusionary norms*. Some norms provide one way to explicitly undercut other norms, namely, to make them inapplicable.

(*iii*) *Contributory reasons or factors*. It is not always possible to formulate precise norms, even defeasible ones, for aggregating the factors relevant for resolving a legal issue. For example: "The educational value of a work needs to be taken into consideration when evaluating whether the work is covered by the copyright doctrine of fair use."

There are however more general reasons why legal reasoning should be viewed as defeasible. In fact, not all legal norms distinguish different types of applicability conditions (what should be proved and what should not be refuted), or not all norms admit exceptions or can be defeated. Independently of this, one may argue that legal reasoning is part of human cognition, which is defeasible (Pollock 1995) or that, even when norms seem to support indisputable conclusions, they are used in legal disputes or, more generally, in legal argumentative settings where arguments and counter-arguments dialectically interact.

When looking at the law through an argumentative lens, we may distinguish inference-based defeasibility, process-based defeasibility, and theory-based defeasibility (Prakken and Sartor 2004).

Inference-based defeasibility covers the fact that legal conclusions, though correctly supported by certain pieces of information, cannot be derived when the knowledge base including those information is expanded with further pieces of information.

Process-based defeasibility addresses the dynamic aspects of defeasible reasoning. As for legal reasoning, a crucial observation here is that it often proceeds according to the norms of legal procedures, such as those regulating the allocation of the burden of proof.

Theory-based defeasibility regards the evaluation and the choice of theories which explain and systematize the available legal input information (such as a set of precedents): when a better theory becomes available, inferior theories are to be abandoned.

The remainder of this section briefly discusses aspects of the first two types of defeasibility. As for the third type (theory-based defeasibility), the interested reader can still find a good primer in Prakken and Sartor 2004, sec. 4.

27.4.2. Defeasibility and Argumentation: Layers in the Law

Defeasible reasoning has been largely investigated in philosophy, logic and AI by usually working on the concept of *inference-based defeasibility* (Makinson 2005). In this sense, defeasibility is formally interpreted within non-monotonic logics, namely, in logics whose underlying consequence relation does not enjoy monotonicity, i.e., that conclusions do not decrease if more knowledge is added. Since non-monotonicity means that a logic lacks a property, its positive interpretation is open to many options. In regard to modeling legal reasoning, since the Nineties the most preferred one (especially in the AI&Law community) has been to develop argumentation systems (see, e.g., Gordon 1995, Lodder 1999, Prakken and Sartor 1996, Bench-Capon et al. 2000, Gordon et al. 2007).[8]

The advantage of this approach is that it intuitively captures the dialectal nature of legal reasoning by clearly considering its different layers. In particular, this approach at least distinguishes a logical layer, a dialectical layer, and a procedural layer of legal arguments (Prakken and Sartor 2002, Prakken and Vreeswijk 2002).

The *logical layer* deals with the underlying language that is used to build legal arguments. Many languages and reasoning methods can be used for this purpose, such as deduction, induction, abduction, analogy, and case-based reasoning.[9] If the underlying language refers to logic **L**, arguments can roughly correspond to proofs in **L** (Prakken and Sartor 2002). It may be argued that most (legal) argumentation systems are based on a *monotonic* consequence relation, since each single argument cannot be revised but can only be invalidated by other arguments (or better, counter-arguments) (Prakken and Vreeswijk 2002): it is the exchange of arguments and counter-arguments that make the system non-monotonic. However, this is not strictly required: when the underlying logic is itself non-monotonic, an argumentation system can be simply seen as an alternative way to compute conclusions in that non-monotonic logic (Governatori et al. 2004).[10]

[8] Although it does not consider the most recent proposals, a still good introductory discussion can be found in Prakken and Sartor 2002.

[9] The application of these reasoning methods in the law have been studied by legal logicians, but space reasons prevent us to handle here this discussion. See Sartor 2005.

[10] If we embed within this language any deontic operators, we will obtain a way to deal with the defeasibility of the corresponding deontic concepts (Nute 1998). In general, various forms of interaction can be found among defeasibility, deontic concepts and normative systems. See Sartor 2005.

Suppose we resort to a rule-based logical system where rules have the form $\phi_1, \ldots, \phi_n \Rightarrow \phi$ and represent defeasible legal norms. An argument for a legal conclusion ϕ can typically have a tree-structure, where nodes correspond to literals and arcs correspond to the rules used to obtain these literals; hence, the root corresponds to ϕ, the leaf nodes to the primitive premisses, and for every node corresponding to any literal ψ, if its children are $\psi_1, \ldots, \psi_n$, then there is a rule whose antecedents are these literals (Governatori et al. 2004).

Argumentation systems, however, do not need in general to specify the internal structure of their arguments (Dung 1995), so this assumption applies, too, to the legal domain. In this perspective, any (legal) argumentation system **A** is a structure $(A, \rightsquigarrow)$, where **A** is a non-empty set of arguments and $\rightsquigarrow$ is binary attack relation on A: for any pair of arguments a and b in A, $a \rightsquigarrow b$ means that a attacks b. This leads us to discuss the dialectical layer.

The *dialectical layer* addresses many interesting issues, such as when legal arguments conflict, how they can be compared and what legal arguments and conclusions can be justified.

Different types of attacks and defeat relations can apply to legal arguments. Pollock (1995)'s original distinction between *rebutting* and *undercutting* is almost universally accepted in the legal-argumentation literature (Prakken and Sartor 2002 and 2004). An argument A_1 rebuts an argument A_2 when the conclusion of A_1 is equivalent to the negation of the conclusion of A_2. The rebutting relation is symmetric. For example, if arguments are built using rules representing legal norms (regulating, for example, smoking in public spaces), a conflict of this type at least corresponds to a clash between the conclusions obtained from two norms (for example, one prohibiting and another permitting to smoke). The undercutting is when an argument challenges a rule of inference of another argument. This attack relation is not symmetric and occurs when an argument A_1 supporting the conclusion ϕ has some ground ψ but another argument A_2 states that ψ is not a proper ground for ϕ. To put it very simple, if one builds an argument A_1 for ϕ using the rules $\Rightarrow \psi$ and $\psi \Rightarrow \phi$ but we contend that ψ is the case, then we undercut A_1.

Conflicts between legal arguments can be solved using specific legal-domain dependent priority criteria such as, as we said, *lex specialis*, *lex superior*, and *lex posterior*. However, such criteria can conflict, too, so some researchers argued that they must be defeasible (Prakken and Sartor 1997, Prakken 1997).

In general, assessing conflicting legal arguments cannot work if we only examine single pairs of arguments. In fact, we need to consider all the arguments to establish what legal conclusions win and are justified in a legal dispute. Argumentation theory usually distinguishes among *justified*, *defensible* and *overruled* arguments. Justified arguments are those which basically survive from all attacks, the defensible ones leave the dispute undecided, and the overruled ones are those defeated by a justified argument (Prakken and Vreeswijk 2002).

Doing so, we may have to capture interesting complex argumentative patterns. For instance, consider this argumentation system:

$$A = \{A_1, A_2, A_3\}, \qquad \rightsquigarrow = \{\langle A_1, A_2\rangle, \langle A_2, A_1\rangle, \langle A_3, A_2\rangle\}$$

The argument A_1 is attacked and defeated by the argument A_2 but it may be reinstated when a third argument A_3 attacking A_2 comes into play (Prakken and Vreeswijk 2002). This is an example of a reasoning pattern known in argumentation theory as *reinstatement*, which is relevant, for instance, in legal evidential reasoning: suppose Henry was killed yesterday and John was charged with that crime. Tom argues that John did not kill yesterday Henry, but Nino testifies that John indeed killed him. Tom original argument can be reinstated by another testimony showing that that Nino was drunk yesterday.

Another interesting pattern regards the so-called floating conclusions (Horty 2002). Consider the following two arguments (represented as chains of rules):

$$\begin{aligned} A_1 \; & testimonyA \Rightarrow JohnShootHenry \Rightarrow guilty \\ A_2 \; & testimonyB \Rightarrow JohnPoisonHenry \Rightarrow guilty \end{aligned} \tag{5}$$

The two arguments lead to the same conclusion but one sub-argument of A_1 attacks one sub-argument of A_2 and vice versa (assuming that the fact that John shot Henry excludes that John poisoned Henry and vice versa). One may say that John is anyway guilty, whatever argument we may prefer, but we can also argue that the two testimonies undermine each other, so no conclusion could be obtained.

The procedural layer considers the ways through which conclusions are dynamically reached in legal disputes. Indeed, disputes can be reconstructed in the form of dialogues, namely of players' dialectical moves (Gordon 1995, Prakken 2001). Legal disputes in turn are regulated by procedural rules stating what dialogue moves (claiming, challenging, conceding, etc.) are possible, when they are legal, what effects the players get from them, and under what conditions a dispute terminates (Gordon 1995, Lodder 1999; see in general Walton and Krabbe 1995) (in general, see Walton and Krabbe 1995).[11]

A basic and fundamental question of the procedural layer regards how to govern and allocate the burden of proof (Prakken 2001). For example, basic dialogue protocols of 2-player civil disputes are defined on account of the requirement that the plaintiff begins the dispute with his claim and has to pro-

[11] The idea that justice depends on formal procedures governing public deliberation and dialogues has been defended, among others, in Rescher 1977 and Rawls 1971 and, in the law, in Alexy 1989a.

pose, to win, at least one justified argument which support, such a claim. The burden of the defendant is not in principle the same, as it may be sufficient in most cases for her to oppose to the plaintiff argument moves that are only defensible counter-arguments. The concept of legal burden of proof is very complex and its logical treatment is difficult: The interested reader can refer to Prakken and Sartor 2008. Even more complex is to handle the interplay between the dialectical and the procedural layers (Prakken 2001). To appreciate this, consider the example on floating conclusions of Formula 5. Here, players, if dynamically modeled at the procedural layer would certainly postpone their judgment and subsequently challenge both the testimonies and test their credibility (Prakken and Sartor 2004).

27.5. Legal Dynamics

One peculiar feature of the law is that it necessarily takes the form of a dynamic normative system. Despite the importance of norm-change mechanisms, the logical investigation of legal dynamics is still much underdeveloped. However, recent contributions exist and this section is devoted to a brief sketch of this rapidly evolving literature.

27.5.1. AGM-based Approaches

In the Eighties a promising research effort was devoted by Alchourrón, Gärdenfors, and Makinson to develop a logical model (AGM) for modeling norm change. As is well-known, the AGM framework distinguishes three types of change operation over theories. Contraction is an operation that removes a specified sentence ϕ from a given theory Γ (a logically closed set of sentences) in such a way as Γ is set aside in favour of another theory $\Gamma^{-}\phi$ which is a subset of Γ not containing ϕ. Expansion operation adds a given sentence ϕ to Γ so that the resulting theory $\Gamma^{+}\phi$ is the smallest logically closed set that contains both Γ and ϕ. Revision operation adds ϕ to Γ but it is ensured that the resulting theory $\Gamma^{*}\phi$ be consistent (Alchourrón et al.1985). Alchourrón, Gärdenfors and Makinson argued that, when Γ is a code of legal norms, contraction corresponds to norm derogation (norm removal) and revision to norm amendment.

AGM framework has the advantage of being very abstract but works with theories consisting of simple logical assertions. For this reason, it is perhaps suitable to capture the dynamics of obligations and permissions, not of legal norms. In fact, it is essential to distinguish norms from obligations and permissions (Boella et al. 2009, Governatori and Rotolo 2010): the latter ones are just possible effects of the application of norms and their dynamics do not necessarily require to remove or revise norms, but correspond in most cases to instances of the notion of *norm defeasibility* (Governatori and Rotolo 2010).

Recently, some research has been carried out to reframe AGM ideas within rule-based logical systems, which take this distinction into account (Stolpe 2010, Rotolo 2010). However, also these attempts suffer from some drawbacks, as they fail to handle the following aspects of legal norm change: (1) the law usually regulate its own changes by setting specific norms whose peculiar objective is to change the system by stating what and how other existing norms should be modified; (2) since legal modifications are derived from these peculiar norms, they can be in conflict and so are defeasible; (3) legal norms are qualified by temporal properties, such as the time when the norm comes into existence and belongs to the legal system, the time when the norm is in force, the time when the norm produces legal effects, and the time when the normative effects hold.

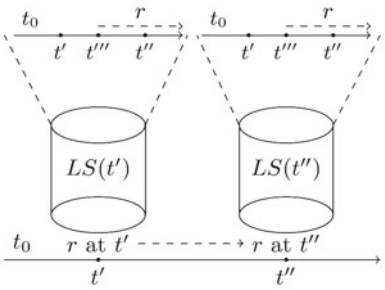

Figure 1. Legal System at t' and t''

Hence, legal dynamics can be hardly modeled without considering defeasibility and temporal reasoning. Some works (see, e.g., Governatori and Rotolo 2010) have attempted to address these research issues. All norms are qualified by the above mentioned different temporal parameters and the modifying norms are represented as defeasible meta-rules, i.e., rules where the conclusions are temporalized rules.

If t_0, t_1, …, t_j are points in time, the dynamics of a legal system *LS* are captured by a time-series $LS(t_0)$, $LS(t_1)$, …, $LS(t_j)$ of its versions. Each version of *LS* is called a norm repository. The passage from one repository to another is effected by legal modifications or simply by temporal persistence. This model is suitable for handling complex modifications such as retroactive changes, i.e., changes that affect the legal system with respect to legal effects which were also obtained before the legal change was done. The dynamics of norm change and retroactivity need to introduce another time-line within each version of *LS* (the time-line placed on top of each repository in Figure 1). Clearly, retroactivity does not imply that we can really change the past: this is "physically" impossible. Rather, we need to set a mechanism through which we are able to reason on the legal system from the viewpoint of its current version but as if it were revised in the past: when we change some $LS(i)$ retroactively, this

does not mean that we modify some $LS(k)$, $k < i$, but that we move back from the perspective of $LS(i)$. Hence, we can "travel" to the past along this inner timeline, i.e., from the viewpoint of the current version of *LS* where we modify norms. Figure 1 shows a case where the legal system *LS* and its norm *r* persist from time t' to time t''; however, such a norm *r* is in force in *LS* (it can potentially have effects) from time t''' (which is between t' and t'') onwards.

27.5.2. Dynamic Logic Approaches

Inspired by recent theoretical and technical developments in the logical study of dynamics—especially the dynamics of informational attitudes such as knowledge and belief[12]—some scholars have proposed models for the "dynamification" of several kinds of deontic logics.

At the heart of these approaches lies the notion of structure transformation. Let us for instance go back to the semantic analysis of obligation that we gave in Section 27.2.1 which was based on an ideality ordering. This semantics lends itself easily to a view of obligation dynamics based on ways of manipulating that ideality ordering. To make a simple example, following van Benthem et al. 2014, the enactment of a command that *A* be the case could be rendered by the modification of that ideality ordering in such a way that all *A*-states are ranked as more ideal than all $\neg A$-states. The upshot is the modeling of different forms of norm dynamics in terms of different operations on their semantic structures. Other recent contributions along these lines, although based on different structures, are for instance Aucher et al. 2009 and 2010.

It is finally worth observing that the approaches based on dynamic logic offer a perspective which is in a way complementary to the one described in Section 27.5.1. Unlike the approaches above, they are—at the present state-of-the-art—blind to much of the fine-grained temporal structure of norm change. At the same time, however, they have the advantage of maintaining a clear link with the underlying logical semantics of deontic notions. How the two perspectives can be technically bridged is very much an open issue.

27.6. Conclusions

We can see in recent works of legal logic how the lines of research we have touched upon in the above sections cover the different functions of normative reasoning in the law: the theory of normative systems and of defeasibility are attempts to address the first two functions concerning the structure and hierarchies of norms and, respectively, their conditions of application; the theory of legal dynamics provides a way of understanding norm change; finally, deontic logic, can be viewed as a transversal endeavor towards the understanding of

[12] See van Benthem 2011 for a recent comprehensive overview.

the deep fine-grained structure of normative notions as they are presupposed by the above attempts.

We find it worth concluding by pointing the interested reader to those which we consider the main events and forums in the field, and that can be an excellent source of further information, especially on ongoing researches. These are the biannual DEON[13] and ICAIL,[14] the annual JURIX,[15] and the *Journal of Artificial Intelligence and Law*.[16]

[13] International Conference in Deontic Logic in Computer Science. See the website of the last edition: http://icr.uni.lu/deonticlogic/index.html.

[14] International Conference on Artificial intelligence and Law. See the website of the International Association of Artificial Intelligence and Law (IAAIL): www.iaail.org.

[15] Foundation for Legal Knowledge Based Systems. Website: www.jurix.nl.

[16] Website: www.springer.com/computer/ai/journal/10506.

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