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Chapter One

History of the Concept of Encyclopedia in General and of Encyclopedia of the Science of Law in Particular

1 HISTORY OF THE CONCEPT OF ENCYCLOPEDIA IN GENERAL

1.1 Its meaning with the Greeks

The word *engkuklios paideia* (*mathêmata engkuklia*, or *ta engkuklia*) originally meant for the Greeks the circle of arts and sciences for a freeman.

The concept *engkuklios* or circle was not oriented towards the organic coherence of knowledge as such. It was rather directed towards the molding of the young Greek person. The *engkuklios paideia* was contrasted with the *higher development of the philosopher*. It moved beyond the *kuklos* of ordinary civil life. In this sense *engkuklios paideia* was the *lower* and *ordinary* knowledge as opposed to the knowledge to which *higher* knowledge introduced a person.

1.2 Encyclopedia as orbis doctrinarum

The word *encyclopedia* acquired an altered meaning with the Romans. Quinctilianus, who no longer understood the Greek meaning of *engkuklios*, spoke of "*orbis ille doctrinae, quam Graeci engkuklion paideian vocant*," and Virtrivius referred to "*encyclios disciplina uti corpus unum ex his membris est composita*."

Thus the term *encyclopedia* was identified with an organic understanding of all disciplines, while the pedagogic element en-

tailed in the Greek conception of a normal civilization fell into disuse.

It may be said that Aristotle can in this sense be seen as the founder of the idea of a systematic philosophical encyclopedia of all the sciences even though he decided not to use the term *encyclopedia* for this idea. Rather, he wished to relate this word to the customary Greek conception of normal popular knowledge (*engkuklios philisophêmata*, i.e., popular philosophy destined for the cultured citizen).

He created a logic as the universal *organon* for all scientific disciplines. The entire system of his encyclopedic treatment of the sciences, logic included, was rooted in his metaphysics of substantial forms (*entelecheia*).

1.3 **The Patristic era**

With the church fathers the concept *engkuklios paideia* came to be identified with the totality of scientific knowledge, encompassing the full range of the pagan classical world. In this sense it was equated with philosophy which, as lower knowledge, had to serve Christian theology as higher knowledge: *philosophia ancilla theologiae* (philosophy as the handmaiden of theology).

1.4 **Its meaning during the early medieval period**

During the Early Middle Ages this systematic philosophical spirit slowly lost its hold. The increasing scope of scientific knowledge was accompanied by a growing lack of systematic mastery of the material.

The former philosophical system was replaced by miscellanies—random collections of knowledge lacking all system. The learned disciplines (*artes*) were divided into the so-called *trivium* (grammar, dialectics, and rhetoric) and the *quadrivium* (music, arithmetic, geometry, and astronomy). This division was maintained whenever an attempt was made to write an Encyclopedia.

The Spanish bishop Isidor van Sevilla developed an encyclopedia along these lines in the seventh century. In a similar fashion Martian Capella (mid fifth century) composed his well-known *Satyricon*. Initially it was meant for use in monasteries and cathedral schools, and was published centuries later in an edition by Hugo Grotius.

1.5 The Late Middle Ages. The Aristotelian conception of the coherence of the sciences

In the late medieval period the term *encyclopedia* was completely lost. During this time scholars vigorously aimed at a broad summary of the main contents of the most important scientific disciplines. This aim really became alive through the emergence of the Universities which, with their division into four faculties, increased the need for synoptic works like these. A stimulus in this regard was generated by the new acquaintance with classical antiquity, particularly the discovery of Aristotle's works in the 12th century. Under the influence of Aristotelian philosophy a revival of the methodical, systematic spirit took place.

As yet no line of demarcation was drawn between philosophy and the special sciences. The various academic disciplines were treated as parts of philosophy. Works integrating methodically the most important contents of the disciplines on a philosophical basis were called *summa*, *speculum*, *receptaculum*, *compendium*, *beehive*, and so on. Dating back to this period are two famous encyclopedic works by Gerbert of Aurillac (Pope Sylvester II), *Figura de philosophiae partibus*, and the well-known *Speculum maius* or *quadruplex* by Vincent of Beauvais (1250).

The same period also produced the famous *Summas* of Thomas Aquinas (*Summa Theologiae*, etc.). They had as their encyclopedic foundation an organological, teleological cosmonomic idea (*lex aeterna* and *lex naturalis*), derived in the main from Aristotle's philosophy.

1.6 Encyclopedia as a book containing a systematic overview of all disciplines. Reformation and Renaissance

Under the influence of the Renaissance and Humanism the word "encyclopedia" (initially "cyclopedia") surfaced once again during the 16th century. The term was introduced to designate *books* that treated the circle of known disciplines. From the circle of disciplines (*orbis doctrinarum*) one thus transposed the name "encyclopedia" to the *book* in which this "*orbis doctri-*

narium" was summarized. The goal was to provide a more or less systematic synopsis of the *material content* of these sciences.

The idea of a *material encyclopedia* thus maintained its validity. The first person to use the word *cyclopedia* once again in this sense was probably Ringelberg who chose it as the title for his work *Lucrebrationes, vel potius absolutissima kuklopaideia* (Basel, 1541).

After him the Hungarian Paul Scalichius de Lika (Paulus de Scala) employed the word as title for his work *Encyclopaedia seu orbis disciplinarum tam sacrarum quam profanarum Epistemon* (Basel, 1559).

Ever since, the word "encyclopedia" was used for similar synoptic works. During the 16th and early 17th century, Protestant thinkers in particular became prominent in the field of encyclopedic endeavors. A very important work from this time is the *Cursus philosophici encyclopedia* by the Reformed theologian Johannes Henricus Alsted[1] – it appeared in this extensive form in 1620 and was dedicated to their *High Mightinesses*, *Gentlemen of the States General* of the United Netherlands. This work remained for a long period the standard work for general scholarly study. It was not an unsystematic string of information but a summary of almost all scientific disciplines known at the time, organized along an external method at least.

However, all these works suffered from the lack of a deeper philosophical foundation. This shortcoming is characteristic of the entire transitional period from the middle ages to the modern era.

These authors understood *encyclopedia* to mean completeness in scope, more than organic coherence in the synopsis of the disciplines. Both the systematization and the methodical subdivision were still understood in a rather external sense.

In order to provide a clear picture of what encyclopedists like Alsted meant with the methodical, systematic classification of

1 Alsted was a professor at Herborn. Qua method he was a *semi-Ramist*, i.e., his aim was to unite Aristotelian logic – in the form given to it by Melanchton – with the new synthetic logic of Peter Ramus. We will say more about Peter Ramus in the next section.

the encyclopedic material, we present here a brief sketch of the contents of Alsted's work.[1]

Alsted commences with a brief resumé of the entire work (a *Compendium Encyclopaediae philosophicae*). Subsequently, as the first part of the main contents of the work, he discusses the four philosophical doctrines considered to be known prior to what follows (*Praecognita philosophica*).

This part comprises (i) the doctrine of principles (the *Archelogia*); (ii) the doctrine of intellectual capacities (the *Hexilogia*); (iii) the doctrine of the disciplines (the *Technologia*); and (iv) the doctrine of method (the *Didactica*). Taken together this constituted the *Prolegomena*.

After the *Prolegomena* the different disciplines themselves are presented, subdivided into theoretical, *practical* and *poetical* disciplines. There are twelve theoretical disciplines, namely *Metaphysica*, *Pneumatica*, *Physica*, *Arithmetica*, *Geometrica*, *Optica*, *Musica* and *Architectonica* (from this summary one can see that Alsted did not really have a firm criterion for the demarcation of the special sciences).

There are five practical sciences, namely Ethica, Oeconomica, Politica, Scholastica (the doctrine of teaching), and Historica. Finally there are seven poetic disciplines (disciplinae poeticae) or arts, namely *Lexica*, *Grammatica*, *Rhetorica*, *Logica*, *Oratoria*, *Poetic*a, and *Mnemonica*. The encyclopedia here explicitly possesses a material character (i.e., it is directed towards the concrete material of the sciences), be it on the basis of a general philosophical foundation.

The Humanists wanted to escape from the oppressive authority of Aristotle which in medieval scholasticism had attained to an almost infallible position alongside the Church. However, during the fermenting individualism of the Renaissance it did not manage as yet to formulate a clearly delineated standpoint.

1 [Dooyeweerd here inserted a footnote informing his students that it was not required to memorize this scheme when preparing for their oral test in Encyclopedia of the Science of Law.]

It was still fashionable to philosophize in an eclectic manner. As a result the necessary philosophical *stimulus* for a new conception of an encyclopedic science was not found during this transitional period.

But even when humanism, during the 17th and 18th centuries, after Galilei, Descartes, Hobbes, and Leibniz, discovered its own philosophical attitude, it did not provide a basis in itself for a philosophical encyclopedic treatment of the sciences. The old conception of an organic unity, rooted in Aristotle's philosophy, was not only temporarily lost but explicitly discarded. In addition to this, and to an increasing degree, the special sciences were separated from philosophy.

1.7 Emancipation of the special sciences from the philosophical orbis doctrinarum

In this way the (materially conceived) encyclopedia of the distinct sciences was introduced. In itself this was a laudable development; but the organic coherence of these distinct disciplines as a whole hardly generated any concern.

Medical and juridical compendia were written, but on the general terrain the encyclopedia increasingly received the character of a polyhistory. The grand philosophical systems of the 16th, 17th and 18th centuries failed to exert a general influence on the universal encyclopedia; that would have asked too much from them at this time. The special sciences, now largely emancipated from philosophy, started more and more to lose their interconnectedness.

1.8 The encyclopedia as alphabetically ordered lexicon

Finally, the conception of a systematic synopsis of the sciences was abandoned altogether. The Enlightenment demolished the last obstacles that scholasticism had erected between the study cell and civil life. To satisfy the public's thirst for the explosion of scientific knowledge, which no one could any longer master as a whole, recourse was taken to a *lexicographical* form of encyclopedia. As a substitute for a comprehensive systematic ac-

count of the main contents of the sciences, the so-called alphabetical *Real-Encyclopedie* emerged.

Three encyclopedias from the 18th century secured a lasting influence:

1. The large encyclopedic dictionary of the chancellor in Halle, Ludewig (1735–1751). It appeared in 64 *folios* and was normally referred to as the *Zedlersche* dictionary, after its publisher.
2. The even bigger *Encyclopédie méthodique* in (1782-1832) in 165 volumes.
3. The famous work of the French encyclopedists Diderot, d'Alembert, and others, *Encyclopédie, ou Dictionnaire raisonné des sciences, des arts et des métiers*, 28 volumes (Paris, 1751–1762). The supplement and index encompassed another seven volumes that were later republished a few more times.

In the same vein came the well-known work by Ersch and Gruber, *Allgemeine Encyclopädie der Wissenschaften und Künste*, begun in 1818 and later continued by Brockhaus. Next came the famous encyclopedia of Meyer, which saw the light under the name *Konversation-Lexicon*, of which new editions continued to be published in order to accommodate the latest developments in the sciences. Of course, also to see the light of day was the *Encyclopaedia Britannica*, or, *A Dictionary of Arts and Sciences*.

In the Netherlands this example was followed by popular encyclopedias such as Winkler-Prins and Vivat.

The general *Real-Lexica* structured in this alphabetic vein set an example for each of the various disciplines. Today almost every branch of science has its own encyclopedia, in part written for scholars, in part for the general public.

The encyclopedic character of a *Real-Lexicon*, a *Konversation-Lexicon*, and so on, meant therefore nothing more than a work arranged in alphabetical order and briefly summarizing what was known about a specific branch of science or of scholarship in general, in part written for popular consumption.

In works like these, every systematic linkage was gone. They were nothing but a purely external succession of things worth knowing.

1.8.1 Francis Bacon's "Globus Intellectualis"

An exception has to be made for a few encyclopedic attempts of some prominent philosophical thinkers of the 16th and 17th century. Francis Bacon (1561–1626) already gave a program for the reformation of the sciences in his large two-volume work *Instauratio Magna*: *I. De dignitate et augmentis scientiarum* and *II. Novum organon*. Bacon attempted to introduce an encyclopedic division of the sciences on a psychological basis. He thus designed the "*globus intellectualis*." The capacity to recollect served Bacon as a foundation for history, the imagination as a foundation for poetry, and the understanding as a foundation for philosophy. Philosophy partly treats God, partly man, and partly nature (theology; natural science and philosophy of nature; logic, anthropology, politics). Little is done with methodology.

1.9 The idea of the encyclopedic coherence of the sciences on the basis of the new humanistic cosmonomic idea. The relationship between the science ideal and the personality ideal. Encyclopedia as "*mathesis* (*scientia*) *universalis*." Descartes, Hobbes, Leibniz

Not until Descartes (1596–1650) did humanistic philosophy, based upon the personality ideal and the science ideal, start to investigate the logical coherence between all disciplines.

Remark: on "*wetenschapsideaal*" and "*persoonlijkheidsideaal*"

Science ideal and personality ideal are both (as we shall see below) *mutually exclusive* factors in the basic structure of the humanistic cosmonomic idea. At its *deepest root*, namely *the proclamation of the sovereignty of reason*, these two factors wrestle with each other for supremacy.

PERSONALITY IDEAL: it is the secularization of the Christian religious idea of personhood and freedom. It is rooted in the idea of the autonomy of free human personality and is permeated with the Faustian will to power of modern man which aims at establishing the dominion of the human person over the temporal world.

SCIENCE IDEAL: it arose only after the rise of modern mathematical natural science and is constituted by the tendency to grasp temporal reality in its entirety under a mathematical or mathematical-physical denominator, seen as a continuous, uninterrupted chain of causes and effects or of mathematical rela-

tionships of dependency. In the science ideal the sovereignty of mathematical thought is proclaimed.

The personality ideal, in its Faustian drive to dominate, *calls forth* the science ideal. But, as we shall see below, it soon finds itself in conflict with it in the domain of the spiritual functions. Inherent in both ideals is a *tendency of continuity* – the postulate, while ignoring the cosmic order and sphere-sovereignty, to carry through across all the boundaries of the law-spheres either the absolute sovereignty of the free personality or the sovereignty of mathematical thought.

The basic scheme of the humanistic cosmonomic idea (founded upon the immanence standpoint) can be represented as follows:
1. The basic question: What is the deepest origin and unity of all facets of reality? Answer: Sovereign reason.
2. The basic question: What is the mutual relation and coherence of these sides or facets? Answer: This relationship has to be construed either through the continuity of mathematical thought (the science ideal), or through the continuity of freedom (the personality ideal).

The starting assumption is the mathematical thought of the rising natural science (Kepler, Galilei, later Newton, etc.), which analyzed the composite phenomena in their simplest mathematically determinable functional elements (movements) and attempted to discover hypothetically the law causing change in the phenomena. The hypothesis then was to be confirmed by experiment. The science ideal absolutized this natural scientific thought into the scepter of the Faustian lust for power found in the personality ideal.

This method induced thinkers to search for the logical coherence between the disciplines in the laws of natural scientific thought itself which explains the most complex phenomena in terms of the simplest elements. Every newly discovered element of knowledge then had logically to preserve the coherence with all the rest. It had to originate solely and exclusively from mathematical thought itself.

Thus, already with Descartes did the conception of a *mathesis universalis* arise as the *logical means* required *to establish logically a mutual coherence between the sciences*. This logical continuity, eliminating the boundaries between the law-spheres, revealed the basic tendency of the humanistic science ideal. The science ideal, if carried through consistently, must eliminate the personality ideal. After all, implicit in the personality ideal is the

pretension that the sovereign human personality stands above nature and its laws and is a law unto itself in sovereign freedom. By contrast, the tendency toward continuity in the humanistic science ideal moves in the direction of maintaining the logical continuity between nature and spirit. How then would the personality ideal escape from the dominance of natural scientific thought?

For all that, Descartes capitulated to the demands of the personality ideal. Although in the domain of nature he carried through with the utmost effort the continuity of mathematical natural scientific thought, he called a halt to this continuity of the science ideal when confronted with the problem of the soul, viewed as the bearer of personality (in Descartes rationalistically conceived of as "res cogitans"). Spirit and body now became two opposite and completely independent "substances" ("*res extensiva*" as a natural substance and "*res cogitans*" as a spiritual substance).

Between these two substances logical thought cannot carry through a continuous coherence. By contrast, the British contemporary of Descartes, Thomas Hobbes (1588-1679), without hesitation pushed aside the boundaries between nature and spirit which Descartes maintained for the sake of the humanistic personality ideal. The humanistic science ideal acquired primacy across the board. In order to carry through the continuity of this science ideal across all the boundaries of the law-spheres, Hobbes reduced all aspects of reality to the mathematical-physical basic denominator of a "moving body" as the sole *substance* of reality.[1] Psychology became an extension of mechanics. It was to understand psychical phenomena as mechanical processes of movement of the soul, in subjection to mechanical laws of motion. On this basis Hobbes then built a naturalistic natural law and a political theory, which swallowed up ethics as well.

His philosophical system, which he divided systematically into three parts (i. *De Corpore*, ii. *De Homine*, iii. *De Cive*), indeed exhibits different attempts to construe the encyclopedic coherence between all the sciences – a coherence situated in the logical continuity from the *prima philosophia* (metaphysics), logic

1 Consult the Introductory Volume with regard to the metaphysical concept of substance [pages 83–207].

and mathematics, over mechanics, astronomy and physics, to psychology (anthropology), down to the doctrine of law and the state, while ethics, as the collection of norms guiding moral freedom, was simply dropped. This whole school of thought, encyclopedically speaking, was a preparation for modern positivism.

1.9.1 Leibniz' new conception of encyclopedia as mathesis universalis. The lex continui

The logical conception of continuity was given its most pregnant formulation by Gottfried Wilhelm Leibniz (1646-1716). In infinitesimal calculus (differentiation and integration) he discovered the so-called function concept, by means of which it became possible to transform two apparently absolutely distinct magnitudes (for example, a circle and an exscribed and inscribed polygon, parallel and intersecting lines, discreteness and continuity) through an infinite series of transitions to approximate one another while treating the one magnitude as limit (function) of the other.

Hobbes still had to capture all of reality under the basic denominator of *moving body* in order to carry through the continuity of the science ideal, and as he did so he relinquished the personality ideal. Leibniz, by contrast, in his metaphysical doctrine of monads, wanted to maintain the mutual independence of natural and spiritual functions. He proposed to achieve logical continuity in reality by solely applying the mathematical concept of function and assuming infinitely small transitions between unconscious matter and the human spirit – transitions that can be approximated by means of the mathematical function concept.

Unlike all his predecessors, Leibniz defended a so-called *pluralistic metaphysics*. That is to say, according to him the cosmos was constituted by *an infinite number of substances (monads*). Each one of these monads existed in isolation and therefore could not exert any influence upon other monads. (The monads are windowless!)

In essence, this monadology was nothing but the reification (absolutization) of number in its infinitesimal (anticipatory) approximative functions. The cosmos itself is similar to the sequence of numbers that approximates continuity, constituted as it is by an infinity of discrete numbers.

These monads (distinguished in material and spiritual monads) are now given no other content than the activity of representation. They are spaceless and time-less, as it were infinitely small ensouled points of force in the universe, which, in their representations, produce space and time. Leibniz assumed that also the material monads have representations, but in distinction from the spiritual monads these representations are *unconscious*. The difference between the lowest (material) monads and the spiritual monads are now quantified through infinitesimal calculus, for Leibniz accepted infinitely small transitions between the conscious and the unconscious representations, which achieve their highest clarity in concepts of thought. The unconscious representations of the material monads he called *petites perceptions*, the conscious representations of spiritual monads apperceptions, which in turn themselves exhibit gradations of clarity relative to the extent to which they are mixed with sensorial representations. The ultimate reification of this metaphysical system is the godhead as central monad, which alone possesses clear and distinct representations within itself. In its representations each monad mirrors the universe. The difference between the monads depends solely upon the degree of brightness of the representations. The unconscious representations are understood as "functions" of clear mathematical thinking. The monads remain mutually coordinated through the cosmic law of *harmonia praestabilita* which guarantees that all monads in their representations have as their content the same universe. They receive a more precise determination through the lex continui, the law of infinitesimal transitions between the monads, in which essentially the absolutized mathematical infinity manifests itself.

In this way the mathematical method is stretched beyond the limits of algebra and geometry as a general method of calculating concepts, a method which ought to be applied to all disciplines without exception (the "*mathesis universalis*," "*ars combinatoria*").

Thus, Leibniz did not employ a mechanistic science ideal but a functional-arithmetical basic denominator for construing the mutual relation and coherence of the sciences. He formulated the logicistic mathematical principle of continuity as a *lex continui* and so penetrated to the rationalistic idea of the func-

tional logical-mathematical unity and coherence of all fields of knowledge.

The latter latch onto each other in a step-by-step progression where every higher domain of knowledge contributes to a closer determination of reality and every new element of knowledge originates in thought itself. By virtue of the *lex continui* it exists in an uninterrupted coherence with all earlier determinations of reality.[1]

Guided by this ideal of a *mathesis universalis*, Leibniz already in his youth wrote an encyclopedia of legal science under the title *Nova methodus*. Through his formalistic method, however, he also became the father of modern formalism in law. Nettelbladt, the disciple of Leibniz' pupil Christian Wolff, carried this through to the extreme.

1.9.2 The speculative-idealistic conception of encyclopedia. Kant, Fichte, Schelling and Hegel

Meanwhile, under the influence of the speculative German idealism of Fichte, Schelling and Hegel, a new formal school of encyclopedia developed. It claimed for itself the character of *an independent philosophical discipline*.

Through his critical dualistic philosophy, in which the domain of nature was isolated and set opposite the domain of the spirit, Kant inhibited rather than stimulated the ideal of a universal encyclopedia.

Remark: on Kantian idealism

> Immanuel Kant of Königsberg (1724-1804), is the father of the so-called *critical transcendental idealism*. Main works: 1. *Critique of Pure Reason*; 2. *Critique of Practical Reason*; 3. *Critique of Judgment*. The basic question of the critical method introduced by him is: *How is universally valid scientific experience (knowledge) possible?* His answer runs as follows: All scientific knowledge is restricted to our experience of *nature*. This knowledge is only possible thanks to our understanding, which *forms* and *orders* the sole givens of experience, namely the (in themselves unordered) *psychical* sense impressions (the *material* of experience)

1 Leibniz' idea of a *mathesis universalis* and his functionalistic lex continui as fundamental law for the coherence of the scientific disciplines was recently resurrected in the mathematicistic Marburg school of the neo-Kantians (Cohen, Natorp, Cassirer). In the field of legal science Kelsen's "Normlogik" oriented itself to this school, defining legal science as a formal "geometry of legal phenomena."

such as color, smell, taste, feeling of hardness, and so on. These impressions are formed and ordered by the law-conformative forms of logical thought and by the forms of psychical intuition. These *forms of understanding* or *categories* (those of quantity, quality, relation and modality) and the *forms of intuition* (space and time) cannot be derived *a posteriori* from sensory experience, since they lie *a priori* (before all experience) in the law-conformative structure of our knowing consciousness. As such they make possible all experience of nature; they are the transcendental preconditions of all experience. All knowledge (still according to Kant) is the result of a synthesis (combination) of forms of understanding and *forms* of intuition on the one hand, and the material of psychical experience on the other. Knowledge therefore has only two sources: *logical thinking* and *psychical intuition*. Kant restricted the mathematical science ideal to the experience of nature, which according to him does not discover the essence ("substance") of things, but merely their sensory appearance (*phaenomenon*). The substance (the *noumenon*) is transposed by him to the *ethical function of the personality*. He declares this function to be free from all natural necessity and auto-nomous, a law unto itself (the normative personality ideal of ethical autonomy). In the supra-sensory domain of freedom (the *noumenon*) no scientific knowledge is possible, but only an a priori rational faith (Kant dissolves religion into morality or "*Vernunftreligion*"). Along these lines nature and freedom emerged in dualistic opposition: they were separated by an unbridgeable gap, and this dualistic cosmonomic idea (under the primacy of the moralistic personality ideal) gave birth to the isolating division between *natural laws* and *norms* which became characteristic of Kantian circles. The Marburg school of neo-Kantianism (which influenced Kelsen) erased the psychical function as a function of knowledge and recognized only *transcendental-logical mathematical thought* as the source of knowledge. Members of the school know no forms of intuition other than *forms of thought*. They want instead to determine the matter of experience solely through creative thought and its categories of understanding. Unlike Kant, they extend the mathematical science ideal also to the spiritual dimensions of reality. In this conception of the science ideal they are the closest to Leibniz.

German idealism reconciled nature and freedom in the dialectical method of reason. It aimed at producing the two domains of nature and freedom from one ultimate principle – subjective reason (the absolute I) in Fichte, the absolute reason (the absolute spirit) in Schelling and Hegel. But by its very metaphysical starting point it created the logical necessity of searching for a deeper unity of all sciences, the unity of the rational meaning of

science. The personality ideal now acquired absolute supremacy over the science ideal and absorbed the latter within itself.

Fichte (1762-1814) gave birth to a "*Wissenschaftslehre*" (theory of science), which aimed at being the foundational philosophical discipline. It chose scientific thought itself in a formal sense as a field of investigation.

This "*Wissenschaftslehre*" inevitably gave rise to the idea of a formal philosophical encyclopedia. For whoever investigates the root of knowledge necessarily arrives at the idea that all fields of knowledge are but parts of an organic whole of knowledge. Encyclopedia became a *speculative philosophical* concept.

In the meantime, the idealistic-speculative philosophy attempted to construe the organic coherence of fields of knowledge with the aid of the principle of continuity of the *personality ideal* (the continuity of freedom).[1]

Already within the final phase of Fichte's thought all aspects of reality are brought under an (irrationally understood) historical basic denominator. The continuity of the idea thus construed can only be pursued consistently if one breaks in philosophical thought with the logical principle of contradiction (the *principium contradictionis*, i.e., the law of thought demanding that two contradictory propositions cannot both be simultaneously true).

The necessary antinomy emerging for (historicistically oriented) thought, by taking nature to be the product of ideal freedom (an antinomy which is born from violating sphere-sovereignty through absolutized reason), is here explicitly sanctioned in the so-called *dialectical method*.

This method proceeds through logical contradictions (thesis and antithesis) towards an absolute synthesis (the "absolute I" in Fichte; the "absolute spirit" in Hegel), in which all domains of knowledge are merely dependent moments. This idealistic dialectics forms the basis of the *idea of encyclopedia* in these speculative-idealistic schools.

1 Freedom idealism therefore tried to conceive of natural necessity as a product of the free and sovereign functions of the human personality (the ideas). This explains why it no longer acknowledged a natural substance as a *Ding an sich*, since the cosmos has to be understood in terms of the *personality*!

This basis already served Schelling when he published his *Vorlesungen über die Methode des akademischen Studiums* (1803). However, Hegel in particular elaborated this point in a stimulating way. In his dialectical method of thesis, antithesis and synthesis he found the logical means to uncover the mutual philosophical coherence (in the idea of freedom) of all the sciences. Dialectical thought is here not oriented to the *mathematical natural science*, but to history. It wants to grasp individuality as a moment of the (irrationally understood) totality taken in a supra-individual sense.

In his *Encyclopaedie der philosophische Wissenschaften in Grundrisz* (1817),[1] Hegel distinguishes the sciences in three mutually cohering areas, according to the dialectical development of the idea, as the totality of philosophical thought and with it of reality (for in this *identity* philosophy reality becomes identical with philosophical thought).

The idea in its thesis is free thought in a formal sense. The idea in its antithesis is nature. The idea in its synthesis of nature and free thought is the spirit which reveals itself in the individual personality (*subjective spirit*, *thesis*), the supra-individual community (*objective spirit as antithesis of the subjective spirit*), and art, religion and philosophy (*absolute spirit* as *the synthesis* of subjective and objective spirit).

So all disciplines are transformed into sciences of the dialectically unfolding idea:

1. logic as science of the idea of thought in a formal sense;
2. natural philosophy as the science of the idea in its being-different (nature);
3. the (historically conceived) philosophy of the spirit (unfolding itself in the subjective spirit, objective spirit and the absolute spirit) as science of the idea that returned from its being-different, from its otherness, to being-itself.

1.9.3 Sociological conception of the encyclopedia. Auguste Comte

Inspired by a similar philosophical systematic spirit aimed at grasping the coherence between the disciplines in an encyclope-

1 *Encyclopedia of the philosophical sciences in outline*. 2nd impr., edited by Georg Lasson (Hamburg, 1920), p. 50.

dic fashion, a positivistic approach emerged next to the above-mentioned speculative trends even before the middle of the 19th century. In reaction to all speculation, positivism wanted to find the empirical base of this coherence in experience. Historically speaking this was the after-effect of the direction represented by the line Hobbes–Descartes–Leibniz insofar as it attempted to pursue the sovereignty of reason in the humanistic science ideal by creating a logical continuity between all sciences – from the simplest to the most complicated ones.

The new encyclopedic trend was introduced by the French philosopher, August Comte (1798-1857), in his famous work *Cours de philosophie positive*. This work exhibits the character of a philosophical encyclopedia entirely based on positivism. Comte assumes in all human thought three stages or phases:

1. the *religious* phase, in which the human being still experiences a sense of dependency upon higher powers personalized into gods;
2. the *metaphysical* phase, in which the insight dawns that religion is simply mythology – this phase now tries to speculate about the hidden power of nature beyond human experience;
3. the *positive* phase, in which man discovers the inexorable laws that govern both nature and society and, armed with this knowledge, sets out to conquer nature in order to elevate humanity to a higher cultural level.

Comte distinguishes six fundamental sciences: mathematics, astronomy, physics, chemistry, biology, and sociology or the science of society. The latter forms the crown and consummation of all the other sciences.

Comte views these disciplines as increasingly complicated subdivisions of abstract science, but governed by the same method, the "*méthode positive*." This method does not search for an unknown goal, but solely aims at discovering (the natural-science conception of) the laws governing all phenomena.

This school of encyclopedia, that found in sociology its all-encompassing fulfillment, exercized an enormous influence. At the "Collège de France" a chair for the general history of science was established, based upon Comte's philosophy.

Until modern times the *sociological-encyclopedic* school remained very influential. Sociology served the purpose of understanding encyclopedically culture as a whole as well as the history of humankind. Modern representatives of this school are, among others, Paul Barth, *Soziologie als Philosophie der Geschichte* (Sociology as philosophy of history) (Jena, 1922) and Franz Oppenheimer, *System der Soziologie* (System of sociology) (Leipzig, 1922).

1.10 **Recent revival of the encyclopedic idea**

Finally, during the most recent period, the urge to establish an encyclopedic system of the sciences is newly experienced. Some prominent works pursuing such a task are:

Paul Oppenheim, *Die natürliche Ordnung der Wissenschaften* [The natural order of the sciences] (Jena, 1926); Wilhelm Sauer, *Grundlagen der Wissenschaft und der Wissenschaften* [Foundations of science and the academic disciplines] (Berlin, 1926) (oriented to the Baden school of neo-Kantian philosophy – see section 2.12.9.2 below); Paul Tillich, *Das System der Wissenschaften nach Gegenständen und Methoden* [The system of sciences according to objects and methods] (Göttingen, 1923).

A threefold division was made:

1. ideal or cognitive sciences (logic, mathematics);
2. "*Realwissenschaften*" or sciences focused upon reality (the natural sciences, sociology, history and linguistics); and
3. the humanities or normative sciences (law, theology, ethics and philosophy).

2 HISTORY OF THE SPECIFIC CONCEPT OF ENCYCLOPEDIA OF THE SCIENCE OF LAW

Closely connected with the general concept of encyclopedia there developed the conception of an encyclopedia specifically of the science of law.

2.1 Awakening of the systematic idea in Roman legal science

Legal science in this sense did not originate with the Greeks because in their legal philosophy they did not see law as something independent, since it was treated as part of their doctrine of ethics or virtues. Legal science among the Romans came into its own during the later phase of the Republic. Particularly under the influence of the later Roman-Greek Stoic philosophy[1] (via Panaetius, who exerted an important influence upon Cicero and the classical Roman jurists), the desire arose to put Roman law on a scientific basis.

According to Pomponius (L 2. par. 41 D 1, 2), Mucius Scaevola (c. 83 BC) was the first person to view law (read: private law) under basic concepts (*generatim*), and to give a systematic account (ars, doctrina) of private law as opposed to the earlier exegetic and casuistic works.

Gaius in his *Institutiones* gave a systematic account of private law, as captured in his adage: "*Omne ius, quo utimur, vel ad personas pertinet vel ad res vel ad actiones*" (Every right we use concerns either persons, or property, or legal actions). This adage was followed in Justinian's *Institutiones.* Nonetheless, neither the *Institutes* of Gaius[2] nor that of Justinian can be seen as a genuine encyclopedia of legal science, since both deal with only a part of law and are deficient in terms of systematics.[3] Justinian's *Insti-*

1 Cicero and Seneca also belonged to this philosophical school.

2 The *Institutiones* of Gaius, by far the most important source for knowledge of law before Justinian, was discovered in 1816 by Niebuhr in the library of the Dome Chapter of Verona.

3 In the modern treatment of private law this systematic framework was abandoned and replaced by the following one: a) Family Law; b) Property Law, differentiating into estate law and contract law; and c) Succession Law. This material treatment is normally preceded by a general part in which the basic concepts of private law are explained.

tutes, like the *Corpus Juris* as a whole, was intended to be an authoritative handbook as well as a student textbook.

2.2 The "*glossae*" and the one-sided exegetical method in legal science

The *glossator school*, founded in the 11th century by Irnerius of Bologna, did in places produce important contributions for the systematic treatment of law, but their glossae in general did not rise above the level of providing elucidation and defence of the Justinian Code. Their legal digests are known by the names *Apparatus, Summa* or *Speculum* and contain only excerpts and general overviews of the material contained in the *Corpus Juris*.

However, this school produced a person who wrote a *Speculum iudiciale* which by far exceeded, both in its material and formal structure, the work of the Italian glossators. This author, Wilhelm Durantis (1237-1296), followed the example of one of the most famous teachers at the University of Paris that was established in 1210, Vincent of Beauvais. Durantis' *Speculum iudiciale* appeared in 1275 and may indeed be called a mirror of the positive law of the time, encompassing both secular and canon law.

It did not include feudal law. It was not geared to the study of law but meant to serve the legal practice of the day. When we disregard this single work, the 13th and 14th centuries produced practically nothing in the area of the encyclopedia of legal science. The casuistic, scholastic method applied in the summarizing treatment of legal material contained in the *glossae* lacked all deeper foundation. It also stayed free of influence from the impressive philosophical systems of scholasticism.

The *post-glossator school*, focused mainly on the practical adaptation of Roman law to Germanic circumstances, simply ignored the sources and studied only the glossae. Although they produced famous jurists, such as Bartolus (d. 1357) and Baldus (d. 1400), their method was extremely scholastic and showed little taste. While treating all kinds of unfruitful controversies the post-glossators lost themselves in an endless mass of *distinctiones*, *limitationes*, *amplificationes*, and so on.

2.3 The struggle for a new method in legal science during the emergence of the Reformation and the Renaissance. The encyclopedic legal literature of this period

Towards the end of the 15th century the scholarly study of law, under the influence of the major historical changes of this period (in particular the rise of the Reformation and Humanism), began to show a general reaction against the authority of glossae and the scholastic method of treating the issues. It now tried to provide legal studies with a new methodological foundation. Especially in its initial phases these attempts suffered largely from a lack of a proper philosophical foundation and genuine systematic competence.

Many works that appeared by the end of the 15th and in the course of the 16th century tried to provide a synoptic overview of existing positive law, often parading artful logical reasoning, distinctions and definitions but rarely succeeding in establishing systematic unity and coherence in the material they covered. What made things worse was that they included a tiresome mass of citations.

The usual titles for this kind of work were *Methodus, ratio docendi, discendique juris*; *Juris ars et scientia*; *Prolegomena juris*; *Exercitatio juris*; *Paraenesis de studio legali*; and so on.

The best of these works are collected in the rare work of Nicolaus Reusner, *Cynosura juris* (Speier, 1588), which contains no less than twenty encyclopedias from the 16th century. The works of this collection are also found in Buder, *Bibliotheca juris selecta*, 8th ed. (Jena, 1756).

2.4 The battle between the analytic-exegetical and the systematic schools in legal science. The "*mos Italicus*"

It was under the influence of Alciatus, Buddaeus and Zasius that Humanism indeed started to have an impact on the *method* of legal science. At the same time, and with greater vitality, the methodological movement of renewal commenced from the side of the Reformation.

In order to explain the significance of this incipient reform of the legal-scientific method, we have to pause for a moment to look at the scholastic method. Under the influence of this method, the so-called "*mos Italicus*" managed for a considerable

time to keep the treatment of law within the post-glossator school, even after the rise of reform movements. In his standard work, *The History of the German Science of Law*,[1] continued by Ernst Landsberg, Roderich Stintzing has provided us with a magnificent sketch of the scholastic method in legal science. Orthodox scholastic thought, firmly bound by faith in personal authorities, considered the task of scholarship on the one hand to be found in showing the correspondence between metaphysical truths[2] (which were regarded as representing the contents of human reason) and the Christian revelation. On the other hand it envisioned as the task of scientific endeavors to discover by way of formal logical analysis the contents of both metaphysical truths and truths of faith, namely, through a method of research which accepts the scientific material as a *given* basis and posits as the sole task for itself the logical analysis of this material aided by the syllogistic method of demonstration[3] which had been worked out for the first time in Aristotle's logic.

The form in which scholasticism applied this method consisted in drawing up so-called quaestiones, sometimes formulated in an abstract manner, at other times raised in the form of a concrete casus. The answers were given while explaining the pros and cons, discussing the objections raised, either through the subordination of one authority to another, or through *distinctiones*, where every standpoint maintains its limited validity (the one, for instance, expanded through *amplificatio*, the other restricted through *limitatio*). The same method attained the upper hand in the legal science of scholasticism. Here as well the syllogistic analytical method dominated and operated with its *quaestiones* and *distinctiones*. Even more than was the

1 *Geschichte der deutschen Rechtswissenschaft*, 3 vols. (Munich and Leipzig, 1884), I, 102 ff.

2 Under metaphysics we understand a branch of science rooted in immanence philosophy, which attempts to trace within temporality itself the changeless *substance* (in Aristotelian scholasticism: the *substantial form*).

3 A deductive "syllogism" was understood to be a form of logical reasoning, built upon two premises and a conclusion drawn from them. The first premise has to contain a universal concept and the second one a particular concept capable of being subsumed under the universal one. For example: Major Premise: All human beings are mortal (universal concept: human being); Minor Premise: Socrates is a human being (particular concept); Conclusion: Therefore Socrates is mortal.

case with the philosophy of the time, scholastics were bound to the traditional authorities in giving pride of place to given truths and the formal-logical solution of contradictions. After all, they did not have to deal with metaphysical problems but with positive legal material, and the latter (that of Roman or canon law) had been worked out in every detail by the *glossae*.

Given the unconditional authority ascribed to the great *doctores* Bartolus, Baldus and others, the rise of a historical-philological critique on the available material was precluded from the very beginning. Scholars at this time were not conscious of the historical gulf that separated the interpreter from the object of his interpretation. Those engaged in exegesis subjected themselves in advance to the formal authority of the text and presupposed without any criticism the historical conditions of their own time as present with the authors of their sources. In the course of time a firm type took shape for this analytic-exegetical method. From the 16th century onward, it was called lecturing "*more italico*" or "*magistraliter*," in order to distinguish it from deviating methods.

No longer familiar with Roman law, scholars in practice applied the *interpretatio* and the *disputatio fori* for adapting an "*usus modernus*" to the legal requirements of contemporary Germanic law. Naturally, no systematic treatment developed given this casuistic and formalistic method.

In order to compensate somewhat for this lack of inherent scientific coherence in legal training, the scholastic method assigned an exceptionally important place to the mechanical memorization of technical aids that were supposed to assist in acquiring an overall picture of the material. Such aids were called *loci*. Although this word was used in different senses, the intention always was to indicate places from which concrete cases could be assessed and classified. Learning these *loci* by heart therefore served as one of the first rules for the method of legal training.

Legal scholars made a distinction between *loci ordinarii* and *loci communes*. By *loci ordinarii* they understood those places in the *Corpus Juris* with which, according to a fixed tradition, the extensive treatment of certain legal material was connected. For

instance, *Corpus Juris* 1.32 D. d.usuris 22, 1 was the *locus ordinarius* for the doctrine of *mora (delay),* and *Corpus Juris* 1. 32 D. depositi 16, 3 was the *locus ordinarius* for the doctrine of *culpa* (fault).

By *loci communes* were understood:

1. The general legal concepts under which the concrete material had to be subsumed as an aid to keep what was learned ready to hand.
2. The "commonplace" *general legal principle,* identical with *regula* or *axioma iuris*. In this sense, mainly through Melanchton, the concept "*loci communes*" is still maintained in the modern period. In this meaning the word also acquired an unfavorable connotation, namely to bring to expression that a theory restricting itself to "commonplaces" without penetrating to the casuistics of a concrete case is worthless (this as an argument against the new humanistic method).
3. The general meaning of "*locus*" (*topos*) as "*sedes argumenti*," as the starting point of logical demonstration. These loci were the object of the "Topica", i.e., the *ars ratiocinandi.*

Legal science made excessive use of the *loci*. Only that form of argumentation which had as starting point a *locus* generally acknowledged in the school was held to be cogent and sound. At the same time the *loci* served as an aid in formulating *quaestiones*. The aim was to obtain the largest possible collection of legally useful *loci*. Already Baldus constructed some 100 of them.

Later on, many more were added, but their "magisterial validity" was doubted. As a consequence, by the end of the 15th century they were sorted out in order to qualify as the acknowledged *loci*. This whole method succeeded in officially maintaining itself against the new direction during the 16th and up to the 17th century, protected by the law faculties and even governments. They were kept in place from the official side especially because the aim was to acquaint prospective jurists from the outset with the practical casuistics because the law faculties at that stage, unlike at present, saw as their main task, next to theoretical instruction, the *practical training* of their students.

2.5 The synthetic-systematic school in legal science in general

Reforming the method of instruction, which took place under influence of Humanism and Reformation, was related to a change in the *organization* of academic teaching.

The official and therefore public and tuition-free *Lecturae* or *Lectiones* were, according to the traditional program, presentations dealing with the source texts. Regardless to what extent a deviation from these sources took place, the structure of these lectures remained *exegetical* and *analytical*. Only in *private* lectures was it allowed to depart from this norm as laid down by tradition and statutes.

This reform came into effect owing to the fact that in the course of time the private lectures slowly replaced the public *lectiones*. Seeing as the Lecturae were not suitable to introduce new students to legal science since they provided merely fragmentary knowledge of details without any systematic connection, a more *systematic* approach surfaced in the private lectures. Thus, under the influence of Melanchton, professors like Johann Apell and Konrad Lagus (Hase) in Wittenberg designed systematic introductions exclusively destined for use in their private lectures.

During the 16th and 17th centuries these lectures received the name collegia. They were based upon voluntary agreements between professor and students with regard to program and honorarium, and they were called *collegia* owing to the closed number of students who made up the associations that were formed around a professor for instructional purposes. Less and less attention was paid to the public *lectiones*, finally causing them to be pushed to the background for lack of interest. This process was the outcome of two factors: i) the professors acquired a financial benefit from these private colleges; ii) the penetrating humanistic studies, with their *philological-historical text criticism1* and their *reform of the logical art of argumentation*, gradually gave the old scholastic method the label "barbarei." In vain did the authorities try to prevent this development, some of whom even banned private lectures.

The more the *lecturae publicae* lost prestige, the more the name itself faded into oblivion. In this way the word *collegium* acquired the general meaning of an *academic lecture*.

The synthetic-systematic school in legal science was founded first of all by the Reformation and not by Humanism. The program of this systematic school, which by the end of the 16th century triumphed over the casuistic-analytical method both in Germany and in France and the Low Countries, consisted of "*in artem redigere*" of the legal material, i.e., in establishing scientific coherence and unity in it.

A method of critical textual philology was introduced by the Swiss jurist Ulrich Zasius (1461-1535),[1] strongly under the influence of Erasmus, by the famous Italian Alciat (1492-1550) and by the Frenchman Budaeus (1467-1540).[2]

In the spirit of Humanism these authors primarily focused on the pure use of Greek and Latin as opposed to the barbarous Latin and Greek of scholasticism. In addition, a desire arose among them for simple logical argumentation.

The spread of the systematic school in legal science was chiefly caused by the contribution of the great Calvinist jurists from France (in particular Duarenus,[3] Donelius, and also Hotman), from Germany (Althusius) and through the philosophical influence of Melanchton.

A particularly lasting influence was exerted by the new systematic logic of the French Huguenot Peter Ramus. The Ramist method put its stamp on the works in legal theory of Johannes Althusius.

We briefly expand on each of the three mentioned factors.

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1 This is also significant for Germanic law, although he treated it – in line with the spirit of the time – according to the Romanist method. (It was only during the 19th century that the Germanist school managed to grasp the distinct ideas contained in Germanic law!) Zasius structured the *Freiburger Stadtrecht* (the Municipal Law of Freiburg) and in 1511 the territorial laws of the margraviate of Baden, albeit he arranged the latter along strongly Romanist lines.

2 Budaeus was the greatest Hellenist of his time.

3 Successor of Alciat at the University of Bourges.

2.5.1 **The French school of jurists**

Under the guidance of the French school of jurists a "*mos docendi Gallicus*" developed in opposition to the scholastic "*mos Italicus*." The "*mos docendi Gallicus*" distinguished itself from the old method both by its *philologic-antiquarian* emphasis (intended to return to the pure sources and dedicated to the exercise of textual criticism of the inherited texts) and by its *synthetic-systematic* element.[1]

The most influential among the great French jurists of this style undoubtedly was Hugo Donelius or Hugues Doneau (born in 1527 at Chalons-sur-Saône, died in 1591 in Altdorf – professor at the University of Leiden from 1579 to 1587). A Calvinist of high spiritual status and impeccable character, Donelius generated through his strongly antithetic actions both the enmity of his opponents and the devotion of his numerous students and supporters.

In his systematic life-work, *Commentarii juris civilis* (5 vols.) he succeeded in fully realizing his methodological program. The plan of his work is as follows. First he gives a general definition of law: law is every obligatory prescription which commands what is right and forbids its opposite. Prescriptions that command what is wrong or forbid what is right do not constitute positive law.

After this *conceptual delimitation* Donelius turns to the *contents* of law, albeit confining himself to private law.

All legal norms determine either what is *ours* or how we can obtain our right. Subjective right is therefore the point of departure.

In carrying through this distinction the system divides into two parts: *Cognitio juris nostri* and *Eius juris obtinendi ratio*.

The first part of the system treats the subjective rights and the second part their jurisprudential (procedural) realization. The

1 Not all outstanding jurists from the French school of law in the sixteenth century appreciated the importance of the systematic method. An example is found in Cujacius (1522-1590) who dedicated himself exclusively to the task of grasping the pure and original meaning of the Corpus Juris. His method remained analytical-critical-exegetical in nature.

subjective rights encompass on the one hand that which properly belongs to us and on the other that which is owed to us ("*quod proprie nostrum est*" and "*quod nobis debitur*"). The former either apply to the human person as such or apply through the relationship between the person and the things external to that person (law of persons and law of things), while the latter consist of contracts.

The second, jurisprudential part of the system, dealing with process law, in the first place treats the subjects, the processing parties, and in the second place the objects of the process, the actions and the exceptions, and furthermore the form and order of the process, and finally the *aim* of the process (verdict and legal instruments).

The great significance of this method is first of all found in its application to concrete legal material. The systematic conception permeates the whole throughout its subordinate parts.

Along these lines Donelius constructs separate legal norms derived directly from the legal sources. He does that within the context of a systematic coherence while his interpretation is likewise permeated by this systematic conception.

In sharp contrast to Cujacius, Donelius does not view law as abstract material, on a par with every other legal material that we have inherited from antiquity, but as a facet of the fullness of reality in the context of real life. Already from his definition of law, regardless of the limited extent to which it meets the requirements of a meaning-analysis, his strongly anti-positivist attitude shines through. He wants to maintain divine jural principles from which those who frame the laws cannot withdraw if genuine positive law is to be created.

2.5.1.1 *The* method *of Ramus in legal science*

The earlier mentioned *Ramist* method came to be of long-lasting and decisive influence for the development of the systematic method – which of course must be viewed as a *sine qua non* for the development of a genuine encyclopedia of legal science.

Peter Ramus (born in Picardy in 1515, murdered during St. Bartholomew's Day Massacre in Paris, 1572) was a key figure in the movement that launched a universal attack on the Aristotelian doctrine of substantial forms and on the Aristote-

lian dialectic (logic) rooted therein. It was strongly influenced by the Humanist Luis Vives (1492-1540) who had declared war on the Aristotelian dialectic because it mixed metaphysics and empirical science.

However, whereas Vives in the final analysis totally divorced the special sciences from philosophy by expecting everything from the empirical sciences, Peter Ramus searched for a new logic and epistemology that could serve as philosophical foundations for the special sciences. There is no doubt that in the philosophical work of Ramus, elements of Humanism and Calvinism intermingle. Assuming that all the disciplines are interconnected and relating this to the sovereignty of God clearly points to its Calvinistic starting point. On the other hand, however, one can see an incursion of the Platonic-idealist spirit of the rising humanism in its unbridled zest for life, so characteristic of the period of the Renaissance.

Ramus himself explains how deeper insight into Plato's dialogues first convinced him of the uselessness of the scholastic method. As the basis for every special science he constructs a logic (called "dialectic" in Platonic fashion) in which the first part deals with the doctrine of concept and definition, the second part with the doctrine of logical judgments, syllogisms, and methods. And in the spirit of Plato, mathematics is held up as the model for this dialectic.

Thus Ramus wants to substitute the scholastic logic, which in an Aristotelian sense found its orientation in grammar and in the biological method of *classification* according to species and genera, with a new doctrine of thinking oriented to geometry. The Aristotelian syllogisms are of no use, because instead of expanding our knowledge they merely lay bare analytically what follows simply from the major premises taken from sensory perception.

Rather, scientific thought has to proceed from the synthetic definitions and postulates which thought itself lays down as its foundation. Dialectic is to derive its material from the empirical sciences and needs to be applied to all these sciences.

The method of Ramus illustrates the new spirit of the time. It wants to liberate itself from the authority of the scholastic system of rules for thought while claiming the right for science to

follow the laws contained within itself. Ramus viewed dialectic as a *practical science*, as the *ars bene disserendi*, which teaches us the art of employing our natural capacity to think correctly.

Dialectic contains two parts: the *inventio*[1] and the *judicium*. The first provides rules for identifying arguments (*topica*); the second teaches the correct way to use these arguments. The *judicium* is either *axiomaticum* by stating whether or not something exists (logical judgment), or *dianeoticum* by deducing a thing from something else. The logical forms of the *judicium* are the *syllogism* and the *methodus*.

Ramus' work *Methodus* is for him the highest level of logical reasoning, binding together the mutually cohering axioms in their natural order of more general and particular rules. The *methodus* or "system" constitutes the actual aim of Ramist logic. It is *dispositio*, that is to say, ordering, dividing, and summarizing what thought has found through *inventio*, established through *axioma*, and deduced through *syllogism*.

For this method Ramus posits the general rule that scientific work has to proceed from the universal and then has to descend to the particular. The only true method is the one that commences with the *definition* and then links to it the distributio, which is partly *partitio* (separating out the *membra* or elements), and partly *divisio* (distinguishing the species). Each element of the definition ought then to be subjected to the same procedure (first the definition, next the analysis into elements, and then the *divisio*), until thought has found its way to the most particular.

As an illustration of the effect of this Ramist method in legal science we look at the plan given by Jean Bodin,[2] the first theoretician of the absolutist concept of sovereignty, in his work Six livres de la République. This work begins with a definition of the state which is presupposed as a free hypothesis without any prior dection: "République est un droit gouvernement de plusieurs ménages et de ce qui leur est commun, avec puissance souveraine" [a republic is the right of a number of households

1 Owing to its view of logical mathematical thought as *inventio,* the acquisition of new knowledge, this logic distinguishes itself sharply from the Aristotelian syllogistic approach that is based merely upon an analysis of already known truths. This new conception influenced the Humanist understanding of science.

2 Initially Bodin started with a Calvinistic orientation, but when the religious conflict broke out in France he switched his allegiance and moved to the camp of the humanist *politiques*.

and what they have in common, to govern with sovereign power]. Next, an analysis is given of the different concepts which are bound together in a unity. The first concept is that of "droit gouvernement" which is considered necessary in order to distinguish between a state and a band of robbers and which is particularly directed against Machiavelli's doctrine of *raison d'état*. This is followed by a systematic analysis of the other concepts entailed in the initial definition, resulting in each case in a new definition of the terms concerned. Once again these definitions are then differentiated and newly defined such that the method constantly leads to more detailed conceptual analyses. In this way the definition of sovereignty in this system of constitutional law becomes foundational for the exposition of all governmental rights. In the Latin edition the definition reads: "*maiestas est summa in cives ac subditos legibusque soluta potestas*" [majesty is that supreme power over citizens and subjects that is not bound by state law].

2.5.1.2 *The juridical encyclopedic literature on the basis of the Ramist method. Johannes Althusius*

On the basis of the Ramist method, the influence of which lasted into the 18th century,[1] various legal encyclopedias were written. I am referring to books that offered systematic overviews on a legal-philosophic basis of all subdivisions of the science of law.

By far the most prominent place among these encyclopedias is occupied by a work written by the Reformed jurist Johannes Althusius (1557-1638), the great opponent of the state absolutism of Jean Bodin.[2] The full Latin title of his work reads: *Dicaeologiae libri tres totum et universum ius, quo utimur methodice complectentes, cum parallis huius et judici iuris* (Herborn, 1617; Frankfurt, 1618; 4th ed., 1649). This work originated as an important expansion of a work that had appeared in 1586: *Jurisprudentiae Romanae libri duo ad leges methodi Ramae conformati et tabellis*

1 Contributing to the spread of the Ramist method, besides Althusius, were his contemporaries H. Treutler, J. T. Freigius, and W. Roding.

2 In 1586 he became the first professor of law in the newly established Reformed academic gymnasium in Herborn. In 1604 he became secretary of the city of Emden, succeeding Dr. Wiarda. This involved him in the big struggle of the city against the Count of East Frisia aimed at maintaining the freedom of the Reformed confession and the rights and privileges of the city. In this he was actively supported by the historian Ubbo Emmius, rector at Groningen and permanent advisor to the city of Emden. Althusius did not accept appointments at the universities of Leiden and Franeker.

illustrati." The work numbered 295 octavo pages, whereas the *Dicaeologiae* numbered 792 quarto pages.

The book proceeds from the definition: "*Dicaeologia est ars juris in symbiosi humana bene colendi*"; hence it is both *juris scientia* and *juris prudentia*. The "dispositio," according to which Althusius carries through the distinction of "partitio" and "divisio" along the lines of the Ramist method, is as follows:

Dicaeologicae

I. partitio : membra, partes
1. Negotium symbioticum
a) membra : res, personae
b) species
2. Jus : species
a) dominium
b) obligation

II. Divisio : species
1. Dicaeodotica (i.e. the doctrine regarding the acquisition and loss of rights: species)
a) acquirens
aa) causae acquirendi dominium
bb) causae acquirendi obligation
aa) conventio (of the procedure)
bb) delictum
b) amittens
2. Dicaeocritica (i.e., the theory of the procedure and the decision of a "quaestio ex dicaeodotica orta")
a) personae
a) judex
b) litigantes
b) quaestio
a) species: actio, exception
b) forma tractandae quaestiones s.processus

The work provides an overview of private law as well as constitutional law, penal law, penal process law and ecclesiastical law.

The important and lasting value of Althusius' contribution does not lie in applying the Ramist method as such, which as a formal-logical method is not oriented to the meaning of law,[1] but in basing a legal and political theory in a theory of associations[2] as he trains his keen eyes on the extremely differentiated structure of legal life. In our treatment of the doctrine of the sources of law we shall return in depth to his insight into the internal structure of organized communities.

Of particular importance in this regard is also his best known work, *Politica methodice Digesta* (1603) which he developed in opposition to Bodin's political theory and which provides a systematically worked out political theory based upon a general theory of organized communities/collectivities.

2.6 The influence of Melanchton on the encyclopedia of legal science. Conrad Lagus

As a third important stimulus for the victory of the systematic approach in legal science one has to mention the universal influence of the Reformer Philipp Melanchton. Since 1518 he had been a professor at the University of Wittenberg, which at its inception in 1502 was the first example of a secular academy outside Italy liberated from the church. During his stay at the university he constantly worked on carrying through a clear systematic method in grammar, rhetoric, dialectics, ethics and theological dogmatics. His purpose was mainly didactical. As such he received the honorary title "*Praeceptor Germaniae*."

Without any philosophical originality he eclectically borrowed from Plato, Aristotle and Stoic philosophy. He internalized a humanistic education and sought after a compromise between Reformation and Humanism. Melanchton's ethical

1 This caused the system to be somewhat artificial. Thus, for the sake of a logical system, Althusius had to treat penal law as the second species of the *causae acquirendae obligationis,* which separate into *conventio* and *delictum*. The penal process he had to weave into the treatment of the civil process. The *ius publicum* was subsumed under the viewpoint of "*potestas*," dividing into *potestas privata* and *potestas publica*.

2 For: "in een verbandstheorie"

works, in particular his *Epitome philosophiae moralis*, provides a contrast to Aristotelian-Thomist ethics. It is written in a purified Latin and as far as possible adapted to Reformed conceptions.

Following Luther, Melanchton finds the origin of all law in God's will which implanted certain basic concepts and norms into human nature. In its totality it forms the *lex naturae*. The divine will revealed in this *lex naturae* could be known through *natural reason* common to all men. (Already here we observe the compromise with immanence philosophy.) However, because of the fall into sin human nature resists God's will, and because human reason is darkened through sensual lusts and desires God once again revealed his law in its purity in the Decalogue, which is an "*epitome et summa legum naturae*."

The first table focuses on the service of God, and the Christian faith is able to understand its commandments. The second table covers man's obligations in earthly life and is accessible to human reason.

The fulfilment of all God's commandments, including in particular the correct relationship to Him, is the correct *iustitia universalis*. The *iustitia particularis* (justice in a stricter sense) is the virtue bearing upon human society, because the "*societas hominem et vincula societatis*" is no less ordained by God. Here Melanchton employs the Aristotelian distinction between "*iustitia distributiva*" and "*iustitia commutativa*" which he had earlier rejected.

The former arranges the ordering among people according to geometrical proportionality (treat equals equally and do not treat people who are different as equals), whereas the latter arranges the exchange of goods according to an arithmetical proportionality (performance and counter-performance must be equivalent). For Melanchton, natural law is identical with the ethical basic concepts implanted by God. As a result, he fails to penetrate to the essential distinction between law and morality. Positive law (*ius positivum*) proceeds from this natural law. It adds only the more precise stipulations required to apply natural law to the factual circumstances.

Positive law is ordained by the government, and since the authority of government rests upon God's ordinance, positive law too has binding effect, thanks to God's will.

The *ius naturale* is *invariant*, the *ius positivum* is variable. But the former, revealed to us in the Decalogue and in the Gospel, does not prescribe any specific form for the state, but sanctions every form of government and every law which is not in conflict with the *ius naturae*.

Melanchton believed that Roman law represents the purest form given to natural law.

Melanchton influenced a whole array of jurists who advanced the cause of the systematic approach in legal science in a powerful way. The most important are Johann Apell (1486-1536), Konrad Lagus (1499-1546), Melchior Kling (1504-1571) and in particular Johann Oldendorp (1480-1567). The latter is one of the first authors of a *systematic theory of natural law*, and as such he is sometimes considered a predecessor of Grotius.

The last jurist to be mentioned in this array is the pupil of Oldendorp, Nicolaus Vigelius (1529-1600). Vigelius is the author of the well-known *Methodus universi iuris civilis* (1561).

Among the encyclopedic works of these jurists we mention one of the best systematic introductions to legal science from the sixteenth century, the *Iuris utriusque methodica traditio* (Frankfurt am Main, 1543), written by Konrad Lagus (Hase). It was meant to be a systematic syllabus for use in private classes, printed by the publisher against the will of the author.

The publication of this encyclopedic work, which was strongly influenced both by Melanchton's dialectic and the thought of Apell, prompted Lagus in 1544 to write a *Protestatio adversus improbam suorum commentariorum editionem ab Egenolpho factum* (Egenolf had been the publisher). In this *protest* Lagus emphatically denounced the publication, explaining that it contained ideas that were highly imprecise and in many cases even incorrect. The class notes on which it was based were, according to Lagus himself, still only an incomplete attempt at producing a systematic account.

Nonetheless Lagus' *Methodica* certainly is the oldest complete systematic legal compendium available to us. The content mainly treats private law, but in the context of the *obligationes ex*

delicto it also discusses the *crimina publica*. A separate chapter (*De iudiciis*) extensively treats the civil process and briefly explains criminal procedure.

Similarly to what Althusius later did with it in his *Dicaeologica*, Lagus subsumed the *ius publicum* under the *potestas* within the domain of the rights of persons. The author describes Roman law as it was changed by canon law. Nothing is said about Germanic law.

In the meantime Lagus did not restrict his encyclopedia to a systematic overview concerning positive law, because the work is preceded by a quite remarkable legal-philosophical introduction.

"Doctrina iuris," according to Lagus, has two main aims:

1) to investigate the grounds upon which we are obligated to obey the laws, i.e., to investigate the foundation of all positive law; and
2) to investigate the "forms that would justly apply the laws in civil and criminal cases."

The first task is *philosophic* and the second *historical* in nature.

Thus the work contains two parts, a *pars philosophica* and a *pars historica*. In the first part an answer is given to the question *Why* is something just? and the second part answers the question *What* is (positive) law? The "pars philosophica" treats the genesis of law and its formations (legal sources); law and custom; the interpretation and application of laws; analogy and the fictions.

The opening chapters contain the first principles of natural law. It is striking to see to what extent Lagus had already progressed to the rationalistic separation of natural law and revelation, while basing natural law entirely upon human reason – a bold step, not yet found that pointedly either in Melanchton or in Johannes Oldendorp's *Isagogè iuris naturalis et gentium* (Cologne, 1539).

In his conception of positive law Lagus continues a view dating back to the legal philosophy of antiquity and also shared by Melanchton, namely that positive law (with the exception of ecclesiastical law) is identical to governmental state law. This conception was first challenged by Althusius in his doctrine of

the symbiosis of organized communities. According to Lagus, *ius civile* is "that which is established in a state by public necessity with the vote of the citizens."

The systematic structure of the second part, discussing positive law, is as follows: in the interest of understanding all legal institutions (*formae iuris*) four questions are considered:

1) Who is entitled?
2) How does one acquire rights?
3) How does one forfeit rights or how are rights alienated?
4) How does one defend rights (i.e., in a court of law)?

What is remarkable about this encyclopedia of Lagus is that also in the second positive part he eliminates all material details because they do not properly belong in a "compendium." An admirer of Ramus, Johann Thomas Freigius, reworked the *Methodus* of Lagus according to the Ramist method and published it under the title *Partitiones iuris utriusque* (Basel, 1571).

Lagus is also the first author of an essentially systematic work on Saxon law, Compendium iuris Saxonici. This work is entirely based upon his encyclopedia and organizes the basic principles of Germanic law according to a system taken over from Roman law.

2.7 Rise of the name Encyclopedia in legal literature

None of the encyclopedic works discussed thus far actually employed the word encyclopedia. Apparently the first jurist using this word was Aegid Hunnius. He did that in his work *Encyclopaedia iuris universi*, posthumously published in 1638. From the point of view of systematic quality, this work cannot compete with those of Althusius and Lagus, since its systematic structure was entirely derived from the highly external grounds of classification that had become customary for the legal codes.[1] Two years later, Philippus A. Vorburg published an *Encyclopaedia iuris publici*, *civilis, criminalis*, *feudalis* (Frankfurt, 1640).

More important than these encyclopedias is the *Paediae iurisprudentiae* of Joachim Unverfährt (Halle, 1675), to which atten-

1 Pars I: ta proota (ius, persone); Pars II: de iudiciis et de processu iudicario; Pars III: de contractibus; Pars IV: de materia ultimarum voluntatum, in which intestate law of inheritance was squeezed in; Pars V (an appendix): continens ius canonicum.

tion was justifiably drawn again by Nikolai Kornukov in his work *General Theory of Law*, 2nd ed. (New York, 1922), p. 12.

The author postulates seven aims for the *Paediae*. We mention the following:

1) determining the sources and criteria for scientific truth;
2) determining the scientific method;
3) enumerating books and documents for student use.

The entire set-up is that of a *formal encyclopedia*. The legal material belonging to any one of the branches of legal science is nowhere dealt with.

2.8 Influence of humanist-rationalist philosophy. The idea of the *mathesis universalis* in the juridical encyclopedia. The school of natural law

Since the second half of the 17th century, humanistic philosophy as established by Descartes, Spinoza, Hobbes and Leibniz started to influence the systematic-encyclopedic treatment of legal science. The idea of the "*mathesis universalis*" begins to permeate legal thought. Particularly the rationalist, humanist representatives of natural law delivered pioneering work in this regard, guided by the idea of a system of natural law deduced "*more geometrico*."

Samuel von Pufendorf (1632-1694) attempted to apply the philosophical conceptions of Descartes in his encyclopedic work *Elementa iurisprudentiae universalis* (1660). The value of this work for the science of law, however, is very low.

Christian Thomasius (1655-1728) was the first person to spend four consecutive semesters on general encyclopedia. He wrote the first academic work in the German language: *Summarischer Entwurf der Grundlehren, die einem studioso iuris zu wissen und auf Universitäten zu lernen nöthig* [Outline of the basic doctrines needed to know for the study of law and required to learn at the universities] (Halle, 1699).

Leibniz, in his early work *Nova methodus discendae docendaeque iurisprudentiae* initiated an attack on the inflexibility and artificiality of the earlier systematic methods, particularly the Ramist ones. However, he himself remained caught in a mathematical formalistic method which, similar to the Ramist me-

thod, only managed to order the legal material in an *external* formal-logical manner since it was not oriented to the meaning of law itself.

This formalism was driven to its extreme by Daniel Nettelbladt, the well-known pupil of Christian Wolff, the philosopher *par excellence* of the rationalistic Enlightenment who deepened Leibniz's philosophy and succeeded at the same time in making it superficial.

Similar to the *mathematical form* that Wolff tried to give to philosophy in general, Nettelbladt wanted to inject this also into legal science. Practically all his labor devoted to the science of law exhausted itself in systematics and encyclopedially well-organized treatment of the discipline. Of his many encyclopedic works we mention only his *Systema elementare iurisprundentiae positivae* (Halle, 1749).

Nettelbladt attempted to carry through in legal science Wolff's geometric, "*demonstrative*" method. He wanted to deduce positive law in a systematic fashion from the postulates of natural law. In this connection we have to bear in mind that during the 18th century legal scholarship in Germany in many ways slid back into an uncritical treatment of the legal material, geared mainly to practical needs. Both a critique of the sources and an account of the systematic structure were largely neglected during this period.

Leibniz nor Nettelbladt tired of urging the improvement of legal practices and legal training. Leibniz especially was for quite some time inspired by the ideal to provide methodically a different form to Justinian's *Corpus Juris* and to bring together in one code of law all of contemporary positive law.

Soon many encyclopedias were written in the spirit of Nettelbladt's work. However, the fruitless methodological formalism of this entire school called forth the opposition of a new movement within the encyclopedia of legal science which mainly had a dogmatical and practical orientation.

2.9 The empirical practical systematic school. Pütter, Moser, and Senckenberg

This more empirical, practical dogmatical school was opposed to the rationalistic philosophical movement of Nettelbladt and others. It was associated particularly with the names of Johann

Stephan Pütter (1725-1807), Johann Jacob Moser (1701-1785), and Heinrich Christian Senckenberg (1704-1768).

These authors were formed by the school of practical life and some were competent practitioners of constitutional law. One can therefore observe an understandable reaction among them against the mistakes of the rationalistic school of natural law that was based upon a formalistic philosophy that is foreign to life. Stephan Pütter, the teacher of Gustav Hugo (precursor of the Historical School) wrote a work with the title *Entwurf einer juristischen Encyclopädie* (Göttingen, 1757), followed by his *Neuer Versuch einer juristischen Encyclopädie und Methodologie* (Göttingen, 1767).

Although not the first jurist to use the term encyclopedia, as we have seen, Pütter's choice to use it for works like these actually helped to bring it into circulation. He was also the first to distinguish *encyclopedia* from *methodology*, though we question whether this distinction is of any real value. The great epoch-making significance of his encyclopedia, as well as those of Moser and Senckenberg, is found in the rejection of attempts by their forerunners to apprehend the living coherence of law in an external, formalistic systematics. Without setting themselves negatively up against the philosophical school of natural law, they aimed at comprehending the prevailing law as living material in terms of simple, general points of view while particularly trying to bring its *national* elements to the consciousness of the people. They wanted to write their overview in an accessible form, such that, according to a statement by Senckenberg, "it might enable citizens in town and country to understand it and to assess it according to their particular circumstances." Senckenberg in fact wrote his book, as he himself tells us, for his eleven-year-old son.

In a certain sense one can trace the opposition between the *philosophical* and the *practical systematic* school in the encyclopedia of legal science back to the general philosophical opposition between rationalism and empiricism.

This philosophical polarity dominated epistemology until Kant. Whereas rationalism (Descartes, Spinoza, Wolff) acknowledged only the mathematical logical thought function of our consciousness as the source of our knowledge, empiricism

(Locke, Hume, and others) recognized only our psychical function of perception as the source of our knowledge.

2.10 Kant's influence on the juridical encyclopedic literature

Kant's so-called critical philosophy attempted to establish a compromise between these two schools. It did so by accepting the mutual relatedness of the (mathematical) *logical* and the *psy*chical functions of consciousness as the sole sources of knowledge, and by locating the universal validity of scientific knowledge in the *apriori*, *transcendental logical thought forms* (the categories of quantity, quality, relation and modality) together with the sensory forms of intuition (space and time) in which the sensory material of experience is apprehended in a synthetic unity.

In opposition to *rationalism* Kant taught that without intuition [Anschauung] thinking is empty and contains only empty forms which have no content until they are combined with sensory experience. In opposition to *empiricism* Kant maintained that intuition without thinking is blind and cannot serve as the foundation of universally valid experience.

Thus Kant's method is in sharp contrast with the aprioristic deductive method of Wolff's rationalism which turned away from experience.

However, the "critical method" introduced by Kant could not immediately be of general significance for legal science, because in the interest of the humanistic ideal of personality Kant restricted all science to the narrow domain of natural experience, i.e., to mathematical natural science, which was the domain of the science ideal. He did not want to base prac-tical legal philosophy (the domain of the personality ideal) on science, but on an apriori rational faith. In doing so Kant con-tinued to follow the path of rationalistic natural law. Only at the turn of the 19th to the 20th century did various neo-Kantian schools broaden Kant's concept of science in an attempt to apply the critical method to legal science and legal philosophy as well (Stammler, Kelsen, and many others).

Nonetheless, by the end of the 18th century we see how Hugo began to attack the aprioristic rationalistic doctrine of natural law with the weapons of the Kantian critique of knowledge. In

calling legal science back to a critical historical study of the sources he became an immediate precursor of the Historical School of Law. Hugo's chief work was entitled *Lehrbuch der juristischen Encyclopaedie* (Textbook of juridical encyclopedia) (Berlin, 1792).

The many encyclopedias of legal science written under the influence of Kant during the second half of the 18th century evince either a more *practical philosophical* or a more *philological historical* character (Hugo's encyclopedia belongs to this latter category), depending upon the question whether or not they are written in the spirit of an aprioristic doctrine of natural law or in the spirit of his critical epistemology (in its focus on *experience*). Most of these encyclopedias commence by giving prominence to basic Kantian theses. The distinction made by Pütter between encyclopedia and method as well as the external treatment of the so-called *auxiliary* sciences, understood apart from the mutual coherence between the law-spheres, was maintained in the encyclopedias of this time.

We mention the following encyclopedias which acquired the most fame: Johann Friedrich Gildemeister, *Juristische Encyclopädie und Methodologie* (Juridical encyclopedia and methodology) (Duisburg, 1783); Johann Friedrich Reitemeier, *Encyclopädie und Geschichte der Rechte in Deutschland* (Encyclopedia and history of law in Germany) (Göttingen, 1785); Theodor Schmalz, *Encyclopädie des gemeinen Rechts* (Encyclopedia of common law) (Königsberg, 1790); Gustav Hugo, *Lehrbuch der juristischen Encyclopädie* (Textbook of juridical encyclopedia) (Berlin, 1792); Ernst Ludwig August Eisenhart, *Die Rechtswissenschaft nach ihrem Umfange, ihren einzelnen Theilen und Hülfswissenschaften, nebst einer juridischen Methodologie zum Gebrauch encyclopädischer Vorlesungen* (Scope, subdisciplines and auxiliary sciences of the science of law, with a juridical methodology for use in encyclopedic lectures) (Helmstadt, 1795); Karl Salomo Zachariä, *Grundlinien einer wissenschaftliche Encyclopädie* (Elements of a scientific encyclopedia) (Leipzig, 1795); and a variety of encyclopedic publications such as the work by Gottlieb Hufeland, *Institutionen des gesammten positiven Rechts; oder Systematische Encyklopädie der sämmtlichen allgemeinen Begriffe und unstreitigen Grundsätze aller in Deutschland geltender Rechte* (Comprehensive institutes of po-

sitive laws; or systematic encyclopedia of the general concepts and uncontested basic principles of all German law) (Jena, 1798), as well as the work by Friedrich Justus Thibaut (the prominent opponent of Savigny in the controversy over codification), entitled *Juristische Encyclopädie und Methodologie* (Juridical encyclopedia and methodology) (Altona, 1797).

2.11 The effect of speculative idealism on the idea of encyclopedia. The historicistic school in the encyclopedia of law

Kant, too, failed to establish an inner systematic unity in scientific thought. This was a result of his dualism between the *form* and *matter* of knowledge and his humanistic conception that *form* as the ordering and law-giving element in knowledge could be located only in apriori functions of consciousness. Because of his criticistic starting point, Kant could not conceive of systematic thought except as formal-logical, which means that it could not be oriented to the intrinsic meaning of the law-sphere that was chosen to be the "Gegenstand" of thought.

Fichte, Schelling and Hegel attempted to resolve Kant's dualistic separation of form and matter. They did so by deducing knowledge as a dialectical organic coherence from the idea of the freedom of the human personality itself. They were no longer willing to accept the "Gegenstand" as an original independent instance ("thing in itself") opposite free consciousness, but instead wanted it to originate in a dialectical way from this free self-consciousness itself. Thus encyclopedia became for them, as we mentioned earlier, *Wissenschaftslehre* (theory of science), in the sense of the self-reflection of scientific thought. It was intended to constitute a philosophy of science that generates the totality of disciplines as a dialectical organism from a highest principle.

Schelling and Hegel conceived of law in a historical sense as the *dialectical unfolding of the idea of justice in historical* development and thus turned away from the rationalistic natural law. The Historical School [of Jurisprudence], founded by Friedrich von Savigny, was strongly influenced by Schelling, as we shall argue more extensively when we examine the different schools more closely.

The juridical encyclopedias written under the influence of the speculative philosophy of Schelling and Hegel exhibit a strong historicistic tendency. Those oriented to Fichte's philosophy on the other hand by and large did not yet succeed in making fruitful for the various disciplines the newly conceived principle of the organism of the sciences. The most important encyclopedias with the richest content oriented to Fichte's philosophy (in its first phase) are: Ignaz von Rudhart, *Encyclopädie und Methodologie der Rechtswissenschaft* (Würzburg, 1812), and Leopold August Warnkönig, *Juristische Encyclopädie, oder Organische Darstellung der Rechtswissenschaft* (Erlangen, 1853).

One of the most important encyclopedias oriented to Schelling in a strict sense is that of Albrecht Hummel, *Einleitung des gesammte positiven Rechts* (General introduction to positive law), 2 vols. (Giessen, 1804). The first section of the first volume contains a "speculative part" which assimilates the idealistic philosophy of Schelling. The subsequent volume, entitled *Einleitung in das gesammte positive Recht, aus dem Standpunkte der Wissenschaft* (Introduction to the whole of positive law, from the standpoint of science), is devoted to a dogmatic-historical exposition of Roman law in all its dimensions. This encyclopedia is written in heavy prose and ponderous thought, hence totally unsuited for student use.

In a broad sense the following encyclopedias are based upon the standpoint of Schelling and Hegel:

Georg Friedrich Puchta (pupil of Savigny), *Grundriss zu Vorlesungen über juristische Enzyclopädie und Methodologie* (Erlangen, 1822), later on taken up in the *Cursus der Institutionen* as *Einleitung in die Rechtswissenschaft*. The 10th impression was published by the Romanist Paul Krüger in 1893.

Julius Friedrich Heinrich Abegg, *Encyclopädie und Methodologie der Rechtswissenschaft im Grundrisse* (Neustadt, 1823).

Alexander Friedländer, *Juristische Encyclopädie; oder System der Rechtswissenschaft* (Heidelberg, 1847) – a brief work entirely kept within the confines of a historical and philosophical approach while giving an excellent overview of the history of the idea of an encyclopedia (like Abegg, strongly oriented to Hegel).

Heinrich Ahrens, *Juristische Encyclopädie, oder Organische Darstellung der Rechts- und Staatswissenschaft, auf Grundlage einer ethischen Rechtsphilosophie* (Vienna, 1855),

oriented to the speculative idealistic philosophy of Krause, a pupil of Schelling.[1]

This encyclopedia was also translated into French.

Ferdinand Walter, *Juristische Encyclopädie* (Bonn, 1856), strongly influenced by the organic legal and political philosophy of Friedrich Julius Stahl (the German antirevolutionary legal philosopher who had an important influence on Groen van Prinsterer in his later period).

Karl Pütter, *Der Inbegriff der Rechtswissenschaft oder juristischen Encyclopädie und Methodologie* (Berlin, 1896).

All these encyclopedias were based upon the organic basic conception that the academic disciplines ought to be practiced in their coherence with the philosophical totality of knowledge. According to this conception all special sciences, including therefore legal science, are merely phases of the methodological development of the universal idea of science.

To the extent that they consistently carried through the organic idea, they rejected the distinction between a *formal* and a *material* encyclopedia in the usual formalistic sense,[2] (even though in a general philosophical sense they did bear a *formal* character) as well as the external distinction between encyclopedia and methodology.[3]

1 [A possible reference to *Cours de droit naturel ou de philosophie du droit, fait d'après l'état actuel de cette science en Allemagne*, 4th ed., rev. and enl. (Brussels, 1853). A copy of this work was part of Dooyeweerd's personal library; see Herman Dooyeweerd Library Collection, Institute for Christian Studies, Toronto. However, this work is actually a translation of Ahrens's *Das Naturrecht, oder die Rechtsphilosophie nach dem gegenwärtigen Zustand dieser Wissenschaft in Deutschland* (Brunswick, 1846).]

2 See Friedländer, *Juristische Encyclopädie, oder System der Rechtwissenschaft*, par. 12: "It [i.e., the encyclopedia] can therefore consist neither in a purely external, mechanical coherence of related entities (the so-called external or formal encyclopedia), nor in a loose succession of linked propositions (the so-called inner or material encyclopedia). Nor is its essence found in an attempt to generate a totality from these two perspectives (the external and the internal encyclopedias), for no integral whole is made by uniting two arbitrarily separated things."

3 See ibid., par. 10-16, where Friedländer gives the following definition: "The encyclopedia of legal science in particular has to demonstrate what are the place and scope of legal science within the totality of human knowledge, and what is the necessary, conceptually determined coherence of the individual branches of legal science."

The organic conception of the encyclopedia of legal science as such certainly is to be applauded. As in our own conception, the special sciences cohere organically, which requires of legal science to determine its place within this organism. However, the philosophy of Schelling and Hegel does not provide a fruitful method to carry this idea through in science because it is rooted in a humanistic type of cosmonomic idea. This cosmonomic idea on principle rejects the cosmic law-order and the boundaries of the law-spheres grounded in it. Instead it construes a rational coherence between the disciplines by means of a dialectical mode of thought rooted in the personality ideal of freedom.

This dialectical mode of thought consciously sanctions the antinomy. Its philosophical basic denominator to which all of temporal reality is reduced essentially is an irrationalistic conception of historical development. It is therefore the antipode of the rationalistic conceptions of natural law and rational law, and it defends a historicistic view of law which does not proceed from the individual but from the historic folk community. Not God is sovereign here, but absolutized human reason, understood in terms of the irrationalistic idea of the free personality (see our *Introduction*, pp. 65-70). On this standpoint all boundaries encountered by thought in the irreducible structure of the law-spheres are considered to be limits that sovereign reason sets for itself. As a consequence, sovereign reason with its dialectical thinking can also overstep these boundaries if it so pleases. This is the reason why this otherwise well-grounded school came to nothing. With its aprioristic constructive spirit, not at all oriented to the intrinsic meaning of law, it was doomed to fail. Nevertheless, the organic idea of encyclopedia, even though it almost completely died out in modern humanist thought, cannot be abandoned, given our own cosmonomic idea. It is not the case, as Professor Zevenbergen avers in his *Encyclopedia* (p. 9), that there is "no room for an encyclopedia of legal science as an independent discipline alongside general legal theory, legal philosophy, legal history, and sociology of law."

A view like that clearly shows to what extent the positivistic spirit, which had severed the interconnectedness of the disciplines, has influenced even believing Christian authors. For one thing is certain: we would not be able to study the history of law, sociology of law, psychology of law, and so on and so forth, if the jural sphere did not display an organic coherence with all

other domains of temporal reality. A fruitful treatment of the domain of law is impossible if one does not philosophically give an account of this coherence.

In the long run neither philosophy nor the special sciences can be satisfied with a mechanistic coordination and formal logical delimitation of the disciplines without accounting for their interconnectedness. From the beginning, the encyclopedia of legal science is legal *philosophy* (modified only in its manner of treatment for pedagogical reasons). But this encyclopedia is not taken in the formalistic sense in which Zevenbergen meant it. For as we have seen in our *Introduction*, legal philosophy, as a subdivision of philosophy in general, has the specific task to reposition special-scientific knowledge within the coherence of the whole. For that reason encyclopedia can never be positioned alongside the special sciences, as seems to be the case in Zevenbergen's conception of encyclopedia as a discipline in its own right. In point of fact, it is the inner basis and bond of the disciplines, in the absence of which they cannot really rise to a genuinely scientific level.

No discipline has ever made real progress without the enriching guidance of an encyclopedic philosophical spirit. The times of a consistent positivism surely are not the best for the flourishing of scholarship!

2.12 **Positivism in the encyclopedia of legal science**

In the course of the 19th century a positivistic reaction arose in response to the speculative organic school oriented to history and influenced by Fichte, Schelling and Hegel. This positivistic school continues to work to the present day and has given up on the core idea of encyclopedia as the *Universal-Wissenschaft* that Aristotle founded and that was still adhered to by the great systems of rationalist humanism in the 17th and 18th centuries.

A positivistic school was present already at the time of the rise of the Historical School of Jurisprudence. Soon it turned against the romantic historical conception of law as taught by the founder of the Historical School, Friedrich von Savigny (1779-1861), who launched its program with his celebrated manifesto, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (On the calling of our age for legislation and jurisprudence) (1814).

Friedrich Justus Thibaut (1772-1840) was the acknowledged leader of the *scientific positivism t*hat opposed the *historical-ideal-*

istic conception of law. His positivism, however, was strongly oriented to Kant's conception of science and revealed itself only in a strict separation of natural or rational law, which he declared to be the fully valid norm for the evaluation of positive law and positive *legal science*. The latter was not to draw its conclusions, in the fashion of the natural law school of Heineccius, Nettelbladt, and others, from the axioms of natural law, but had to adhere strictly to the empirical legal material. Thus he worked only with positive law, in a strictly positivistic sense. Positivists like Georg Arnold Heise (1778-1851) and Friedrich Cropp (1790-1832) followed in his footsteps.

Heise wrote the famous textbook *Grundriss eines Systems des gemeinen Civilrechts* (Heidelberg, 1819), which dominated the academic teaching of private law for many years.

Gradually, however, the positivistic conception of law culminated in a total denial of natural law, even as a criterion for evaluating positive law. Positive law whose content was divorced from all supra-arbitrary foundations and principles became the one and all.

Meanwhile, the positivistic school differentiated into more nuanced subdivisions.

Alongside a naive subdivision, which no longer sensed any philosophic problem in positive law, we more recently find, under the influence of Kant's critical method, a critical positivism which takes the concept of law to be a *logical* thought-form without any material content. In another transitional school between naive and critical positivism, to be discussed below, the encyclopedia of legal science as formal encyclopedia is absorbed into a so-called "general theory of law." To the extent that this positivistic school continued to exert its influence, the designation "Encyclopedia of Legal Science" slowly became obsolete. Preference was now given to an "Introduction to Legal Science."[1]

1 Walter already reacted against this designation (*Jur. Enc.*, 1856, p. 5): "Encyclopedia thus held up its discipline to the mirror, allowed it to be examined, and gave it self-consciousness." Thus it is not the introduction to science but science magnified, the science of the sciences (the view of Fichte, Schelling, and Hegel).

It is typical in this regard that since the revision of our [Dutch] Higher Education Act and in connection with it the so-called *Academic Statute* (Royal Decree of June 15, 1920) the subject of instruction that was earlier designated as the "Encyclopedia of Legal Science" now got rebaptized to read "Introduction to Legal Science." But even where the name "encyclopedia" remained in use, it no longer carried with it the meaning given to it by Schelling and Hegel. Much rather it was taken to mean an "introduction" to legal science," allowing for widely differing conceptions about its task and object.

2.12.1 The juridical encyclopedia as "general theory theory of law" (formal encyclopedia). The conception of precritical positivism

The philosophical critique of Hugo, who proceeded from the philosophical orientation of Schelling and that of the Historical School, struck a mortal blow at rationalistic natural law. Even the philosophical foundation of the historical conception of law lost its hold through the rise of a new naturalism, stimulated by Darwin's theory of evolution. Alongside these developments positivism gradually entered legal science in the garb of utilitarianism.

It allowed the meaning of law to be fully absorbed by the conception that law derives its validity exclusively from the subjective will of the law-giver and has *social utility* as its sole aim. As a substitute for natural law the best representatives of this school recognized as positive law only formal-logical truths and universally valid formal concepts (arrived at through abstraction from positive laws). The aim was to investigate these general legal concepts and legal truths in a so-called "general theory of law."

In this vein the Germanist Nikolaus Falck (1784-1850)[1] had already absorbed the juridical encyclopedia into a "general legal theory" after declaring in the very opening paragraph of his Juristische *Encyclopädie* (5th edition, Leipzig, 1851, prepared by his friend Rudolf von Jhering) that the idea of an encyclopedia as an *Universalwissenschaft* was "impossible." The content of this otherwise very informative encyclopedia consisted mainly

1 Professor at Kiel. As a Germanist, he specialized in the legal system of Schleswig-Holstein.

of the history of legal science, while the concluding chapter dealt with the auxiliary sciences.

Henceforward the distinction between *formal* or *external*, and *material* or *internal* encyclopedia, which explicitly emerged at the end of the 18th century, received its pregnant meaning within legal science.

Formal or external encyclopedia, according to the positivist school, avoids dealing with any positive legal material and merely introduces law students to the scope and external formal limits of what they need to study. It entails explanations of the basic concepts of law as well as its subdivisions into the general distinctions of universal and particular, obligatory and supplementary, private and public law, civil law, process law, commercial law, constitutional law, criminal law, and so on.

Material or internal encyclopedia is merely meant to provide a succinct purview of the positive legal material. Sometimes it is conceived of in a more historical mode, at other times in a more systematic fashion. (See also Falck, *Juristische Encyclopädie*, Sec. 29).

It is not possible to classify all encyclopedias which appeared after leaving behind the conception of Schelling and Hegel in terms of the distinction between *formal* and *material* encyclopedia, because many of them occupied an in-between position. The distinction between *formal* and *material* here indeed comes to have an external, positivist meaning.[1] This is the case because positivism by no means takes the expression "formal encyclopedia" to mean "an investigation oriented to the jural sphere's intrinsic meaning of the inner structure of legal science in its organic coherence with the other disciplines" (the conception defended by us). Instead, by "formal encyclopedia" positivism means an external synopsis concerning the scope and limits, the basic concepts and subdivisions of the field of law, in which the latter is simply *coordinated* with other fields of scientific inquiry without any intrinsic connection to them and is distinguished from them according to external logical characteristics – that is,

1 For that reason this positivistic concept of a *formal encyclopedia* can be equated neither with the Schellingian-Hegelian school nor with the conception defended by us.

identifying their *differentia specifica*, derived after determining the *genus proximum*.[1]

"Material encyclopedia" then simply becomes a more or less detailed systematic or historical *exposé* of the material treated in the various branches of legal science, without any inner coherence. In fact, sometimes material encyclopedia abolishes any systematic plan altogether and opts for the *alphabetical lexicographic* form.

Alternatively, it becomes a detailed compilation in which the subdivisions of legal science are treated in separate articles or even in separate books by contributors who diverge widely in terms of basic orientation.

Good examples are Franz von Holtzendorff's alphabetically arranged *Rechtslexicon* (Leizig, 1870/71) and the *Handwörterbuch der Rechtswissenschaft* published by Fritz Stier-Somló and Alexander Elster, the first volume of which came out in Leipzig in 1926. Other examples worth mentioning are the *Wörterbuch des Völkerrechts* (Berlin/Leizig, 1924) edited by Karl von Strupp, the 5-vol. *Staatslexicon* (Freiburg im Breisgau, 1889-1897) edited by Julius von Bachem, the *Wörterbuch des Deutschen Verwaltungsrecht* edited by Karl von Stengel, and the *Staatslexikon* commissioned by the Görres-Gesellschaft, hence written from a Roman Catholic perspective, edited by Hermann Sacher (Freiburg im Breisgau, 1926-32; 5th impr. in 7 vols.).

Among the material-encyclopedic compilations particular mention ought to be made of the *Enzyklopädie der Rechtswissenschaft* (Berlin, 1901; 2nd ed., 1904) edited by Karl von Birkmeyer; the systematically and alphabetically structured[2] *Enzyklopädie der Rechtswissenschaft im systematischer und alphabetischer Bearbeitung*, edited by Holtzendorff, 5 vols. (Leipzig, 1882), of which the first volume contained systematic articles while the other

1 Conceptually, for example, law is first brought under the *genus proximum* of "community norms" and then distinguished from other "community norms" (social, religious, ethnic, etc.) by means of *differentia specifica* – e.g., as having the nature of external coercion or having its source in the will of the state or the will of an "ordering subject." This method is derived, incidentally, from Aristotle's logic.

2 For that reason this positivistic concept of a *formal encyclopedia* can be equated neither with the Schellingian-Hegelian school nor with the conception defended by us.

four volumes simply contained a lexicon of law (the 7th ed. came out in 1915, edited by Josef Kohler). To the same category belongs Vol. II, § 7 of the collective work *Kultur der Gegenwart* (Contemporary culture), edited by Paul Hinneberg and published under the title *Systematische Rechtswissenschaft*. Contributors were Rudolf Stammler, Rudoph Sohm, Karl Gareis, Victor Ehrenberg, Ludwig von Baer, Lothar von Seuffert, Franz von Liszt, Wilhelm Kahl, Paul Laband, Gerhard Anschütz, Edmund Bernatzik, and Ferdinand von Martitz (Berlin, 1906; 2nd rev. ed., 1913).

Finally we should mention the large *Enzyklopädie der Rechts- und Staatswissenschaft* edited by Kohlrausch and Kaskel. The subdivision on legal science was supposed to encompass 32 smaller volumes, prepared by 32 scholars. The series opened with the well-known book of M. E. Meyer on *Legal Philosophy* (1922). In the subdivision on "Legal Science" the last one to appear was that of Lutz Richter, "Social Insurance Law" (as Vol. 31a).

In the combination of formal and material encyclopedia the former serves as the logical systematic framework within which a largely arbitrary attempt is made to order the material-legal contents. The "ancillary sciences" (such as sociology, linguistics, economics, psychology, history, and logic) are a mere external addendum without any internal systematic order or necessity. Needless to say, perhaps, is that notwithstanding this loss of the basic idea of an encyclopedic science, many of these encyclopedias have a really worthwhile content.

After the period in which legal encyclopedia experienced a significant flourishing (1840–60), we see a period of its decline. In Ernst Friedlieb's *Juristische Enzyclopädie* (Kiel, 1853) we can already see the gradual transition from the organic-historical to a positivistic conception of law. Only in some respects does the after-effect of the Romantic historicistic philosophy become apparent in his thought (e.g., the idea of individual national "folk-spirits" and the rejection of mere custom as a basis of validity for positive law); but his conception of encyclopedia as an "Introduction to Legal Science" has little in common with the school of Fichte, Schelling and Hegel.

Between 1860 and 1870 the only work to make mention of is that of Levin Goldschmidt, *Encyclopädie der Rechtswissenschaft* (Heidelberg, 1862). This work really does little more than provide a summary exposé, kept within the confines of a material approach, of the contents of the various subdivisions of legal science, supplemented with an overview of the relevant literature.

In Germany a strong stimulus was given to the notion of a *general theory of law* (the positivist substitute of a "philosophy of positive law") by means of systematic research into the general basic concepts of law among authors such as Adolf Merkel, Ernst Rudolf Bierling, Karl Bergbohm, Otto Becker, and others. As we have seen, Falck was the first to emphasize the necessity of a "general theory of law" as the philosophical basis of an encyclopedia of legal science.

2.12.1.1 *The causes of the rise of a general theory of law*

The big incentive that led the positivistic conception of law to the idea of grounding positive, practice-oriented legal science in a "general legal theory" as "philosophy of positive law" has to be sought first of all in the attack on the *scientific character* of a legal science which, in a naive positivistic fashion, accepts positive law as a given datum of legislative arbitrariness without any deeper foundation.

In 1847 Julius von Kirchmann published his work about "the worthlessness of *Jurisprudenz* as a science." It stems from his presentation given to the "Juristic Community" in Berlin in 1847, that is to say, just before the storm of the revolution broke out. Entirely in the grip of the naturalistic science ideal of the humanistic worldview, this work was primarily an attack on the conception of the task of legal science as defended by the Historical School.

However, in essence it carried *ad absurdum* the positivistic school of legal science by wrongly equating it with the Historical School. The oft quoted words: "Three amendments by the legislators, and whole libraries turn into scrap" were meant only to accuse legal science of a lack of objective legitimacy when it chooses no other object of investigation than the products of ever changing state legislation. Because such a discipline chooses the "contingent" as its object, it becomes contin-

gent itself. Kirchmann knew only one kind of science, *natural science*, which uncovers the "eternal" and immutable laws by means of which the human intellect learns to control nature and so carry humanity to a higher cultural level. Kirchmann speaks of a "natural justice" that lives in a folk's consciousness, a kind of "right" that legal science cannot grasp when it is bound to the accidental moods of a legislative body. He accuses such science of being "unproductive." It was in reaction to this attack that positivism was forced to begin accounting for the objective legitimacy of positive law.

2.12.1.2 *Rudolf von Jhering*

The towering figure of Rudolf von Jhering (1818-1892) stood in the front line and in many ways became the guide to the future in the struggle to take the positivistic conception of law beyond naive positivism and provide it with a deeper foundation. In his first period (1842-1852) he was still in the grip of the Romantic organic legal conception of the Historical School whose original train of thought was strongly defended by him against its epigones in his great treatise, *Die historische Schule der Juristen* (The historical school of jurists) which appeared anonymously in the *Literarische Zeitung* of 1844. In his second period (1852-1859), commencing with the appearance of his famous work *Geist des Römischen Rechts auf den verschiedenen Stufen seiner Entwicklung* (The Spirit of Roman law in the various phases of its development), 4 vols. (Leipzig, 1852-65) he gradually started to free himself from the irrationalist romantic and historical view of law (which was oriented to the philosophy of Schelling). In the first volume of this work, in which he tried to realize the program of the Historical School, namely to understand a legal system in terms of the supra-individual historical folk-spirit,[1] with regard to the development of Roman law, he opposed the attempt of Savigny to interpret the *reception* of this law in Germanic countries as a product of the spirit of the German folk.

Jhering himself grounded the reception of Roman law uponthe *general cultural law of the community of nations*. Closely approximating Darwin's naturalistic theory of evolution, Jhering took this general law to be a law of assimilation and adaptation equally valid for the material and the spiritual world. Thus,

1 Hence the title: The *Spirit* of Roman Law.

in opposition to the one-sided assumption of the Historical School of a national folk-spirit as the only material source from which positive law initially grows unconsciously as a historical organism, Jhering inserted the concept of universality into the theory of the genesis of law. It was chiefly through its *universality* that Roman law became a cultural ingredient of the modern world. "The world-historical significance of Rome, in a word, is the mission to overcome the nationality principle by the idea of universality."

Jhering did not at all reject the idea that the *initial* development of positive law flows from a folk's spirit. On the contrary, exactly at this point he attempted to carry through the program of the Historical School, namely to see positive law arising from a folk-spirit. He even dedicated a whole chapter in his first volume to the essence of the Roman national spirit. He apologized for his dilettantism in this field but presented his contribution as a historical-philosophical sketch in which to track down the constitutive features of this national spirit – something never attempted by Savigny and Puchta. But Jhering's "sketch" reveals at the same time that he distanced himself on principle from the irrationalist conception of the initial unconscious genesis of law from the womb of the national spirit.

In the objectification of the Roman national spirit, whose essential character is summarized by Jhering as a "system of disciplined egotism," *reflection* or *conscious calculation* also played a role. "The Romans had a strong urge to independently give shape to things; it went against the grain for them to leave things to themselves, as is supposed by the theory of a natural growth process." (That was the Romantic organicistic theory of the Historical School!). This reaction against the irrationalistic conception of a folk-spirit, a reaction already present in Volume I of *Geist*, would lead, as Jhering's pupil Adolf Merkel correctly remarks, to a different idea of *development* in legal history. Whereas this idea of development was unquestionably a conservative idea in the thought of Savigny, it was turned into a progressive concept with Jhering (transcending Roman law by means of Roman law!).

In Volume III of his *Geist des römischen Rechts*, which appeared in 1858, Jhering attempted to parry Kirchmann's attack on the scientific character of legal science by developing an exten-

sive theory of legal technique. In this theory he defended the *productive character of positive theoretical science as source of law*. Puchta had already elevated theoretical science to the level of a source of law since he believed that along the lines of juridical construction (*Begriffsjurisprudenz* or *law conceptually generated*]) it can form new law.

Jhering now ventured to provide a more precise foundation for this conception by means of an elaborate, slightly bizarre natural-historical view of the method of the science of law, a view which in his later period he ridiculed with unrestrained irony in his work on "banter and seriousness in law": *Scherz und Ernst der Jurisprudenz* (Leipzig, 1884).

In the work of 1858 he regards legal concepts and legal institutions as "juridical bodies" leading their own organic life. Positive law formed a legal organism which ought to be viewed in an "anatomical" and "physiological" way (in other words, biologically). The concrete material of legal rules are brought to a "higher aggregate state" through general legal concepts. The legal concepts in which the positive legal rules are "precipitated" can mate like natural organisms and thus generate new legal rules. Thus, logical constructions in legal science indeed become creative: they generate news law by supplementing the shortcomings of the positive legal material. — Here we already find the foundations of a general theory of law, a crea-tive legal systematics that Jhering designates as the "higher jurisprudence," as opposed to the "lower jurisprudence" which occupies itself solely with interpreting the content of positive legal stipulations.

As we shall see, the "general theory of law," under the influence of the later position of Jhering, largely distanced itself from "*Begriffsjurisprudenz*," even though in the thought of an author life Karl Bergbohm we still find strong reminiscences of Jhering's theory of the creative power of logical construction in the formation of law.

Jhering's method, based on the "natural history" of law, ultimately has nothing to do anymore with the organic conception of law of the Historical School. It is already in step with the new biological idea of evolution in biology (Darwin) and should

be seen as an optimistic answer to the skeptical critique of the value of legal science aired by Kirchmann.

Unquestionably, it merits attention that Jhering's pupil, Adolf Merkel, already noted a close connection between Jhering's "productive legal science" and the "general theory of law" in the sense of a "philosophy of positive law."

For all that, Jhering in his second period should still be seen as belonging to the Historical School, since he viewed historical development, albeit no longer in a romantic historicist sense, nevertheless as being subject to an immanent regularity of positive law and still expected the modern development of law to arise from a systematic-constructive legal science in the sense of "*Begriffsjurisprudenz*."

The radical break with the Historical School and with Puchta's "*Begriffsjurisprudenz*" did not occur until the third period of Jhering's scientific labor. This third period, which dates from approximately 1859, was characterized by (1) a complete aversion to historical construction as legal norm; (2) a naturalistic conception of legal development in close connection with Darwin's theory of evolution, coupled with a sharp attack on the irrational organological theory of development of the Historical School; (3) a form of social utilitarianism which found its well-known expression in the motto of Jhering's second major work, *Der Zweck ist der Schöpfer des ganzen Rechts* (Purpose creates all law); (4) an *individualistic conception of society* which no longer proceeds from a *supra-individual organized community,* as was done by the Historical School, but from the *individual*, which means that organized communities could only be seen as mere complicated individual coordinational relationships. This individualistic view led Jhering to the notorious conclusion that all organized legal communities are absorbed into the state community as the totality of all individuals.

The new direction, which found its first expression in 1861 in Jhering's two "Letters by an Anonymous Writer about Contemporary Jurisprudence" (later taken up in *Scherz und Ernst in der Rechtswissenschaft*), is also evident in the fourth and last volume of *Geist des römischen Rechts*. The most important part of this volume starts with § 58 where a transition is made from a description of an objective legal system (the legal norms) to a

theory of subjective rights. Emphasis is laid upon the historically changing character of legal concepts and their teleological nature, followed by an exposition of the role of a "juridical logic within law" in which a crushing verdict is passed on the methods of "*Begriffsjurisprudenz*."

> Blinded by the splendor of the logic that overlays Roman law, the eye's capacity to observe is all too easily blunted for seeing anything else. This strikes everyone who first approaches it when no fresh air renews its energy. As a substitute for the real world ruled by the real forces of life, it sees only the *fata morgana* of a world ruled by abstract thought. Next, the concept takes on the role of a demiurg: the concept created the world of law and governs the world of law. The dialectics of the concept puts itself in the place of the real forces operative in the course of law; what *they* have created and brought forth is presented as its *own* work insofar as it deduces, depending on whether it is positive or negative, the one as logically *necessary* and the other as logically *impossible*. In the case of obligations any substitute or assignment is excluded because the concept of obligation does not allow it. Similarly, a testator "cannot specify an inheritance in part by will and in part according to the intestate law, because a testament and intestate law are logically incompatible concepts.
> . . .

Instead of this "*Begriffsjurisprudenz*" Jhering proposes an "*Interessenjurisprudenz*" that would base juridical construction upon an assessment of actual interests. Jhering attempts to provide a sociological foundation for this new theory in his second main work, *Der Zweck im Recht* (Purpose in law), 2 vols. (Leipzig, 1877, 1883). In this work he ventures to assign a place to positive law within the life of society which he understands entirely in a naturalistic Darwinistic sense.

The foundation of this entire work is the distinction between a twofold causality which determine all events, namely *mechanical* and *psychological* causality.

According to Jhering, both are applications of the logicalprinciple of sufficient reason which requires that every change demands a sufficient cause. Focused on *sensory nature*, this principle yields the *mechanical law of causality*: no material effect without a material cause. Focused on the (psychologically conceived) *will,* it yields the *psychological law of causality* or *the law of purpose*: no *action* without a purpose. With Jhering this whole opposition of mechanical and teleological causality remains enclosed within a naturalistic framework. The concept of purpose

employed by Jhering stems from biology and is clearly oriented to Darwin's hypothesis of evolution. According to Jhering there are four *final causes* or motives for social action. Two of them, namely *reward* and *coercion*, have as motive *egoism*, when the will is directed exclusively towards self-interest. Without these two motives no society is conceivable; without reward no interaction, without coercion no law and state.

The other two motives are not directed towards individual self-interest but towards the objective existential conditions pertaining to society as such; they are the *sense of obligation* and *love*, which in turn are only a *higher form* of *egoism*, namely the *egoism of society*. Law in its development is only understandable as the law of the strongest, which is clearly understood as the limitation of the power of self-interest. This law holds equally in the animal world, but whereas in the animal world the strongest live at the cost of the weaker and destroy the latter in the case of a conflict of interest, historical experience has taught mankind to realize not only that the weaker enemies are harmless but also that they can be utilized in the service of the stronger.

The first step on this road was the *institution of slavery*; the next was the termination of conflict with a *peace treaty* that regulated the relationship between the parties and allowed for the *free* existence of the weaker. "Thus we have portrayed the road upon which power becomes law without utilizing a motive different from its own self-interest. . . . Thus power sets a measure for itself which it observes, it acknowledges a norm to which it wants to subordinate itself, and this self-derived norm is the *law*." Law is therefore the "politics of power." Law as a norm for power needs the state as the monopolistic organization of social coercion in a mechanical sense: the state as the highest organization of power is soverreign *as such*. All other forms of power within the territory of the state, both those of individuals and those of the many (notice the individualistic conception of organized communities) are *derived* from the power of the state. This brings Jhering naturally to his definition of law: "Law is the totality of the existential conditions of society in the broadest sense of the word, secured by means of the external force of state power." Since all norms – those of justice and of social intercourse as well as those of morality – are equally founded in the existential conditions of society, therefore the only criterion

of law left to Jhering is the coercive authoritative will of the state.

With his naturalistic sociological foundation of law Jhering left the way of formalistic positivism behind him, yet in the end returned to this positivism by making the validity of law as will of the state not dependent upon the objective correlation of the contents of positive law with the existential conditions of society, but solely upon the *motive* which subjectively guides the framer of the law. Thus Jhering could argue for maintaining the medieval laws against witchcraft and other practices: "The motive which *subjectively* guided them was that of securing the conditions of the life of society, and my viewpoint is to be read only in this subjective sense. It ought not to state that something is an objective condition of life, but that it is subjectively held to be that."

Of course this softened the dangerous consequences for positivism of Jhering's social utilitarianism. It was the modern sociological doctrine of law (Jung, Ehrlich and others) that would carry through the full consequences of Jhering's sociology of law by giving up positivism and introducing a *naturalistic natural law* into legal science. With Jhering the naturalistic sociology merely served – to be sure, in an internally contradictory way – as the foundation of a form of positivism that would support a kind of state absolutism.

2.12.1.3 *General legal theory in Germany under theinfluence of Jhering*

Jhering's powerful influence was transmitted via the conception of his pupil Adolf Merkel (1836–1896),[1] who introduced his "general theory of law" as a "philosophy of positive law." Positivism, which over time had confined itself entirely to the exegesis of *national* positive law, now cast its eyes on the formal basic concepts common to *all* positive law.

The school introduced by Merkel's general theory of law is characterized by a sharp rejection of all "metaphysical" concepts in legal theory, in particular the concept of a norm in the sense of the embodiment of absolute, supra-temporal ethical ideas (Kant and his successors). To his positivistic way of think-

1 Professor in Criminal Law in Strassburg since 1874.

ing, the legal norm, similar to the moral and social norm, is a fact of nature: with a kind of natural necessity it governs the development of societal life (in the sense of an ongoing adaptation to the social needs). It is a conception in which Merkel follows his much admired teacher and in which, as we have seen, the young mechanistically conceived theory of evolution of Darwin began to make its appearance.[1]

For Merkel the entire problem of the *idea of law* has ceased to exist – understood in the sense we described earlieras *a deepening of the rigid meaning of law through an approximation of the meaning of the later law-spheres* (and in the final analysis of the supra-temporal religious fullness of meaning of justice). The idea of law, according to Merkel, ought to be deduced from the historical development of human society (taken in a naturalistic sense) which presumably also provides the norms for evaluating positive law as "normal" or abnormal.[2] We can now also understand why Merkel must deny any difference in principle between un- lawful actions belonging to the sphere of civil (private) law and unlawful actions belonging to criminal (public) law. In the background of this standpoint we find Jhering's *individualistic view of society*, in which the structure of *organized communities* is resolved into *inter-individual co-ordinational relationships*. From his naturalistic standpoint Merkel is unable to see, for example, that the concept of guilt in criminal law provides, *under the sway of the idea of law*, a *deepening* and *differentiation* of the concept of unawfulness. Given his naturalistic orientation, he neither has a genuine idea of law nor knows of any enrichment of the meaning of law. Jhering's biologistic naturalism – evident also here – causes an irresponsible *restriction* of meaning within the jural sphere.

The general theory of law as defined by Merkel is meant to uncover the common basic concepts of law from the given posi-

1 In his treatise *Concerning the Relationship between Legal Philosophy and Positive Legal Science* Merkel completely dissolves the distinction between normative and natural-scientific judgments: "The *Ought to be* is therefore merely a consequence of the *Is* judgment and cannot serve as the object of a discipline which independently stands next to the science of what *Is*." Merkel conceives of being in a causal biologistic sense (his biologistic cosmonomic idea).

2 Merkel here draws a parallel with the medical practitioner who also derives a criterion for an organism's "being healthy" or "being ill" from the biotical phenomena themselves.

tive legal material by means of a process of continuously abstracting from the individual particulars. The perspective is automatically lifted above any national legal order: through a *legal comparison* of the various national legal orders in the stages of their development an attempt is made to recover the *constant* elements of *all* positive law. Thus, general legal theory implies using the comparative method when studying law.

On the basis of his "General Theory of Law" Merkel wrote a *Juristische Enzyclopädie* (Berlin, 1885; 5th impr., 1913, completed by his son Rudolf Merkel) which is a cross between a formal and a material encyclopedia in the positivistic sense described above. The work is divided into a *general* and a *particular* part. The general part treats the general theory of law in the sense intended by Merkel (which he had explained earlier in his work *Elements of a General Theory of Law*).

In the Introduction the author accounts for this set-up. Here he writes that his encyclopedia intends to provide an excerpt from the main parts of legal science "by highlighting those ideas permeating the totality of law and providing the intellectual ground of the latter." The subdivision, according to Merkel, corresponds with the classification of legal science. The latter divides into the *general theory of law* and the *particular juridical disciplines*, namely constitutional law, administrative law, private law, criminal law, process law, ecclesiastical law, and international law. The latter part investigates the parts of law enumerated above in their particularity, whereas the former focuses on what is common to all the parts of law (!). The general part first lays out the author's starting-point. Chapter I then discusses *Law* viewed according to its *charac-teristics*, *subdivisions,* and *genesis* (the sources of law). Next, Chapter II looks at *Legal Relationships* (which are described according to their properties, subdivisions and genesis). Finally, Chapter III takes care of the *Application of Law* (the domain of application of legal rules: application by the judge: juris-prudence, interpretation) as well as *Legal Science*.

In the same spirit as Merkel's Encyclopedia, Karl Gareis (professor in Munich) produced an *Encyclopedia and Methodology of Legal Science. Introduction to the Science of Law* (Giessen, 1887; 5th ed., with Addenda, by Leopold Wenger, 1920). Remarkably, the witness given by this author in the first edition of 1887 about the

then contemporary state of the "encyclopedia of legal science," is one that currently still applies in full:

> By the name *legal encyclopedia* every academic teacher who dedicates his or her teaching capacity to this discipline practically presents something different. The preference for and inclination towards some or other special discipline, or the conviction regarding necessarily elevating some or other discipline above all the others, or the subconscious effect exercised by the influence of the main subject of the teacher, leads to different forms and a highly varying delimitation of the object of the encyclopedia, not even taking into account the effect caused by practical concerns within these schools.

Gareis himself gives the following definition: "Encyclopedia of law is therefore a systematic total overview regarding the peaceful ordering of the external relationships of people and communal bodies." The orientation to Jhering's "*Interessenjurisprudenz*" with its utilitarian basis is evident in the author's announcement about the basic tendency of his encyclopedia: "My aim is first of all to develop the whole of law harmoniously on the basis of the concept of *the interests that are protected by the norm*, and to show that factually this basis can be applied in the construction and grouping of all parts of our discipline."

The set-up of this work for the rest is largely similar to that of Merkel's. The only difference is that Gareis offers a lot less for the domain of the "general theory of law" and spends far less time on determining the general basic concepts, despite the fact that he considers the concept of law to be the basic concept of legal science, from where one has to find the way to the periphery.

Among the sharpest and most systematic defenders of the *general theory of law* as *encyclopedic philosophy* of positive law we have to mention Ernst Rudolf Bierling (1841-1919, professor in public law in Greifswald), with both his encyclopedic main works, *Critique of Juridical Basic Concepts*, 2 vols., (1877, 1883) and *Theory of Jural Principles,* 5 vols. (1894-1917).[1]

In both these major works Bierling developed, in a more detailed and systematic way than Merkel, a comprehensive sys-

1 [To save space and facilitate ease of reading, from this point on most foreign-language titles are cited only in English (without implying that English translations of such works actually exist). Dooyeweerd could assume that his students, who were gymnasium graduates, were familiar enough with the modern languages not to be daunted by complicated, ominous-looking titles in German, French, etc.]

tem of a general theory of law, in which the most important general concepts of private, criminal and constitutional law are defined. The very way he defines the task and method of his *Theory of Jural Principles* makes clear that he has affinity with the critical school in positivism oriented to Kant, which we shall discuss later on. Bierling offers the following definition:

> A theory of jural principles is constituted by the systematic presentation of those juridical concepts and basic propositions which essentially (that is to say, according to their most enduring nuclei) are independent of the particulars of a specific (concrete) positive law. To this belong, first of all, the concept of law itself and what necessarily follows from it; and then also those concepts and basic propositions that flow from the essential abiding spiritual organization of all people for the theory and practice of law.

All these concepts have according to him a *strictly formal character* and he *rejects* then also every *natural* law directed towards the material content of law.

Bierling defines law as follows: "Law in a juridical sense in general is everything that human beings, living in community, acknowledge as norm and rule for this shared life." Thanks to this conception of law Bierling became, within positivism, the father of the so-called "theory of acknowledgment." We shall return to this theory in a different context.

Next to Bierling we immediately have to mention Karl Bergbohm (b. 1849; professor of public law in Bonn). In his main work *Jurisprudence and Legal Philosophy* (Leipzig, 1892) he defended a much more radical positivism than his predecessors. He relentlessly tried to ban from the historical and positivistic legal theories all remnants of natural law. Bergbohm, too, insisted that a general, purely formal "general theory of law" be a philosophy of positive law.

In Germany as well, Theodor Sternberg defended this approach in his work *A General Theory of Law* (1904). Volume I treats "The Method," and Volume II "The System"; both booklets were published in the *Sammlung Göschen*. A newly edited version of this work appeared under the title *Introduction to Legal Science*, 2 vols. (Leipzig, 1912, 1922). The first small volume deals with the theory of the "Methods and Sources" of law; the second contained the first half of "The System of Law" and discusses the basic concepts of private law. The third vol-

ume promises to treat whatever remains. This work provides more than a "general theory of law" as formal encyclopedia in a positivistic sense.

What furthermore deserves special mention is the *Introduction to Legal Science* written by J. W. Hedemann, professor of civil law at Jena. First printed in 1919, it was reprinted in 1927 as Volume 9 of the material encyclopedic compendium *The Basic Structure of Legal Science* (edited by Fehr, Gerland, Hedemann and Lehmann). This work, too, excellent in its kind, equates the "encyclopedia of legal science" with a "general theory of law" and honors the method of abstraction for finding the general concepts: "The general values are found by proceeding from the particulars to ever higher levels of shared properties."

Hedemann sees the general theory of law, i.e., the "encyclopedia of law," simply as one of the necessary subdivisions of an "Introduction to Legal Science." The latter ought to include, besides (1) a *general theory of law* ("formerly," he writes, "also known as Encyclopedia"!; also (2) an overview of the development of (Germanic) law for the sake of the general education of the jurist – where a close connection is sought with comparative legal science (which compares the development of different, in particular primitive, legal orders with each other); and (3) an overview of the different particular legal domains of contemporary positive (German) law; and finally (4) a synopsis of the practice of law. Thus here again we see a combination of formal with material perspectives.

Although Hedemann himself still clung to the positivistic starting-point he did realize that it is inadequate for any legal philosophy of the future as well as for insight into a "higher justice" transcending the arbitrariness of human legislation. In particular in his theory of the sources of law he managed to overcome positivism's individualistic view of the structure of legal life. For this reason I recommend that you study this work carefully.

To the formal encyclopedias (in the sense of "general theory of law") in Germany also belongs the book of Karl Friedrichs, *The General Part of Law: A Presentation of the Common Theory of Public and Private Law* (Berlin and Leipzig, 1927). Friedrichs formulated his positivistic creed in his definition of law: "For us,

law is the synopsis of those effects of human actions or natural events which the state acknowledges and which state officials are to realize through sanctions or coercion, through insisting on intervening or declining to intervene."

Hans Nawiasky, a professor at the Institute of Economics in St. Gallen, Switzerland and an adherent of this school, published a work with the title *General Theory of Law as a System of Juridical Basic Concepts* (1941; 2nd impr., 1948). Nawiasky distinguishes the general theory of law from legal systematics. The former has the task to investigate what is common among different legal orders and what is most important in a particular legal order, whereas the latter investigates the particular legal rules of a specific legal order. The general theory of law is also different from legal philosophy which, according to Nawiasky, has to track down the "idea of law." In line with positivism he distinguishes law from morality and religion as external behavior that differs from custom and conventional norms because it consists of "the command of acts of commission or omission, where disobedience leads directly to power of execution and punishment" (p. 12).

This utterly insufficient (but prevalent in positivism) delineation of law is combined with a naturalistic sociological conception of the state. The legal order, which Nawiasky defines as "the legal propositions cohering externally according to space and time and internally according to their spiritual foundation," is borne by the state which he identifies with the leading group that factually determines what is just and also what shall be the content of the law. Thus law is reduced to power, which is the logical consequence of all positivism. In order to account for the coherence of a legal order he adopts, in a considerably altered form, the theory of levels (Stufentheorie) developed by by Adolf Merkl and Hans Kelsen. We will presently return to this.

For the sake of completeness we have to mention in this context two further works which, although they do not display a comprehensive encyclopedic character, are nonetheless fully oriented to the positivistic conception of legal science as a general theory of law. In his standard work *Norms and Their Contravention*, 4 vols. (Leipzig, 1872, 1920) Karl Binding (1841-1920), a noted professor of criminal law at Leipzig, devel-

oped a kind of general theory of criminal law in a strictly positivistic sense, while rejecting any interference from philosophy or sociology. It contains his strange but well-known doctrine regarding the nature of positive legal rules. In this conception the *actual legal norm* (thou shalt not kill, thou shalt not steal, etc.) which is laid down in other parts of positive law (for example in the civil code, in administrative laws, and so on), logically precedes the stipulations of criminal law (who or what committed the fact, ought to be punished with what, etc.). The delinquent oversteps no more than the legal norm, while the judge alone can go beyond the stipulations of criminal law.

Binding influenced August Thon, professor at Rostock, who published a work entitled *Legal Norm and Subjective Right: Investigations into a General Theory of Law* (Weimar, 1878).

2.12.1.4 *The Encyclopedia of Legal Science as a "General Theory of Law" in British positivism. The analytical school of law*

The positivistic conception of the general theory of law as philosophy of positive law established itself, besides Germany, especially in England. The founder of this school of thought is John Austin (1790-1859). His legal and political theory may be seen as the positivistic offshoot of the doctrine of natural law of Thomas Hobbes (particularly in his state absolutistic concept of sovereignty). Austin's school is known as the *analytical* law school, in contradistinction to the British *historical* law school with representatives such as Henry Sumner Maine, the author of *Ancient Law* (London, 1930), and others.

Austin, too, wanted to provide a "general theory of law" which aims at deriving the general basic concepts of positive law by means of logical analysis from the legal material of positive law of all civilized peoples. This general theory of law is also designated by him as "general jurisprudence," by which term he understands indeed what the positivistic conception means by "formal encyclopedia of the science of law." "Analytical general jurisprudence," which uses the logical-analytical method of research when tracing legal concepts, is contrasted with "the historical general jurisprudence," which employs the historical method as it traces the historical development of legal concepts. For Austin and his pupils, however, this "general ju-

risprudence" is exclusively "analytical." In 1832 Austin wrote *The Province of Jurisprudence* determined in the form of six Lessons along with an "Outline of the Courses of Lectures." Austin's major work, *Lectures on Jurisprudence*; or, *The Philosophy of Positive Law*, 2 vols. (London, 1863) appeared posthumously. It contains everything Austin produced in this field, including the above-mentioned *The Province of Jurisprudence Determined*. A second, expanded edition of the big work appeared in 1869 and since then it has been reprinted many times. Robert Campbell, who compiled the edition of 1869, also provided an abridged edition of the *Lectures* "for the use of students." The 12th impression of this concise work appeared in 1912.

The first part of Austin's work discusses "The Province of Jurisprudence"; the second part treats "Law [objective law] in Relation to Its Sources, Its Purposes and Subjects." A practical commentary on Austin's work was written by Edwin Charles Clarke, *Practical Jurisprudence: A Comment on Austin* (Cambridge, 1883). Among others the following authors belong to Austin's school: Sir William Markby, *Elements of Law*: *Considered with Reference to Principles of General Jurisprudence* (Oxford, 1871); Thomas Erskine Holland, *The Elements of Jurisprudence* (1890; 13th impr., 1924); Frederick Maurice Goadby, *Introduction to the Study of Law*: *A Handbook for the Use of Egyptian Law Students* (London, 1910; 3rd impr., 1921); John Mason Lightwood, *The Nature of Positive Law* (London, 1883); Sheldon Amos, *The Science of Law* (London, 1874; 8th impr., 1896); John W. Salmond, *Jurisprudence or the Theory of the Law* (London, 1902; 7th impr., 1924); John Chipman Gray, *The Nature and Sources of Law* (New York, 1896; 6th impr., 1929). Frederick Pollock, *First Book of Jurisprudence for Students of the Common Law* (London, 1896; 6th impr., 1929). None of these authors, however, can be compared to Austin when it comes to sharpness of analytic insight.

Written in the positivistic spirit of a "general theory of law," the following encyclopedia published in English merits special attention: Nicolaï Kurkunov, *General Theory of Law* (Boston, 1909; 2nd ed., 1922). This work was translated from the Russian by W. G. Hastings (Kurkunov was a professor at the University of St. Petersburg from 1889 until 1902). The work contains an overview of the history of the concept of encyclopedia and also

mentions what Russian legal literature had hitherto produced in the field of encyclopedia.

We finally mention William Geldart, *Elements of English Law* (Oxford, 1911); Oliver Wendell Holmes, *The Common Law* (Boston, 1881); and Edward Jenks, *Treatise on Law* (London, 1920) and *The Book of English Law* (London, 1928). This last title is more of a material encyclopedia.

2.12.1.5 *The struggle between the "exegetical school" and the general theory of law in Belgium, France, and the Netherlands*

Also in Belgium, France (Switzerland) and the Netherlands the positivistic school introduced the conception of the encyclopedia of legal science in the sense of a "general theory of law." The codification of large parts of state-law in France, Belgium and the Netherlands in closed law codes[1] initially led legal science onto the path of the so-called "exegetical school." In the mold of a radically naive positivism, this school did not want to hear of anything but the laws and their interpretation. For this school, positive law no longer posed a problem. The conviction prevailed that, thanks to codification, law was positivized once and for all and that the scholarly work of jurists could confine itself to that of exegesis. In this vein a large number of extensive volumes were written as commentaries on the "legal codes." The idea of a systematic treatment was completely left aside. In keeping with the so-called "legal method" commentators simply followed the order of the encoded articles. Thus we see a revival in a modern positivistic sense of the one-sided exegetical method of the medieval *glossator* school which fancied it had found a complete codification in the *Corpus Juris*. Representatives of this school in France were Merlin, Toullier, Troplong, Demolombe, Aubry, Rau, Demante, Colment de Santerre, Marcadé, and Baudry-Lacan-Tinerie. In Belgium, the radical adherent of the grammatical interpretation of laws was François Laurent, the prominent civil law representative of this school. (Every law student ought to know these names!)

In the Netherlands, too, the positivistic school reigned supreme (Diephuis, Opzoomer, Land in civil law, Buys in consti-

1 In Germany the Historical School came out on top in the debate about codification. Not until 1901 was a civil code enacted in that country.

tutional law, etc.). Under the supremacy of this exegetical school almost nobody continued to practice encyclopedia of legal science. During the entire 19th century the Netherlands produced only one (merely formal) encyclopedia, the *Encyclopaedia Jurisprudentiae* (Amsterdam, 1839) of Cornelis Anne den Tex, professor at the Athenaeum of Amsterdam. Written in Latin, it was no doubt a fine specimen for its day.[1]

In terms of legal philosophy, this encyclopedia had an anti-positivist orientation. It saw no human arbitrariness in positive law since it considered positive law to be founded upon natural law. In this respect Den Tex was a kindred spirit of the famous Dutch jurist Jonas Daniël Meyer[2] who wrote on page 225 of his work *Sur la codification* (Amsterdam, 1830): "No legislation exists that does not rest on the immutable foundations of natural law; none can exist that does not render homage to the principles of equity and justice, principles that are impossible to disregard."

The encyclopedic-philosophical aim of the work by Den Tex is evident in the very way it is structured. An introduction about the meaning of general encyclopedia and that of legal science in particular is followed by Part One which treats law and legal science in general and then discusses the place of legal science within the totality of disciplines. Part Two enumerates the divisions of legal science into private law, public law, international law, and the disciplines dealing with the state. Part Three covers legal philosophy, accompanied by a fundamental exposition of the relationship between natural law and positive law. Part Four surveys legal history (in the Orient and among the Greeks

1 This encyclopedia was written under the inspiration of Article 60 of the *Reglement op het Hooger Onderwijs* (Regulations for Higher Education) of August 2, 1815. Entitled "Encyclopaedie en methodologie," the article reads: "Each discipline is to start with a short overview of all subdivisions of said discipline, a description and objective of each of these parts, or at least of the most important of them, to be apportioned over an entire course of studies."

2 J. D. Meyer is the well-known author of the work *Principes sur les questions transitoires* (Amsterdam, 1813), which deals with inheritance law and in which the doctrine of acquired rights is defended on the basis of natural law. This small book has had an enormous influence right up to present-day jurisprudence! Our Succession Act of 1829 likewise holds to the doctrine of acquired rights.

and Romans, the Germanic peoples, including Frankish law as well as Old Dutch law during the medieval period and later). Part Five, finally, elaborates on the method of teaching legal science and the requirements a jurist must meet. As we mentioned, this encyclopedia remained unparalleled in the Netherlands. As in France and Belgium, the "exegetical school" before long (our codification dates from 1838) gained the upper hand in our country. With the systematic treatment of positive law the truly systematic legal encyclopedia vanished from the scene.

2.12.1.6 *The encyclopedia of legal science in Belgium under the supremacy of the "exegetical school"*

A number of legal encyclopedias appeared in Belgium during the nineteenth century. Written entirely in a positivist vein as "introductions to legal science," their content was arbitrary. In particular, laws took center stage: how they come to be and how they are repealed, how they are interpreted, and so on. The following titles can be mentioned: Adolphe Roussel (professor at the Free University of Brussels), *Encyclopédie du Droit* (Brussels, 1843); Parfait Joseph Namur (professor at Gent), *Cours d'Encyclopédie du Droit ou Introduction générale à l'étude du Droit* (Brussels, 1875); O. Orban (professor at Liège), *Cours d'Encyclopédie du Droit* (Liège, 1893).

In France, meanwhile, although the juridical encyclopedia of Heinrich Ahrens was translated into French by Anatole Chauffard under the title *L'Encyclopédie juridique* (Paris, 1880), no original French encyclopedic literature to speak of developed during the nineteenth century.

2.12.1.7 *The reaction of the "general theory of law" in Belgium, Switzerland, and France*

Starting in 1899, a remarkable reaction took place in Belgium, Switzerland and France against the supremacy of the "exegetical method." In that year Edmond Picard published his noteworthy book *Le droit pur; cours d'encyclopédie du droit: permanences juridiques abstraites* (Pure law; a course in encyclopedia of law: abstract juridical constants) (Brussels, 1897). It was at this time that François Gény came out with his extensive work, *Méthode d'interprétation et sources en droit privé positif* (Interpretation method and sources in positive private law) 2 vols. (Paris, 1899), in which he launched a general attack on the positivistic

conception of law. Picard in his book on "pure law" wanted to introduce "a new idea of enyclopedia" on a positivistic foundation. He meant to have the term stand for a general theory of law in a positivistic sense: "Encyclopedia of law," Picard writes, "looks like a synthesis of the abstract generalities in this science, such as its first principles, norms, substrate, simplest elements, the alphabet, but then in capital letters: that which is valid, which exists, the True for all times and all places." In other words, encyclopedia of legal science in the sense of a "pure science of law" is conceived as an "ensemble of the abstract juridical constants." It becomes identical to a formal encyclopedia in the positivistic sense of a science of the general, constant, logical, basic concepts of law which must be united in an external logical systematics.

The problem as formulated by Picard closely approximates the school of critical positivism which we shall discuss below, but in the final analysis Picard remained caught within the confines of a general theory of law.

Picard's juridical encyclopedic system is constructed in the following way.[1] Part One establishes the general characteristic by means of which law distinguishes itself externally from other "societal" norms. Only the difference with morality is investigated. It is found in "social constraints," the coercive sanction of society's power of the sword based on legal rules. (This typically positivistic criterion is stripped of all meaning of law, yet it is immediately forced to appeal to the meaning of law because legal force differs from moral force or force in the sense of social interaction. But as soon as one makes legal force the criterion of law, one gets caught in a vicious circle, and the question remains: What is the criterion of law?)

Part Two is presented as a "description of the phenomenon of law." Applying the criterion mentioned, it attempts to show that the whole of practical life has a jural side. For example: I am writing in my study; this study room is an object of my property right, just as is my pen and the paper that I am writing on. I board a streetcar and by so doing I enter into a transportation contract with the transport company, etc. etc.

1 For an extensive exposition, see *Problème du droit et science belge du droit civil* (Paris, 1931) by Julien Bonnecase, a professor in Bordeaux.

Part Three sets out to give an analysis of the anatomy of law, in which the author represents law in its formal logical abstract structure as an organic coherent whole, as an "ensemble of juridical constants." In order to designate this formal system adequately Picard introduces the term *juricité* because the word *droit* does not sufficiently cover the idea of a system. He distinguishes different phases in the development of law, superimposed upon one another as lower and higher storeys.

The phenomenon of law comprises four phases:

1) law in its practical (empirical) phase;
2) law in its legislative (rational) phase;
3) law in its customary (instinctive) phase;
4) law in its theoretical (scientific) phase.

The *noumenon* of law comprises

5) law in its the transcendental (invisible) phase, i.e., law in the abstract logical system of basic concepts (*juricité*).

Practical law in its first four phases is then nothing but the *phenomenon* (the visible form) of *juricité* as law's invariant systematic *noumenon* (its invisible logical essence).

Part Four of Picard's *Le droit pur* contains the classification of law, based on general characteristics of legal phenomena.

Part Five treats the dynamics of law as such, and Part Six deals with its dynamics as an organic configuration. Part Seven covers law in its temporality (the evolution or history of law). These last three parts highlight law in its dynamic character, whereas the first four portray law with its static, constant characteristics.

In Part Eight, which discusses the foundations of law, Picard pays attention to the causes that bring laws into existence.

In Part Nine, which illuminates the sociology of law and the idea of justice, the purpose of the legal order is underscored. In following Emile Durkheim, the pupil of Comte, Picard derives this purpose from the socio-psychic drives of the human being.

Part Ten sets out to explain the method of legal science. It is done according to the "abstract constant precepts which deserve the qualification encyclopedic." According to Picard this encyclopedic method can be applied not only to law in its total-

ity but also to each of its subdivisions. Civil law, commercial law, criminal law, public law, process law, etc., all exemplify "abstract juridical constants" which can be treated in a special juridical encyclopedia. Indeed, it is a common view of the positivistic defenders of the idea of an encyclopedia of legal science as general theory of law that each and every one of the subdivisions of legal science contains a "general part" and that their shared basic concepts can be distilled by means of an ongoing process of abstraction. Picard calls juridical encyclopedias *small encyclopedias* ("petites encyclopédies"), in distinction from general encyclopedias which he calls *large encyclopedias* ("grandes encyclopédies"), and contends that the system which he has developed for the *grande encyclopédie* can be applied in the same way with regard to determining the *abstract constants* in all other social sciences such as ethics, aesthetics, economics and the science of religion: "By calling attention to these common features in the requisite procedures of study and research, one can better see the place of law in all of life . . ."

A further elaboration of Picard's system is found in his second encyclopedic work, published under the title *The Constants of Law: Modern Jural Institutes, Philosophical Encyclopedia of Law* (Brussels, 1921).

Also in Switzerland and France the positivistic conception of a formal encyclopedia of legal science as "pure juridical science" gained ground. It developed by closely approximating the critical (neo-Kantian) conception of a "*reine Rechtslehre*" (pure law theory). To be mentioned is Ernest Roguin, professor of comparative civil law at Lausanne, with his works *La Règle de droit; étude de science juridique pure* (The rule of law: a study in the pure science of law) (Lausanne, 1889) and *La science juridique pure* (The pure science of law), 3 vols. (Paris, 1923). Although not critical in the narrow sense of the term, Roguin arrived at his logical-mathematical conception of encyclopedia as "pure science of law" under the influence of classes with Léon Walras, one of the main representatives of the abstract-mathematical school in the modern science of political economy. Roguin describes his understanding of general theory of law as follows: "At bottom, the pure science of law is nothing but an analysis and synthetic construction of law based upon the application of logic."

The first volume of Roguin's work *La science juridique pure* commences with an extensive exposition of the theory of Austin, according to Roguin the first scholar who managed to grasp the "pure science of law." It is followed by a resumé of his earlier work *La règle de Droit* (The rule of law). In his new book Roguin wants to proceed in a purely logical fashion, implying that all the sociological expositions of his earlier works ought to be discarded. This book became very famous.

Partially indebted to the work of Roguin is the *Introduction to a General Theory and Philosophy of Law* (Neuchâtel and Paris, 1937; 2nd ed., 1942) by Claude du Pasquier, at the time professor at the University of Neuchâtel. In the general theory of law, so he argues, law is investigated from a "purely intellectual vantage point." The logical form of a legal rule is constituted by two elements: its juridical factuality and its legal consequences. Following Roguin, Pasquier describes the legal rule as the "expression of the will that a particular social fact should necessarily follow from a particular social effect."

Pasquier, unlike Roguin, is strongly influenced in his last work by the sociological schools of law. The assumption is that legal rules originate when certain ideas of emulation and tradition are stabilized through the laws (the natural inclination) within a social organization. These rules generate respect for a social power. This social power is the concentration of power in the hands of a few (the governors). Such a concentration appears within every social organization. Pasquier defines law as "the ensemble of rules obtaining in a social group, imposed on each member by the power which disposes over public constraint" (p. 36). The ideas upheld within the social group are the dignity of the human person, justice, the common good, and legal security. These ideas are correctly realized only when there is a healthy balance between the moral and practical sentiments of governors and judges. In this way Pasquier ties the stabilization of ideas within a social organization to morality, providing a basis for his self-qualification as an idealistic positivist.

This conception is untenable and shows a lack of insight into the irreducible proper nature of law. Law is bound to the legal power of those who form law. The concept "social power" does not have a precise delineation and contains a serious threat to

law, and the support called in from the side of morality fails to check this threat. Because Pasquier argues for a sociological foundation of law his approach actually falls outside the domain of a general theory of law.

A totally different spirit is found in the comprehensive work of Arthur Baumgarten, a professor in Basel, formerly in Geneva and Cologne. It is entitled *The Science of Law and Its Method*, 2 vols. (Tübingen, 1920, 1922). Volume I contains the foundation. Volume Two contains an extensive treatment of cases as well as a synopsis of the author's theory of law. Only in part can this work be classified with the positivistic "general theory of law," because its philosophical orientation is clearly influenced by modern natural law ideas.

Baumgarten makes a sharp distinction between legal science "*de lege lata*" and legal science "*de lege ferenda*."

Legal science "*de lege lata*" is entirely constructed as *a general theory of law* in the spirit of Jhering's constructive "*Begriffsjurisprudenz*." Baumgarten defends the creative power of the logical construction extensively against modern attacks, and he even wants to provide an improved version of Jhering's natural-historical method. The method employed in order to establish the concept of law is empirical and inductive – ascending from particular legal material to the abstract general features of law.

Legal science "*de lege ferenda*" (the politics of law) on the other hand is reckoned by Baumgarten among *legal philosophy*. In his legal philosophy he defends an idealistic utilitarian position which he qualifies as metaphysical liberalism. Sociology and moral philosophy should together serve as a "metaphysical foundation" of law and the finding of principles for legislation.

Also in his "general theory of law" proper, the author carries through his utilitarian teleological standpoint and in that context warns against an overestimation of formal logic in a systematic treatment of law. He says: "In this regard it is particularly our aim to show that the legal system is determined to a lesser degree by the logical concepts of super- and sub-ordination than by the many purposeful relationships of life. We want to sound the warning that harm will be done to the scientific enterprise if the material is divided and combined under

formalistic points of view." That said, Baumgarten's view of law is utterly individualistic.

In other respects, too, Baumgarten betrays tendencies that are moralistic and utilitarian in nature. This can be seen, for example, when he refuses to reduce the concept of jural norm to a purely logical thought-form and where he reproaches Somló, despite great appreciation for his work *Juristische Grundlehre* (Basic juridical theory), that he failed to provide this theory with an ethical foundation.

Baumgarten elaborates his empiricist methodology in his *Basic Structure of a Juridical Theory of Method* (Bern, 1939). With more extensive experience, he writes, better concepts are possible. One can formulate a concept of law that contains all the characteristics attributed to law by jurists over the course of time: "Law in the service of an ethical purpose is a positive, valid ordering of human societal life encompassing the most diverse domains." Law after all receives its ethical orientation from the fact that it has to play an important role in the great working community of free and equal men. Mankind is *en route* to this community. Baumgarten assumes a force operative in history that will, similar to the mysterious law of ant hills, lead humanity to this community. Empiricism, he thinks, provides the only means to understand this journey.

This conception, too, actually falls outside the scope of the general theory of law.[1] Among the modern literature the work of H. Lévy Ullman, professor at Lille, could be mentioned: *Elements d'introduction générale à l'étude des sciences juridiques* [Elements of a general introduction to the study of the science of law], 2 vols. (Paris, 1917, 1928). Volume I discusses the concept of law; Volume II is entirely dedicated to the British legal system and can be recommended as an excellent introduction to British law.

1 For all these reasons Baumgarten should actually no longer be classified as a defender of the positivistic conception of a general theory of law. His orientation is too closely linked to the doctrine of natural law.

2.12.1.8 *The situation in the Netherlands. The idea of an "Introduction to Legal Science" in the sense of a general theory of law*

Although we had no comprehensive encyclopedias of legal science in the sense of a *general theory of law*, a number of works did emerge in our country as "Introductions to Civil Law" that were entirely oriented to this conception. In 1910, Nicolaas Land (1840-1903) provided an *Introduction* to accompany his *Commentary on the Dutch Civil Code*.[1] However, measured against the yardstick of a "general theory of law" this introduction turned out to be highly unsatisfactory.

Much more is found in the *Inleiding tot het Burgerlijk Recht* (Introduction to civil law), 6 vols. (Haarlem, 1927-1943) by Joh. Suyling, professor of civil law in the University of Utrecht. Suyling pursued the positivistic standpoint to such an extent that he thought he had succeeded in freeing his work of "all philosophy or pseudo-philosophy." The first part of this work indeed provides a "general theory of law" with special reference to private law.

Pieter van Bemmelen, professor in Leiden, published his treatise on *Les notions fondamentales du droit civil* in the Proceedings of the Royal Academy of Sciences, Division of Letters, new series, I.1 (Amsterdam, 1892).

Worthy of mention, but only to a certain extent, is the well-known work of E. M. (Eduard) Meijers entitled *Dogmatische Rechtswetenschap* (Systematic science of law) (diss.; Amsterdam, 1903). The author defends his conviction that legal theory as a systematic legal science (in contrast to legal interpretation) ought to be taken up in a syllogistic *general theory of law*. To this extent his work belongs to the positivistic conception of legal encyclopedia. For the rest, this work finds its philosophical foundation in a naturalistic doctrine of natural law, to which we shall return below.

In 1948 Meijers published his *General Theory of Civil Law*. The first part treats *General Concepts*. Its aim is "to formulate the general concepts of civil law as a systematic problem, to reduce the question regarding the genesis, existence and termination of

1 See his *Verklaring van het Burgerlijk Wetboek* (Haarlem, 1889). N. K. F. Land was a professor in the University of Groningen.

distinct configurations of law to issues of ordering given legal material, and finally to show that the concept of a legal obligation, formerly considered to be the nucleus of law, is actually constituted by many other elements." Unlike today's positivists, Meijers does not base law upon the will of the state, since he takes the jural to be the rules according to which the government – and in particular the judge – should orientate themselves. The genesis of law is no longer investigated. Meijers only remarks that there is no a priori difference between the ethical norm and the legal norm. The question when a legal norm is at stake is purely systematic in nature. It is rewarding to speak of a legal norm only when a sufficient number of cases is available in jurisprudence.

In this connection we have to mention, though with the same reservation, the work of A. A. H. (Teun) Struycken, *The Concept of Law* (diss.; Leiden, 1903).[1] In his Introduction the author distinguishes sharply between the why (or whereto) and the how, i.e., between legal philosophy and the general theory of law. The former addresses the question about the purpose of the legal order and aims at a comprehensive understanding and delimitation of the idea of law. The latter examines the concrete shape of law and the concept of law, the recognition and proper description of its general form of appearance. As such, this distinction is certainly not positivistic, since positivism, as we have seen, identifies legal philosophy and general theory of law (Austin, Merkel, and others). However, the position of Struycken is not quite clear, because he leaves open the question whether or not legal philosophy and the general theory of law constitute "two forms of inquiry" or whether legal philosophy indeed encompasses both.

Struycken's aim is to discover the concept of law (as distinct from the idea of law) by employing the method of the general theory of law, which without doubt is in line with a positivistic approach. He describes the task of a "general theory of law" as follows: it "focuses upon the concrete legal material in which mankind attempts to realize the idea of law [and] tries, through

1 Teun Struycken was a noted professor of constitutional law. He was the first person to write a systematic work on Dutch constitutional law, *Het Staatsrecht van het Koninkrijk der Nederlanden*, 2 vols. (Arnhem, 1915, 1917).

logical analysis and across all contingent and complex forms of appearance, to discover the irreducible type of legal rule as the indispensable basis of a logical schema of general and particular concepts." The author sharply opposes the theory of imperatives which demotes subjective right (the competence) to a mere reflection of the norm.[1] In the Netherlands Struycken's dissertation acquired considerable authority.

My esteemed predecessor, the late Professor Willem Zevenbergen, published a *Formal Encyclopedia of Legal Science* (The Hague, 1925). He did not belong to the school of a "general theory of law" in the strict sense, because his theoretical approach was oriented to the neo-Kantian critical positivism of the Marburg school, though it absorbed the "general theory of law" while it attempted to complement the critical standpoint of the genetic-sociological view of Beling[2] (the theory of the ordering subject as the criterion for distinguishing between national legal orders).

2.12.2 The revival of philosophical reflection within juridical positivistic encyclopedic thought. Critical positivism and juridical encyclopedia as "Theory of Legal Science," "Pure Theory of Law," "Juridical Methodology"

The introduction of the general theory of law as formal encyclopedia of legal science was merely a transitional phase in the general revival of philosophical reflection within legal science.

Since the end of the nineteenth century an important school within positivistic legal theory, under the slogan "Back to Kant!" focused on the critical question, *How is legal experience possible?* It did so by taking from Kant's critique of knowledge and transposing to legal science the epistemological distinction between the transcendental (i.e., *a priori*, universally valid, logical) *form* and the empirical (i.e., the Kantian sensory) *matter* of

1 Cf. e.g. August Thon, *Rechtsnorm und subjektives Recht* (Weimar, 1878).

2 Ernst Beling, born in 1866 and professor of Criminal Law and Legal Philosophy at Munich, regards law as a mass psychical phenomenon. He combines this psychological orientation with his own empirical-inductive method and with Kant's critical method. His major works, with an encyclopedic and philosophical stamp, are *Methodology of Legislation* (Berlin, 1922), *Legal Science and Legal Philosophy* (Augsburg, 1923), and *Revolution and Law* (Augsburg, 1925).

knowledge. This move, however, contradicted Kant's own epistemology which rigorously restricts *science* to the experience of *nature* and which, once thought through consistently, cannot allow for the possibility of scientific knowledge of normative legal phenomena. For Kant, law as norm belongs to the supra-sensory domain of the idea (the *noumenon*) which can therefore not be *experienced* or scientifically *known*, but only *believed*.

Rudolf Stammler (1856-1938), who taught civil law and legal philosophy in Halle (after 1916 in Berlin), certainly was the first to try and apply Kant's critique of knowledge to legal science. His aim was to deduce the a priori necessary thought-forms of legal-scientific thinking (as opposed to natural-scientific thinking) in a systematic analytical way.[1] The aim was no longer to recover the fundamental concepts of law by means of an ever increasing form of abstraction from the positive empirical legal material (as attempted in the *general theory of law*). Rather, the concept of law, including all the requisite universally valid basic concepts presupposed in it, was to be generated through a critical aprioristic investigation into the universally valid transcendental-logical thought-forms which ultimately make possible all legal experience. After all, the "general concepts" of the general theory of law acquired through abstraction are indeed exclusively *empirical* in *nature*, *derived from legal experience itself*. But the necessary transcendental thought-forms of law are of an *a priori* character, preceding all experience. They have to be found through critical analysis of the forms of our consciousness, where we order all material of experience in a law-conforming way. Although the term "encyclopedia" was not employed for systematic investigations such as these, this approach gave rise to an essentially critical positivistic conception of formal encyclopedia of legal science. In this vein Stammler published his extensive *Theory of Legal Science* (Halle, 1911; 2nd ed., 1923), which throughout has the character of a critical formal encyclopedia of the science of law.

1 Austin already distinguished between formal universally necessary legal concepts, without which no legal order could be conceived, and general legal concepts which are not necessary for a legal order. However, in his general theory of law Austin did not carry this distinction through and with his pupils it was totally wiped out. We already pointed out that there are affinities between the critical framing of the problem and the thought of Bierling, Picard, Roguin and others.

Influenced by Stammler is Walther Burckhardt, professor at Bern and author of *The Organization of the Legal Community* (Zurich, 1927), *Method and System of Law* (Zurich, 1936), and *Introduction to Legal Science* (Zurich, 1939). Burckhardt, too, looks at law as a postulate of practical reason which has validity independently of empirical (nature) reality. Like Stammler, he distinguishes sharply between a law-concept and a law-idea (*Rechtsbegriff* and *Rechtsidee*) in the sense that the concept serves to construct the legal order logically, whereas the idea determines the content of law. (We shall soon return to Stammler's view.)

Burckhardt defines law as "an order of binding provisions subject to coercion." Law binds because it is a postulate of practical reason. Unlike morality, law can be enforced, from which it follows that the legal order ought to be uniform and without any logical contradictions, because "demands" that are logically contradictory cannot be enforced at one and the same time. This again implies that law ought to be formed for all legal subjects by a single agent. Thus the state is seen as the only logical agency to form law. Burckhardt separates the logical construction of law from legal philosophy which has the task to investigate the law-idea of justice, which he calls "ethical correctness."

Likewise oriented to the thought of Stammler is Professor Giorgio del Vecchio (b. 1878) of the University of Rome, in his work *Lezioni de Filosofia de Diritto* (Lectures on the philosophy of law) (Rome, 1930; 7th ed., 1950). He seeks to merge the Thomist conception of natural law with the neo-Kantian distinction between law-concept and law-idea. Natural law, however, is reduced by Del Vecchio to the Kantian reason-idea of the free autonomous personality. To investigate this idea is the deontological or axiological problem of legal science.[1] Moreover, legal philosophy has both a logical and a phenom-enological problem. The logical problem is posed by the task to formulate the universally valid thought-form that makes possible all legal experience; the phenomenological problem is posed by the philosophical inquiry into the legal history of all humanity. This legal phenomenology has nothing to do with Husserl's modern phenomenology since it is oriented to the philosophy of history of the Italian philosopher Giambattista Vico (1668-1744). Vico,

1 [I.e., the task to examine the nature of justice or "the essence of law as it should be."]

proceeding from the thesis that man can know only what is created by man, endeavored to discover the the basic traits of humanity through the study of history, because history reveals the fundamental equality of the human spirit as the source of the eternal truths of reason.

We next turn to Hans Kelsen, who thinks in the abstract logicistic mathematical vein of the Marburg school of neo-Kantians (Hermann Cohen, Paul Natorp, and Ernst Cassirer).[1] Kelsen (a professor in Vienna and Cologne before he went to Berkeley) sets for himself a similar task in a strictly positivistic sense with his so-called "pure theory of law" which is seen as a critical theory of the "essential concepts of law" – to be sharply distinguished from the concepts directed toward the content of law. In this sense Kelsen's *Basic Problems of Constitutional Law* (Tübingen, 1911; 2nd ed., 1923) and his *General Theory of the State* (Berlin, 1925) may indeed be seen as formal critical encyclopedia of legal science.

It is important to realize that Kelsen in his *General Theory of the State* identifies political theory with legal theory, because in his view the state is nothing but a logical system of legal norms! Kelsen distinguishes himself from Stammler first of all in his conception of law as norm. Stammler views law as a kind of conjunction of purposes or ends, whereas Kelsen in his method pursues the line of the so-called "logic of origin," the generating logic (the "*Erzeugungslogik*" of the Marburg neo-Kantians) which intends to generate the basic concepts of law (categories) not as something *statically given* in consciousness, because they ought to emerge *dynamically* from the concept of origin.[2]

1 Hermann Cohen (1842-1918), professor in Marburg; his major work is *System der Philosophie*, 4 vols. (Berlin, 1902); Paul Natorp (1854-1924), professor at Marburg; his major works are *Die logischen Grundlagen der exakten Wissenschaften* (The logical foundations of the exact sciences) (Leipzig, 1910) (written in a very lucid style), *Social Pedagogy* (Marburg, 1898; 4th ed., 1920); Ernst Cassirer (1874-1945), professor at Hamburg; his major work is *Das Erkenntnisproblem* (The problem of knowledge), 4 vols. (Berlin, 1906-1932), which is an excellent history of epistemology and the concepts of substance and function.

2 Kelsen did not arrive at this position until 1920, when he published his *The Problem of Sovereignty and the Theory of International Law* (Tübingen, 1920). In his work *Major Problems of a Theory of the State* (Tübingen, 1911) his approach was still static.

At this point the influence of Leibniz can be seen in this neo-Kantian school. Leibniz' *lex continui*, the law of logical continuity in the thought process, oriented to differential and integral calculus in mathematics, is posited as the fundamental law of transcendental epistemic logic. Every category newly acquired through the process of creative thinking is treated as a function of those already attained. Along this line of thought an uninterrupted logical continuity between the categories can be obtained. Kelsen applies this method in his *Pure Theory of Law*. From the concept of origin, the logical legal norm,[1] all other basic concepts are derived as "functions." In this way the concepts of legal subject, subjective right, legal personality, and so on, become "functions" of the pure legal norm. They are the legal norm itself in a particular (subjective) function. Thus, for Kelsen the entire subject side of the jural sphere is absorbed as "function" into the jural norm (the law-side); the legal person becomes a subsystem of legal norms, while the state is equated with the logical system of legal norms.

In his logicistic systematics of legal norms Kelsen took over the so-called "theory of layers" of his student Adolf Merkl, professor in Vienna.[2] According to this theory (in the form given to it by Kelsen)[3] the legal system ought to be created logically from a logical original norm.

Remark: Kelsen's "original norm"

> For an absolute monarchy, for instance, this original norm would read: "Coercion ought to be exercised under all conditions commanded by the monarch." The school of Kelsen accepts as original norm for international law the norm "*pacta sunt servanda*" (agreements ought to be kept). In his *General Theory of Law and State* (Cambridge, Mass., 1945), Kelsen accepts the basic norm of international law as the highest norm for the legal order which overarches national legal orders as a higher law. With this standpoint he returns from his initial stance in 1920 and afterwards, when he still allowed for two options: legal science

1 The logical legal norm is a "pure" thought-form of law: When A . . . then B ought to be; so, when a fact A occurs, coercion ought to follow.

2 This theory is developed in Merkl's works, "Law in the Light of Its Application," *Deutsche Richterzeitung* (1917), *The Double Face of the Law* (Vienna, 1918), and more extensively in his large work *The Theory of Legal Force Developed from the Concept of Law* (Leipzig, 1923).

3 Merkl himself does not want to start with a logical norm. As the point of orientation for his system he prefers a positive legal original norm (such as the Constitution

may choose its basic norm (*Grundnorm*) either in constitutional law or in international law; see his *The Problem of Sovereignty and the Theory of International Law* and his "Report on introducing the internal system of law and international public law," published in *Recueil des cours de l'académie de droit international* (1926), pp. 231-331. The basic norm is now: States ought to behave as they usually behave. The subsequent "levels" are international customary law and *pacta sunt servanda*. With this, Kelsen accepts a basic norm in which a fact is elevated to a norm – which contradicts his Kantian separation of *sein* and *sollen*. In this work Kelsen declares himself to be an adherent of the general theory of law, which he differentiates from philosophy of law and sociology of law. He endorses the analytical method of John Austin.

As a logical (not itself positive-legal) hypothesis, this logical original norm serves to apprehend all law based upon it in its jural nature. Law is concretized in the levels of legal formation: constitution, legislation, regulation, contract, judicial sentence, execution. Every "level" in this dynamic legal system is legal *application* with regard to the immediately higher one and legal *source* with respect to the immediately lower one. In this way a logical-mathematical continuity is obtained in legal systematics. This holds whether primacy is given, as Merkl does, to constitutional law, in which case the original norm is geared only to the logical systematics of constitutional law, or whether primacy is given to international law. But in both cases, of course, it is done at the cost of a radical leveling of all structural differences within the jural sphere. We shall return to this *Stufenbautheorie* (theory of levels) in our discussion of the problem of legal sources.[1]

Figuring among he best known pupils of Kelsen, in addition to Adolf Merkl, are: Alfred Verdross, the author of *The Unity of the Jural Worldview on the Basis of International Law* (Tübingen, 1923). Later on, in his *Law of Nations*, 3rd ed. (Vienna, 1955), Verdross became an adherent of the Thomist doctrine of natural law.

Felix Kaufmann, to whom we shall return in a later context.

1 Hans Nawiasky, discussed earlier, defends in the place of Kelsen's "*Normstufentheorie*" an "*Ermächtigungs¬stufentheorie*" (a theory of empowering levels). Because he takes a legal norm to be "a prescript for external behavior which, when disobeyed, leads to coercion or punishment," he can elevate to norms only positive laws, not legal actions. He therefore assumes that the higher (general) legal action authorizes a lower legal action, which ought to agree with the spirit of the higher one.

Fritz Sander, who soon became the "enfant terrible" of Kelsen's school becaue he strongly opposed his mentor for sticking to a natural-law conception of the normative character of law. Sander's major work, *State and Law: Prolegomena to a Theory of Jural Experience*, was published in the *Wiener staatswissenschaftliche Studien*, new series, vol. 1 (1922). Sander then became a member of the sociological theory of law.

Further names to be mentioned are Fritz Schreier, J. L. Kunz, and in part also Alf Ross in his well-documented work *Theory of the Sources of Law* (Vienna, 1929). Ross also switched to a different school, namely that of the so-called realistic school, which counts many supporters in America (discussed below); see his work *A Textbook of International Law*: *General Part* (Stuttgart, 1947).

Maurits van Praag, in his work *A General Theory of Law* (Alphen aan den Rijn, 1949), is a follower of Kelsen in the Netherlands. Where Kelsen wants to keep all ethical-political postulates outside legal science, Van Praag subscribes to an absolute standard against which positive law ought to be assessed, namely the worth of the human person. He shows a strong influence of modern existentialist philosophy (in particular that of Simone de Beauvoir). At the time this emphasis surfaced particularly in the well-known journal *Zeitschrift für öffentliches Recht* of which Kelsen was the editor. Today, most of these authors are connected to the continuation of this journal in the *Österreichische Zeitschrift für öffentliches Recht*, edited by Verdross.

The movement that has entered legal-scientific literature with the contributions of Stammler and Kelsen practically dissolved juridical encyclopedia into a theory of method for legal philosophy. The main concern of these authors and their students is to provide a distinctive method by which legal science could acquire a foundation totally different from the natural sciences (in the case of Stammler the method was formal teleological, in the case of Kelsen it was a norm-logical method).

2.12.3 Somló's "fundamental juristic theory." Genetic positivism

A special place must be reserved for the work *Juristische Grundlehre* by the Hungarian professor Felix Somló (1873-1920). The

book came out in Leipzig in 1917 and a posthumous edition was provided by Julius Moór ten years later.

In this work Somló indeed presents a formal encyclopedia of legal science which in a fashion treats the formal basic concepts of systematic legal science. He makes a sharp distinction between his "fundamental theory" and the "general theory of law." He elaborates Austin's distinction between "necessary formal concepts" and "general concepts of content" – a distinction not carried through by the British author himself. As he does so, Somló comes very close to the criticistic standpoint.

However, Somló cannot be counted as a member of the critical school, because he wants to demarcate the concept of law not through *critical* but through empirical-genetic attributes (the authority posited by law as *factual origin*) whereby he shades off into the mindset of naturalistic sociology. Withal, Somló is strongly influenced by Austin, and his book has gained much prominence in modern legal encyclopedic literature.

2.12.4 The natural-law reaction to the positivist conception of legal science. Legal science as a theory of what exists prior to positive law. The distinction between legal science and juristic method

Finally, within the legal encyclopedic literature there emerged a strong *reaction* to positivism as such, accompanied by the desire to bind the "material content of law itself" (which positivism had surrendered to the arbitrariness of the former of law) to *necessary, natural-law factors* or *basic principles*. In this sense mention is made of a "modern renaissance of natural law"![1]

The movement is combined with a critical attitude towards the positivistic conception of the scientific status of legal science. It is generally felt that, as a result of the positivistic absolutization of the formative human will, the law-concept has been

1 The term 'natural law' is taken here in a very broad sense in order to capture any orientation that proceeds from a foundation for law that is deeper than positive legislation. The latter is what is absolutized by positivism. [Dooyeweerd was the supervisor of the dissertation by Hendrik Jan van Eikema Hommes (1930-1984), who eventually succeeded him in the chair of legal philosophy at the Free University. The study by Hommes received a cum laude and was entitled *Een nieuwe herleving van het natuurrecht* [A new revival of natural law] (Assen, 1961).

eroded in such a way that a genuine *science* of law is made impossible.

In the practice of law the new school has won the day with a less restricted attitude of the judge towards the law. The idolatry of laws as faultless sources of law, so characteristic of the initial period following codification and which, as we saw, led to the rise of the strict, positivistic "exegetical school," eventually paved the way for a more critically attuned attitude. The circumstances themselves brought this about. Just after the codification, the legally codified law largely suited historical developments, but as actual developments continued, many legal stipulations became outdated yet were not amended. As well, many shortcomings in the codification became evident, generated by new legal needs. In these instances legal practice had to help itself by going beyond the law or even contradicting it (albeit with respect, usually, for the letter of the law). This development by itself stimulated the renaissance of natural law, just as this renaissance in turn had a stimulating effect upon subsequent legal developments.

2.12.5 **Metaphysical schools of natural law in France**

The assault on positivism in France was launched by Charles Beudant in his well-known book *The State and the Rights of the Individual* (Paris, 1870; 2nd ed., 1891). See also Joseph Charmont, *The Renaissance of Natural Law* (Paris, 1910). Studies in the field of legal encyclopedia saw a return to a pre-positive natural-law foundation of law. Well-known are the works of François Geny, *Method of Interpreting the Sources of Positive Private Law* (Paris, 1899; 2nd ed., 1919) and *The Science and Technique of Positive Private Law*, 4 vols. (Paris, 1915-1925). Geny's "natural law" is no longer the old rationalist version based on the supposed absolute sovereignty of mathematical thought. His conception of legal science is, in part at least, oriented to Henri Bergson's irrationalist philosophy of life. This philosophy believes it takes hold of true reality (taken by Bergson in an irrational psychologistic sense) – of the very stream of life (*durée*, *élan vital*, the "noumenon" behind the phenomena) – by way of immediate, subjective (non-objectifying) psychic feeling. The intellect, with its law-conformative mathematical thought-forms, can only

generate an intellectual illusion which merely facilitates man's biotical adaptation to his milieu.

Geny wants to break with the dominant formal-logical method of interpretation, which appeals to the law as the sole sufficient legal source. He regards laws merely as imperfect empirical expressions of a genuine higher law, which has to be recovered from society's laws and human consciousness. *Legal science*, which Geny (like Stammler) distinguishes sharply from *legal technique* that is directed towards positive law, has the task to find this higher supra-positive law ("*droit naturel*"), which has to be applied whenever positive law shows shortcomings.

Thus for Geny "free scientific research" (*le libre recherche scientifique*) becomes a subsidiary (natural-law) material source of law,[1] next to positive laws and customs as *formal sources* (the validity of such laws and customs depends upon their form and not upon material principles). But legal science cannot deduce this higher law from mathematical thought along the lines of a rationalistic natural law. According to Geny, the science of law, besides invoking reason and social facts, has to appeal to intuition and faith as the deeper stems of knowledge. It has to dig up those legal principles from the depths of *immediate feeling*; they do not flow from the rational and factual data.

Legal science, therefore, has to uncover what is given in law, independent of human arbitrariness. Geny believes that this given can be reduced to four basic forms: the real data (the societal relationships, the nature of things); the historical data; the rational data (rational natural law, reason, among which Geny reckons the prohibition of incest and the stability and durability of the marital relationship), and the ideal data that have to be dug up intuitively from the depths of people's religious faith and conscience (for example, the principle of monogamy and the fundamental indissolubility of marriage).

Geny's view of societal relationships and the nature of things is conceived in terms of a naturalistic sociology. He proceeds from the postulate that "societal relationships carry within them the conditions of their equilibrium and themselves reveal,

1 Geny also regards as sources of law the theoretical views of university-trained lawyers as well as legal practice (designated as "authority" when it is younger and "tradition" when it is older than the *Code cvil*).

so to speak, the norm that must govern them." In other words, the subjective relationships of societal life contain, according to Geny, their norm within themselves, just as is the case with the law-conformity of natural facts. Geny's natural law would therefore synthesize an idealistic metaphysics and a naturalistic sociology.

In contradistinction from what is *given* – from what is to be investigated by legal science – Geny posits the constructive element, i.e., that which is arbitrary in positive law, for example stipulating a term of 5 or 10 years for periods of prescription, or 21 for a person's coming of age. These things are studied by legal technique and imply, says Geny, a deliberate deformation of reality. He takes the constructive element in a broad sense, since it also includes concepts such as "legal person" and "subjective right." It should be noted that Geny does not rise above positivism in all respects, because he considers the validity of positive statute laws to be based upon their *legislative form* quite apart from their content. It is a position that conceals an unresolved dualism in Geny's concept of law, a concept that dissolves itself. We shall return to this issue in our discussion of the problem of legal sources.

The metaphysical school of natural law in modern French and Belgian encyclopedic literature also includes neo-Thomism (cf. Chap. 2, § 2 below) which seeks to adapt the natural law theory of Thomas Aquinas to modern circumstances.[1] An important representative of this school is Georges Renard, like Geny a professor at the University of Nancy. He is the author of *Philosophical Introduction to the Study of Law*, 4 vols. (Paris, 1924-1928). Volume I deals with *Law*, *Justice and the Will*; Volume II deals with *Law*, *Logic and Common Sense*; Volume III elaborates on *Law*, *Order and Reason*; Volume IV introduces the subject *The Value of Laws*: *A Philosophical Critique of the Idea of Law*. *Why and How We Are to Obey the Law*.

1 Geny, too, appeals to Aristotle and Aquinas as he describes "justice as such," justice as the highest legal principle. However, in essence his theory of natural law, which aims at a synthesis between his natural-scientific conception of social lawfulness and his absolute, metaphysically conceived, legal ideas, is not oriented to Thomism, because the latter has a rationalistic bent, whereas Geny's thought is irrationalistic.

After this, the first volume of a new work by Renard came out entitled *A Theory of Institutions: Essay in Juridical Ontology* (Paris, 1930). Following Thomas Aquinas, this work attempted in a quite remarkable way to maintain the institutional or organized legal communities on a natural-law basis against the supremacy of the idea of a social contract.

Julien Bonnecase, a professor at Bordeaux, should also be counted as belonging to the metaphysical school of natural law. In his work *Introduction to the Study of Law* (Paris, 1926; 2nd ed., 1931) he wants to ground law in a rational metaphysical natural law combined with an empirical sociological factor.

2.12.6 The sociological school of natural law in France

In contrast to the metaphysical orientation of the school of natural law, a psychologistically inclined historical-sociological direction established itself in both France and Belgium. Its leader in France was Raymond Saleilles. In his study of 1902 on "The Historical School and Natural Law," published in the *Revue trimestrielle de droit civil*, he on the one hand demanded a historical-sociological method and on the other defended the validity of a *natural law with varying content* (introduced by Stammler). This "socio-psychologically" conceived natural law does not have a fixed content, but varies in time and place, in keeping with the "collective conscience" – the people's "sense of justice." According to Saleilles the judge may apply this absolutely relativistic "natural law" only when it has objectified itself in one of the following three forms: (1) in legal principles, constructed analogously to positive law; (2) in the "*conscience collective*" – in what people feel would be just; (3) or, finally, in the "*droit comparé*," that is, in the coherence between given societal relationships and the legal order, as established by comparative legal science.

One member in particular of the school founded by Saleilles in France is Edouard Lambert, who in his large work *Studies in Common Law Legislation* (Paris, 1903) struck out for a positive empirical sociology as a substitute for a metaphysical natural law. This author uses the term "legal science," according to French usage, to refer to "the art of law" that applies legal science to the practical formation of law, the politics of law. In this school the natural-scientific encyclopedic conception of sociol-

ogy founded by Comte dominates completely. The author wants to discover norms for framing laws on the basis of empirical sociological research and finds the method of legal comparison quite appropriate for this purpose. The above-mentioned work also contains an extensive account of the sources of law, in particular a section of customary law. In line with the British theory the author views customary law as created by jurisprudence, as "judge-made law."

Finally, we have to mention Léon Duguit as an adherent of the sociological school of natural law in France. Duguit is a student of the sociologist Durkheim and represents syndicalistic legal philosophy and theory of constitutional law. From the two fundamental "social" laws, *division of labor* and *solidarity* (viewed as laws of nature), he derives all legal norms according to their *content*. Of the encyclopedic works of this author the first volume of his *Treatise on Constitutional Law*, 2 vols. (Paris, 1921; 3rd ed., 1927) ought to be mentioned. It contains a complete legal theory and political theory. His relevant smaller works are *The State*: *Objective Law and Positive Law* (Paris, 1901) and *Social Law, Individual Law and the Transformation of the State* (Paris, 1908).

In the footsteps of Comte, Duguit denies on principle the existence of "subjective rights," which he calls *metaphysical concepts*. He wants to speak only of *social duties* and *social functions*. In a radically nominalistic, individualistic view of reality[1] he denies the reality of all organized communities and leaves room only for those social relations in which individuals participate. A "communal bond" is disqualified by him as a "metaphysical concept," one that has to be eliminated by a sociology oriented to "experience." As a result, the state as an organized community is explained away as the mere factuality of powerful individuals (*gouvernants*) who succeed in superimposing their will upon the weaker ones (*gouvernés*). However, the dictates of the *gouvernants* do not constitute law; they can lay claim to validity only if their content is derived from objective legal norms that hold equally for all individuals. These objective legal norms originate from the social laws of division of labor and solidarity which are at the same time the source of economic and moral

1 For nominalism, see Chapter 2, § 2.3 below.

norms. The legal rule differs from the other societal norms simply through people's sense of justice ("*le sentiment de la justice*").

Duguit distinguishes these *normative, pre-positive legal rules* sharply from the *technical, constructive* rules that are creations of positive law and ought to be founded upon the normative ones. Duguit is a socio-psychological representative of the *modern doctrine of the sovereignty of law*.

To be mentioned as well is the Russian-French sociologist Georges Gurvitch. His theory of "*faits normatifs*" (normative facts) is worked out in his study *The Idea of Social Law* (diss., Univ. of Paris, 1931) and in *Legal Experience and a Pluralist Philosophy of Law* (Paris, 1935).

In his conception of human knowledge Gurvitch is influenced by Henri Bergson. He distinguishes scientific knowledge strictly from the immediate intuitive experience of reality, which ought to be the root of all scientific knowledge. Legal science, too, takes its point of departure in this distinction. Philosophy of law, sociology of law, and positive legal science illuminate different sides of legal experience and must work together constantly in order to arrive at proper results. The immediate intuitive experience of law is possible through the "*faits normatifs*" (by which Gurvitch means "societal facts" like community, family, trade union, international community, and so on) in which values are realized, with the result that these *normative facts* impress themselves upon people's consciousness by an impersonal "qualified authority." The normative facts are primary sources of law. Next to these we find the secondary sources of law which affirm the normative facts in a technical mode of action (formal positive law). To this category belong, according to Gurvitch, law, statute, custom, agreement, and so on. They contain positive law only insofar as they bring to expression these normative facts.

Here the influence of Duguit becomes evident. The multiplicity of normative facts leads to a pluralistic conception of law. This plurality displays two directions: on the one hand there is a multiplicity of aspects in which the immediately experienced idea of justice is revealed "in the richness of its infinite totality," and on the other hand there is a multiplicity of social groups who know their own immediate experience of law. "All law is

but an attempt at realizing one of the multiple aspects of justice in the most diverse and varied milieus."

In Gurvitch's conception of "*normative facts*" as impersonal objective facts with social authority inspired by values or ideas, the influence of the famous French sociologist Maurice Hauriou is clearly in evidence. Hauriou developed a "theory of institutions" which regards them in a neo-Platonic sense as supra-temporal ideas that are realized in the societal relationships between individuals through working ideas (*idées d'oeuvre*) which exert a psychological influence upon an elite group of entrepreneurs who are moved to give concrete shape to these ideas. Via these working ideas the institutional ideas are incorporated within human societal relationships.[1]

2.12.7 **The metaphysical natural law school in Belgium**

During the first half of the 20th century the metaphysical school of natural law gained wide support in Belgium. According to Bonnecase,[2] this support marks a sharp decline of the positivist school, represented on the one hand by Laurent and on the other by Picard. The main representatives here are Jean Dabin, *Philosophy of the Positive Legal Order* (Paris, 1929) and Jacques Leclercq, *Lessons from Natural Law*, 4 vols. (Namur, 1927-1932); vol. I deals with "The Foundation of Law and Society" and vol. II with "The State or Politics." Both authors, in linking up with Thomas Aquinas, adhere to a *metaphysically conceived moralistic conception of natural law*.

2.12.8 **Sociological natural law in Belgium**

This school has two versions: (a) one with a psychologistic orientation that chooses as its starting-point the sense of justice of mass psychology, represented chiefly by Georges Cornil, *Private Law: An Accessible Essay into the Sociology of Law* (Paris, 1924); and (b) one with a materialistic orientation, represented chiefly by Henri de Page, *On the Interpretation of Law*: *Contribution to the Quest for a Method and Current Theories*, 2 vols. (Brussels, 1925).

In a deeper sense, this entire sociological school of natural law is oriented to Auguste Comte's encyclopedic conception of

1 Hauriou's conception of institutions must not be confused with that of the French sociologist Durkheim, who has institutions arise from human society's collective consciousness.

2 See Julien Bonnecase, *Problème du droit et science belge du droit civil* (Problems of law and Belgian studies in civil law) (Paris, 1931), p. 304.

sociology, in the variant given to it by Durkheim's psychologistic turn.

2.12.9 **Natural law in modern Germany**

In Germany the modern antipositivistic school of natural law in encyclopedic literature exhibits an enormously variegated number of currents and standpoints, which may be distinguished chiefly in idealistic and naturalistic schools.[1]

2.12.9.1 *The idealistic schools*

The first to be counted as belonging to the idealistic[2] approach is the neo-Kantian school.

2.12.9.1.1 *Rudolf Stammler*

Although earlier we identified this author as a critical positivist in his concept of law, Stammler stands for a natural-law orientation in his conception of the criteria employed in assessing positive law. He distinguishes sharply between a concept of law or law-concept (*Rechtsbegriff*), which constitutes the formal logical thought-condition for all legal experience, and an idea of law or law-idea (*Rechtsidee*), through which we assess the content of positive law as being just or unjust. Stammler too thinks we can grasp the law-idea in a formal-critical way as the *a priori* logical condition for the assessment of law. However, he fills it with the contents of the humanistic ideal of personality: the human person as the "freely willing"[3] person (the will directed towards the idea as ultimate purpose) that must never be conceived as a means for other purposes, but only as an "end in itself"! The law-idea for Stammler is, in line with Kant, a perpetual task for positive law, which, being temporal empirical law, will never be able to fulfill this task adequately. It functions like the polestar for the navigator: it only points in the right direction but does

1 An excellent overview of German schools of legal philosophy is Karl Larenz, *Contemporary Legal and Political Philosophy* (Berlin, 1931); 107 pages.

2 I.e., based on an absolutization of normative reason-ideas.

3 For Stammler the will is neither psychological nor normative, since it is a thought-category with the aid of which the (psychic) contents of consciousness is ordered in the form of the means-end relationship. In contrast, natu106ral science orders it in the form of the cause-effect relationship. Along this line of argument Stammler defines his law-concept as the "inviolable sov ereign binding will." For him, "freely willing" is action "according to the idea directed towards the end as ultimate purpose."

not provide the empirical goal. Keep in mind, however, that for Kant the idea (as norm) is not a theoretical concept that generates knowledge, but a practical principle for action. Stammler, by contrast, sees in the law-idea a regulative principle that establishes unity in the contents of legal norms by focusing them upon the final end.

From this law-idea Stammler thinks he can derive, in a logical-analytical manner, various basic principles which in a formal sense display the character of natural law. Their content is supplied only by the historico-economic material of experience. If positive law wants to qualify as just law it has to satisfy this material.

Stammler calls this "natural law with varying content" and assigns an important function to it in the general formation of law and in the interpretation of positive law in order to supplement lacunae. Positive law itself also refers to these principles of natural law with expressions such as equity, good faith, bona mores, and so on. Stammler arrives at this idea because according to him positive law is "a compulsive striving towards what is just."

Stammler developed his theory of formal natural law in a separate work entitled *The Doctrine of Appropriate Rights* (Berlin, 1902; 2nd ed., 1926), the final section of which he called "Praxis," citing numerous instances from case law. His entire critical legal system is developed in his work of 1911 cited earlier, *Theory of Legal Science*, and also in his *Textbook for Legal Philosophy* (Berlin, 1923; 3rd ed., 1928). The first large work in which he developed his ideas in the philosophy of law bore the title *Economics and Law according to the Materialist Conception of History* (Berlin, 1896; 4th ed., 1921). This work contained a principled critique of the Marxist view of law on the basis of Kant's critique of knowledge.

In the field of criminal law the well-known professor Graf Zu Dohna adheres to Stammler's critical theory of natural law. (Commit this to memory!)

With the "*law-idea*" Stammler wants to re-establish the philosophic-encyclopedic coherence of law, which through the "law-concept" is logically *separated* from other orderings. He does this by means of the system of human goals and the final

goal as mankind's "eternal task": the idea of the "freely" or "appropriately willing."

2.12.9.2 *The Baden school of neo-Kantianism*

In the second place mention is to be made of the idealistic Kantian direction within legal theory that is oriented to the Baden or South-West German school of neo-Kantian philosophy: Wilhelm Windelband (1848-1915); Heinrich Rickert (1863-1936]), Emil Lask (1875-1915), and others.[1]

It was Fichte's philosophy of history that exerted a strong influence upon this school. It views law neither as norm nor as a fact of nature, but rather as a synthesis established by thought between an empirical nature reality and absolute, *supratemporal* values (in this case: the *value of justice*). The Baden school splits temporal reality into a realm of sensory empirical temporal (nature) reality (phenomenon) and a supposed supratemporal realm of (not really existing yet valid) *values* (absolutized normative ideas of reason, like truth, beauty, justice, sanctity, etc.). The school assumes the domain of *culture* as a third realm, a subjective connecting link, a synthesis of thought between natural reality and (non-real) values. Here one takes a subjective position *vis-à-vis* values. As a consequence, culture can only be grasped by an individualizing "value-relating" mode of thought, as opposed to the "blindness to values" present in the generalizing natural-scientific mode of thought. For the Baden

1 For the study of this school a good introductory work is Rickert's small book *Kulturwissenschaft und Naturwissenschaft* [Cultural science and Natural Science] (Tübingen, 1899; rev. ed., 1926). Rickert was a philosophy professor at Freiburg and then at Heidelberg. Major works: *The Object of Knowledge* (Tübingen, 1892; 4th ed., 1921); *The Limits of Concept Formation in Natural Science*: *A Logical Introduction to the Historical Sciences* (Tübingen, 1902; 4th ed., 1921); and *System of Philosophy* (Tübingen, 1921). Founder of the Baden school was Wilhelm Windelband (1848-1915), another professor at Heidelberg. Major works: *Preludes*: *Essays and Addresses Introducing Philosophy* (Tübingen, 1911; 6th ed., 1919), written in an easily accessible style; *Introduction to Philosophy* (Tübingen, 1914; 3rd ed., 1923); and also his excellent work *History of Modern Philosophy*, 2 vols. (Leipzig, 1880; 3rd ed., 1923). This work is highly recommended as an introduction to the history of modern philosophy in general. Emil Lask (1875-1915), also a professor at Heidelberg, died in action during World War I. His *Collected Works* were published in 3 volumes (Tübingen, 1923), edited by Eugen Herrigel, with a Foreword by Rickert. Lask also published a work on *Legal Philosophy* (Heidelberg, 1907).

school, culture is natural reality to which *values cling* (for example, a work of art, a scholarly work, etc.).

In the case of the Baden school one is justified in speaking of an axiological (i.e., value-oriented) criticism, in opposition to the *mathematical logicistic criticism* of the Marburg school. The humanistic personality ideal here acquires primacy in the field of the cultural sciences and represses the mathematical natural science ideal.

In this way positive law is positioned within this third realm as a cultural phenomenon. For this school the *concept of law* can only be understood in relation to the *idea of law* (the value of justice), because as a cultural concept it can only be conceived of in a mode of thinking that relates natural reality to values. The main representatives of this school are Emil Lask, *Legal Philosophie* (Heidelberg, 1907), who strongly emphasizes the teleological nature of legal concepts; and Fritz Münch, *Culture and Law* (Leipzig, 1918).

Prominent in this school as well is Gustav Radbruch (1878-1949), professor in criminal law and legal philosophy at Heidelberg. He served as a social-democratic representative and as a minister of justice during the Great War. His major works include *Introduction to Legal Science* (Leipzig, 1910; 4th ed., 1929 – a small encyclopedia of legal science mainly conceived in a material way and containing an introductory part which is philosophic in nature); *The Fundamentals of Legal Philosophy* (Leipzig, 1914; 4th ed. by Erik Wolf, 1950). Like Rickert, Radbruch remains strictly *relativistic* about determining the contents of the values that depend, according to this whole school, upon the question which value in the realm of values is chosen to be the *highest, absolute value*. Although one's worldview is not entitled to intervene in theoretical matters, it does determine one's choice of the highest value. The philosophy of law may, in a neutral and theoretical way, investigate only the logical conditions and consequences of the various standpoints with regard to justice, but the actual choice should be left to the faith of every individual person. (In sociology it was Max Weber who fanatically pursued the elimination of value judgments from theoretical thought.)

Max Ernst Mayer (1875-1924) also had close affinities with this school. He was a professor of criminal law and legal philosophy at Frankfurt. His major works are *Legal Norms and Cultural Norms* (Breslau, 1903) and *Legal Philosophy* (Berlin, 1922), the first volume in the *Encyclopedia of Legal Science* edited by Eduard Kohlrausch and Walter Kaskel.

Mayer also wrote an important study on criminal law, *The General Part of German Criminal Law* (Heidelberg, 1915; 2nd ed., 1923). This work embodies his new cultural theory of law in a (material) understanding of the concept of criminal illegality. He called culture "reality-turned valuable" or "values turned real." In addition he went beyond the Baden school which actually sees in culture merely a subjective mode of viewing, a particular synthetic thought-form,[1] one that does not acknowledge a genuine realization of values that has validity. Mayer approximates the speculative metaphysical position of Hegel. Under the generic concept of cultural norm he subsumes the legal norms along with the norms of religion and morality, social norms and norms of interaction, and academic, technical, military and agrarian norms. The cultural norm is defined by him as a prohibition or a command by means of which a society demands those actions that conform to its interest. Culture itself is "the embodiment of society related to ideas." The "idea" of culture is for him the "idea of humanity" (the humanistic personality ideal). This idea realizes itself within cultural norms; the legal ideals, as temporal manifestations of the law-idea, are for Mayer only a constitutive part of the temporal cultural ideals which are themselves historical manifestations that reveal the universally valid idea of humanity. The law-idea as a universally valid guideline for the formation of positive law, as the "thought through which the value of law, which cannot be traced back any further and in which the eternal meaning of every legal order ought to be maintained," is itself identical with

1 According to Rickert one can view the same (natural) reality from a natural-scientific and from a cultural-scientific perspective. The difference between these two modes of viewing lies exclusively in different *directions* of thought, *not in reality itself*. Only during his last phase did Rickert manage to let go of this criticistic conviction.

the idea of culture, the idea of humanity. By returning to the pre-positive complex of cultural norms Mayer wants to ensure an objective and trans-positive content to the formal concept of lawfulness and unlawfulness (legality and illegality).[1] This approach, too, is a question of "natural law with varying content." According to Mayer the state cannot create culture; all it can do is critically weigh the cultural norms that are independent of it.

The Baden school of neo-Kantians, to which also belonged Julius Binder (in his first period) as well as Wilhelm Sauer (in a slightly broader sense[2] thus posits and understands law within the encompassing context of a philosophical encyclopedia, oriented to social culture of absolute, supratemporal values. In addition to his above-mentioned general encyclopedic work, Saur published *The Foundation of Science and the Academic Disciplines* (Berlin, 1926) as well as a *Textbook of Legal and Social Philosophy* (Basel, 1929) which serves as a helpful (though somewhat superficial) survey of modern currents in German philosophy of law.[3] Later he published a *Theory of Juridical Method* (Stuttgart, 1940) and a *System of Legal and Social Philosophy* (Basel, 1949).

Moving to the center of attention at the beginning of the 20th century, also in Germany, was the vehement debate about the relationship between the judge and legal science and about the value of positive law. The authors just mentioned, working within the cultural philosophical school alongside those who adhered to the current of the naturalistic sociology, played a prominent role in this debate. Hermann Kantorowicz, *Legal Science and Sociology* (Tübingen, 1911), who himself was oriented to the legal philosophy of the Baden school, published under the pseudonym Gnaeus Flavius a passionate polemic with the title

1 For example, in criminal law Mayer wants to distill the objective content of the concept "insult" from the social norms which forbid anyone from calling a person an ass or a pig. That would of course erase the boundaries between the jural sphere and the social sphere.

2 In line with Leibniz, Sauer speaks of "value-monads." All science is constituted by a certain coherence of *value-monads*.

3 Wilhelm Saur was a professor of criminal law and legal philosophy at Königsberg. He published a very well-known work in the field of penal law, *The Foundations of Criminal Law* (Stuttgart, 1919). This work, like his *Foundations of Process Law*, is fully based on his legal philosophy.

The Struggle for Legal Science (1906). In this work, judicial construction is bound by free, irrationally conceived legal sense. It is not bound to a law or to logical construction. This was also the shibboleth of the naturalistic sociological school of law. The main representatives of the "free law movement" from the legal philosophic school of Baden were Gustav Rümelin (already in his famous oration of 1885, "Value Judgments and Decisions of the Will") and the Swiss scholar Karl Wieland in his published rectorial address *Historical and Critical Legal Science* (Basel, 1910). Another prominent figure in the free law movement was the Swiss jurist Max Rumpf in his book *Laws and Judges* (Berlin, 1906); Rumpf, like Brütt (*The Art of Legal Application*, 1907), was oriented to the philosophy of the Baden school.[1]

2.12.9.2.1 *The phenomenological school*

In the third place we have to mention the extremely influential phenomenological school in Germany. It is oriented to the philosophy of Edmund Husserl, a professor of philosophy in Freiburg,[2] and his followers. This school has no critical predisposition. It aims, rather, along an inductive way and by means of the so-called intuition of the essence ("*Wesenschau*") to uncover apiori essential (*eidetic*) law-conformities in what is given immanently in human consciousness.

Husserl regards phenomenology as the encyclopedic philosophical basic discipline for all special sciences. Phenomenology believes that it can grasp in an adequately eidetic way what

1 In France, Paul Roubier, a professor at Lyon, followed the Baden school in his rather eclectic work *General Theory of Law*: *The History of the Doctrine of Law* and the *Philosophy of Social Values* (Paris, 1946). The values that should be realized by law are legal security (put in the foreground by the formal, i.e., positivistic, legal schools), justice (championed by the *idealistic* schools), and social progress (entertained by the *realistic* schools). Through these values, law stands in the service of civilization, which Roubier understands in the sense of Josef Kohler (see below). In this respect he distances himself from the Baden school. In Switzerland, Oscar Adolf Germann, a professor in the University of Basel, is also influenced by the Baden school; see his *The Foundations of Legal Science* (Bern, 1950).

2 Husserl's major works include: *Logical Investigations*, 2 vols. (1900-1902); *Ideas Concerning a Pure Phenomenology* (1913); *Cartesian Meditations*: *An Introduction to Phenomenology* (Paris, 1931); and the essay "The Crisis of European Sciences and Transcendental Phenomenology," *Husserliana*, vol. VI (Louvain, 1954).

is given. It has a strong affinity with Plato's doctrine of ideas. Actually, it works with the logical principle of identity when it investigates what can vary in a given individual phenomenon without affecting its logical essence (eidos). It does not want to proceed in an apriori systematic way, but aims instead to advance in a purely descriptive mode by strictly holding itself to the phenomenological experience. The phenomenological school does not want to take this experience in a psychological sense[1] since it wishes to eliminate all metaphysics. It is interested only in the *presumed factuality* present in the act of consciousness, in the content of intentional acts immanent in consciousness, in the ideal "significance" or "meaning" intended by consciousness when it directs itself towards a transcendent "*Gegenstand*" (object).

The phenomenological method is totally different from the critical (Kantian) method. Whereas the critical idealist sets out to find the transcendental, universally valid forms of knowledge edge while conceiving the individual "Gegenstand" of knowledge as being necessarily determined by these forms, the phenomenologist proceeds from the particular "Sachverhalt" (factuality) and tries by means of analysis to trace the essential law-conformities given in the intentional consciousness. The phenomenologist does not begin by asking, *How is experience possible*? but instead turns directly to the full intentional experiential content intuitively present in consciousness, in order to come to an intuitive view of the general essence of what is individually given: its ideal structure and its "*so-sein*" (its mode of existence).

When this method is applied to the field of law the object of study is not (as is the case with the neo-Kantians) law as a

1 In both his *Logical Investigations* and his *Ideas* Husserl makes a sharp distinction between factual sciences (*Tatsachenwissenschaften*: the disciplines that confine themselves to the natural experience) and phenomenology as science of essences. The latter has to penetrate behind the natural experience (also in the norm-sciences) by returning to the pure intuition of the essence of the phenomenological consciousness (the pure "I") which sticks to the subjective act of consciousness and its intentional content, without choosing a position regarding the reality or value of the supposed "*Gegenstand*." Phenomenology calls this abstention of all natural *reality* or *value* judgments the "*epochè*."

self-enclosed body of positive legal rules (*Rechtssätze*), but typical legal phenomena such as promises, obligations, property rights and liens – phenomena in which the universal apriori essence (*eidos*), the law-conformative essential structure, ought to be traced.

This phenomenological school in legal theory gives shelter to a variety of academic orientations. It includes a radical positivist like Felix Kaufmann, whose chief works are *Logic and Legal Science* (Tübingen, 1922) and *The Criteria of Law* (Tübingen, 1923), in which he attempts to combine Husserl's method with Kelsen's "Pure Theory of Law." The school also includes jurists who are more inclined to pursue natural law, such as Adolf Reinach, *The Apriori Foundations of Civil Law* (Halle an der Saale, 1913) and a scholar like Fritz Schreier, *Basic Concepts and Forms of Law* (Leipzig, 1924) who see logical possibilities in the apriori essential jural laws from which the framer of positive laws can make a choice without being strictly bound by them. According to Schreier the legal norms are, in their being, independent of the legislator, though they acquire positive validity through the mediation of the legislature. Two other members of the school are Gerhart Husserl,[1] author of *Legal Force and Legal Validity*, I (Berlin, 1925), and Wilhelm Schapp, author of *The New Science of Law* (Berlin, 1930). The school has a strict logicist and rationalist predisposition, but it has never arrived at any consensus.

Alongside the rationalistic phenomenological line there has arisen an irrationalistic phenomenological school strongly influenced by the German historian and philosopher Wilhelm Dilthey (1833-1911; professor at Berlin) and his followers (Martin Heidegger, Theodor Litt, Max Scheler, Eduard Spranger, Hans Freyer and others). They demand a so-called "*geisteswissenschaftliche*" (humanities) method for legal theory and political science, as opposed to the objectifying method of those natural-scientific disciplines that find their field of study in a spatializing natural-scientific method. They conceive the phenomenological consciousness much broader than Husserl did, who dissolved it into pure thought (the pure "*cogito*"; compare

1 Gerhart Adolf Husserl (18931973) taught philosophy at the University of Kiel and later at the University of Washington. He was the son of Edmund Husserl, the founder of phenomenology.

Descartes' *Cogito ergo sum*). They take consciousness in all its sensitive emotional and evaluating (spiritual) functions. This school starts from the *identity of subject and object in spiritual reality* which in line with Dilthey's thought is brought under a historical, irrationalistic basic denominator. Its method is dialectical-phenomenological. This is an irrationalist philosophy of life. It searches for the individual (subjective) moments of the spiritual totality of the phenomenological consciousness. In this approach the normative boundaries between the spiritual lawspheres are dialectically transcended and leveled in order to subsume them all under an historical social basic denominator. Thus the inner contradiction is dialectically sanctioned.

This school comes close again to the historical dialectical philosophy introduced by Fichte during his last period and by Hegel. Unlike the Historical School, which saw in organized social communities supra-individual realities, each with its own proper soul or spirit, this school regards them as spiritual (historical) relationships that *continue to find their center in the individual*.

This irrationalistic current has found supporters particularly in political theory. Its adherents are also prone to embrace an irrationalist foundation of positive law in the individual "decision" which cannot be traced back to general norms. As a consequence they hold, in their concept of sovereignty, that the sovereign is elevated above the law (in particular Hermann Heller and Carl Schmidt). A strong romantic trait runs though this conception of law. The leader of this school is Rudolf Smend, professor of criminal law and author of *Constitution and Constitutional Law* (Munich, 1928), a work that moves in the direction of the fascist idea of a dictatorial state. Among the other adherents are Gerhard Leibholz, Hermann Heller, and Carl Schmidt.[1] I have critiqued this school in my work *De Crisis der Humanistische Staatsleer* (Amsterdam, 1931).[2]

1 Leibholz is a professor in Göttingen and author of *Fichte and the Democratic Idea* (Freiburg im Breisgau, 1921); Heller, a professor in Berlin, is the author of *Sovereignty* (Berlin and Leipzig, 1927); Schmidt, a professor in Bonn, wrote among other works a *Theory of Constitutional Law* (Berlin, 1928).

2 [Eng. trans., *The Crisis in Humanist Political Theory* (Paideia Press, 2010), esp. pp. 48-70.]

In the more recent encyclopedic legal literature Hermann Isay (a lawyer and notary in Berlin and later a professor at the Technical University of Charlottenburg), in his important book *Legal Norm and Decision* (1929), has tried to link up with the phenomenological school, even though his philosophical foundation, which he calls "phenomenological," is rather weak. The author emphatically accentuates the essential difference between legal norms and concrete legal decisions. In line with the free law movement he views the "*Entscheidung*" (decision) as the basis of the norm. In essence the norm is a fixated static *rationalization* of the "decision," which by definition is *irrational*. Now then, according to Isay the "decision," as an act of the will, has its irrational source in the sense of value, the sense of justice. Every true "decision," one based on the *sense of justice*, has for Isay the feature of universal validity, that is, of normativity, because the communal sense forms an essential component in the sense of justice. The communal sense demands that the decision for or against any other member of the community would turn out to be the same. The sense of justice finds its limit in technical issues where only the value of practical usefulness matters.

The only requirement in the case of technical issues is *that* a rule be established, but it does not say *how* this is to be done. Here commences the domain of practical reason, which Isay describes as "an experience of consciousness directed at the practical value of the *decision's* content." No more than a sense of value is operative in this domain, although the understand ing also plays a limited role in it. The sense of justice concerns itself as a rule only with the broad lines, the *principles* behind a regulation, and leaves the technical details to *practical reason*. Isay here intends to introduce a distinction in legal decisions similar to what Geny and others make with regard to *legal norms* and *legal technique*. The legal technique (the "*construit*") does not appeal to feeling, but to reason.

This whole school positions law in the *encyclopedic coherence of a sociology conceived in the sense of the humanities*. Theodor Litt, professor of philosophy at Leipzig, and Hans Freyer, professor of sociology at Leipzig, have laid the groundwork for such a sociology. Litt did this in his well-known work *Individual and Society* (Leipzig,, 1919; 3rd enl. ed., 1926), and Freyer in his *Sociology*

as the Science of Reality (Leipzig, 1930) and in his earlier work *The State* (Leipzig, 1926).

A noteworthy effort of late to come to a new foundation of natural law on the basis of a phenomenological analysis of man's spiritual powers and a deliberate use of Dilthey's "*geisteswissenschaftliche*" method is found in the thought of Helmut Coing, a professor in Frankfurt am Main. He has written a work on the *Supreme Basics of Law*: *Toward a New Foundation of Natural Law* (Heidelberg, 1947) and *The Basic Traits of Legal Philosophy* (Berlin, 1950). Legal philosophy, Coing writes, has the task to give a phenomenological description of law and to investigate guidelines for the formation of law. Phenomenological research describes properties of law (law brings peace and security) and investigates the psychological and sociological foundations of law. As it does so, phenomenology takes its starting-point in man's feelings or consciousness (not in his reason). It does not see human feeling or consciousness as a mass of unordered impressions (the distance from the Kantian critique of knowledge is clearly in evidence here). Instead, it accepts certain structures in them. As a guideline for the formation of law Coing accepts the law-idea, the "moral archetype and prototype for all law." To this belong the ethical values of justice, human dignity, freedom, troth, and so on. In the scale of ethical values justice occupies the foremost position. It excludes arbitrariness and caprice and forms law according to the standard of equality.

Furthermore, the "*Natur der Sache*" (the nature of the case) belongs as well to the law-idea. Under this Coing subsumes the fundamental structures of those "social" facts that every legal order ought to take into account. He points out that he is pursuing an avenue already pointed out by Kaufmann and Reinach. The rules of natural law emanate from a union of ethical values and the recurrent elementary situations and relationships of social life. "In these rules we acknowledge and formulate a particular factual coherence in the human world that we encounter as we attempt to establish a just social order. In them we formulate specific ethical contents and givens of social life that come into play in the social order."

The "nature of the case" is not a closed ordering but an open one. It provides no more than ordering elements which require a "valuing" intervention of the legislator. In this respect Coing distances himself from traditional Thomist natural law, which contains eternal, unchangeable supratemporal legal norms that hold directly. For Coing, natural law constitutes a particular domain of ideal being that is located between the rules of ethics and the laws of social life and is to be realized in the positive formation of law.

2.12.9.2.2 *Neo-Hegelian currents*

In the fourth place we have to mention the neo-Hegelian currents in German legal and political theories which consciously want to position law in the encyclopedic coherence of Hegel's historical, dialectically constructed philosophy of the Spirit. In this connection the first to mention is Julius Binder (1870-1939), a professor of civil law and philosophy of law at Göttingen. His work *Concept of Law and Idea of Law* (Leizig, 1915) contains a critique of Stammler's mathematical logicistic deduction of the concept of law and dates from an earlier period in his development when he was still oriented to the Baden school of the neo-Kantians. But whereas the Baden school stands for a conscious approach to the speculative idealism of Fichte's last (cultural-history) period, Binder crossed the boundary of neo-Kantianism by consciously linking up with Hegel's objective historical idealism. The most extensive exposition of this new view can be found in his large work *Philosophy of Law* (Berlin, 1925). It contains a wide-ranging critical discussion of other philosophical theories of law in the modern period. What is most typical in this neo-Hegelianism is the break with the dominant *individualistic* conception of legal life which also held sway in the neo-Kantian currents. Instead, the individual is seen as a mere moment in a trans-individual *collectivity*. Also the conception of the law-idea, which with Kant and his followers still was envisaged individualistically as the delimitation of the areas of freedom between individuals each functioning as an *end in itself*, now becomes transpersonal: the law-idea is the subordination of the individual within the *legal community*, the *state*, of which all other, smaller communities are but dependent individual components

(with implied state absolutism). On this standpoint, positive law is a *historical manifestation* of the idea of law.

Binder teaches neither a material natural law with timeless validity (the metaphysical rationalistic conception!), nor a formal natural law with *varying content* (the neo-Kantians!).[1] He teaches, rather, the rationality of positive law as a historical manifestation of the law-idea. The particular content of a legal order is thus historically understood and justified. *Die Weltgeschichte ist das Weltgericht*: "world history is the judgment of the world" (Hegel). "The real is the rational" because it is an individual, irrational appearance of the Idea! The law-idea is the dynamic moment in the history of law.[2] Thus law is positioned within the encyclopedic philosophical coherence of the history of the Spirit, as objective manifestation of the *Idea* (the actuality of all reality, which in essence is *spirit*, *freedom*, personality).

Walther Schönfeld belongs to the same school. His publications include *The Logical Structure of the Legal Order* (Leipzig, 1927), The Concept of a Dialectical Jurisprudence (Greifswald, 1929), and "The History of Legal Science in the Mirror of Metaphysics," in *Empire and Law in German Philosophy*, ed. Karl Larenz, vol. 2 (Stuttgart, 1943). This study was later revised in his *Foundation of Legal Science* (Stuttgart, 1951). Next, Schönfeld published On Justice (Göttingen, 1952), in which he seeks to elucidate legal philosophy from the perspective of Christianity.

Also published in *Empire and Law* is a study by Karl Larenz, "Ethics and Law." Earlier works by Larenz are *The Problem of Legal Validity* (Berlin, 1929) and Contemporary *Legal and Political Philosophy* (Berlin, 1931).[3]

The method of this school for legal science is radically opposed to the abstract logical method of the positivists. In this vein Schönfeld sharply opposed the positivistic logical concep-

1 Hegelianism, of course, dialectically abolishes the Kantian distinction between *logical form* and *empirical material* (content) when it abolishes the distinction between nature (reality) and freedom (norm).

2 Hegel taught that the Idea is immanent to the empirical world, in sharp opposition to Kant, who assumed an unbridgeable gulf between empirical "being" (phenomenon) and ideal "ought" (*sollen*). Binder does draw the consequences of Hegel's standpoint, although he still denies the immanence of the law-idea in positive law.

3 His latest book is *Methodology in the Science of Law* (Berlin, 1960).

tion of jurisprudence as the subsumption of the concrete case under the abstract and general definition in the law of legal fact. Rather, the legal application has to acknowledge the peculiarities of the concrete case, which cannot be deduced from the formal general rule in a logical way. So, for example, the institution of property in Roman and Germanic law does not constitute examples of the abstract genus of the concept "property," as the positivistic "general theory of law" would hold. Rather, they are historical types that realize the general law-idea in their individual peculiarities.

2.12.9.2.2.1 The pseudo-Hegelian school of Kohler and Berolzheimer. The naturalistic conception of cultural development. The method of *legal comparison* (Kohler, Post)

The well-known Josef Kohler (1849-1919) also counts himself a member of the neo-Hegelian school, but unjustly so. Born from a strict Catholic family, Kohler taught civil law, criminal law and process law in Würzburg and Berlin, and founded the journal *Archiv für Rechts- und Wirtschaftsphilosophie* (Journal for legal and economic philosophy). The same is true of Fritz Berolzheimer (1869-1920). Actually, both scholars belong to one of the naturalistic, anti-positivistic positions which transformed Hegel's idea of development in a naturalistic way; the real Hegel renaissance belongs to a more recent period! *Both are completely dependent upon the science-ideal of the 19th century!*

Kohler takes law to be a serviceable part of culture.[1] He defines culture as an everflowing movement and unfolding of human activity towards the aim of "knowing all and doing all in order to master nature."[2] In truth, by means of the *comparative study of law*, which he strenuously promotes, Kohler wants to discover the *general developmental laws* in law along the lines of a naturalistic sociology. Law is portrayed by him within the encyclopedic context of a universal cultural development. The materials for this construction are to be supplied by his studies of French, English, American, Indian, and Islamic law and law

1 In his *Introduction to the Science of Law* (Leizig, 1905), p. 3, Kohler defines culture as "the totality of human achievements in conquering the universe by way of knowledge, technology, and physical control."

2 Kohler, *Textbook of Legal Science* (Berlin and Leipzig, 1909), p. 14.

among some African tribes. The chief encyclopedic works of Kohler are *Introduction to Legal Science* (Leipzig, 1902; 5th ed., 1919) and his already mentioned *Textbook of Legal Science* (Berlin and Leipzig, 1909; 3rd ed., 1923). The former work is an encyclopedia mainly written in a material sense and provided with some introductory reflections on culture and the place of law within it. Kohler also occupied a prominent place in the struggle for the freedom of the judge from the law (in the "free law movement") as well as in the debate about acknowledging the so-called *immaterial legal goods* (copyright, trademarks, and so on). He may be called the *father of the theory of immaterial goods*.

Next to Kohler, Albert Hermann Post (1839-1895) is the main representative of the *comparative legal method* in legal science. His major works are *The Origin of Law* (Oldenburg, 1876) and *Outline of Ethnological Jurisprudence* (Oldenburg, 1895). The central organ of the school is the *Zeitschrift für vergleichende Rechtswissenschaft* [Journal for comparative legal science] founded in 1878 by Kohler, Post, and Franz Bernhöft. The main representative of the naturalistic sociological school in Germany is Franz von Liszt (1851-1919). By using this method Liszt believes he can discover normative laws of development!

As already noticeable in the case of Jhering, the background of this whole school is found in an overestimation of Darwin's theory of evolution. Berolzheimer, in an even more radically inclined naturalistic orientation than Kohler's, wrote a five-volume *System of Legal and Economic Philosophy* (Munich, 1904).

2.12.9.2.3 *The critical psychologistic school of Fries. Nelson and Schuppe*

In the fifth place we have to mention the idealistic school of natural law. This school is oriented to the German philosopher Jakob Fries (1773-1843), a psychologistic thinker who was nonetheless influenced by Kant's critical method. Fries wanted to analyze the apriori knowledge present in the psychic consciousness that comes to our awareness in a provisional and unclear shape. In the process he also brought logical thinking and our normative spiritual functions under a *psychological denominator*. The psychic consciousness, however, conceals apriori and practical law-conformities that have to be cleared up through critical analysis. In the Netherlands the former professor from Gro-

ningen, Gerard Heymans, held a position that was not far from that of Fries.

The main representative of this school in modern legal philosophy is Leonard Nelson (1882-1927), a professor in Göttingen. His main works are A Science of Law without Law (Leipzig, 1917), which contains a sharp critique of the positivistic schools, and *System of a Philosophical Theory of Law* (Leipzig, 1920). Similar to Fries, we find a critical psychologistic orientation in Nelson, leading him to reject the psychological empiricism that denies apriori knowledge and wants to base all knowledge on varying psychic experience. He accepts apriori principles of natural law but is of the opinion that these principles can only be brought to consciousness through a critical analysis of our *psychical feeling for law*, where they still hide in darkness. With Kantianism and neo-Kantianism Nelson shares the *individualistic conception of legal life*, apparent in his very definition of law which is almost identical to the one given by Kant: law is "the practical necessity of mutually limiting the domains of freedom in the interaction of persons." Nelson explicitly calls his legal theory "metaphysics of law" because it deals with practical normative values of legal life. Viewed methodologically, Wilhelm Schuppe (1836-1913), professor in Greifswald, follows the same direction in his *The Basic Structure of Ethics and Legal Philosophy* (Breslau, 1882).

2.12.9.2.4 *The neo-Thomist school. Victor Cathrein*

Finally, we mention the metaphysical neo-Thomist theory of natural law in modern German legal science. This school has its main representative in Victor Cathrein, S.J., (1845-1931), a professor in the seminary at Valkenburg. His chief encyclopedic works are *Moralphilosophie*, 2 vols. (Freiburg im Breisgau, 1890) and *Law, Natural Law and Positive Law* (Freiburg im Breisgau, 1901; 2nd enl. ed., 1909). This school is today the dominant one in Roman Catholic circles. In line with the Aristotelian-Thomist tradition, Cathrein understands natural law as a (serviceable) component of natural ethical law (*lex naturalis*).

Because positive law can ground its validity only in natural law, Cathrein argues that it too is an indirect *ethical* norm that lays an obligation upon the conscience. From natural law, with its basic principle "*suum cuique tribuere*" (to each his own; give

every one their due), natural reason can deduce the norms of natural law (such as the entire Decalogue, *pacta sunt servanda*, etc. etc.). These norms, which are independent of time and place, have immediate positive legal validity apart from human positivization. However, natural law contains only the most general legal principles and therefore needs positive law for its more precise definition and application at any given time and place. Every form of positive law that violates natural law lacks binding force and therefore *is not* positive law. Like all Thomists, Cathrein grounds the encyclopedic philosophical coherence of law in Thomas' teleological cosmonomic idea with its doctrine of substantial forms (to be discussed in a later chapter). His conception of law is not individualistic but oriented to society's organized communities (which are implicit in the substantial form of being human).

In modern German literature on natural law, the following neo-Thomist scholars ought to be mentioned as well: Emil Hölscher, *An Ethical Theory of Law* (1930); Otto Schilling, *Christian Social and Legal Philosophy* (Munich, 1933) and *A Christian Theory of the State and of the Duties of the State* (Donauwörth, 1951); Heinrich Rommen, *The Eternal Recurrence of Natural Law* (Leipzig, 1936); Gallus M. Manser, O.P., *Natural Law Elucidated from the Perspective of Thomism* (Freiburg, Switzerland, 1944). These authors understand natural law as comprising only the highest principles of natural law. Particularly in Germany there arose an extensive literature on natural law following the Second World War. With the exception of Hermann Coing, this literature is predominantly oriented to the Thomist theory of natural law. To be mentioned are Georg Stadtmüller, *Natural Law from the Perspective of Historical Experience* (Recklinghausen, 1948); Heinrich Mitteis, the well-known historian of law, who pleads for a very radical natural law position in his *On Natural Law* (Berlin, 1948); and Günther Küchenhoff, *Natural Law and Christianity* (Düsseldorf, 1948). This last author defends a "law of love" which is a "baptized natural law."

Particularly worthy of note is a work by Johannes Messner, *Natural Law: A Handbook for Social Ethics, Political Ethics and Business Ethics* (Innsbruck, 1950). Messner attempts to construct a natural law on the basis of Thomism which accounts for the "ex-

istential ends" of human nature. Reason, which acknowledges the principles of natural law, is not just a capacity to know good from evil, but it is also man's inner impulse to follow his true nature and to understand it. Because mankind constantly improves its insight into what meets the existential ends of being human, there is development within the moral law, which therefore displays a dynamic character. Thus Messner ascribes to natural law the properties of universality and individuality, of unity and diversity, of being distinct and indistinct, of being immutable and mutable.

Messner distinguishes in natural law between a general and an applied part. The general part consists of the legal principles that form part of the ethical apriori; the applied part provides an adaptation of the elementary natural law to particular circumstances. The first requirement for this adaptation is legislation. A special kind of applied natural law is original sin, which used to be called "relative natural law." "It is genuine natural law because it is conditioned by the existential ends and factual demands of human nature in its current state." For this purpose extensive legislation and governmental power is required, to prevent the decay.

In his view of natural law Messner deviates from traditional Thomist thought, particularly as to its mutability. Thomism bases natural law upon the rational-ethical essential form of the human being, which is immutable and universal; changes in reality are always accidental with regard to the substance, which constitutes the essence of reality. Interestingly, in an article from 1949[1] Messner states that the foundations for the order of being for mankind determines man's thought, which in turn is able to comprehend the universal validity of these foundations: "Through its operation in the corporeal-spiritual impulse in human nature, the order of being itself becomes an impulse toward insight into the ethical-legal principles."

The nuclear family provides the context for the fundamental experience of the natural-law principles implicit in the order of being (the impulse towards values), which is coupled with an understanding of their universal validity (the insight into their

1 J. Messner, "Natural Law Is the Order of Existence," *Archiv für Rechts- und Sozialphilosophie* 43 (1949): 187 ff.

value). Thus not the state is the *perfect society* within which the natural-law principle can be realized, but rather the nuclear family. Also in this respect we note a not inconsiderable deviation from the Thomist conception of law. The same is true of the relationship between reason and the order of being. According to Thomism the order of being for mankind cannot be anything but *rational*: reason (the substantial form of the human being) determines the order of being, and not the other way around.

The last to be mentioned from the circle of representatives of Thomist natural law is Josef Funk, *The Primacy of Natural Law: The Transcendence of Natural Law as Opposed to Positive Law* (Vienna, 1952). Funk provides quite an extensive theory of natural law in which the whole of positive law is conceived as a further determination of natural law. He no longer views the substantial form of the human being as the foundation of natural law. Instead, in deviation from traditional Thomist thought, the total encompassing nature serves as this foundation. He views natural law as "an expression of the totality of concrete nature in its full scope and in all its situations, in its actual and its potential state, in its abstract but also in its entirely concrete condition." Positive law, with regard to its jural character, its validity, construction, alteration, interpretation, and so on, is fully dependent upon natural law. Funk defines natural law as "that objective social principle of ordering through which the structural differentiation of the human community or of humankind as a whole receives those societal means which are required by the natural order itself for achieving the grand goals of mankind." This work is written in a very speculative mode.

From the side of Protestantism Emil Brunner published a work entitled *Justice*: *A Theory of the Fundamental Laws of the Social Order* (Zurich, 1943), which is strongly oriented to Thomism. Brunner rejects the term natural law because he does not want to accept natural law as a competing legal order next to positive law. He wants to see it only as a critical normative idea. In a material sense he accepts natural law, summarized by him in the principle *suum cuique tribuere*. He grounds this natural law in the primal order of divine creation. The difference with Thomism is that Brunner does not accept a natural rational knowledge, but a knowledge of the creation order rooted in the bibli-

cal revelation as the basis of our knowledge of justice. This he does in following Luther and Calvin.

From the camp of Protestantism we also mention – although it does not concern a natural law in a Thomist sense at all – the Christological foundation of law that is influenced by the theology of Karl Barth. To this category belong Jacques Ellul, professor at Bordeaux, with his book *The Theological Foundation of Law* (Neuchâtel, 1946); Ernst Wolf, author of the article, "Libertas christiana and libertas ecclesiae," in the journal *Theologische Existenz Heute* 18 (1949); and Erik Wolf, professor at Freiburg, author of *The Idea of Law and Biblical Directive* (Tübingen, 1948). Instead of legal philosophy, it is theology that is here given the task of providing a foundation for law.

2.12.9.3 *The naturalistic schools*

Also belonging to the modern naturalistic schools in German encyclopedic legal literature oriented to natural law is the entire so-called sociological school of law. From this group comes the loudest call for *free* legal construction – a call based upon the empirical search for societal laws and legal construction oriented to people's sense of justice. It began with a general attack on the positivistic conception which *considers all law to be a creation of the will of the state*. In its place it restricts the scope of the will of the state and pursues the task of discovering law empirically from the reality of social life conceived of in a naturalistic sense. This also explains the school's vehement rejection of the positivistic dogma of the closed logical nature of law – the dogma that state-law does not show any gaps – and its repudiation of an *overestimation of traditional juridical logic* which serves to buttress this dogma. It no longer proceeds from the general positivized rule (*Rechtssatz*), but from the particular legal relationship, and it teaches that the general rule is only a secondary generalization from what is just in a particular case.

Erich Jung (1866-1950), professor in Strassbourg, later in Marburg, is one of the main representatives of this school in the encyclopedic legal literature. In his work *The Problems of Natural Law* (Leipzig, 1912) he intends, in opposition to all metaphysical, idealistic theories of natural law, to deduce natural law "empirically and realistically" from the facts of social life. He is strongly oriented to Darwin and draws the full consequences of

Jhering's sociology of law which is based upon the latter's conception of interests or ends.

Typical of this naturalistic conception of law is the explanation that positive law can originate from factual subjective events. The particular aim is to provide a material sociological foundation for the validity of customary law. Jung writes:

> The transition from the factual occurs by considering what is otherwise most simple and obvious, namely that every fact points to social actions on the part of those who are living together. This social conduct cannot but express itself and therefore must have had certain social causes. Consequently, continued existence is first of all expected from the counterpoise, while disappointments of this expectation are experienced as harmful. [Notice how social causes (the sense of equability) are conceived naturalistically and used to explain the validity of law.] Whatever qualifies as valid law is just law. Every person who draws correct conclusions, be it an individual legal subject or a judge, is searching for a just law. Unjust law is a contradiction in terms. However, a specific assessment of it, which may be required by another interested party, can always be given only for that particular society in its historical context. Whenever action is taken in a specific direction (which expresses itself in the existence of a legal rule), the decision to introduce a new legal rule counter to an existing one would be experienced as a violation of the right of those interested in its maintenance – since the right of one as a rule is the duty of the other – and therefore unjust and unjustified. This would be the case even if the newly introduced legal rule would have been the just one in a legal sense as evident from later legal developments (op. cit., p. 123).

In other words, society's sensitivity of what is legally just, based upon the custom of equable decisions concerning issues of interest, is elevated to become the criterion of law. In the Netherlands, Hendrik Jacobus Hamaker (1844-1911), the former professor from Utrecht, adheres to the same standpoint inasmuch as he makes customs, factual actions, to be the origin of legal sensitivity. According to Jung (and also Hamaker), the legal rules of the state for private legal relationships are not immediately binding but serve only as a basis of knowledge (not a limit to the will) – as indications, theories, directives, guidelines. The true source of law for private law is the natural laws of societal life as they are reflected in the legal sensitivity of folk customs. Accordingly, the concrete decision in the case of a conflict of interests is always *primary*, whereas the general *so-called positive*

legal rule is always *secondary*. Only within the domain of public law can the state lay down binding norms for the judge.

Oscar Bülow wrote in a similar vein in his work *The Law and the Office of Judge* (Leipzig, 1885), p. 3: "Governmental authority determines by law what should count as law . . . *but it is not yet valid law*. It is merely a plan, a design for a desirable future legal order that the legislature is able to draw up." As was taught already by the Historical School, customary law is the original manifestation of positive law. The legal rule has its origin in the equable *nature of the reaction of fellow legal subjects to the concrete violation of individual interests in a specific community*. Only if and when fellow legal subjects psychically become conscious of equability in the realization of law, does the rule become norm. Only then will it be possible to determine whether the law is just or unjust:

> But even in the case of the most highly developed legal culture, it is never possible to derive from pre-existing rules all the particular rules that [legal] intercourse needs. It is therefore a *normal* phenomenon in legal life that legal rules in the final analysis have to be recovered from a subjective experience of injury or harm in a unique situation. This is the original way to arrive at individual statements about concrete law, and as a rule it constitutes the core of the task facing the judge when confronted with conflicting claims in a legal case (op. cit., pp. 323).

What is primary about the law construed in an individual case and drawn directly from the sense of justice is equity law, natural law, or whatever one calls it. It is from this that the general legal rules couched in norms are always derived.

Next to Jung the name that immediately comes to mind is Eugen Ehrlich (1862-1922), a professor in Czernowitz, Austria. In his famous book *Fundamental Principles of the Sociology of Law* (Berlin, 1912) he dissolves legal science into sociology. Ehrlich is the real father of this whole trend in German legal science and undoubtedly the most original and brilliant mind in the sociological school of law. His significance lies not least in his break with the individualistic view of human society. The latter perspective was still not shed by many adherents of the sociological school who follow the path opened by Jhering. Ehrlich even overestimates the idea of an *organized community* to such an extent that he declares in principle all law to be law of an organized community. Among his writings in legal encyclopedia we

include his *Contributions to a Theory of Legal Sources*, vol. I (Berlin, 1902) and *The Logic of Law* (Tübingen, 1918; 2nd ed., 1925). The latter work contains a powerful attack on the overestimation of logic in legal construction and on the dogma of the logically closed nature of all state-law.

We should also mention Alfred Bozi (1857-1938), a justice in the Regional Court at Hamm, Germany. Under the spell of the Darwinian theory of evolution, Bozi wants to restructure legal science into an inductively functioning[1] sociological natural science. He wrote a most remarkable juridical encyclopedia with the title *The School of Jurisprudence*: *An Introduction to the Elements of Legal Science on the Basis of the Inductive Method* (Hanover, 1910), a work dressed up in the form of a dialogue between teacher and pupil. In the author's "Introduction" he gives instruction in common legal concepts entirely on the basis of concrete legal cases. As he does so, he brings legal science into the closest contact with the natural sciences. Bozi also wrote *In the Struggle for Law on the Basis of the Science of Experience* (Leipzig, 1917).

Another person in this school of encyclopedia is Ernst Weigelin, director of the Regional Court in Stuttgart. He wrote an instructive booklet, *Introduction to Moral and Legal Philosophy*: *Outline of a Reality Ethics* (Leipzig, 1927), which treats law within the comprehensive context of communal norms (under which he also subsumes moral and religious norms). He too believes that spiritual communal life is governed by natural laws. However, he does demarcate these norms conceptually from natural laws insofar as they are not immutable and rest upon the *command* of a "supra-ordinate collective will" to which the members of the community are sub-ordinated. But according to Weigelin the norms themselves, with respect to their genesis and positive validity, are governed by the natural laws of society.

1 In the otherwise outdated scholastic logic, the *inductive method* is opposed to *deductive logic*. Inductive logic attempts to ascend from the individual cases to the law, whereas deductive logic deduces from the general law the mode of action in a concrete case. In light of the concept of law and the concept of subject developed in our *Introduction* (Volume I of the present work) it is clear that there is no either/or between these two methods, something that is widely acknowledged in contemporary formal logic.

Finally we also mention Ignaz Kornfeld, *A General Theory of Law and Jurisprudence* (Berlin, 1920).

2.12.10 **Modern natural law in Anglo-Saxon countries**

In Anglo-Saxon countries, philosophy of law is generally characterized by an empirical focus. As a rule, works that want to penetrate into the deeper foundations of law steer clear of metaphysical conceptions.

In England, Hersch Lauterpacht, in his *International Bill of the Rights of Man* (New York, 1945), has declared himself to be an adherent of natural law. For him, natural law is no abstract speculation, since it encompasses what mankind in its rich experience has observed is the universally valid in man. Lauterpacht uses the empirical data of all times as the basis for his thesis.

In America, Morris R. Cohen accepts natural law in his work *Reason and Nature* (New York, 1931). He is concerned with questions of good and evil in the externally enforceable relations between people. Because the human race forms a unity there normally is consensus in public discussions about justice. These discussions provide sufficient ground for legal science to formulate, according to Plato's method, "ideal" hypotheses and test them against the social facts.

We also mention Charles Groves Haines, who in his *Revival of Natural Law Concepts* (Cambridge, Mass., 1930) wants to steer clear of all metaphysics. By natural law he understands the whole of principles, conceptions and guidelines that exist above or alongside positive law. He appeals to the "experience of man in his social relationships" as the object from which reason can recover natural law. This can be done by employing "common sense" and "intuition based on experience." In this work Haines first of all investigates the natural law elements in American jurisprudence. Natural law has penetrated it especially via the principles of "due process," "the law of the land," and "equal protection of rights."

Dependent upon Haines is Benjamin F. Wright Jr., author of *American Interpretations of Natural Law* (Cambridge, Mass., 1931).

Walter B. Kennedy [of Fordham University] is an adherent of Thomist natural law, as is evident from his article in the anthology *My Philosophy of Law* (Boston, 1941), pp. 143-160.

2.12.11 The so-called realistic theory of law in America and elsewhere

In America and elsewhere the so-called "realistic" theory of law[1] has been very influential. It views law as "social control," "social engineering" and "social technics." This theory tries to conceive the essence of law in terms of a-normative categories borrowed from psychology and a-normative sociology.

One of the most important representatives of this school is Roscoe Pound (1870-1964) from the University of California, Los Angeles. He wrote among others *An Introduction to the Philosophy of Law* (New Haven, Conn., 1922; 6th ed., 1959 [repr., 2003]); *Outlines of Lectures on Jurisprudence* (Cambridge, Mass., 1903; 5th ed., 1943). The latter work, which is intended to be a reference book, sketches the basic structures of a legal system and includes a bibliography for each section. Pound also wrote *The Task of Law* (Lancaster, Pa., 1944) and *Justice according to Law* (New York, 1914; repr. 1951). For Pound, law is one of the means of social control and, for that matter, the most perfect means, because law uses power.

This conception of law was initially developed by Edward Alsworth Ross (1866-1951) in his work *Social Control*: *A Survey of the Foundations of Order* (New York, 1901 [repr. 2009]). According to Huntington Cairns [1904-1985] in his *Law and the Social Sciences* (New York, 1935 [repr. 1969]), Ross defines law as "the most specialized and highly finished engine of control employed by society."

Pound has undergone the influence of these ideas. He views law in a psychological sense as the balance between the instinct

1 This realistic school should not be confused with the metaphysical realism of John Daniel Wild (1902-1972) who established the Association for Realistic Philosophy in 1948, the platform of which is taken up in the collective work *The Return to Reason*: *An Essay in Realistic Philosophy* (Chicago, 1953). On this basis Wild built a theory of natural law in his essay "Plato's Modern Enemies and the Theory of Natural Law." In the same spirit William A. Banner developed a theory of natural law in his essay "Natural Law and the Social Order." Both essays appeared in *Return to Reason*.

of self-preservation and the instinct to form a community. The human being formulates demands and desires which limits and orders law. Law protects the interests of the community against aggressiveness and thus protects culture against annihilation. Law has to satisfy the desires of people as far as is compatible with security for all. Pound wants to have nothing to do with a normative assessment of these wants, since there is no absolute criterion in terms of which this satisfaction might be measured. He writes:

> I am content to think of law as a social institution to satisfy social wants – the claims and demands involved in the existence of civilized society – by giving effect to as much as we may with the least sacrifice, so far as such wants may be satisfied or such claims given effect by an ordering of human conduct through politically organized society.[1]

Pound views the history of law as a constantly increasing refinement of this method, as a form of "continually more efficacious social engineering."[2] The aim of law is to promote civilization. Law has to be serviceable to the idea of civilization that contemporaries hold. Currently, says Pound, this idea promises optimal satisfaction of human needs and hopes, so on this point the various social sciences ought to join hands.

Another important representative of this school is Julius Stone of Auckland University College, New Zealand, with his work *The Province and Function of Law*: *Law as Logic*, *Justice and Social Control* (Cambridge, Mass., 1946). He too views law as social control, with human interests as the stakes. Law establishes a balance between these interests, a balance that is carried by people's ethical convictions and by power. Stone considers ethical convictions "the result of psychological interaction among group members," and he regards power as "the common psychological basis of all forms of power whatsoever."

Stone divides legal science into three parts: the logic of law, the theory of justice, and the sociology of law. Stone points out that this does not mean that legal science is exhausted in logic, ethical and political philosophy, and sociology. Rather, legal science has the task to arrange each of these three fields of re-

1 Pound, *An Introduction to the Philosophy of Law*, p. 98.
2 Ibid.

search in terms of its own distinct categories. They serve to provide an overview of the material for the benefit of students!

First, logic has to lay bare the consequences of a legal system and to make a juridical argumentation convincing.

Secondly, the theory of justice is the ethical and political philosophy that evaluates and designs the science of the ethical, political, and social problems of the future. Justice is the relationship between three social phenomena: a) the needs, desires, and hopes of humankind; b) the resources that serve to satisfy these desires; c) the safety valves for the tensions that arise between human desires and their satisfaction. As a minimum condition for justice Stone holds that people should be free to express their wishes and thereby contribute to the maintenance of a politically organized society.

Sociology, finally, is engaged in describing the competing interests that law has to bridge. Stone defines legal science as "the lawyer's examination of the precepts, ideals and techniques of law in the light derived from present knowledge in disciplines other than the law."

As can be seen, this a-normative treatment of law ends in denying the distinctive (normative) nature of law and so cannot but lead to the abolition of the science of law.

Other scholars belonging to this school are Karl N. Llewellyn, *The Bramble Bush*: *On Our Law and Its Study* (New York, 1930; repr. 1951), and the Danish scholar Alf Ross, *A Textbook of International Law* (London and New York, 1947).

2.12.12 **Modern natural law in the Netherlands**

Modern encyclopedic legal literature in the Netherlands, too, has undergone, in various shades, the influence of the renaissance of natural law. Critical psychologistic and naturalistic currents are dominant, although now and then also the Baden and Marburg schools of neo-Kantianism have had their representatives.

2.12.12.1 *The naturalistic-sociological school. Hamaker and Meyers*

The former professor at Utrecht, H. J. Hamaker, is the most remarkable representative of the naturalistic (materialistic) sociological school in the Netherlands. His writings include: *A Sys-*

tematic and Empirical View of Law (inaug. oration, 1884); *Law and Society* (The Hague, 1888), which is the most systematic exposition of his ideas; *The Contrast between Private and Public Law* (1894); *Legal Consciousness and Legal Philosophy* (1907); *Law and the Jural* and *The Jural, Law and the Judge*.[1] In all these works Hamaker turns out to be a consistent adherent of Darwin's theory of evolution in intellectual and spiritual life, subsuming all spiritual functions under a materialistic physical basic denominator. He sees law and morality as ruled by natural laws and derives law from the customs of social life, which find their dependent psychic precipitate in the legal conviction, the sense of justice, of one's fellow citizens. Hamaker views private law as the real law, as compared to public law, and he defends private law on the basis of this naturalistic sociological orientation, justifying the judge's perfect freedom over against the law in support of the free law school. All (private) law, according to Hamaker, finds its source in customs governed by natural laws in societal life. These laws can at most be *described* by the legislator but never created at will.

In opposition to Hamaker an extraordinarily extensive work was written by J. A. Levy, "Judge and Law," as an Appendix in vol. 12 of the commentary on the Dutch Civil Code, entitled *Het burgerlijk wetboek verklaard*, 16 vols. (Amsterdam, 1874-1911), ed. C. W. Opzoomer et al. This work of Levy is almost entirely filled with a critical treatment of literature and is inspired by the idealistic foundations of the Historical School of Jurisprudence. A similar stance is taken in Levy's treatise "Savigny and the Historical School," in *New Contributions to Legal Scholarship* (Amsterdam, 1879), in which he defends the thesis that supra-individual ideal convictions of the people provide the basic principles of law which legal science then has to develop further with the aid of systematic constructions.

Based upon a utilitarian (naturalistic) sociological standpoint is further the earlier mentioned dissertation of Eduard Meyers, professor in civil law at Leiden, entitled *Systematic Legal Science* (1903). Meyers laid out a utilitarian sociological basis for

1 Available in Hamaker's *Collected Writings*, 7 vols. (Haarlem, 1911-1913) which are largely dedicated to civil law, process law, and law of evidence. The first two titles especially are important!

a natural-law theory of legal sources.[1] He tried to base the interpretation of law on a natural-scientific probability calculus while attacking the constructive "*Begriffsjurisprudenz*" and defending the thesis that genuine systematic legal science ("jural dogmatics") should be taken up in a "general theory of law." Notwithstanding incidental critique of Jhering, Meyers in principle remains an adherent of Jhering's utilitarian sociology. The year 1948 saw the publication of his *General Theory of Civil Law* (Part I, General Concepts), in which he still adheres to the same position by deeming the efficient ordering of legal material the only criterion when forming legal concepts.

An intermediate view of law, in between a utilitarian-sociological and a religious-ethical position, is occupied by Joseph van Kan (1877-1944), a professor in Leiden, later Batavia [Djakarta], in his short but excellent *Introduction to Legal Science* (Haarlem, 1920; 8th ed. by J. H. Beekhuis, 1951). For a good part this encyclopedia focuses on legal material, although it also contains extensive general sociological and idealistic conceptions of law. Written in a clear and accessible style, this work can be recommended as an excellent introduction to the details of legal science.

2.12.12.2 *The critical-psychological school. Krabbe, Kranenburg, Polak*

In the Netherlands the critical psychologistic school is philosophically altogether oriented to the idealist-rationalist psycho-monism of Heymans[2] with its reification of the psychical aspect of reality into a metaphysical "noumenon." Additionally, the school is influenced by the *empirical-analytic method* which Heymans introduced in sharp opposition to the logical-critical

1 Cf. E. M. Meyers, *Dogmatische Rechtswetenschap*, p. 109: "The question itself as to the sources of positive law, according to the prescriptions by which the judge ought to apply the law, cannot possibly be viewed as a question of positive law . . . This question can only be dealt with as a general ethical question, proceeding from either utilitarian or purely pragmatic grounds. In the previous chapter we rejected purely practical grounds and therefore we acknowledge, also for the question "*According to what prescriptions ought a judge to apply the law?* no other criterion, ultimately, than efficiency."

2 Gerardus Heymans (1857-1930) was professor of philosophy and psychology at Groningen. Major works: *Introduction to Metaphysics on an Empirical Basis* (Leipzig, 1921); *Laws and Elements of Scientific Thinking* (Leipzig, 1923); *Introduction to Ethics on an Empirical Basis* (Leipzig, 1914; 2nd ed., 1922).

and the natural-scientific method. Like Fries, Heymans wanted to analyze the apriori universally valid laws of our legal and ethical consciousness from psychical experience itself. On his view, this experience itself already contains those laws, though in the form of dark, not yet elucidated concepts. Meanwhile, the supremacy of the mathematical, natural-scientific science ideal is clearly evident in Heyman's strict deterministic causal conception of the human will, which leaves no room for freedom from natural causality.

On the basis of the empirical-analytical method of Heymans, Roelof Kranenburg, professor of constitutional law in Leiden, wrote his Positive Law and Legal Consciousness: *Introduction to the Philosophy of Law* (Groningen, 1912; 2nd rev. ed., 1928), in which he attempts along empirical inductive avenues to demonstrate the universally valid law-conformities of psychic legal consciousness – sensitivity for what is legally appropriate – as manifested in natural-law principles for the formation of law. This method involves taking into account historical and social data in order to demonstrate the identity of the normative standard amidst the flux of circumstances. To the material of investigation then belongs every concrete legal assessment, albeit that this involves comparing concrete norms from different stages of development. By following this method Kranenburg attempts to discover the fundamental, universally valid legal principles of 1) property rights and the ways of acquiring property; 2) thing-law and the law of contracts; 3) law of delicts; 4) marital law; 5) corporate law (constitutional and administrative arrangements and tax law). From all this he derives the following general law of legal consciousness, the postulate of proportionality:

> All members of the legal community are equal with regard to the division of the conditions of pleasure and pain insofar as they have not personally created the conditions for the rise of particular pleasure and pain; only so much of pleasure and pain is due to members as they have personally created the conditions for it.

One immediately sees the individualistic conception operative in this formulation. It causes Kranenburg to deny consistently the difference between public and private law.[1] In the preface to

1 Cf. also his work *The Foundations of Legal Science: Juridical Epistemology and Methodology* (Haarlem, 1946; 4th ed., 1952).

the 4th edition of this work [in 1952], the author's reaction to my review article, "On the Method of Concept Formation in Legal Science" in *Rechtsgeleerd Magazijn Themis* 72 (1953): 298-340, is quite remarkable.[1]

Kranenburg had been preceded in the chair of constitutional law at Leiden by Hugo Krabbe. Krabbe (1857-1936) defended his well-known individualistic theory of the *sovereignty of law* by proceeding in principle from the same philosophical orientation. On this view, the *individual sensitivity* for *what is just* becomes the sole source of law, such that any positive law that is no longer supported by the sense of justice felt by a country's citizens loses all validity.

Krabbe can arrive at the unity of norm only by attempting to derive the parliamentary majority principle from the lawfulness of the individual sensitivity of what is just, a position that leads to a veritable *salto mortale*.[2] He, too, consistently rejects the difference between public and private law, holding to the unity of all law which does not allow for any subdivisions. His theory of the sovereignty of law turns especially on the concept in constitutional law of governmental authority, which according to him clashes with the modern democratic sense of justice.

A number of works of Krabbe have been translated into various languages. His main encyclopedic works are: *The Theory of Legal Sovereignty* (Groningen, 1906); *The Modern Idea of the State* (The Hague, 1915); *The Authority of Law* (The Hague, 1917); and his rectorial oration, *The "Intrinsic Worth" of Law* (The Hague, 1924).

1 [Dooyeweerd erroneously refers to his review article of 1953. In the preface to the 4th edition of his book, dated 1952, Kranenburg had reacted "quite remarkably" to Dooyeweerd's short reviews of earlier editions of the book. Dooyeweerd now responded to Kranenburg's reaction with that long review article of 1953. For an account of the prickly exchange, see Marcel E. Verburg, *Herman Dooyeweerd*: *The Life and Work of a Christian Philosopher* (Grand Rapids: Paideia, 2015), 383-387; but see also p. 401.]

2 His position boils down to this: also in the psyche of an individual person, desires and ambitions are at war with each other, the stronger drives overcoming the weaker ones. Similarly, a nation's legal consciousness demands that in the case of a conflict among the individual legal convictions the majority principle decides. The unity of norm trumps all!

Another member of this school is Leo Polak, originally professor of philosophy of law at Leiden and later the successor of Heymans in philosophy at Groningen. His major works are *Epistemology contra Materialism* (Amsterdam, 1912) and *The Meaning of Retribution* (Amsterdam, 1921).[1]

2.12.12.3 *Neo-Kantian currents. Van der Vlugt, G. Scholten, and others*

Willem van der Vlugt (1853-1928), who taught legal philosophy in Leiden, belonged to the neo-Kantian school. His major work is his *General Introduction to Legal Scholarship* (Haarlem, 1925), which is a synopsis of his lecture notes on the encyclopedia of legal science. Written in an exhausting rhetorical style, it contains mainly cultural-sociological perspectives on the development of law and culminates in tracing the growth of the idea of a league of nations.

Part One of Van der Vlugt's *magnum opus* contains, in line with Stammler, an exposition of the "concept of law" and the "idea of law," while strongly emphasizing the distinction between ideal norms and natural facts (cf. Windelband and adherents) and finally construing law as a condition for the possibility of individual morality (a typical Kantian and individualistic-moralistic conception). Van der Vlugt defines the *concept of law* as follows:

> Law, taken as a *descriptive* concept, is an expression of will that binds people mutually to serve each other's ends, quite apart from their consent (this in contrast to pure morality) and without permitting the duration and scope of the exercise of power over them to depend on anything performed on their part (this in order to distinguish it from decency).

This definition is a cumbersome translation of Stammler's concept of law as a logical thought-form: law is an "inviolable, sovereignly binding will" (a means-ends ordering), in which the property of sovereignty serves to differentiate *law* from *convention* (the social norm), the property of *inviolability* serves to mark off law from subjective arbitrariness, and the *binding* ele-

1 Cf. my criticism of Polak's conception of the "meaning of retribution" in the Postscript to my article, "Beroepsmisdaad en strafvergelding" [Professional crime and penal retribution], *Antirevolutionaire Staatkunde* (quarterly) 2 (1928): 233-309, 389-436, at 390 n. 90.

ment distinguishes law from morality (morality supposedly concerns only the individual disposition!).

In his *General Introduction to Legal Scholarship* Van der Vlugt defines the *idea of law* in these words:

> Law (according to its idea) is the totality of impartially delineated boundaries for compulsory and permitted behavior which, as indispensable conditions under which we alone can achieve our ethical destination in freedom, may or must be maintained through coercion.

This is an individualistic conception of law. In Part Two, Van der Vlugt provides an overview of the disciplines dealing with positive law, paying special attention to the distinction between public and private law. He defends this distinction on the basis of the two-sidedness of the law-idea which on the one hand commands people to live in society but on the other hand obliges them to as much as possible respect freedom, an idealistic criterion that is devoid of any insight into the communal structure also of private law.

The main substance, finally, of Part Two consists of a kind of cultural sociology on the basis of the periodization of history developed by the well-known historian Kurt Breysig (this part is entitled "Elucidation of law from the perspective of the science of society"). Whoever wants to get to know Van der Vlugt's position more fully can also read his inaugural oration, *The Science of Justice* (Haarlem, 1880).

Oriented to the Marburg neo-Kantians is Gerbert Joan Scholten (b. 1849), whose treatise, "Law, Positive Law, and Sense of Law," was published in *Onze Eeuw*, vol. 20 (1920), in which he combated the empirical-analytical method in legal theory.

More or less oriented to the Baden neo-Kantians was Paul Scholten (1875-1946), with his *Reflections on Law* (Haarlem, 1924). His aim was to provide an oft attempted synthesis between neo-Kantianism and the Christian faith. See also his *Law and Worldview* (Haarlem, 1915). In 1931 Scholten contributed a *General Volume* to Carel Asser's *Guide to the Practice of Dutch Civil Law* (Zwolle, 1931), containing a kind of encyclopedia in the sense of a "general theory of [private] law." First-year students are advised to read especially Chapter 3, about the history of the making of our Civil Code.

In an earlier context I referred to the *Formal Encyclopedia of Legal Science* (The Hague, 1925) by my predecessor, Professor Willem Zevenbergen. The organization of this work is strictly logical and in its conception of positive law, as we saw, it is in part critical and in part genetic-positivistic. With regard to the law-idea the author maintains the critical natural-law conception of a formal, universally valid criterion of positive law, a standard which he envisages as being instantiated in "concrete legal principles" (in a Christian sense). However, in my opinion the author is caught in the misconception that the critical neo-Kantian approach can be reconciled with Christian doctrine. Next to his course syllabus for encyclopedia, this published encyclopedia remains highly recommended for purposes of comparison.

2.12.12.4 *The Calvinist school*

Positivism is opposed from a Calvinistic Christian standpoint by, among others, our Professor Anne Anema (1872-1966). See his fine rectorial oration *The Sources of Private Law* (Utrecht, 1913), which I recommend highly.

I would further mention some of the works of my teacher, Professor D. T. P. [Paul] Fabius (1851-1931) such as *The Divine Nature of Law* (inaug., Free University; Amsterdam, 1880); *Sin and Law* (Leiden, 1895); and *Voortvaren* (Forging ahead) (Leiden, 1898; 2nd impr., 1902), a work that is of particular interest for an overview of the nuances in antirevolutionary political theory (highly recommended!).

Finally, I mention the work of Professor A. F. [Alexander] de Savornin Lohman (1837-1924). His main work is *Gezag en vrijheid* (Authority and Freedom) (Utrecht, 1875). Lohman's legal philosophy was not oriented to Calvinism and his political theory was strongly influenced by K. L. von Haller.

2.12.12.5 *The neo-Thomist school. Beyssens and others*

The neo-Thomist conception of natural law has been defended particularly by J. Th. [Jozef] Beysens, a professor of philosophy in Utrecht, in his *Ethics and Natural Morality* (Leiden, 1913).

Another representative of this school is W. J. A. J. [Willem] Duynstee, professor in the Catholic University of Nijmegen, in his paper of 1926 "On Natural Law" for the Dutch Association for the Philosophy of Law. See also his lecture given at the Asso-

ciation for Thomist Philosophy (1939), published in an appendix of the journal *Studia Catholica*. In 1956 Duynstee wrote *On Law and Justice* ('s-Hertogenbosch, 1956).

Although with deviations, Johannes Petrus Hooykaas linked up with Thomist natural law in his paper on "Ethics and Law" delivered at the 1949 meeting of the Dutch Association for the Philosophy of Law, as well as in his *The Problems of Administrative Law* (Zwolle, 1952).

A fully dedicated adherent of natural law is W. P. J. (Willem) Pompe, professor of penal law in Utrecht, author of an essay entitled "The Essence and Foundations of Law," which was the opening contribution to a symposium covered in instalment in issue nr. 15 (1957) of the *Dutch Center for Conversation*. The publication contains chapters on the shape of law in society, on state and law, on statutory law, customary law, jurisprudential law, principles of law, the content of law, and the validity of law. Responding to Pompe's essay are contributions by Professors A. M. Donner, H. Dooyeweerd, R. Kranenburg, J. J. Loeff, W. G. Vegting, G. J. Wiarda, and Mr. H. Winkel. This very readable publication provides a good insight into the different conceptions of law in the Netherlands.

In the interest of completeness I mention the well-known *Inleiding tot de studie van het Nederlands recht* (Introduction to the study of Dutch law) (Zwolle, 1932; 13th impr. 1955) by L. J. [Bert] van Apeldoorn, to which I devoted a critical review article, "Perikelen van een historistische rechtstheorie" (The hazards of a historicist theory of law), *Rechtsgeleerd Magazijn Themis* (1954): 25-54. Finally we mention G. E. [Gerard] Langemeyer, *Inleiding tot de studie van de wijsbegeerte des rechts* (Introduction to the study of the philosophy of law) (Zwolle, 1956) and J. H. P. [Paul] Bellefroid, *Inleiding tot de rechtswetenschap in Nederland* (Introduction to legal science in the Netherlands) (Nijmegen, 1937; 8th rev. ed., 1953).

Chapter Two

The Meaning of Law and Its Elimination in the Conception of Law on the Immanence Standpoint

1 PROVISIONAL ORIENTATION IN THE PROBLEM OF THE CONCEPT OF LAW. THE LAW-CONCEPT AS A MEANING-FUNCTIONAL CONCEPT. THE RELATION OF THE CONCEPT OF FUNCTION AND THE CONCEPT OF THING IN THE SCIENCE OF LAW

1.1 Critique of the scheme of legal facts in the general theory of law

All law, as we saw in the *Introduction*,[1] lies enclosed within a specific law-sphere, one whose meaning does not derive from another law-sphere (such as that of morality, or sociation, history, the economic or psychic), but whose general meaning-structure possesses complete sphere-sovereignty with respect to all the other law-spheres. Now, the point is to get to know this universal meaning of law and to demarcate the sphere of law – the jural law-sphere – from the other law-spheres.

Suppose two people, person A and person B, enter into an agreement that A will deliver an amount of grain to B, for which B will pay A a certain amount of money. They can attach various conditions to this agreement, for example about the quality of the grain or the date and place of delivery. They can also conclude the agreement through intermediaries like brokers or commissioners.

1 [Cf. H. Dooyeweerd, *Encyclopedia of the Science of Law: Introduction*, trans. by Alan M. Cameron (Grand Rapids, MI: Paideia, 2010), pp. 16-31, *et passim*. Hereafter cited as *Introduction*.]

No one doubts that we are here in the presence of a specific legal act, called a contract of purchase. Should the conditions of sale not be met, *both* parties to this agreement have at their disposal certain legal means to enforce compliance with the conditions of the contract. They can sue the other party and so have the courts make an impartial decision about their quarrel. In this way the parties involve each other in a legal case, which may be heard in different courts and will end in a judicial verdict, if need be appealed and upheld by the highest court in the land. This verdict will then be carried out by an officer of the court. The parties can also appoint arbiters to seek an out-of-court settlement. Only if one party then fails to comply with the decision do the courts get involved again.

As you can see, the legal phenomenon that I briefly analyze here in its various stages is a highly complicated one. It displays a dynamic, lively nature, and the different stages in which it unfolds are not isolated from one another. First, two parties entered an agreement. Next, one or both of the parties acted contrary to the agreement. At this point certain legal consequences entered the picture, provided that a legal act had in fact originally taken place, that this act satisfied the requirements of a legal contract, that one of the parties acted wrongfully by violating his or her contractual obligations, and that as a result the injured party has decided to file a lawsuit in order to have his lawful claims met. There is a dynamic connection between a legal condition or legal ground and legal consequences. German authors call this condition the *"Tatbestand."*

Now imagine a different case. I promise a friend to have dinner with him at his house on a given evening. For one reason or another I fail to keep my promise and my friend has to do without me that evening. It enters no one's mind to speak in this case of a *legal* act or a violation of a *legal* obligation flowing from it. And yet, here too there is an invitation on the one hand and a promise on the other, an acceptance of that promise by the first mentioned party and a failure to comply by the last mentioned party.

Or consider the following case. At an agreed upon hour I show up at a gala party (formal wear prescribed) in everyday clothes, without any valid excuse. I have kept my promise all

right, but I am violating a demand of courtesy, decorum, convention, fashion. (We won't analyze these various social norms just yet.) I will be called impolite, ignorant of society's rules, and probably not be invited next time.

Now take a fourth case. A conscript shows up at roll call in his civilian clothes instead of the mandatory uniform. No one will accuse him on this account of being ignorant of social rules. Still, he is violating a public-legal service rule and will be disciplined.

Anyone with any critical sense, when placing these four cases next to each other and comparing them, will have to wonder why in the first case we speak without a moment's hesitation of a *legal* agreement, in the second case refuse just as firmly to ascribe a legal character to the contract at hand, in the third case speak not of a legal demand but of a social requirement, and in the fourth case, even though it concerns a dress code, do not hesitate to ascribe to it the character of a public-legal regulation, a legal rule for those in military service.

But is it true that in the second and third case we are *outside the realm of law*? If you have properly digested my expositions in the *Introduction* you will immediately answer this question in the negative. After all, there we learned enough to realize that there is not a single area of life, of full temporal reality, which on principle is jurally irrelevant; in other words, there is not a square inch that falls outside the jural law-sphere. And when we analyze the narratives under two and three more closely it is at once evident that such is not the case there either, provided we treat them not as mental abstractions but as truly *real*. The very moment I record my appointment in my appointment book I am performing an act that I can only perform in a lawful way as legal owner of, or at least as a rightful claimant to, book and pencil. The appointment was set, whether in the home of my friend or in a public place, in my house or in a restaurant, and so on; but regardless of where the date was set, I was in a place that is subject to legal relationships, a legal object of the subjective right of a legal subject.

If in the third case I dress for the evening gala, it is my property that I put on in my house (again, a legal object of a property right or the right of a renter, etc. etc.). I cannot leave my house

without entering upon the *public* roadway, where I find myself everywhere in *legal* relationships. I hail a taxi to take me to the house of my friend and thereby conclude a transportation contract in a legal sense, and presently I enter the property or rental home to which I have been invited.

Granted, in the second and third case I do not conclude a contract in any *legal* sense. But even apart from what I said earlier, the promise and its acceptance are in no way irrelevant for law.[1]

Imagine for a moment that my appearance on those evenings was so important (say, they were organized in order to network with potential business partners) that failure to keep these appointments had a penalty attached to it, or that it would incur legal obligations toward others, etc. etc. In all such cases, keeping or not keeping my promise is relevant also legally. My promise has a jural aspect within a jural act, just as in a broader sense all events, even natural evens (like fires, floods, etc.), as objective legal facts[2] in correlation with subjective legal acts (e.g., an insurance contract) can have a legal aspect. On the other hand, in the fourth case of the conscript showing up in his civvies we do not speak of a violation of social norms *as such*, but it is undeniable that in concrete circumstances like these the military social norms have been transgressed by the incriminated and penalized act.

In other words, with these four simple examples we find ourselves in the very midst of full temporal reality, in which law and interaction with all the other law-spheres are intertwined with a thousand strands. Only the individuality structure of each of the four phenomena is different. Owing to the general structure of the jural it touches upon all of them equally.

This alone demonstrates that an *external* delimitation of the jural from the other law-spheres, by declaring certain categories of acts or facts to be on principle outside the domain of law, is untenable.

The concept of law is a modal concept; that is to say, it comprises only a specific *mode of being* of temporal reality. The defin-

1 ["for law" : that is, for the jural dimension of temporal reality.]

2 In current terminology, the concept "legal fact" is taken as the broader, general concept that comprises legal acts (actions consciously directed at certain legal consequences, like contracts, etc.) as well as unlawful acts. This terminology, even though students must be acquainted with it, causes much confusion, as we intend to show at the end of this section.

ing criterion for the jural law-sphere cannot be found in terms of the thing-concept in temporal reality. Using this concept to scientifically analyze the structural differences of things within the jural sphere has to be preceded by defining the modal structure of the jural sphere in terms of the concept of function. Function in this sense comes logically before thing or individuality structure, even though in cosmic reality these two structures – thing and function – *occur together*. The logicistic method of abstraction used by the "general theory of law" to derive the concept of law ultimately from concrete legal material as the most common concept is to be rejected if for no other reason than that it reverses the logical order of time. Scientifically, the concept of the jural comes before understanding the individual legal phenomena.

Without the function concept legal science cannot properly deal with the thing concept. As we saw already in Chapter 4 of the *Introduction*, the individuality structure cannot be analyzed except with the aid of the modal structure. That is why the method of the general theory of law disrupts both the concept of law and insight into juridical individuality. It is just not a scientific method! Already with the expositions offered above we demonstrate the fundamental deficiencies of this method for the formation of legal concepts.

In Chapter 3, page 188, of the *Introduction* we discussed *subjective jural* [or *legal*[1]] acts and *objective jural* [or *legal*] facts, clari-

1 [The reader is reminded of a word of caution in *Introduction*, p. 5, where the editor accounts for his exercise of editorial discretion when translating the Dutch term *juridisch* by the English word *jural*: "Although it is true that Dooyeweerd himself, throughout the entire *Encyclopedia*, uses examples taken from state law in explaining and applying his elementary concepts, it is vitally important to understand that these concepts and the cosmic aspect of reality that grounds them are *universal*. That is to say, this aspect for Dooyeweerd manifests itself not only in the state rules of the courts and legislatures but within every sphere of human life. Therefore the elementary concepts of "law" that are introduced in this volume, and systematically explained in the third, are not confined to explaining the rules and legal phenomena associated with the organs of the state. Hence the available but less common term "jural" is employed rather than "legal" or "juridical" whenever the author intends to convey this meaning of *juridisch*. Nevertheless, Dooyeweerd's less-than-always-consistent use of terms in this regard and the prevalence of state law examples to illustrate his philosophy require one to constantly be alert to the "pluralist" feature of his philosophy of law."]

fying the general structural difference and at the same time the structural coherence between these two abstract jural configurations.

On the factual side[51] of every law-sphere we encounter also object functions which are indissolubly correlated with the subject functions and cannot be actualized except in connection with the latter. A natural fact, such as the outbreak of a fire, never has the same fundamental position in a jural sphere as a subjective legal act (e.g., taking out a fire insurance policy and then committing the crime of arson). Only in connection with such a subjective act, or at least with the legal subject himself, does it acquire legal meaning, does it gain objective legal sense in distinction from the legal sense of a contract or a tort which always bears a subjective meaning. In other words, objective legal facts can never occur in the sphere of law apart from their coherence with subjective legal acts, or at least apart from legal subjectivity as such.

But what does the "general theory of law" do? It *abstracts* from the structural peculiarities of subjective acts and objective facts and takes the concept of legal fact as the most general concept, under which it then subsumes both natural facts (with objective legal meaning) and subjective legal acts. In so doing, it arrives at the following schema, which has become dominant in legal science:

General concept: legal fact, comprising as to its content:

a) natural facts: facts to which the legal order attaches legal consequences, equally involving both subjective and objective jural facts, such as a fire or a flood next to insanity, death, etc. (which as we shall see are in no way natural facts);
b) permitted acts: legal or jural acts that aim at establishing, changing or dissolving legal relations (i.e., the agent *desires* the legal consequences which by law are attached to the act). Reckoned in particular among these are contracts, as well as unilateral acts such as last wills, offers of reward, of-

1 [In the original text Dooyeweerd still employed his initial terminology by using the term *subject-side* instead of the more encompassing expression *factual side*. His mature conception differentiates unambiguously between the factual subject-side and the factual object-side.]

fers of supply or sale (sometimes construed as "*contrats d'adhésion*"; in German: *"Rechtsgeschäfte*": legal transactions).

c) permitted acts in the sense of acts that *resemble* legal acts, i.e., acts that result in what is called the "factual consequence" even when the agent's desire need not be aimed at the consequence yet which nevertheless entail legal consequences pursuant to the prevailing legal order. The example given is *mora*: when A warns B that any further postponement in performing what B has contracted to do will be viewed as *delay*. The legal order attaches to this warning the legal consequence of being in *default*. And so a new legal relationship is born alongside the original contractual relationship.

d) prohibited acts: delicts and torts, all unlawful acts by a legal subject.

Usually the scholasticism in this classification is taken even further than appears from this schema. For example, a distinction is made between a "legal fact" in the narrow sense of the word and a "legal condition," depending on whether a fact is viewed as the *direct ground of* a given legal consequence or as a *mere condition for* the occurrence of the legal consequence attached to the fact in question.

This further definition is then justified as follows. In the eyes of the legislator, for instance, a last will or testament is the *direct ground* for the estate to be transferred to the heirs named in the will.[1] The fact, however, that the heirs have survived the testator is merely a *secondary condition*, on the presence of which the transfer is dependent.[2] Similarly, the delivery of the deed to the buyer of a house is the *direct ground*, but it "effects" this transfer of ownership as a legal consequence only if the seller was himself the owner.[3] The practical significance of this distinction is then said to lie in the fact that the legal consequence can never go into effect *before* the initial legal fact has been realized, while on the other hand the law sometimes allows *retroaction of the incidental condition* when this is realized only *after* the initial legal fact. For example, a principal is deemed to be legally bound by

1 Dutch Civil Code, Articles 921 and 922.
2 Ibid., Articles 946.
3 Ibid., Articles 639, 671, 1214.

his agent to any unlawful acts committed by him, even though he (the principal) did not sanction such acts until after the agent had committed them.[1]

One must object to this whole schema already because it creates the impression that objective legal facts can function as legal grounds for legal consequences independently of subjective legal facts. Objective legal facts, as we saw, can never be correlated with subjective ones, because they are not independent, "self-standing" legal facts, *dependent* as they always are on subjective legal facts. Nullification of a legal case as ground for nullification of material rights is no exception to the rule. The disintegration of a meteor as it collides with another celestial body is also a nullification of a thing. But an objective legal fact, such as the incineration of a thing, can only function as a ground for the occurrence of legal consequences on condition that this matter is the legal object of a subjective right (e.g., property right, usufruct, mortgage, etc. etc.). When a person who possesses legal subjectivity dies, then indeed we are not dealing with an objective but with a subjective legal fact. Here, the demise of the legal subject is not the legal consequence of an objective[2] but of a subjective legal fact (death subjectively affects a person's total temporal existence, also as to his spiritual sides). No doubt objective legal facts can occur with or without human involvement (the former happens in the case of arson, the latter in the case of a fire caused by lighting). But objective facts never have an independent function in the jural aspect *alongside* subjective ones, because the objective ones have no meaning without a connection with legal subjectivity, whereas subjective legal facts (e.g., mental reservation, error, fraud, etc.) can indeed occur apart from any connection with objective legal facts.[3] The "general theory of law" does not trouble itself about these structural differences

1 Ibid., Article 1844.

2 I.e., in a natural fact objectified in the jural aspect.

3 We meet a parallel state of affairs, for example, in the psychical law-sphere. Here no objective image can occur apart from a subjective observation. But the psychical subject-function can be operative without connection to psychical objectivity (albeit never without a connection to its substrate functions), as in dreams, the power of suggestion, and similar sensations.

because it is not oriented to the modal and individuality structures of reality but works with an abstract logic. The fundamental distinction ought to have been that between subjective and objective, dependent and independent legal facts.

For the rest, the schema of legal facts as drawn up by the "general theory of law" is highly confusing. Note, for example, the distinction between legal acts and acts resembling legal acts. The criterion is the orientation or non-orientation of the *will* to the legal consequences, taking "will" in the psychological sense, which as we know from the *Introduction*[1] is utterly impossible in the science of law.

Buyer and seller in no way desire ("will" in a psychological sense) all the legal consequences attached to the conclusion of a contract as a legal act. Unless they are trained in law, it is in fact highly unlikely that they are always *aware* of all these consequences. And if the will is taken in a normative jural sense, as cannot be otherwise in legal science, then the will of the seller who puts the buyer in default as to the payment of the sale price is just as much keen on the legal consequences of default as his will was intent, at the time of concluding the contract, on activating the legal consequences of the contract. In the general theory of law this distinction too is not grasped in the meaning of the jural and is therefore juridically *worthless*.

No doubt there is a fundamental structural difference between a contract of sale and an instance of default, if only in this respect that the contract is not just a legal ground for legal consequences but it is also (when taken in a material sense, as we shall see in a later context) an independent source of positive *legal norms*, whereas non-compliance of a contract is merely a subjective legal act that is legal ground for effectuating legal consequences but never a *legal source* of *legal norms* (that is, in this case, the law, or the contract itself, or a society's common law.) But the distinction between legal acts and acts resembling legal acts obscures rather than clarifies this structural difference. Proclaiming someone in default is just as much a legal act as concluding a contract of sale.

Finally, as far as the distinction between legal facts and legal conditions is concerned, here too the terminology is most con-

1 See *Introduction,* pp. 58f.

fusing. A legal fact as legal ground is always a condition for the activation of legal consequences. The existence of the heir at the time of the death of the testator as a condition for becoming the heir according to the last will and testament (art. 946) is just as much a legal fact as the testament itself. The difference between the two legal figures, however, is again that the testament is also an independent legal source of legal norms.

Furthermore, it can be remarked with respect to this example that there is a non-reversible relationship of dependence between existing as a testamentary heir and the last will that specified the heir. But this structural relationship, too, does not justify the distinction between legal fact and legal condition.

The same is true about the relationship between the unauthorized acts committed by an agent and the *post facto* sanction of them by the principal. The fact that this sanction is retroactive does not in any way detract from its character as a legal fact (as a "*legal act*," we say boldly, in the face of prevailing terminology).

2 THE HISTORY OF FRAMING THE PROBLEM REGARDING THE CONCEPT OF LAW. NATURAL LAW IN ANTIQUITY AND THE MIDDLE AGES

It has always been a matter of debate whether justice as embodied in customary law or statutory law rests purely on human ordination and will, or on immutable and eternal principles. As early as classical Greece, two views by and large diametrically opposed each other. On the one hand, Skeptics and Sophists held that justice is a creation of human arbitrariness and is solely and exclusively regulated by people's interests. They pointed to the fact that what was considered just in one country was considered unjust in another. Justice, they concluded, is what people regard as their interest.

Since in those days justice and ethics were not yet clearly separated, this doctrine meant no less than the denial of the essence of justice and morality *as to the law-side.* In his works *De Republica* and *De Officiis*, Cicero severely denounces this teaching and over against it defends the view, dominant since Socrates, Plato, Aristotle and the Stoics, that all positive law is tied to eter-

nal and immutable jural principles, which in turn are grounded in a moral world-order, the *lex naturae* of natural law. In stirring prose Cicero sketches the sacredness of this natural law, which is in harmony with human nature:

> There is indeed a true law – namely, right reason – which is in accordance with nature, applies to all men, and is unchangeable and eternal. Its commands call upon men to perform their duties, and its prohibitions deter them from doing wrong. Its commands and prohibitions always influence good men, but are of no effect on the bad. To abrogate this law by human laws is never morally right, nor is it permissible ever to restrict its operation. To annul it is altogether impossible. We can be absolved of this law neither by the Senate nor by the people from our obligation to obey it, nor do we need anyone to expound and interpret it for us. It will not lay down one rule at Rome and another at Athens, now or in the future. There will always be one law, eternal and unchangeable, binding at all times upon all peoples; and there will always be one common master, as it were, one ruler over all, God, who is the author of this law, its interpreter and its sponsor. The man who refuses to obey it abandons his self, and by denying the true nature of a human being will suffer the severest of penalties, even if he has escaped all the other consequences that are called punishments.[1]

Thus natural law is here powerfully affirmed as an eternal and immutable jural order above positive law. It was a natural law[2] grounded in a cosmonomic idea, an eternal world-order in which the laws of both irrational and rational-moral nature were grounded.

Ulpian summarized it as follows: "Live honestly, harm no one, give each his due." "Natural law is what nature has taught all living beings."[3]

1 Cicero, *De Republica*, 3.22. [Dooyeweerd quotes the passage in Latin only.]

2 The Romans distinguished sharply between this *jus naturale* and the *jus gentium*, the law of nations. The latter stood opposite the *jus civile*, the Roman tribal law, which as such did not cover the *peregrini*, the foreigners. The *jus gentium* is simply the justice that is common to all nations but need not be *jus naturale*. The standard work about this is Moritz Voigt, *Die Lehre vom jus naturale, aequum et bonum et jus gentium der RÖmer*, 4 vols. (Leipzig, 1856-1875).

3 This statement reveals the influence of Stoic naturalism.

In particular Aristotle and Stoic philosophy[1] expanded greatly on this natural law and provided a basis, from a rationalistic immanence standpoint, for linking natural law to the other laws in creation.

2.1 The law-concept in Aristotelian-Thomist natural law

With Thomas Aquinas (c. 1225-1274),[2] Aristotelian philosophy gained a decisive victory over the neo-Platonism imported into Christian philosophic thought under the influence of Augustine. Plato had torn reality apart into an eternal, supra-temporal and supra-sensory world of ideas (*noumenon*), one that can be known only by reason in intuitive contemplation, and a temporal, mutable, sensory world (*phenomenon*) which we experience in psychical perception.

Aristotle took Plato's ideas out of the transcendent sphere and turned them into immanent principles of a reality that could be experienced through the senses. These immanent ideas could be grasped by reason (the active intellect) from sense perceptions by means of abstraction (*aphaeresis*).[3] This organism develops from a germ or embryo in which the complete form (*actus*) is potentially (germ) already present. In this way the idea (*eidos*) is conceived as the *entelechy* or substantial form of things which takes the sensorily perceptible matter of the organism and

1 The influence of Stoic philosophy on the formation of concepts in private law among the Romans has been shown by Paul Sokolowski in his very instructive *Die Philosophie im Privatrecht*, 2 vols. (Halle, 1902, 1907).

2 Aquino is a small town in Italy. Thomas' main works are *Summa Theologiae*, *Summa contra Gentiles*, and *De regimine principium* (the authenticity of this last work has been disputed [it is today attributed to his pupil, Giles of Rome]). Thomas has official authority in the Roman Catholic Church as "*Doctor angelicus*." The encyclical *Aeterni Patres* (1879) of Pope Leo XIII urged renewed study of Thomas.

3 This explains why Aristotle's theory of knowledge or epistemology is set up quite differently from Plato's, whose "ideas" do not lie embedded in sensory reality, thus cannot be retrieved from there by abstraction. Plato's epistemology is oriented to a-sensory *mathesis* which views the sensory forms merely as *occasion* for the intuitive contemplation of the a-sensory spatial forms with their laws. Aristotle's epistemology, by contrast, is oriented to biology with its classification of genera and species according to the *genus proximum* and *differentia specifica*.

brings it to its mature form as the goal or end of the development. In this way the idea (*eidos* or *entelechy*) becomes the hidden moving cause and at the same time the nearest goal of the development of temporal things. Every being, says Aristotle, has such a substantial form within itself. The interrelation between things is that the lower being is the material or means (potentiality) for the form (actuality) of the higher being (e.g., soil serves as food for the plant, the plant for the animal, the animal for man).

In this way Aristotle assumes a double order of purposefulness: (1) the order by virtue of which every being by nature strives for its own perfection, i.e., for the realization of its substantial form as its innate goal or end; (2) the order by virtue of which all beings are ordered to each other in a hierarchy of matter and form, potential and actuality, means and end.

The starting point for this entire metaphysics is the following basic principle: Everything that moves presupposes a cause, and the movement presupposes a goal. Ultimate goal of the temporal cosmos is man, whose substantial essence lies in his rational-moral nature. Human reason (*nous*) is still hampered by its connection with matter. For this reason Aristotle assumes as absolute end goal, as pure form (actuality), an *absolute reason* which he calls the Godhead and which serves as the unmoved first mover and the cause of all temporal movement (a typical ultimate reification or absolutization of the temporal functions of reason).

Aristotle calls the double teleological order in the cosmos the "*lex naturalis*," the natural moral law.

Now then, this entire train of thought Thomas Aquinas tried to accommodate to the Christian revelation. In principle, the Christian cosmonomic idea had always been conceived as follows: To the question, What is the deepest origin of all temporal law-spheres? its answer was: God's absolute and holy sovereignty as Creator. To the question, How must one see the interrelation and coherence of the aspects of temporal reality? it answered: They are part of God's providential world-plan. Nature (meant is the whole of temporal reality) is anchored in the reli-

gious root of the human race which has fallen through sin but by grace is redirected toward God.

Thomas next makes a separation between natural philosophy and the Christian mysteries of grace known only through faith. He grounds the first in the "*naturalis ratio*" in an Aristotelian sense and teaches that man by his natural reason, without the light of the Christian revelation, can acquire philosophical knowledge of the cosmos and of man's rational-moral destiny therein, and also that man can acquire a natural knowledge of God (the immanence standpoint!). The natural reason can never be in conflict with the Christian revelation, although the knowledge it provides must be viewed as lower material (means) that needs to be brought to a higher form (the goal of eternal beatitude) by faith with its knowledge of grace. Nature (read: all of temporal reality, including the natural knowledge of it) is the lower stepping-stone to grace. "Nature is the preamble of grace; grace does not destroy nature, but perfects it."

Aquinas next permeates both elements of the Christian cosmonomic idea with the teleological rationalism of Aristotle. The resulting semi-pagan, semi-Christian cosmonomic idea he calls, in the footsteps of Augustine, the *lex aeterna*. With regard to natural truths of reason he holds that they all have their deepest origin in the *divine reason* (the Aristotelian *nous*): the natural world-plan of God, including the rational-moral order, becomes identical with the divine *ratio*. Only with respect to the supernatural mysteries of grace does the Christian view of God's sovereignty remain intact (hence Thomas upholds the doctrine of election).

Next, the content of this providential world-plan is identified with the double purposeful order of the Aristotelian *lex naturalis*. This cosmonomic idea, once applied to ethics or natural morality (which in line with Aristotle also includes natural law as serviceable component), yields the following principle: the innate rational-moral nature of man, as the substantial form or entelechy of the being of man, is the ultimate norm of good and evil. For, human reason in its innate *lex naturalis* participates in the *lex aeterna* of the divine reason. Good is that which accords with this nature; evil is that which is in conflict with it. The

apostatic-rationalistic nature of this moral philosophy, which brings it into irreconcilable conflict with the Christian view of God's sovereignty, is obvious in the conclusion Thomas draws from the rationalistic immanence standpoint: the good is not good because God so ordained it, but God had to ordain the good because it was good.

The whole of natural law is now directly deduced from the rationalistically conceived *lex naturalis*. Law is proclaimed the object of the moral virtue of justice in an Aristotelian-Platonic sense. The virtue of justice is the enduring inclination of the will (*habitus*) to give "each his due" (*suum cuique*). In the broadest sense, justice is not a *special* virtue: it includes all virtues; it is moral perfection. He who gives everyone his due (to God what is his, to the neighbor what is his, and so on) fulfills all duties.

However, according to a more restricted and proper sense, justice is a special virtue, unlike any other, namely, one of the cardinal virtues (wisdom, moderation, justice, and courage – the schema of the folk ethic in ancient Greece, also adopted by Plato). Justice is then the virtue that gives each his due in the strict sense of the word, i.e., as his *right*. (Compare Ulpian: "*Justitia est perpetua et constans voluntas jus suum cuique tribuendi*": Justice is the perpetual and constant will to give each his due.)

In this more restricted sense justice never relates to the acting self, but to others. That is what distinguishes justice from the virtue which man has to practice with respect to himself, such as moderation, chastity, gentleness, patience, modesty, etc. How, then, does justice differ from the other virtues which relate no less to other people, such as neighborly love, mercy, etc.? By its *object*. Justice in the more restricted sense gives to one's fellow-men what they may demand as theirs, or what belongs to them.

What does the word "*suum*" stand for in this restricted sense? Thomas defines it, in line with his teleological cosmonomic idea, as "*that which is ordered to him as means* or is *tied to his person for his benefit or use*."[1] Compare this to how Kant defines *suum* : "That which is rightfully mine (*meum iuris*) is that to which I am so bound that its use by someone else without my

1 Summa Theologiae I, Q. 21, Art. 1, ad 3: "Dicitur esse suum alicuius, quod ad ipsum ordinatur."

permission would injure me [i.e., would hurt my free personality as '*noumenon*']."

This concept of "*suum*" includes the relation of a person not only to his external possessions, but also to those thing that are parts of his personhood (e.g., body, life, etc.).

A second characteristic of justice that Thomas identifies, in Aristotelian fashion, is that it tries, in distinction from other virtues, to practice a form of equality (*to ison*), so that everyone receives exactly as much as is due to him, no more and no less.[1] "Each man's own is that which is due to him according to equality of proportion."

This equality, however, has a different standard in the relationship of the unbound individuals among each other than in their relationship as members of an organized community. In the first relationship, justice is commutative justice (called *dikaiosuné synallagmatic* in Aristotle);[2] in the second, it is distributive justice. The first holds for private contract law and measures equality according to an arithmetic standard (what is withdrawn from the assets of the one must be equal in value to the counterperformance by the other). The second measures equality according to a geometric standard; it takes into account the inequality of the community's members and demands equal treatment of equals, unequal treatment of unequals. Thus it orders the relation of the community to the members in the distribution of benefits and burdens.

A third specimen of justice is *justitia legalis*: legal justice. It regulates by law what each member owes the (state) community. (The law commands every soldier in wartime to be valiant; it forbids divorce and slander, etc. etc.). In the broadest sense, legal justice is the perfect civil virtue that also comprehends commutative justice and is therefore also given the name by Aristotle of "general" justice. Distributive and legal justice are applied and enforced in public law.

It is on the basis of this discussion of justice (*gerechtigheid*) that Thomas, in line with Aristotle, defines the concept of law (*recht*), a definition that does not distinguish between law-con-

1 Ibid., II.2, Q. 58, Art. 7, ad 3: "Dicitur esse suum unicuique personae, quod ei secundum proportionis aequalitatem debetur."

2 *Nichomachean Ethics* 5.3.

cept and law-idea. As it is, Thomas is unable to make any such distinction, because he classifies the jural (*het recht*) among the ethical, hence cannot distinguish (a) the functions of jural meaning which anticipate the meaning of the ethical that is implicit in the law-*idea*, from (b) the retrocipatory functions[1] of the jural that are contained in the law-*concept* in the context of the not yet deepened meaning-kernel of the jural.

As a result, the law-concept has a threefold meaning in Thomas:

(1) law is "*suum*" in the broadest sense of the word, differentiated according to the object of commutative, distributive, or legal justice (Greek: *to dikaion*, Latin: *justum*);

(2) law in the objective sense is the law or norm of jural action, of acting in accordance with the virtue of justice. The legal norm is defined by Thomas as "every obligatory and enduring norm relative to "*suum cuique*" for action, promulgated, with competency to coerce, by the lawful authority of a public-legal collectivity (state or church) for the common good";

(3) law in the subjective sense is the subjective competence to claim something as one's due, to possess it, and to dispose of it for one's own use at the exclusion of others. Subjective law according to Thomas is a competency, that is, a moral ability or licence, that gives us mastery of a thing and differs from a legal obligation which tells us only what we ought to do, not what we are able or permitted lawfully to do.

In keeping with this threefold function of justice there are also three sorts of subjective rights.

Answering to legal justice is the subjective right of an organized community to demand of its members what is its due, i.e., what is needed for its well-being.

Answering to distributive justice is the subjective right of members to demand of the community that in distributing the public benefits and burdens it take into account the proportion

1 [In accordance with his older conception Dooyeweerd in the original text still speaks here of "analogical functions."]

of their merits and strengths (as with the tax burden, for example).

Answering to commutative justice is the subjective right of individuals to demand their due from each other.

The above three meanings of the word *law* cannot, says Thomas, be united in a single definition. They must always be kept apart, even though they are very closely connected.[1] The legislator, who determines the penalty for transgressing his norms, practices legal justice. The judge who punishes the guilty practices either legal justice insofar as he punishes for the sake of the common good; or else he practices distributive justice insofar as he maintains a geometric equality in the proportion of guilt to punishment when punishing several convicted subjects; or, finally, he practices commutative justice insofar as he metes out punishment exactly according to the degree of guilt.

According to Aristotelian Thomism, justice as a component of ethics must be justified by the goal or end it serves:

(a) The goal of law that answers to commutative justice is the mutual freedom and independence of individuals in everything they can call their due.

(b) The goal of law that answers to legal justice is to secure the life and welfare of the public community. (This also justifies state coercion, governmental authority, and punishment.)

(c) The goal of law that answers to distributive justice is to protect the rightful claims of the members of the community over against this community.

The content of law is grounded in natural law, which divides into subjective and objective natural law, or as we would rather say, in a natural law according to its subject-side and its object-side. By natural law in its objective sense Thomas understands the whole of such binding legal norms that hold for all mankind by virtue of the *lex naturalis* itself and not after positive institution, be it by God (*jus positivum divinum*, e.g., the Mosaic ceremonial law) or by man (*jus positivum humanum*). This natural law can be deduced by man's natural reason apart from any

1 Next to the three forms of justice, so-called "vindictive justice" (*justitia vindicativa)* is not a separate or distinct type.

revelation, namely through direct or more remote inference from the teleological principle of ethics, "*Do good and shun evil*" as it applies to the rule "*suum cuique*" in the narrow sense of the word.

Natural law, then, in the objective sense, is part of the natural moral law. It is in part included in the Decalogue but has force of law for the natural reason independently of it. It is not just an ideal law as a standard by which to judge, but a truly valid law that directly binds the subjects.

For all people to necessarily acknowledge this law, however, it is immediately clear only as to its general basic principles. Positive law is required for making more remote conclusions and, in the context of changing circumstances of time and place, for making follow-up stipulations not deducible from the natural moral law. And positive law is needed as well for giving coercive sanctions to the commandments of the natural law. But the entire validity of positive law depends on natural law. Any prescription in positive law that conflicts with natural law is no longer binding.

Thus in Thomas natural law encompasses only general, natural jural principles, along with the conclusions that immediately flow from them. Yet these jural principles are themselves already regarded as binding valid law (one might call it natural-law positive law). Thomas does not know any changing jural principles grounded in historical development, but only timeless, unchangeable natural law.

Positive laws contain either necessary conclusions from rational natural law (e.g., the prohibition of theft, murder, slander, sedition, breach of contract, etc.), or they contain (and these are the most numerous) further stipulations with a view to time and place.

By natural law in a subjective sense Thomas understands the whole of legal competencies that a person may claim directly on the basis of objective natural law (e.g., the right to life and its integrity, the right to freedom, the right to acquire property, etc. etc.).

This distinction alone of three types of justice shows how the Thomist-Aristotelian view is aware of the fundamental difference between individual private legal relationships and pub-

lic-legal communities. The same is clear from the view about the origin of the state and the other organized communities. The community idea according to Aristotle and Thomas is grounded in the substantial form, the rational-moral nature of man. Man is a *zoon politikon*, a political being, an *animal sociale*. He cannot reach his temporal destination, his temporal happiness, his temporal moral perfection in isolation, on his own. The smaller communities (home, family, village) are there to provide man with what he as an individual cannot attain on his own. In the final analysis, it is the state as the complete and perfect (autarchic) community that is to give people the means for their material and moral well-being, something they cannot attain either as individuals or as members of the smaller communities.

The Thomist view of the state, therefore, is not individualistic; it does not construct the state out of individuals but conceives the individual from the outset as belonging to the community by virtue of his substantial form of being.

2.2 Critique of the Thomist natural-law concept of justice by means of the method of antinomy

The doctrine of substantial forms is vintage metaphysics: looking for essential being in temporal reality itself. A metaphysical, speculative natural law, such is the nature of the entire Aristotelian natural law. It is not oriented to the sphere-sovereign meaning of the jural but to a metaphysical, semi-rationalist ethics. Justice has turned into an object of a moral virtue. Neither the concept of "*suum*" nor that of equality is taken in the jural sense. "Equality" is an abstract, general concept lacking any definition related to the meaning of justice. That is already apparent when Thomas, following in the footsteps of Aristotle, talks of an arithmetical and a geometrical equality in practicing justice. These are mathematical analogies which, as we know from our *Introduction*, lack all delineation of meaning unless they are comprised in the nucleus of the jural. But that meaning-nucleus cannot comprise the concept "*suum*." It is once again defined in the metaphysical-teleological line of the Thomistic cosmonomic idea as that which has been ordered as a means to someone's person. But the expression "means and end" refers to a relationship, which in turn has to receive its definition from the meaning in which this relationship is understood. If this meaning is

the jural, then the whole concept of "*suum*" is useless for analyzing the meaning of justice. A definition must never contain the very thing to be defined. However, in the doctrine of substantial forms of Aristotle and Thomas the express purpose is to abolish the sphere-sovereignty of the jural. Justice is merely a means toward the end of man's moral perfection; it therefore has to be subsumed under an absolutized (understood according to a biological analogy) *moral* denominator. This leads inevitably to inner contradictions. The commandment *Thou shalt not kill* is perfectly delineated as to its meaning as a moral (ethical) commandment, allowing of no exceptions. It means: under no circumstances may our heart give room to a loveless attitude toward our neighbor, which gives rise to the desire to kill. The moment one joins Thomas Aquinas and reads in this commandment a natural-law principle, a conflict arises with the meaning of *retribution* (this is the meaning of the jural, as we shall see later.)[1] Retribution can sometimes require the taking of a life.

Victor Cathrein, a neo-Thomist, tries to resolve this antinomy by reading the commandment as follows: Thou shalt not kill *unlawfully*. But that undoes the whole meaning of the commandment, for it then becomes either a meaningless tautology (What is unlawful? I may not ride my bicycle unlawfully on the sidewalk either); or it becomes, if one wants to maintain the meaning of the moral attitude of love, a contradiction in terms. (How can I nourish a loveless attitude unlawfully? And am I allowed to do so lawfully?)

The same holds for the commandments, *Thou shalt not steal. Thou shalt not commit adultery. Etc.* All these commandments have a sovereign moral meaning and therefore a well-defined content. They also *appeal* to jural principles since, as we know, the moral law-sphere rests on the jural sphere as its substrate. The moment, however, that one wants to read in these moral commandments a natural-law jural principle, one stumbles into a most patent tautology: What is theft? What is adultery? These concepts first have to be delineated as to their jural sense. No sooner has the jural sense been established, however, than reading jural principles in the commandments *Thou shalt not steal,*

1 As you can see, our immanent criticism here applies the method of antinomy; cf. *Introduction,* pp. 112-21.

commit adultery, etc. becomes a tautology, since the concepts of adultery and theft already imply their unlawful character. The concept of natural law in Thomas Aquinas is a metaphysical one and therefore must be rejected from a Christian standpoint.

For the same reason his view of positive law is not satisfying. In line with Aristotle, he recognizes positive law on its law-side only in a public community (the state, in Thomas also the church) and not in the private communities and jural relationships in society (in the latter of which the individuals are coordinated, not subordinated in a higher unit). In Thomas, the relation between natural law and positive law turns dualistic to such an extent that he accords, in a rationalistic manner, positive legal force to a simple principle of reason. A dualism of this kind dissolves itself. A principle can never have legal force in the same way as a positive legal norm, which precisely has the character of *positivizing* a legal principle. Thomas arrives at this incorrect view as a result of his misconception that positive legal norms ("objective justice," as it is called obscurely enough) can have binding force only in state or church – in other words, that only political government or ecclesial authority can create positive law. His *ad hominem* argument, "Do you fancy that outside the state or the church there is not a *natural law* which forbids murder, adultery, and so on?" strikes only his own inadequate view of positive law. There is a third possibility: also in private life there are competent organs for positivizing jural principles that are relevant for these private spheres. But this possibility cannot become clear to us until we come to discuss the question of the sources of law.[1]

Finally we have to point out once more that the natural law of Thomas and Aristotle is not grounded in the divine cosmic law-order, but in a metaphysical rational order. As a result, the real "natural law," that is to say, the law that is grounded in the nature aspects of reality, is stretched far beyond its boundaries. This point will be discussed when we analyze jural principles.[2]

1 See *Encyclopedia,* Chapter 5. [Eng. trans. forthcoming.]
2 See *Encyclopedia,* Chapter 3. [Eng. trans. forthcoming.]

In the present context we merely note that some authors[1] call it a natural-law principle that the obligation in private law to pay for damages must be based on the principle of fault (*culpa lata:* gross negligence), whereas the modern principle of risk liability of him who called this risk into being is supposed to be purely a "further provision" in positive law of this natural-law rule. This argument is untenable on two counts. First, the principle of compensation for damages in private social interaction is hardly grounded "in nature," and even less the claim to payment. Secondly, in no way is the modern principle of risk liability purely a provision of private law; rather, it is a true pre-positive jural principle grounded in the norms of historical development and in need of human form-giving or positivization. Finally, the principle of risk liability (e.g., of the owner of an animal that causes damage) can never mean a "further provision" of a supposed natural-law principle that requires gross negligence for the obligation of compensation. More about this when we discuss jural principles.[2]

2.3 The concept of law in nominalistic natural law during the Late Middle Ages. Law as "general will"

The Thomist-Aristotelian philosophy was essentially a justification of the unified ecclesial culture of the Middle Ages, a phase in historical development in which the Church of Rome in its closed hierarchical structure dominated all of worldly life in family, state, business, learning, the arts and ethics. The Thomist cosmonomic idea ordered all collectivities, including the state as a *natural* (that means here: "worldly") institute, under the leadership of the church as the hierarchical institution of grace. Over against the church all worldly collectivities were mere *matter* that had to receive supra-natural *form* from the church.

It is certainly true, says Thomas, that in "purely natural," "worldly" affairs the state is independent of the church. But in all matters that concern the well-being of the soul – which includes marriage, the oath, combating heresy, and countless other matters – the state must follow the leading of the church.

1 Cf. V. Cathrein, *Recht, Naturrecht und Positives Recht,* 2nd ed. (Freiburg im Breisgau, 1909), 227.

2 See *Encyclopedia,* Chapter 3.

The compromise between the Christian religion and pagan philosophy naturally had its basis in the rationalist metaphysics of substantial forms. Turning against this basis in the 14th century was the medieval movement of nominalism in Late Scholasticism, which would prove so critically important for the development of modern times. It denied the reality of the *universalia* (general concepts, ideas).

Nominalism had reared its head already around A.D. 1100 (Berengar of Tours, Roscelin of Compiègne) and had forced the church to intervene because it denied the reality of the church as an organized community and even qualified the Trinity as a *general concept without reality* (the heresy of tri-theism!). But not until the 14th century did nominalism, under the leadership of William of Occam (c. 1300-1350), become a spiritual force of world-historical significance.[1]

An important historical factor in the development of nominalism was the battle over the so-called primacy of the will over that of the intellect.

Augustine (A.D. 354-430; bishop of Hippo, chief of the Latin church fathers) had taught the primacy of the will on the basis of the Christian doctrine of the absolute sovereignty of God. Because the will of God the Creator is not bound to the necessary conclusions of human reason, therefore Augustine also denied the self-sufficiency of our temporal cognitive functions for acquiring knowledge of the cosmos, and he linked all knowledge to divine illumination of the intellect. This remained the dominant element in Augustine's cosmonomic idea, even though we already find in his conception of the *lex aeterna* a link of the Christian religion to pagan (neo-Platonist) philosophy. The latter placed beneath each other in temporal reality levels of greater or lesser reality, depending on whether they radiate to a greater or lesser degree of clarity the divine ideas: *nous*, *psyche*, and *mè on* (matter, taken in a Platonic sense).

By contrast, Thomas Aquinas had taught the primacy of the intellect throughout the realm of nature (again, "nature" here refers to the temporal cosmos as a whole over against "supernatural" grace). And this doctrine also anchored his view, rationalistically, about the self-sufficiency of the "*naturalis ratio*" in the whole domain of natural knowledge.

1 Luther was educated in nominalist scholasticism by way of Occam's pupil Gabriel Biel. As he once said: "I am of the school of Occam."

Throughout the High Middle Ages the Franciscan orders in particular had held to the Augustinian tradition and indirectly or more openly combated this Thomist rationalism. A contemporary of Thomas, the British philosopher John Duns Scotus, O.F.M. (c. 1270-1308), who lectured in the universities of Oxford and Paris, was a fierce enemy of the doctrine of the primacy of the intellect and opposed it with his doctrine of the primacy of the will. (Meanwhile, this did not in any way prevent him from siding with Thomas, against Augustine, about the self-sufficiency of the *naturalis ratio* in the natural domain.)

Duns Scotus withdraws all of theology from the domain of "natural knowledge" and strongly emphasizes God's sovereign action, his contingent (not rationally comprehensible) intervention in history. He also teaches that the entire second table of the moral law is not based in reason but in God's sovereign will. However, unlike nominalism he does not take God's will (*potentia Dei absoluta*) as unbound despotic caprice, but instead as bound to God's holy Being. That is why God can grant dispensation from the commandments of the second table of the Decalogue, but not of those of the first (which concern the worship of God). Of scholarship Scotus demands, in line with Franciscan Augustinianism, that it be mathematically exact.

Meanwhile, from his doctrine of the primacy of the will Duns Scotus certainly does not draw destructive conclusions with respect to the metaphysical theory of the reality of universals. On the contrary, he is if possible more a realist in his view of the *universalia* than Thomas, who taught that the ideas have a threefold existence: *universalia ante rem* (i.e., ideas have real existence before the creation, namely in the divine reason), *universalia in re* (i.e., they have reality as the immanent substantial form of things), and *universalia post rem* (i.e., they also have "subjective" existence in the human mind, as concepts). Scotus instead happens to accept, next to general universals (e.g., beings like "man," "animal," etc.) also so-called *formae individuantes*, i.e, individual, substantial essential forms. For example, Peter is not just a man but what makes him the individual Peter – Peter's "*haeccitas*" as it was called later in the barbaric Latin of the Schoolmen – is the individual essential form of "*Petreitas*"

(Peterness).[1] With that, Scotus combated the Aristotelian-Thomist view that the *principium individuationis* is found only in *matter* (as "*dunamei on*," potential reality[2]) and that the *form,* the metaphysical substance, is always general.

William of Occam begins by extrapolating the doctrine of the primacy of the will in the fatal sense of *utterly boundless arbitrariness*. With that, the bottom drops out of the metaphysics of substantial forms, along with a basis for the compromise between Christian and pagan philosophical themes in the Christian worldview.

The *universalia*, among which Occam includes *voces* (words, terms) as well as *conceptus* (general concepts),[3] are in his view neither *realiter ante rem* nor *realiter in re*, but only subjective in men's minds. They are purely signs that presuppose and point toward an incalculable multiplicity of individual things,[4] and they are able to do so only because they are *Abbilder*, subjective images of things. Only the individual really exists. The individual itself can only be known from sensory intuition, but this knowledge is not scientific knowledge.

There can be scientific knowledge only of the *universalia*. Thus science does not focus, as Thomas and Aristotle taught, on the real things, but on the general *conceptus*, which "suppose" the individual things. This also cancels the "realistic concept of truth" of Thomas and of realist scholasticism in general.

For Occam, the criterion of scientific truth is not found in the agreement of our concepts with the essential forms of real things "outside" of us, but is located immanently in the human

1 Here Scotus simply discovers the truth that individuality has a meaning-side or function also in the logical law-sphere. In the typical fashion of rationalist metaphysics, however, he absolutizes the logical function of individuality into a supra-temporal substance.

2 For Plato, matter was merely "*mè on*," "*apeiron*," i.e., that which thought has to fend off. In Aristotle, matter acquires a positive function as "*dunamei on*."

3 Occam distinguishes *voces* as *arbitrary* conventional signs, from *conceptus* as *natural* signs.

4 This doctrine of *conceptus* agrees in the main with Peter Abelard's doctrine of *sermo*. Abelard (1079-1142) cannot, however, simply be called a nominalist.

mind, namely in the coherence of the concepts with each other (the nominalistic concept of truth). Before long, nominalism began to orient itself to the Platonic, mathematical understanding of science.[1]

Obviously, these nominalistic views undermined the entire metaphysical natural law as grounded in the doctrine of substantial forms, and with that the natural-law concept of justice of Thomist scholasticism. To the nominalistic way of thinking, "justice," "right" and "law" are mere names, general concepts that have subjective existence only in the human mind and therefore can never be grounded in a metaphysical rational world-order. God's sovereign arbitrariness, says Occam, extends over the entire "natural moral law" (including the first table). God could just as well have willed that Christ had come into the world as a stone or a donkey! He might just as well have sanctioned an egotistic morality. In other words, the natural moral law is not grounded in reason with its substantial forms, but only in the divine arbitrariness. Factually it is a *jus divinum positivum* which, like all other truths of revelation, can only be accepted in faith and never deduced rationally-metaphysically.

Consequently, nominalist natural law, to the extent that it still proclaims itself scientific, soon begins to focus its attention on another problem: mathematically constructing organized communities like church and state out of individuals, using a *theory* of a primordial contract between individuals. The communities, after all, can no longer pass for *realities* that stand above individuals. They are merely universals that "suppose" a collection of individuals. With that, the entire hierarchical institution with its supra-personal authority collapses. The church becomes exclusively "*congregatio fidelium*," a gathering of believers. Authority, too, has to derive from individuals.

Nominalist natural law prefers to link up with the *state of nature*, a condition without authority, property, state coercion and inequality, one in which only free and equal individuals once lived side by side. Nominalists start with the state of paradise, the state of innocence, but they bend this ideas in the spirit of

1 Occam's school in the university of Paris prepared the rise in the 14th and 15th century of the mathematical modern natural science. Some chief figures in this school were Nicholas d'Autrecourt, Jean Buridan, Albert of Saxony, and Nicholas d'Oresme.

Stoic individualism. The later Roman Stoicism (Seneca et al.) taught that once upon a time there had been a golden age (*aureum seculum*) in which all individuals were good, free and equal, and that the state with its inequality, slavery, property and coercion had come into the world only because of a fall into sin.

Thus a distinction came to be made between an *absolute* natural law, a natural law for a sinless state of nature, and a *relative* natural law, a natural law altered by sin. This distinction was made already by the early church fathers who were influenced by Stoicism. And all revolutionary types of sects, which wanted to embody the kingdom of God externally in society, liked to link up with absolute natural law – which they believed was identical with the evangelical law of love – to draw from it radical, revolutionary consequences against inequality in life, government, property, etc. etc. Meanwhile, the contrast between absolute and relative natural law in the Aristotelian-Thomist sense of immanent purposeful development was pushed entirely into the background.

Nominalism, too, preferably linked up with absolute natural law, taken in a completely individualistic sense, in order to attack the church's hierarchy with its papal primacy and in general the worldly claims of the church,[1] as well as to counter the claim to supremacy by the Holy Roman Empire over the rising nation-states.

In this entire individualistic train of thought, even prior to Occam, a theory of a compact establishing royal supremacy crops up, based on some passages in the *Corpus Juris* that speak of a "*lex regia*" whereby the people are supposed to have transferred their power to the king. The theory was used to defend the original sovereignty of the people. From the outset, the whole nominalist theory had to ground the content of law, understood individualistically, in the will (in the sense of arbitrariness), and so come into sharp conflict with the metaphysical

1 At the Councils of Basel, Pisa and Constance, the nominalist theory, with John Gerson as its mouthpiece, argued in vain against the primacy of the pope by championing the sovereignty of the General Council.

natural law of Thomas Aquinas, who grounded law in human reason.[1]

As long as nominalism, in an ecclesial positivism, held on to the truths of the Christian faith, it continued to ground also natural law in the divine will and retained in its concept of law the content of the natural moral law as the sovereign decree of God. But this changed already when nominalist theories of natural law, under the influence of the teachings of the Arab philosopher Averroës,[2] were infiltrated by the doctrine of double truth, with its absolute rupture between believing and thinking, faith and reason. Then nominalism no longer tried to accommodate its individualistic theory of law to the faith of the church and sought to base its natural-law theory exclusively on experience and strictly mathematical demonstration.

When William of Occam was condemned by the church he found refuge in a Franciscan monastery in Munich, where Marsilius of Padua (1270-c. 1340) and John of Jandun (c. 1285-1328)[3] likewise enjoyed the protection of the emperor. In the ensuing struggle between pope and emperor, the latter two wrote the famous polemic tract *Defensor Pacis*, in which natural law, and with it the concept of law, was entirely robbed of its

1 Thomas traced only the binding force of natural law to the will of God; the content of natural law he grounded in reason, independent of God's will.

2 Averroës (Ibn Roschd), born in 1126 in Cordoba, Spain, died in 1198, aimed to introduce Aristotelian philosophy to Muslim thought. However, he "naturalized" the Aristotelian substantial forms to pure properties of matter. The doctrine of double truth, although in this form it was not introduced to medieval thought until the Averroist scholastic Siger of Brabant, nevertheless can be traced to Averroës, since he did not see his way clear to accommodate Aristotle's philosophy to the faith of Islam. His deepest conviction was that religion was given to the common people as sensory images while the philosopher penetrates to truth in its purity. From Aristotle's metaphysics he concluded that there is no individual immortality, since the *nous* knows no individuality and the *principium individuationis* rests in *matter*. As early as the 13th century the naturalistic Aristotelianism of Averroës had come to govern the natural-law theories of Pierre Dubois (pupil of the great opponent of Thomas, Siger of Brabant) and the thinking of John of Paris, and in their case, too, had led to individualistic conclusions.

3 Jandun was an adherent of Averroës' philosophy. One can speak here of an Averroist nominalism. Another convinced Averroist was Occam's older contemporary and kindred spirit Peter Aureol (c. 1290-1322).

substantial character and demoted to a purely utilitarian principle.[1]

The authors begin their exposition of the concept of law by completely disregarding the metaphysical "*lex aeterna*" as well as the evangelical and Mosaic law, on the grounds that their validity and content cannot strictly be proved by "the whole world of philosophers." They want to confine themselves exclusively to experience and the mathematically provable. Although they seem to start from Aristotle's thesis that man by nature is a social animal and that human society necessarily develops in smaller and larger communities, to culminate in the state, they rob this Aristotelian idea of development of its metaphysical character, detached from the doctrine of substantial forms, divorced from the "*lex naturalis*" as the natural moral law. They have given it a fully naturalistic and individualistic character.

Typical for nominalists, the authors take their point of departure in a raw state of nature where there are no laws or rights and where the individuals live alongside each other in perfect freedom and equality. Their idea of the state of nature, however, is taken completely in a naturalistic sense and entirely divorced from its connection with the state of Paradise or the "Golden Age" of late Stoicism. (It would become the prototype for Hobbes' doctrine of the state of nature as a "war of all against all.") Given that humans enter this world naked and without resources they are instinctively driven together into herds. The fact that no rights or laws obtain in this state of nature gives rise to continual altercations, during which the individuals violently subdue each other. Next, reason and experience teach men that it is useful to establish states with coercive power, in the interest of self-preservation and temporal welfare. Thus is born the coercive legal order, one that ought to contain the general will of the people as a collection of individuals. This conception of natural law, proceeding from an abstract individual living in a fictional state of nature, views the essence of law in the general will of the people, which is to be established by applying the majority principle. This conception of positive law as the "general will" ("*volunté générale*," as it would be called later in Rousseau) was to become of critical importance in the whole rationalist natural law of modern times.

1 [Current scholarship ascribes the tract solely to Marsilius, although he may have collaborated with Jardun during its preparation.]

Here already we also find the view that positive law can never be unjust for anyone, since it is grounded in everyone's own will. "*Volenti non fit inuria*":[1] to the willing no injury is done. (This theory, as we shall see, would be defended in a radical form by Thomas Hobbes.) Accordingly, the nominalist doctrine of natural law ascribes no other natural-law content to positive law than that it ought to be the expression of the "general will." Marsilius of Padua and John of Jaudun gave us the prototype of Rousseau's theory of the "*volonté générale*" as the natural-law hallmark of all positive law.

The nominalist doctrine of the will has rejected every material tie of the formation of law to divine jural principles and has retained as the essence of law nothing more than the subjective general will of one's fellow-countrymen, a will which according to the authors of *Defensor Pacis* is to be determined by majority vote in a representative assembly.

This nominalistic, individualistic concept of law forces the leveling of all individual structural differences in jural life. When law has become "the general will," which can manifest itself only in the state, no room is left for non-state communities to have any internal law within their own sovereign sphere.

Thus, the authors of *Defensor Pacis* can only draw the inevitable conclusion from their concept of law when they teach that the church as a temporal community is absorbed in the state, that the state has sovereign authority over the church and is alone competent to give binding rules in ecclesial affairs.

Occam, who still held to the "*jus divinum*" as taught by the church, concluded only to a coordination of state and church and taught that the state is fully sovereign in arranging the legal order and may even depart from canon law, for instance in regulating marriage. But Marsilius and Jaudun sever all ties between faith and knowledge and draw the most radical conclusions from their nominalistic, individualistic point of departure.

2.4 Immanent criticism of the nominalist concept of law by means of the method of antinomy

Nominalism was right when it sensed the untenability of a compromise between the Christian revelation and pagan, rationalist

1 Cf. *Defensor Pacis*, [1.12.6]: "*Hanc [legem] quilibet sibi statuisse videtur, ideoque contra illam reclamare non habet*": because then each would seem to have imposed the law upon himself, and have no recourse against it."

metaphysics. Its critique therefore has the negative merit to have broken the monstrous alliance between these two antagonistic worldviews and to have shown in the clearest way that there is an irreconcilable antithesis between thought that is rooted in the immanence standpoint and a religious approach rooted in the transcendence standpoint of Christianity.

However, it halted at this dualism and did not even make an attempt to erect a truly Christian conception of science on the basis of the Christian religion. In fact, in its zeal to banish rationalist metaphysics from the Christian religion it fell into another extreme that was even more fatal: it infected the Christian understanding of the absolute sovereign will of God the Creator as the deepest origin of all law with an equally pagan concept of the will, the concept that had already in the nominalism of the Greek Sophists robbed law of all meaning.

For what was at the core of the nominalism of the Sophists? They reified the psychic subject-side of temporal reality at the expense of the law-side! That is how they, very logically, came to deny any supra-subjective norms for truth, justice and morality. The will as the source of laws and morals was taken in the sense of rule-less, orderless, subjective arbitrariness.

That was a form of psychologistic irrationalism, no less rooted in the immanence standpoint than the ethical-teleological rationalism of Aristotelian-Thomist metaphysics. Seen in this light, the whole struggle about "primacy of the will or the intellect" was a family quarrel within the domain of anti-Christian immanence philosophy.

The Christian transcendence standpoint cannot ascribe primacy to any immanent function of consciousness over other functions. Insisting on primacy for the will or for the intellect points to a reification of the one over the other at the expense of the supra-temporal religious root of the cosmos.

Thus nominalism, by identifying God's will with an irrationally defined orderless arbitrariness, in fact equated the Creator's will with the subject-side of the psychic law-sphere and committed the error of embracing an irrationalist metaphysics which *factually* places God *under the law*. For to speak of a divine arbitrariness that could just as well have sanctioned an egotistic morality is meaningless unless we can apply a norm, a su-

pra-subjective law by which to begin to make out whether these are in fact instances of arbitrariness and "egotism."

That nominalism is indeed guilty of metaphysics, that is, of reifying a specific meaning-aspect of temporal reality, is crystal clear from its view of reality itself. In its zeal to break down the rationalist metaphysics of substantial forms (which reified reason-ideas into substances) it declared that no genuine reality belongs to the spiritual-normative aspects of reality. For nominalists, the *universalia* do not exist in reality itself, but are merely subjective signs that the human mind uses to signify the individual things which alone are real! In short, this means that nominalism tears temporal reality apart into a "true reality" that is closed off with the pre-logical aspects of reality, and an "apparent reality" that is contained in the logical and post-logical aspects of reality.

In other words, nominalism does exactly the same thing *in reverse order* as rationalistic realism: it tears temporal reality apart into a *noumenon* and a *phaenomenon.* It absolutizes the pre-logical sides of subjective individuality into the "individual" as *substance*. It is a naturalistic individualism in metaphysical style. It disregards the cosmic supra-rational law-order no less than rationalist metaphysics does. Only theoretical, scientific thought is capable of applying the analysis needed to abstract certain aspects of reality (in this case the pre-logical aspects) from the full coherence of reality, as we saw already in our *Introduction* (pp. 23ff.). Nominalism, too, chooses its Archimedean point of philosophy (*Introduction*, pp. 34 ff.) immanently in the temporal functions of reason. Only the basic denominator under which reason subsumes all law-spheres has become one that is different from the law-sphere privileged in rationalist metaphysics.

With that, we have already implicitly leveled immanent critique of the nominalistic natural-law concept of justice. With the aid of the method of antinomy (*Introduction*, pp. 112 ff.) we have demonstrated once again that this concept of justice dissolves itself in contradictions.

The natural-law theory of nominalism subsumes the meaning of the jural under the "metaphysical" denominator of psy-

chic-subjective arbitrariness, construed mathematically as the "general will." In the nature of the case, no concept of law can be built on a purely nominalist psychic concept of the will, witness the Sophists, who denied every legitimate concept of law. A concept, after all, must from the outset "de-lineate" logically the object of investigation, and no de-lineation is possible if you begin by denying all supra-subjective legitimacy. The Sophists therefore arrived at a complete skepticism as to truth, but this skepticism dissolved itself by demanding the status of truth for its theory!

Marsilius of Padua does arrive at a concept of law, but only at the cost of a hypothesis that dissolves its nominalist point of departure in the subjective arbitrariness of individuals. For how does he arrive at his concept of law as "general will"? By assuming that the minority in the subjective formation of its will should submit to the majority. Yet this majority principle itself cannot possibly be derived from subjective arbitrariness, but apparently is a mathematically construed natural-law jural norm that stands above the subjective arbitrariness of the individual. Here a mathematical concept of science has taken over the task that a consistent nominalist individualism cannot perform and so has inserted into the nominalist point of departure a lethal internal contradiction![1]

Individualism, when consistently sustained, cannot but deny all law, and in its view of law can lead only to anarchism[2] and in science only to a radical skepticism.

Moving on, how did Marsilius arrive at the majority principle as a postulate of natural law? He appears to have derived it from a naturalistic view of how human society has unfolded, a process that prompted individuals, from natural necessity as it were, to leave the wretched state of nature. This idea, as we shall

1 [The majority principle entails an infinite regress. How does one justify it? Did the *majority* decide that the *majority* decides? And: did the *majority* decide that it is the majority which has to decide that the majority will decide? One simply cannot escape from a *regressus ad infinitum*.]

2 Cf. in modern times the anarchist theory of Max Stirner as developed in his book *Der Einzige und sein Eigenthum* [The individual and his property] (Leipzig, 1845; 3rd ed., 1929), a sustained argument for the standpoint of individualism.

see, would be consistently carried through in the 17th century by the humanist theorist of natural law, Thomas Hobbes. But it, too, harbors an inner contradiction, seeing as the majority principle, if it is to lead to a concept of law, must already possess normative jural meaning – in other words, must presuppose the meaning of the jural which it wants to define in the manner of a natural science.

However, if you want to derive a rule of "ought" from a natural-causal lawfulness, you will get entangled in a most blatant internal contradiction.

2.5 THE CONCEPT OF LAW IN HUMANIST NATURAL LAW SINCE THE RENAISSANCE.NATURAL LAW AND THE THEORY OF RAISON D'ÉTAT ("REASONS OF STATE")

Nominalism, as we saw, undermined and abandoned the Aristotelian-Thomist cosmonomic idea. That shift had led to the loss of the idea of an organic coherence between all the law-spheres as mirrored in the medieval unified culture in which the church had absorbed all spheres of life and guided them from the top down.

A number of concurrent events had a disintegrating effect on the medieval mind. With the collapse of the medieval unified culture, nation-states arose and countries like France, England, Sweden, Norway and Denmark shook off the supremacy of the church. Economic life began to emancipate itself from the church which had tied it to morality and natural law. The organic ties of the guild system gradually broke up and a money economy made its debut. Science and scholarship, too, liberated themselves from the grip of the unified ecclesiastical culture and began to examine their foundations entirely free of theology. In other words, in all areas of life the Modern Era destroyed the old foundations and ushered in a new historical period.

The emancipated spheres of life – politics, the economy, the world of learning – now began a contest for supremacy in culture. The former Aristotelian-Thomist cosmonomic idea had put all of life's spheres in an organic relationship and had assigned to each their distinct boundaries under the guidance of the church. The new age, however, the age of the Renaissance, no longer held to a cosmonomic idea. Saturated with the

nominalistic ideas, it viewed all spheres of life as existing on their own, as atomistically separated values of life.

Economic life, brought to an unprecedented level of development thanks to the reintroduction of a money economy, the exploitation of new mines in gold, silver and iron ore, and the discovery of new navigation routes and continents, now entered, in the period of early capitalism, a phase in which it broke with every link to religion, morality and law, a time when commerce and industry spared no means to accumulate wealth upon wealth (think of the careers of the early capitalists in the Germanies, the Fuggers and the Welsers).

Political life, which began to be consolidated within national monarchies, had to do battle on every side against internal division and external threats. An idea from Antiquity, that the interest of the ruler is the sole law for politics, was elevated to be the standard norm. It was at this time that Macchiavelli developed the doctrine of *raison d'état*.

The teachings of Niccolo Macchiavelli (1469-1527) were strongly influenced by the political conditions in the Italy of his day, when the various states, large and small, were allied together to strive for a balance of power and when diplomacy taught all those sophisticated and cunning tricks that were to exercise an almost demonic influence upon the outsider.

Rampant at the papal court in Rome as well as at the court of the Medici in Florence was a well-nigh diabolical spirit of corruption which employed poison, dagger and bribery as ordinary means in the political fray. In addition, Italy suffered the catastrophes of invasions by French and Spanish troops, the loss of independence of Napels and Milan, etc.

Macchiavelli's express purpose was to offer a political doctrine and to give this doctrine a scientific basis independent of theology or morality. His attitude toward Christianity was decidedly negative. Like many of his contemporaries he was of the opinion that by preaching gentleness and defencelessness the Christian religion had delivered the world over to evil-minded men. As an alternative he held out before all practical statesmen the example of the ancient Roman idea of power. He based this on a naturalistic ethics, grounded in the universal law of

necessita or natural inevitability according to which people simply must follow the inclinations prompted by their nature.

We read in Macchiavelli's famous work *Discourses on the First Ten Books of Livy* (1517) that people do not do good of their own accord unless necessity drives them to it. People have an irresistible proclivity to let their desires seduce them to do evil unless a brake is applied. Animal drives and affects are at the core of human nature, especially love and fear. This affective nature constitutes the origin of the state, morality, law, and religion.

Thus we have here a view of law that is in sharpest contrast with scholastic natural law: it views law as a natural-causal phenomenon that does not want to have anything to do with immutable jural principles. The rulers, by scientifically investigating the make-up of human nature, are to calculate which laws best fit the circumstances. Laws and morals are creatures of the state and find their standard in the anticipated interest and benefit. The only reason the original savage hordes instituted coercive authority and laws was to escape the evil of constant threats to life from each other.

Necessita as a universal natural law, once applied to political administration, yields the principle of *raison d'état*[1] that makes law and morality as well as religion serve the interest of the state and consolidates its power. Everything must yield to this interest. In his work *The Prince* (posth. 1532) Macchiavelli teaches that under extraordinarily difficult circumstances the ruler need not renounce the means of deceit, poison and dagger, although he should always keep in mind that force alone does not make for a reign that will endure.

Thus we have in Macchiavelli's doctrine of *raison d'état* a kind of naturalistic positivism, one that makes a radical break with the old natural law.

1 In the circles of German historical idealism, particularly in Hegel, we encounter a modern renaissance of this theory of *raison d'état*, but this time on an idealist-historical basis!

2.6 General characteristics of humanism' rationalistic natural law: its nominalist, abstract, mathematical nature and its basis in the humanist science ideal

Humanism now had to try and check the amoral tenor of Machiavellism. Only, it could no longer use the old Christian, Thomist natural law that grounded law in a metaphysical world-order according to its immutable essence as a subdivision of the moral natural law.

The nominalist line was carried forward, but this time in the sense that the point of departure was no longer the will of God but natural reason, more precisely mathematical, individualist thought. Law was abstracted from its natural organic coherence with the other law-spheres and a program was launched to deduce an entire code of concrete natural-law prescriptions from the ultimate axiomatic principles of all law, just as mathematicians do from mathematical axioms. This code was to have binding force and perpetual validity as the law-order of reason, independent of circumstances, independent of any connection with the law-spheres surrounding the jural.

And just as the mathematician goes about analytically by resolving a complex problem in its simplest elements, so too natural law would have to be constructed analytically by viewing law abstractly, disengaging it from historical development, and deducing from the simplest principle the more complicated legal rules.

2.7 The concept of law in the natural-law doctrine of Grotius and its internal contradictions

The founder of modern humanist natural law was Grotius and his famous work *On the Law of War and Peace* (1625). His life and best-known works can be summarized as follows.

Hugo de Groot (1583-1645), the "miracle of Delft," was born in the city of Delft on April 10, 1583. Barely eleven years old, he was enrolled in Leiden University where he studied from 1594 to 1597. Here he was taught Roman law along the exegetical method. The entire curriculum of the law faculty was given over to the study of Roman law.

In Leiden he enjoyed close contacts with the leading Dutch humanists of the day and was strongly influenced by the moral rationalism of Erasmus and Coornheert as well as the Italian scholar Valla, which saw the essence of Christianity in the proclamation of a pious walk of life that was in harmony with reason. In the nature of the case, dogmatic truths of faith were not necessary for salvation. In Coornheert, Erasmus and Valla this moral rationalism is suffused with a potent leaven of Stoicism.

After his graduation De Groot was sworn in as a barrister in the Court of Holland in The Hague, followed two days later by his installation in the Supreme Court. In 1607 he was appointed advocate and in 1613 he accepted the office of attorney of Rotterdam. In The Hague he lived with the Arminian pastor Johannes Uytenbogaert, the eloquent chaplain of Prince Maurice and the indefatigable defender of the sovereignty of the States[1] in internal ecclesiastical affairs.

Grotius became an adherent of the humanist ideas of toleration that can best be characterized as maintaining tolerance within the church under the authority of the state, thus a form of religious toleration that also formed the basis for political toleration. He drafted the well-known resolution of the States of Holland in 1613 to establish the points on which peace in the church was to be preserved and he defended it in an address to the city council of Amsterdam. In his discourse to the States of Zealand, sent to them in 1617, he championed the sovereignty of the provinces in religious affairs and defended the idea of convening a general synod, but only for the purpose of revising the [Calvinist] creeds in such a way as to avoid the ongoing doctrinal controversy[2] and of creating a basis for accommodating all Christians in a single denomination.

Grotius defended these ideas of toleration both in his main work *De Jure belli et pacis* (2.20.L3) and in his *Apologia for the Lawful Government of Holland and Zealand* which he published in

1 [I.e., the governing bodies of the seven federated provinces making up the Dutch Republic.]

2 [Reference to the divine election vs. free will controversy of those years, culminating in the international Synod of Dordt, 1618-19 and the imprisonment of leading Arminians, including Grotius. Grotius was detained in a castle from which he made his famous escape by hiding in a book chest.]

1622 during his exile in Paris. On this point he was in complete agreement with the party of the *politiques* in France whose most powerful mouthpiece was Jean Bodin. Typical of this idea of tolerance is the following statement in the *Apologia*:

> As to the disagreements that have arisen over the doctrine of predestination and all that appertains to it, the States of Holland and West Frisia were minded, either unanimously or by far the greater majority, to prescribe tolerance, not just politically but also ecclesiastically, in such a way that both sides should have a right to their opinion if presented by qualified teachers in an edifying way, so that the sentiments of both members and ministers could remain in one church communion under the common protection and maintenance of the government.

In the controversy between Remonstrants and Contra-Remonstrants Grotius ranged himself on the side of the former, defended the sovereignty of the provincial States over against the States-General, and in 1619 was sentenced to life in prison. He managed to flee to France in 1621 and three years later entered in the service of Sweden, first as privy counsellor, then as ambassador to France. He died in Rostock in 1645.

A universal scholar who stood head and shoulders above his contemporaries in almost every field of learning, Grotius was open to all the intellectual currents of his day. In 1636, in Paris, during his busiest preoccupations, he showed concern for his much admired Galileo who was being fiercely prosecuted by the Jesuits, and he tried to arrange asylum for him in Amsterdam. He studied and published in legal philosophy, in international law (he is considered the father of the science of international law[1]), as well as in general political theory, history of law, and especially also theology and ethics. He was an expert in Latin and wrote poetry in that language. In the area of theology he did a great deal of work in textual criticism in the spirit of the historical-philological method used by Valla and Erasmus. One of his best-known theological works is *On the Truth of the Chris-*

1 In that field, however, he had significant forerunners among the Spanish scholastics Vitoria and Suarez, who took the commonly misconstrued understanding of "*jus gentium*" and refined it in the sense of international private law. But Grotius was the first to offer a *system* of international law.

tian Religion[1] in which he offered an apologia for Christianity without entering into any specific doctrines.

In the area of medieval Dutch law he produced the standard work *Introduction to Dutch Jurisprudence*,[2] composed in 1620, during his incarceration, but not published until the year 1631, along with four other works and soon several more titles. He must have developed an interest in Dutch law when he had to apply it repeatedly both as attorney and in his later positions. The famed *Consultations and Opinions for Holland*[3] alone contains 94 of his legal opinions, forty of which date from the years 1612 to 1633, the others being undated.

All the same, Grotius, like his contemporaries, was trained one-sidedly in Roman law. Moreover, given his rationalist natural-law approach, he viewed Roman law as "*ratio scripta*" (written reason). As a result he penetrated no more deeply than his contemporaries into medieval Dutch law.

That is evident already from his legal opinions. They do refer here and there to edicts, proclamations, and articles of local privileges; but when it comes to interpreting these sources he usually reaches back to Roman law and the writings of Romanist "legists." Writes Focke Andreas, the one-time Utrecht professor of law: "Also in those opinions Grotius gives little evidence of realizing that Dutch succession law, marriage law and nuptial agreements, and so many other matters belonged to a system of rules that was foreign to Roman law and must not be interpreted in terms of that law but on its own terms."

Nevertheless, viewed in the light of his time, his *Introduction* was a serious and excellent work. It was written under very unfavorable circumstances during his imprisonment in the castle at Loevestein, 1619-1621. Particularly commendable was Grotius' effort to form a Dutch legal language, albeit not all his suggestions gained acceptance.

1 *De veritate religionis christianae* (Paris, 1627). [Eng. trans., *The Truth of the Christian Religion*, ed. John Clarke (Edinburgh, 1819).]

2 *Inleydinge tot de Hollantsche regts-geleertheit* (The Hague, 1631). [Eng. trans., *The Jurisprudence of Holland*, ed. R. W. Lee (Oxford, 1926).]

3 *Hollantsche Consultatien en Advijsen* (Leyden, 1633).

Another celebrated work of Grotius in the field of legal history is his *On the Antiquity of the Batavian Republic*.[1]

In the field of international law one could mention, apart from his classic work on the law of war and peace which also contains his systematic theory of natural law, his well-known little book *The Freedom of the Sea*[2] in which he attempted to defend freedom of the seas and oceans for the merchants of Holland on the basis of natural law (the booklet was commissioned by the Zealand chamber of the Dutch East India Company). On this question Grotius does not yet dare emancipate natural law from the divine will. The English author John Selden wrote a rejoinder to Grotius' *Freedom of the Sea* with his work *The Closed Sea, or on Dominion of the Sea.*[3] Selden himself wrote a work on natural and international law which was published under the title *The Law of Nature and Nations*.[4]

We must further name a work by Grotius, written around 1604 and discovered in 1862. The sizable work bore the title *The Law of Prize and Booty*[5] and dealt with the right to seize enemy property at sea during wartime.

2.8 Structure and method of Grotius' system of natural law. Its individualistic, nominalistic character

The work *On the Law of War and Peace* contained not only an extensive exposition of rules of international law resting on natural law or on the "tacit consensus" of the civilized nations, nor just a natural-law theory of politics annex sovereignty, but also a complete code of strictly private law based on natural law. It covered commercial law, contract law, family and succession law, down to the minutest details, often casuistically (e.g., inheritance rules based entirely on natural law, with precise order of the heirs, very detailed rules about reworking material

1 *De antiquitate reipublicae Bataviae* (Leyden, 1610). [Eng. trans., *The Antiquity of the Batavian Republic*, ed. Jan Waszink (Assen, 2000).]

2 *Mare liberum* (Leyden, 1609). [Eng. trans., *The Free Sea*, ed. Richard Hakluyt; repr. ed. David Armitage (Indianapolis, 2004).]

3 Johannes Seldenus, *Mare clausum, seu de dominio maris* (London, 1636).

4 Johannes Seldenus, *De iure naturali et gentium* (London, 1640).

5 *De iure praedae commentarius* (The Hague, 1868). [Eng. trans., *Commentary on the Law of Prize and Booty*, ed. G. L. Williams, 1950; repr. Indianapolis, 2006).]

(*specificatio*), adding to property (*accessio*), acquiring and forfeiting property, statute of limitations, etc. etc.).

In the Prolegoma of this work Grotius explains that he follows a *mathematical method* as he develops his system of natural law. Just as a mathematician abstracts geometric figures from the material of sense perception, so in treating law scientifically Grotius wished to abstract from all perceptible particulars. This approach was influenced by the Platonic conception of science that was commonly enthroned during the Renaissance to counter the Aristotelian conception. A remarkable statement in the Prolegomena reads:

The laws of nature [he includes the natural-law norms], being always the same, can easily be reduced to scientific rules, but those which have their origin in this or that human institution are not susceptible to scientific treatment since they are often altered or differ from place to place.

In other words, for Grotius the systematic science of law is identical to the system of natural law. And he wants to deduce this natural-law system from the abstract-rational side of human nature as one of man's innate qualities that raise him above the brutes and clearly demonstrate his rational character through the instrument of speech. By this sociable nature he understands a certain disposition of man to live together with his peers, not just any way but peaceably, and in a community that is well arranged as dictated by the light of reason.

Grotius regards this "sociability" – the inclination to live in community in a manner that conforms to natural reason – as the deepest fountain of natural law properly so called. And he believes he can summarize the content of his natural-law concept of law in four main principles:

1. That we must abstain scrupulously from what belongs to another, to restore what we have held in custody, or else compensate for any profit we have derived from it. (The principle of mine and thine.)
2. That we are obliged to keep our promises and contracts. (*Pacta sunt servanda*.)
3. That we are obliged to pay reparation for any damages inflicted on others through our fault.

4. That every violation of these rules deserves punishment, even from the side of man.[1]

Thus he defines natural law as consisting of the rule and dictate of right reason which says that an act is morally good or evil depending on its conformity or not to its rational and sociable nature.[2] Thus it is not a blind impulse of nature, but rational sociable reason that is to be elevated to the fountain of natural law. This shows that Grotius' natural law is grounded in an idealist, humanist worldview.

A superficial view sees in all of the above a surprising similarity with the natural-law theory of Aristotle and Aquinas. However, only outwardly so, as we shall show below. In fact, the view of man as a rational being with a disposition to live in society is common to the natural law of Platonism, Aristotelianism and Stoicism, as well as to the Christian metaphysical theory of natural law from Augustine right through to Thomas Aquinas. But in each of these systems the natural-law principle was grounded in a metaphysical-organic cosmonomic idea that did not isolate it mathematically but gave it nourishment from a semi- metaphysical, semi-Christian conception about the coherence of reality in a rational world-order.[3]

Grotius, however, abstracts and isolates his basic principle into an individualistic mathematical principle stripped of the Aristotelian-Thomist metaphysics of substantial forms. He follows instead the path of the humanistic, nominalistic science ideal, in order to erect, free of all speculative metaphysics that searches for hidden causes, a scientific system out of the fewest possible thought principles.

2.9 The dualism between natural and positive law in Grotius' concept of law

The nominalistic, individualistic character of Grotius' doctrine of natural law, in contradistinction to the Aristotelian-Thomist

1 Hugo Grotius, *On the Law of War and Peace*, Prolegomena, VIII.
2 Cf. ibid., X.
3 The whole of immanence philosophy, which chooses its Archimedean point (*Introduction*, pp. 34-37) in the temporal function of reason, replaces the cosmic law-order (ibid., 35, 76) with a rational order of its own making and of arbitrary make-up!

school, surfaces already in the first basic determination of the relation between natural law and positive law.

In Thomas, as we saw, positive law was nothing but an elaboration of material, natural-law legal principles, be it by way of logical consequences or by way of further definition relative to special circumstances of time and place. With that, natural law in its primary and derived principles was taken as an organic unity and then integrated into the organic coherence of the entire "*lex naturalis*."

In Grotius, by contrast, positive law, with its sole positive source of law, *the binding will of the government*, is based on a contract – the contract whereby the individuals pass over from the state of nature into civil society.

As the natural-law basis for the binding force of this positive law nothing is left but the isolated principle *pacta sunt servanda*,[1] a principle which in Grotius especially acquires such a formalistic, abstract character because he no longer even considers the legal ground of a *justa causa* a necessary requirement for a contract to be binding; for example, a contract in which a sum of money is promised for committing a murder is binding, according to him, once the murder has been committed.

This definition of contracts, familiar in the nominalist view of law, goes back to the idea of originally free and equal individuals. In and of itself (that is, apart from the *material content* of contracts) it can never count as a jural principle (as we shall see when we present our positive exposition of jural principles[2]). It does not receive its jural meaning except in connection with all

1 Cf. Prolegomena, XVI: "Since the keeping of contracts belongs to the law of nature (for there had to be some means of obliging men among themselves, and we can conceive no other means that would be more conformable to nature than a contract), it was therefore from this very source that civil law originated. For the people who had incorporated themselves in a society, or had subjected themselves to one or more persons, had explicitly promised (or in the nature of the case must be understood to have tacitly promised) that they would submit to whatever was ordained either by the greater part of the society or by those on whom the sovereign power had been conferred."

2 [See *Encyclopedia*, vol. 4 (forthcoming).]

the other jural principles, which place the content of positive law on a legitimate basis that transcends all arbitrariness.

Once you join Grotius and isolate *pacta sunt servanda* as the only natural-law basis of positive law, it carries you straight to the most *radical positivism* which surrenders the content of law to subjective arbitrariness (the nominalist concept of law grounded in the principle of the will).

This explains why the critical positivist Hans Kelsen, who banishes all material legal principles from his positivistic view of law, has no objection to extending binding force to *pacta sunt servanda* as a formal natural-law norm for the origin of international law.

Of course, this positivistic consequence that would turn Grotius' entire material code of natural law into scrap paper cannot be accepted by him. He further defines the relation between his natural-law system and positive law by applying natural law in the first place to those persons who are not under the authority of any positive laws and by explaining that natural law is there to fill any gaps in positive law. But for the rest, positive law cannot command anything that is forbidden by natural law, and cannot forbid what natural law commands. [It can only] curtail natural liberty by forbidding what was permissible by nature. . . . According to the judgment of all upright persons, there is no question that the commands of a government that militate against natural law or the divine commandments ought not to be obeyed.

In other words, Grotius presents us with a dualistic view of law: natural law and positive law really are two closed legal orders that have contact with each other only insofar as positive law is grounded in an isolated natural-law principle (*pacta sunt servanda*) and only insofar as the material natural-law system serves as a brake on the arbitrariness of governmental commands that are acknowledged as the only legal source for positive law. In Thomas Aquinas, by contrast, natural law was not an external brake but the fundamental basis of positive law.

This introduces an inner dualism into Grotius' *concept of law* which upon further reflection dissolves itself. For, as we shall

yet see, natural law in Grotius in no way functions as content of the *idea of law*, as a criterion for positive law, because he stays, also in his natural-law system, entirely within the limits of his natural-law concept of law.

Thus in principle we are confronted here with a twofold concept of law:

1. a positivistic concept that traces positive law back, by way of the formalistic principle of *pacta sunt servanda*, to the will of the government as the mandatary of the people; and
2. a natural-law concept that takes law as a closed material rational order and grounds it in the sociable side of rational human nature.

The dualism between natural law and positive law, which we could detect to a certain limited extent already in Thomas Aquinas, has here become a complete break.

Let us next examine more closely the so-called mathematical method whereby Grotius wants to systematically deduce natural law.

It is evident, first of all, that Grotius is oriented to the new humanist cosmonomic idea, at least in the basic structure of its two components: the personality ideal and the mathematical science ideal.

In the Prolegomena to *War and Peace* Grotius remarks that natural law according to its main source and its four main principles is valid even if one were to concede ("which one cannot concede without sinning grievously") *that there is no God*, or that the affairs of men are of no concern to Him.[1] In itself, this rationalist faith in the self-sufficiency of reason to deduce natural law says nothing new over against Thomas.[2] It gets its unique meaning only in the light of the entire work, which bears the stamp of the new science and personality ideals by mathematically isolating just one functional side of human nature as ade-

1 Prolegomena, XI.

2 It is borrowed verbatim from the Spanish founder of modern realistic scholasticism, Gabriel Vasquez (c. 1550-1604), who went even further than Thomas Aquinas when he taught that both the natural moral law and the existing order of amoral nature in themselves have binding force for us unless supplemented by a decree of the divine will.

quate ground for the whole system of natural law. Meanwhile, as he deduces the concrete rules of natural law it turns out that the mathematical method is not the main thing. Grotius himself distinguishes an *apriori* method that proves mathematically, independently of experience, whether something conforms or not to man's rational sociable nature. It is the finer, abstract method. The other method, which is followed more by the popular view, is the *aposteriori* method, which enables one to determine – if not with mathematical certainty at least with a very high degree of probability – that something is of the character of natural law if it is regarded as such among all – or at least all civilized – nations. For a universal effect also requires a universal cause.[1]

The cause of such a universal consensus can hardly be anything other than the so-called universal human mind. However, when applying the *aposteriori* method it will be necessary to go back to the *apriori* method. After all, what different nations in different places and at different times have regarded as just can be either an application of natural-law principles or simply a tacit agreement from which no *jus naturale* (natural law) but only a *jus gentium (voluntarium)*, a voluntary "law of nations," can sprout forth. (By *jus gentium* Grotius understands exclusively the international law that arises from explicit or tacit agreement, in contradistinction from natural law.)

At the opening of Book I, Chapter 2, the *apriori* method is further explained, in line with the Stoic distinction of principles of nature, in terms of:

1. instinct, which is common to all living beings;
2. knowledge of a thing's agreement or non-agreement with natural reason (*honestum*).

The first principle teaches that every creature is bent on self-preservation and is inclined and obligated to look for all means that are required to sustain his own existence and to avoid or repel whatever might lead to his destruction. The second principle is the test of rational nature conformable to "the nature of things" covered by this test. These two principles then serve

1 This is a typical rudiment in Grotius of an Aristotelian-Thomist argument based on the metaphysical principle, "whatever moves presupposes a metaphysical cause of this motion."

first of all to defend as a law of nature the right to wage a just war.

However, the Stoic argument from "universal consensus"[1] (Grotius' *aposteriori* method) and "the nature of things" was already in use by the classical Roman jurists, where it was in no way oriented to mathematical abstractness. Tracing "the nature of things" consisted rather in uncovering in the legal institutions themselves the dominant immanent ends or goals from which the concrete relationships of life were to receive their legal regulation.

For all practical purposes, Grotius does no different as he details his natural-law norms. As he does so, however, he is entirely caught up, owing to his education, in the dogma that Roman law is "*ratio scripta*." Consequently, the basic principles of Roman private law, which themselves for a good part rested on an individual historical substrate, are promoted to the level of a code of eternal, immutable natural law.

Let us now examine how Grotius delimits his natural-law concept of law.

Earlier we gave Grotius' definition of natural law, but this definition by itself is still a blank formula. Only in connection with his later expositions are we able to discover how he defines his natural-law concept of law.

In the first place, then, natural law is limited to justice in the strict sense of the word, the content of which is determined by the four main principles mentioned earlier.

In this context Grotius sharply differentiates law from *morality*. According to him, law, strictly speaking, creates only external obligations that spring from the rational, sociability principle. The moral, internal obligations, those touching only the conscience, are acknowledged by him as "imperfect legal duties," which, however, do not, strictly speaking, belong to law.

1 Groen van Prinsterer as well, in his booklet *Proeve over de middelen waardoor de waarheid wordt gekend en gestaafd* [Essay on the means by which truth is known and confirmed] (Leiden, 1834), uses this Stoic *communis consensus* or *consensus omnium* as a source of recognizing truth. He writes that truth can be known from four sources: philosophy, history, universal consensus, and Revelation.

Naturally, this is a wholly external, formal criterion. (Thomasius, and later also Kant, availed themselves of it.)

Further, the coercive nature of law, the penal sanction, is already taken up in the fourth main principle of Grotius' natural law, even though he does not necessarily mean by this coercive element *state coercion*, as do Pufendorf and Thomasius. Without coercion, says Grotius, law cannot fulfill its social task (Prolegomena, XIX and XX). Furthermore, Grotius sharply distinguishes his concept of law from *politics*, which he defines as the doctrine of the purposefulness of acts.

Functioning as the content of this strict natural-law concept of law is the principle of mine and thine and of the inviolability of contracts, deriving from the sociable side of rational nature.

According to Grotius, the Aristotelian *justitia distributiva* – which he does acknowledge but also extends moralistically to practicing the correct measure of charity, etc. – falls outside natural law in the strict sense. This is typical for the individualistic, nominalistic weft of his theory of natural law. We noted, after all, that Aristotle and Thomas, within the framework of their natural-law concept of law, distinguished between *justitia commutativa* and *justitia distributiva*, and so were on the trail of the structural difference between organized legal communities and coordinated legal relations between individuals.

Grotius subsumes the Aristotelian *justitia legalis* under natural law in the broad sense but only to the extent that its norms are elevated by the law to binding legal obligations.

Like Thomas Aquinas, Grotius divides natural law in an objective and a subjective sense. Rationalistically, however, he conceives subjective law as a reflection of the imperative norm of natural law. (The so-called *jus permissivum* falls outside the concept of law insofar as it does not impose on others the strict duty to abstain from what is mine.[1]) This subjective natural law (in the strict sense) encompasses, according to Grotius:

1. power over oneself and power over others; the first is natural-law freedom, the second encompasses paternal authority, the authority of master over slave, man over woman, etc.;

1 *On the Law of War and Peace* 1.1.9.1.

2. property, in the general sense of the absolute right of ownership of a thing, so that it actually encompasses all thing-rights;
3. competence to demand that which is legally owed.

The entire remainder of Grotius' natural-law system of law is based on this threefold law covering persons, things, and contracts.

If we now examine what Grotius understands by "mine and thine" we see at once that it differs fundamentally from the Aristotelian-Thomist principle. The latter, as we saw, was oriented to a teleological cosmonomic idea (the "*suum*" is something that is ordered to someone). In Grotius this metaphysical basis is gone. Property and state authority are themselves in the final analysis traced back to the contract principle and as such counted among "hypothetical natural law." That is to say, originally they are indeed *jus voluntarium*, based on a compact between the individuals who call these institutions into being, but once established they are no longer *jus voluntarium* but natural law, that is, inviolable to later expressions of the legislator's will because they are grounded in man's rational, sociable nature.

Furthermore, Grotius is one of the first to separate strict natural law from morality, quite different from Thomas, who made law in the strict sense the object of moral virtue. This comes out in that Grotius does not deem slavery, which he certainly condemns in an ethical sense, to be in conflict with natural law[1] and that he, like Bodin, accords the father the right to sell his children if the circumstances of life demand it. That disposes of the prevailing misconception that Grotius mixed law-concept and law-idea. Thus the material content of his natural-law concept of law, as a result of the abstract mathematical way he wants to understand it, shrivels up more and more, until nothing really is left but the formal contract principle, the restitution principle, and the Roman-Stoic principle of power and will. Here, subjective natural law (subjective right in natural law) is no longer the

1 Thomas Aquinas knows a subjective natural right to the body, to life, etc. Yet he too recognizes slavery as an institution of *jus gentium* (in Thomas it is an intermediary concept between natural law and positive law, somewhat like the Roman view of "*jus quod apud omnes gentes peraeque custoditur*" (a right which is equally observed among all nations).

Aristotelian-Thomist right grounded in a teleological metaphysical cosmonomic idea; it is suffused, rather, with the Roman Stoic doctrine of power and will. No more oriented to the meaning of the jural are Grotius' formal criteria, the *external* and *coercive* nature of law, criteria which could later pass easily into positivistic theories of the concept of law.

All this, however, does not resolve the dualism in Grotius' law-concept, as Gierke thought. The formalistic principle of *pacta sunt servanda* continues to stand irreconcilably opposite the other principles of his natural law.

This fundamentally nominalistic natural law was incapable of reining in the Macchiavellian theory of *raison d'état*. Grotius, in his exposition of subjective natural law in the strict sense, makes a sharp distinction between public and private law, according to the criterion that the first has in view the common interest of the state, whereas the second serves private interests.[1] And then, in typically individualistic fashion, he proclaims public law sovereign in every respect over private law. It possesses regal authority, he writes, like the father has over his children and the master over his servant. Thus the "eminent dominion" which the king has over the property of his subjects in the interest of the common good outweighs that of private ownership. Similarly, the claims of the state for the sake of public expenditures take precedence over the claims of private creditors.

The absolutism in this concept of sovereignty lies, obviously, in the first statement about the relation between state authority and private communities. In this, Grotius sides completely with the father of the theory of absolute sovereignty, Jean Bodin, and he also agrees with Bodin's view that sovereignty is not bound to positive laws, even though he acknowledges the possibility of including limits to the regent in the social contract. As noted above, Grotius follows the line of the absolutist theory of sovereignty when he declares the state to be sovereign over internal ecclesiastical affairs.

1 This criterion introduces a fresh antinomy into Grotius' law-concept if for no other reason than that he wants to keep law separate from politics as the doctrine of purpose or end. But here he simply makes a concession to the theory of *raison d'état*.

In public law Grotius indeed takes the principle of the common good in the sense of *raison d'état* (and not in the Aristotelian-Thomist sense[1] of the common interest of all citizens), and since he holds that public law without exception takes precedence over private law, he does not allow the basic principle of his natural-law system (*pacta sunt servanda*) to prevail over the interest of the state. The sovereign alone decides whether the interest of the state demands it, and if he acts arbitrarily his subjects will have to acquiesce. It makes no difference that Grotius upholds his natural-law principle of restitution whenever subjects are dispossessed of acquired rights (*jura quaesita*); for his concept of natural law excludes breach of contract by virtue of the second abstractly conceived main principle.

2.10 The concept of law in the naturalistic natural-law system of Thomas Hobbes and its internal antinomies

Grotius' system of natural law, when measured against the demands of the humanist science ideal, was grounded properly neither in its starting point nor in its methodical intention. A first demand of this science ideal, after all, is not to accept a single proposition dogmatically as a *given*, but rather to develop the system from elements that mathematical (natural-scientific) thought has created in strict logical continuity.

To be sure, the starting point of Grotius' theory of natural law, the rational, sociable nature of man, was mathematically isolated, and the attendant individualistic, nominalistic tenor of his contract theory did meet the demands of the science ideal; nevertheless, his very starting point suffered from a dualistic cleavage between rational and irrational nature. That was a dogmatic concession to the humanist personality ideal and derogated from the continuity postulate of the science ideal, quite apart from the fact that in distinguishing three kinds of justice,

1 Unlike Thomas, Grotius no longer deems the welfare of the subjects a necessary requisite of positive law. Pointing to the master-slave relation, he argues that nothing prevents the legitimacy of civil societies that are set up exclusively for the benefit of the sovereign, such as the realms that a ruler acquires through the right of conquest. Governments like that ought not to be characterized as tyrannical, for tyranny presupposes an injustice (*Law of War and Peace* 1.3.8.14).

differentiating between subjective and objective natural law, and so on, Grotius in many respects still showed his dependence on the Aristotelian-Thomist theory (even though he emancipated that theory entirely from its metaphysical cosmonomic idea). As well, in deducing his concrete natural-law norms Grotius, as we saw, did not at all remain true to the mathematical method.

The natural-law system of the Englishman Thomas Hobbes (1588-1679) breaks with Grotius' dogmatic bias and endeavors also to account for the system's basic principle and starting point according to the demands of the science ideal, so that the logical continuity in natural-science thinking is nowhere interrupted.

2.11 **Hobbes' life and main works**

Thomas Hobbes was born in Malmesbury, Wiltshire county, as the second son of a humble Puritan pastor. Shortly after attending Oxford at a very young age, he became closely connected to the family of the earls of Devonshire. Still in his youth he came in contact with his most celebrated countrymen: with the lord-chancellor Lord Bacon of Verulam [Sir Francis Bacon], the most passionate adversary of Aristotle's concept of science, in many respects an as yet immature empiricist of Renaissance stamp; and with the chivalrous Sir Edward Herbert Cherbury, in whose famous work *De Veritate*, with its bold ideas particularly about natural religion, Hobbes took great pleasure, as appears from many a pronouncement preserved from this time.

The second period of his life, which the eminent Hobbes scholar, the sociologist Tönnies, places between 1628 and 1660, saw Hobbes travel to France, where he soon became a respected member of the famous circle of Mersenne, Descartes and Gassendi, and to Italy, where he interacted almost daily with the great Galileo in Florence.

Hobbes did not immediately enter upon mathematical and scientific studies. His initial interest went to the Greek historian Thucydides, whose work he translated during the first period of his life. It led him to consider the problems of politics and morality. As he studied the works by moralists and politicians it struck him how much they contradicted themselves and each

other, which made him conclude that not reason but only affect spoke through them.

His ambition now focused on establishing once for all the principles of law, that is, to deduce them from the essence of man through strict logic free of affects. This led him to the problem of observation, which in turn led him to mathematics and from there ever deeper into the whole field of natural science.

During this period he came up with the idea that when the body and its members are all in a state of rest or are all moving at the same time, it would annul all distinction between things, and hence also all perception. The cause of all things, therefore, must be sought in the diversity of motions. This became the basic principle of his entire philosophy, a principle that he would now carry through with great boldness in his theory of law and politics.

The study of Galileo's *Dialogues* reinforced Hobbes' conviction that there is only one reality in the world, namely motion in the internal components of the body. As early as 1637 Hobbes drew up a plan for a philosophical system composed of three parts: *De corpore*, *De homine*, and *De cive* [On the body, on man, and on society]. He worked on all three simultaneously, but his plan was temporarily interrupted by political events in his country.

Political developments in England, in contrast to those in France, led after a brief victory for absolute monarchy to a revolution that restored the rights of Parliament and laid the foundation, albeit still precariously, for the later parliamentary form of government.

The Tudor monarchs, whose reign ended gloriously with the Protestant queen Elizabeth I, was succeeded by the Scottish dynasty of the Stuarts. The first Stuarts, James I (r. 1603-1625) and Charles I (r. 1625-1649), were despotic and untrustworthy and steeped in the idea of kingship by the grace of God in that crass absolutistic sense in which Filmore had defended it in his writings. They repeatedly interfered with the rights of Parliament, particularly through imposing taxes without consent. They offended national sentiments through their foreign policy in which they initially sought to drive England into the arms of

archenemy Spain. By favoring the episcopal church they outraged the Puritans, whom they declared enemies of the state.

The tragedy of the house of Stuart unfolded under Charles I, whose absolutist delusion raised the religious and political conflict between king and people to a catastrophic pitch, in both England and Scotland. Ill advised by his favorite, Buckingham, who in 1628 fell victim to popular wrath,[1] the king offended the constitutional sensibility of his people by imposing tolls without consent, making arbitrary arrests, and governing for eleven years without Parliament.

His attempt to thrust the Anglican church order on the Scots aroused the religious fervor of the Presbyterians against him. An insurrection broke out that obliged the king to put an ignominious end to his absolutist experiment in England by having to summon Parliament in order to gain funds.

The Long Parliament, so called because it sat for more than 12 years straight, from 1640 to 1653, dictated its will to the king who had become dependent as a result of the Scottish uprising. The perfidious advisers of the king, the Earl of Strafford and the Anglican bishop Laud, died on the scaffold.

Parliament succeeded in pushing through its demand that henceforth the interval between two Parliaments could not be more than three years, that it could not be dissolved without the consent of both the House of Commons and the House of Lords, and that the king must select advisers whom Parliament trusted. The power of the Anglican bishops in the House of Lords was broken by excluding them from this body. A failed attempt by the king to arrest the leaders of the opposition in Parliament ignited the civil war.

The later Lord Protector Oliver Cromwell and his invincible Puritan army defeated the royal cavaliers decisively at Marsten Moor, Naseby and Preston. On January 27, 1649, the king was beheaded and the Republic of England was proclaimed, in which Cromwell would soon be invested with dictatorial power.

This entire tragic course of events was followed with keen interest by Thomas Hobbes. In France he had gotten to know and

1 [The Duke of Buckingham was assassinated by a Puritan fanatic.]

admire the consciously centralizing politics of Cardinal Richelieu who ruthlessly carried through the principle of *raison d'état* and beat down all opposition with a mailed fist.

At this time Hobbes was a convinced adherent of the royal cause. This is evident in his *Elements of Law, Natural and Politic*, a treatise composed in 1640 at the urging of his protector and friend, the Earl of Newcastle. He incurred the enmity of the Long Parliament because it defended royal absolutism, though not on theocratic grounds but with naturalistic arguments. Afraid for his life, he fled to Paris. Here he associated with Mersenne, Gassendi, and other luminaries as he continued to work on his philosophical system.

In the first years of his stay in the French capital (1640-1651), Mersenne got him involved in a polemic with Descartes in connection with his theory of sense perception. A sharper conflict arose when he critiqued the proud French philosopher's *Meditations*. Descartes posited a fundamental split between soul and body, a notion that Hobbes attacked using universal mechanical arguments.

In 1642 appeared the last volume of his intended system, *De Cive,* long before the first two volumes were published. In the meantime, Hobbes' keen political eye realized the hopelessness of the royal cause in England. All indications were that the republican form of government would for the time being be continued. And Hobbes, who had anything but a constitution for championing a lost cause, began to think about returning to England.

For that to be possible, however, a change in political standpoint would be required. As early as the foreword to the second imprint of *De Cive*, written in 1646, which was sent into the world from Holland, he wished to defend himself against the allegation that his theory seemed to imply that less obedience was owed to an aristocratic government than to a monarchical one. Hobbes would make his political about-face in his English-language tome *Leviathan*,[691] in which his earlier work *Elements of Law* was incorporated with important changes. This meant a de-

1 Thomas Hobbes, *LEVIATHAN, or, the Matter, Forme and Power of a Commonwealth, ecclesiasticall and civill* (London, 1651); Latin ed., abridged and altered (Amsterdam, 1668).

finitive break with the royalist cause because he expressly condemned the rebellion against the Commonwealth. This book now made him the enemy of the exiled royalists who had gathered around the young son of Charles I.

Hobbes returned to England in 1652, where he was received not unkindly by Cromwell. He offered his submission to the new government. There followed a time for quiet study (1652-1660), in which Hobbes successively published the first and second volume of his great system: *De Corpore* and *De Homine*. In old age he was fated to see the fall of the Republic and the restoration of the monarchy under Charles II. Embroiled in fierce polemics with the clergy, he continued to defend his basic theses against every attack, when he died in 1679, in Hardwicke, at the age of 91.

Hobbes was a thinker in whose mind all the tendencies of the new humanistic worldview converged with immense intensity. He was deeply attracted to humanism's science ideal with its postulate of the logical continuity of creative mathematical thought, an ideal that required a thinker to eliminate and overcome all hidden qualities (substantial forms), all irrational boundaries, in order to erect logically the entire cosmos in all its law-spheres, as it were in a continuous line after breaking down the given cosmic order, by means of mathematical thought. On the other hand, he was a living representative of the humanist personality ideal (with a Stoic and Epicurean streak) and a pioneer of the Enlightenment. Hobbes was the sworn enemy of what he called the "empire of darknesses": dogmatic beliefs that rested on the authority of the church, all "scientific prejudices," everything that stood in the way of the autonomous development of the human personality, all miracles and superstition. He detested the clergy, Presbyterian and Roman Catholic alike, who sought to bind the free spirit to spiritual laws and precepts.

2.12 Structure and method of Hobbes' natural-law system. The nominalistic basis and the continuity principle of the humanist science ideal

Hobbes is an extreme nominalist: "Nothing in the world is universal but names; for the things named are every one of them individual and singular" (*Leviathan* 1.4). Directly connected with this nominalist starting point is his concept of truth. It is no lon-

ger *realist*ic in the sense of correspondence of our concepts with the essence of things outside our minds (Aristotle, Thomas), but *immanent* in the sense of the mutual coherence of the concepts within our minds. "For true and false are attributes of speech, not of things. And where speech is not, there is neither truth nor falsehood" (ibid.). Hobbes portrays a scientific judgment as a calculation in which concepts ("names" he calls them, in a nominalistic vein) function as mathematical units. All thought is "reckoning"; all reasoning can be viewed as addition or subtraction (ibid. 1.5).

The meaning one gives to concepts is entirely arbitrary, as long as one always uses the names in the same sense. "And therefore in geometry, which is the only science that it hath pleased God hitherto to bestow on mankind, men begin by settling the significations of their words; which settling of significations they call *definitions*, and place them at the beginning of their reckoning" (ibid. 1.4). Hence the first demand of science is that it proceed from exact definitions, i.e., from settled meanings and names that we give to our ideas.

According to Hobbes, true *scientia* (as distinct from *knowledge of facts*, which he calls *cognitia*) consists in knowledge of the causes and effects or the origin of an event to which one concludes on the basis of pure ratiocination.[1]

For this reason, science properly so called – i.e., science that is *a priori* demonstrable – is only possible about those things that arise from the human will. The cause of a thing must be present already in its definition, for what is not laid down as a foundation in thought cannot be deduced from it through reasoning. Hence it is geometry that is a science in the true sense of the word, for the cause of the properties of the special figures is found in the fact that we construct these figures ourselves; thus their genesis depends on our will.

1 The causality concept of the humanistic science ideal is of course totally different from the metaphysical causality principle of Aristotelian scholasticism. In the former, "cause" is not a "hidden substantial form" as a purposeful moving principle (*entelechy*), but a mechanical cause functionalistically understood, whereby a given motion is necessarily followed by another.

In the same way politics and also ethics – in Hobbes this is the science of right and wrong – can be demonstrated *a priori* because we ourselves have made the causes of that which is right, namely laws and contracts, whereby we first know what is right and fair and what is their opposite. Before contracts and laws were made, after all, there was neither right nor wrong, and people knew no more difference between good and evil than the brute beasts. Physics and astronomy are sciences in the proper sense of the word only insofar as they base themselves on mathematics and so furnish the possibility of *a priori* demonstration.

The encyclopedic idea of *mathesis universalis* (see chap. 1, sec. 9),which reveals the continuity postulate of the humanist science ideal, pervades Hobbes' construction of the coherence of all the sciences. In the preface to his *De Corpore* he writes: ". . . we can best make a beginning of natural philosophy, as shown above, from a negation, namely from the fiction that we mentally remove the cosmos" – and he compares this thought experiment with God's act of creation.

It is in logic that philosophy first turns on the light of reason, whereupon the world can be erected as a logical coherence in the first philosophy (natural philosophy or metaphysics), which develops the most universal fundamental relations of reality in clear concepts. Next, philosophy does so in geometry, which "sets asunder" the extension of bodies in space. Then follow mechanics, astronomy ("celestial physics") and physics. Then the science of man (anthropology, conceived by Hobbes as a naturalistic psychology). And finally, the science of the state and natural law.[1]

Hobbes, like Descartes (and all humanists really), proceeds from the notion that the entire reality of the external world is given to us only in the psychical ideas of our consciousness. When we mentally break down the whole sensible world, what is left at the end is the idea of space, which is therefore merely a subjective function of our consciousness, just like time.

Mathematical thought has to distinguish in these ideas the objective reality from the purely subjective ones (the sensible impressions of color, smell, taste, etc.). But how else can thought

1 Hobbes, *De Corpore,* Epistle to the Reader.

establish this objective reality other than by finding out in what manner these impressions were scientifically constructed? Sufficient as means for such construction are space, time, number and motion. However, space and time have already been recognized as subjective "phantasms" of our mind. Space is but the subjective "phantasm" of the bodies that exist external to our notions of them – that is, to the extent that we focus in these bodies on their existence in the external world, while abstracting from all their other properties.

Similarly, time is but the subjective "phantasm" of motion insofar as it makes us conscious of "earlier" and "later" (*De Corpore* 2.7.2). Thus the only substance of things that remains is the body as a quantitative material mass and its motions.[1]

With that, we have made the transition from Hobbes' view of science to his mechanistic metaphysics which subsumes the psyche with all its properties under the category of the moving body. Our perceptions, too, are in the final analysis the result of movements that proceed from the material bodies in the external world and then effect movements in the sense organs. Ultimately, thought itself can in this way be reduced to motion: all thought rests on sense perception caused by motions between the bodies in the external world and in the sense organs.

The internal antinomy of this metaphysics is glaring: if even thought is an ordinary mechanical process, how can truth and untruth still be distinguished? And is Hobbes' substance concept not altogether a product of absolutized mechanistic thought? How then can thought be reduced to its own product?

Meanwhile, this mechanistic metaphysics provides the method applied by Hobbes in his natural-law and political theory. Every phenomenon, also the state, must be traced back to its simplest elements that admit of mathematical calculation. This explains why Hobbes tries to subsume all phenomena in the worlds of nature and the spirit to the general denominator of the moving body. "Body" here means nothing more than susceptibility to mathematical analysis, just as "motion" is in fact constructed in logicistic fashion from thought-movement (a me-

1 Descartes made a natural substance *re vera* of *spatial matter*. The fact that Hobbes elevated "moving matter" to substance can be explained from Galileo's mechanics with which Descartes was not yet familiar.

chanical analogy in the meaning of the logical law-sphere). Thus he also subsumes the state under this denominator, since the state according to his nominalistic starting point can be dissected into individuals as a means of mathematical construction.

Hobbes' natural-law system is based upon a mechanistic, mathematical explanation of the life of the mind and thus has a purely naturalistic orientation. The life of the mind is analyzed by him as a mechanical process of psychical motions that are called up by the objects of sense perception, memory, and expectation. All mental motions are traced back to two original affects: appetite and aversion, corresponding to the two fundamental directions in mechanical motion: attraction and repulsion.

Characteristic of the propensity for continuity in the humanist science ideal is the fact that Hobbes' mechanistic explanation of psychic imagination and memory expressly chooses its starting point in Galileo's law of the continuation of motion in the absence of retarding factors (the law of inertia). The attendant affects or passions are caused by special representations or thoughts and they relate to the present as perception, to the past as memory, and to the future as expectation. And these representations are themselves in turn caused in the mind by the objects they refer to.

Attached to this mechanistic explanation of the life of the mind, in which Hobbes followed the line of association psychology, is his ultra-nominalistic theory of the good. In the Aristotelian-Thomist theory, the good is that which corresponds objectively with the substantial form of every being. In the nominalist Hobbes, the good is merely a common name for what everyone subjectively considers his benefit, his interest, his increase in power. Because he reduces all of reality to motion, Hobbes is unable to acknowledge a highest, absolute good. In this life there can be no experience of a highest good. For if there were a highest goal, a highest good, one could not desire or strive after anything above that. In other words, motion would come to a halt, and that would be death! For to live is to be endlessly in motion. (This argument betrays the impulse for infinity, the immoderate intellectual pursuit of the Renaissance period!) To his theory of

the good Hobbes attaches his odd naturalistic theory of power, whereby all goods like beauty, loveliness, public honor, the arts, scholarship, weapons, etc. etc. are looked upon from the vantage point of power, as means for acquiring more goods in the future.

The capstone of Hobbes' mechanistic psychology is his deterministic doctrine of the bondage of the will, a necessary consequence of the starting point in which the personality ideal is dissolved by the science ideal.[1] Not until mathematical construction has thus acquired logical continuity – from the simplest elements (motions in their infinitesimally small degree, or *conatus*) up to the most complicated elements of the life of the mind – does Hobbes set out to erect his natural-law theory of law and politics. He takes his point of departure not in an historical state but in a constructed state of nature.[2] In the state of nature, every individual has his personal disposition and desires. Here there is no objective moral law nor legal norm, so there is also no sin or transgression.

All men aim at security and seek the necessary means to enjoy it. All men shun what is troublesome and self-destructive. As soon as two individuals compete for the same goods, discord and violence erupt, fanned by man's natural affects: ambition, pride, etc.

In the state of nature "every man has a right to every thing" (*Leviathan* 1.14). This is the quintessence of Hobbes' natural law. For there is no mine and thine, no law, no standard of conduct. What a difference with natural law in Grotius! There the claim

1 However, the hidden motive of the personality ideal comes out in Hobbes as he campaigns for enlightenment from which he expects the elevation of mankind.

2 A common mistake by critics of rationalist natural-law theories is that they read the construct of a social contract as an *historical fact*, an interpretation that has always been explicitly dismissed by those holding this theory. Not until Liepmann in his book on Rousseau – but only with respect to Rousseau – has it been pointed out once more that this author's "social contract" was in no way intended to refer to an historical event but only to justify the existence of the state. This holds essentially for all humanist teachers of natural law, who in so many words, after all, eliminate historical development from their constructions. [Cf. Moritz Liepmann, *Die Rechtsphilosophie des Jean Jacques Rousseau: Ein Beitrag zur Geschichte der Staatstheorieen* (Berlin, 1898).]

is made that it is precisely in the state of nature that natural law holds most strictly. For Hobbes, in the state of nature no injustice is done when a person is robbed, injured, or killed (*ibid.* 1.13).

Natural law in Hobbes, therefore, is the negation of all law. Deceit and violence are the two cardinal virtues. Nothing is sin, because sin presupposes the existence of a law. Deceit and violence are the results of natural inclinations of the soul, according to which every man seeks to attain what is advantageous and pleasurable to him (*appetitus*) and shuns (*fuga*) what is injurious or displeasing to him.[1]

This is the lamentable state of nature, of the "war of every man against every man" (*Leviathan* 1.13), in which the relation among individuals is best characterized by the expression "man is a wolf to man." Now then, the way to escape this state of nature is indicated by the "laws of nature." In Hobbes this refers to the whole of logical conditions that reason acknowledges as necessary for attaining a condition of security, safety and peace. Reason comes to the realization that it cannot be beneficial for anyone, not even for the strongest, to stay in the state of nature. The state of nature is marked more or less by equality in power and aptitude. No one can know, therefore, whether in the long run he can preserve life and limb in that war of all against all. For this reason the fundamental law of nature in another passage reads: "Every man ought to strive after peace so long as he has hope of obtaining it; and if he cannot obtain it he may use any means of war deemed necessary for self-preservation" (*Leviathan* 14.1). From this fundamental law of nature, whose logical continuity is guaranteed by the law of mechanics thanks to Hobbes' mechanistic construction of the life of the mind, he deduces all other laws for legal and political theory.

Hobbes' second natural law exhibits surprising similarity with Kant's characterization of the concept of law as the principle of coexistence: namely, the quintessence of the rules according to which the arbitrariness of the one can be united with the arbitrariness of the other under one universal law of liberty. This second law of nature reads: Everyone, to the extend that he observes the same inclination in the others, must be prepared to

1 Hobbes, *Elements of Philosophy: Concerning Body* 4.25.12.

abdicate his natural right to all things and to be content with as much freedom with respect to others as he would want others to have with respect to him. And giving up one's natural right to all things can be carried out by conferring it "upon one man or upon an assembly of men," to whom all the others should also transfer their right (*Leviathan* 2.17).

A conferral of this kind requires a contract, and since contracts are concluded in the interest of peace, the third natural law reads: *pacta sunt servanda*. After all, if the law of nature were not observed, the destruction of all against all would immediately resume. *Pacta sunt servanda* is the quintessence of all justice. Even a father's authority is juridically construed by Hobbes as a contractual relation, which of course is entirely subject to the sovereignty of the state, Leviathan, as we shall see below.

Hobbes will have nothing to do with the Thomist view that justice is differentiated into *justitia commutativa*, *justitia distributiva*, and *justitia legalis*, of which the commutative kind consists in equality of performance and counter-performance. Instead, for Hobbes the whole of justice is commutative, and this says nothing about the *content* of the contracts but only *formally* guarantees a jural connection. Hobbes goes much further here than Grotius, who at least still maintained the distinction within "natural law in the broad sense."

Here the nominalistic principle of the will breaks through in all its fullness. Law is purely formal and no longer has an essential character. Contracts in Hobbes also demand upholding immoral or usurious contracts. The only barrier against this anarchistic freedom of contract is the natural and inalienable right to self-preservation. This right cannot be conferred, not even by contract.

The additional sixteen laws of nature in Hobbes mainly express the principle of equality. They comprise both moral and political principles: administer impartial jurisprudence, be no respecter of persons (equity) or judge in your own case, but also refrain from contumely, hatred or contempt of your neighbor, etc.

The laws of nature that Hobbes deduces logically in this way are in themselves nothing but hypothetical theorems of reason – in this form: if you want peace you should act in such and such a

way. In themselves these laws have no obligatory force, since in the state of nature all things are justified. Here people prefer to follow their natural inclinations rather than reason.

If one wishes to give the laws of nature, and in particular *pacta sunt servanda*, binding force, then a power has to be created which unites within itself the power of all individuals, an artificial Leviathan above whose head is inscribed: "His equal is not found on earth—Job 41:24". What we have here is a purely naturalistic theory of the binding force of law, based entirely on the naturalistically conceived power of the State and the psychic affect of fear among the subjects. This theory, too, is a strictly methodological conclusion from Hobbes' philosophical principles. Next, we see him making a masterful use of the mathematical-analytical method of Kepler and Galileo for a logical construction of the body politic.

The individual with his natural affects is the mathematical point from whose motion the State must be constructed. In this construction the jural concept of personhood serves as a methodological aid which from a plurality of wills creates a unity of will by means of the majority principle.

It is in this sense that Hobbes constructs – again not in a historical but a logical sense – a social contract between all individuals, one in which each, on condition of mutuality, binds himself with respect to the others to transfer all his unlimited right (except for his inalienable right to self-preservation) from the state of nature to a natural or a legal person. Henceforth that person, as mandatary, is authorized by everyone to do anything. This authority thus becomes sovereign. In his person he represents the personhood of all subjects. In him the State becomes a person. Without him the people will again fall apart into a collection of unconnected individuals. It follows from this that no subject can ever complain to the sovereign about an injustice suffered; after all, by virtue of the contract that each person has entered into with all the others, each has authorized the sovereign to do anything, so that all deeds of the sovereign are a person's own deeds. However, not one individual has concluded a contract with the sovereign, and "the people" as such cannot conclude an authority contract with the sovereign because with-

out a government it has no juridical existence. On this point Hobbes deviates sharply from Grotius and the entire earlier contract theory. Later, Rousseau would adopt Hobbes' monistic construction and convert it, in harmony with altered historical trends, to ground the inalienable sovereignty of the people.

To be sure, natural law forbids theft, adultery, manslaughter, and in general every form of injustice. But it is up to positive law alone to determine what is to be understood by injustice.

In this way Hobbes' natural law led him to a fundamental victory over natural law, turning him into the father of all positivist legal theory.

The laws of nature do hold for the sovereign too – in his conscience. But when these laws are violated by the sovereign no one can complain of injustice. Positive law has no other foundation than *pacta sunt servanda*. In other words, natural law in Hobbes is not even a jural barrier anymore against an arbitrary legislator, as it was in Grotius. Hobbes has destroyed the essential nature of law. In his theory, law has become nothing but superior coercive state power, constructed from the abstract formal principle of *pacta sunt servanda*. His natural-law content has shriveled up into a naturalistic order of peace, an idea that would be revived in the 19th century by Jhering.

Raison d'état is easily incorporated into this natural law. The moral norm as binding law has been absorbed into the legal norm. Even the church in her worship and interpretation of Scripture must submit to the absolute sovereignty of Leviathan.

Irreconcilably juxtaposed to this positivist train of thought stands Hobbes' political natural-law train of thought that wants to deduce from reason the guidelines for sound statecraft, embodied in the 19 laws of nature. But deducing the essence of law from the formally conceived principle of *pacta sunt servanda* destroys it, and Hobbes' political natural law is nothing but a collection of unenforceable – in part ethical, in part political – counsels, dictated by a mathematical reason that prejudges nothing about the nature of law.

2.13 The resolution of the dualism between natural law and positive law in Hobbes' law-concept

Meanwhile, the dualism between natural law and positive law that we could not help but notice in Grotius is gone in Hobbes. He no longer knows an actual *natural law*. Apart from positive law as the will of the government there are only moral-political legal norms which enjoy at most *hypothetical-theoretical* force of law in the conscience, "*in foro interno*" [*De Corpore Politico* 2.6.3], but which in any case no longer fall within the domain of *law-concept*. Hobbes' law-concept can be called "natural law" only to the extent that he grounds it in the basic principle of *pacta sunt servanda*, which itself is grounded in the naturalistic postulate of peace. But actually even this supra-positive foundation is gone, since Hobbes makes the juridical force of this principle dependent upon state coercion which was precisely meant to ground it. This at the same time marks the fatal contradiction in Hobbes' nominalistic law-concept. The principle of *pacta sunt servanda* has no force of law until there is a state, and yet it is made to serve as the state's juridical origin.

Furthermore, this law-concept dissolves itself by its desire to leap from the mechanical natural law to the normative meaning of law. From mechanical natural necessity one can construct neither legal obligation nor legal authority.

The juridical force of law of the principle of *pacta sunt servanda* cannot rest on the coercive power, conceived with natural causality, of a Leviathan. Hobbes tries in vain to resolve this antinomy. He construes the relation between natural law and positive civil law as being of equal value and reciprocally implied in each other.

> For the laws of nature, which consist in equity, justice, gratitude, and other moral virtues on these depending in the state of nature . . . are not properly laws, but qualities that dispose men to peace and obedience. When a commonwealth is once settled, then are they actually laws, and not before; as being then the commands of the commonwealth; and therefore also civil laws: for it is the sovereign power that obliges men to obey them. . . . The law of nature therefore is a part of the civil law in all commonwealths of the world. Reciprocally also, the civil law is a part of the dictates of nature. For justice, that is to say, performance of covenant, and giving to every man his own, is a dictate of the law of nature. . . . Civil and natural laws are not different

kinds, but different parts of law; whereof one part being written, is called civil, the other unwritten, natural" (*Leviathan* 2.26).

Hobbes here operates with a pure fiction to mask the antinomy – and yet on the basis of "*volenti non fit iniuria*" (to the willing no injury is done) he explicitly ascribes binding force to positive laws which *as to content* are in conflict with the laws of nature (e.g., not observing impartiality or equality).

2.14 The concept of law in Spinoza's naturalistic natural law as power. Natural law and *raison d'état*

Closely akin to Hobbes' views of natural law are those of Benedict de Spinoza (1632-1677). He developed these in his best-known works, *Tractatus theologico-politicus* (Hamburg, 1670), *Tractatus politicus* (unfinished), and *Ethica ordine geometrico demonstrata* (Amsterdam, 1677). Spinoza's theory of natural law, like that of Hobbes, can only be understood in light of the foundations of his philosophical system.

Spinoza's system is a form of naturalistic pantheism in which the method of geometry is suffused with a mystical-pantheist metaphysics. Here the Deity is identified with Nature as a necessary logical coherence of laws. The basic denominator of this philosophy, however, is not a mechanical but a geometric one.

The Deity or the natural law-order (*Deus sive natura*) is identical with the infinite substance which has an infinite number of attributes or spheres of realization and of which all finite individual things are mere *modi* or modes of manifestation. Of the divine attributes only two are comprehensible to us: extension and cogitation or thought. However, Spinoza, unlike Descartes, no longer makes these two functional sides of reality themselves into separate attributes.

Thought and extension are to him two independent spheres of existence of the same substance, the same geometric order of the laws of nature. Although not mutually reducible, the two attributes find their unity in the necessary coherence of reason. Spinoza construes this coherence as the necessary coherence among geometric truths. Just as all properties of a cone are necessarily determined by a 180-degree rotation around its axis, in the same way all that happens is determined, both physical-spatially and psychically, by prior grounds, which find their deeper

unity in the gapless, continuous coherence of the laws of nature. Within each of the knowable attributes, thought and extension, the course of the processes must be understood as a gapless chain of mathematical grounds, in this sense, that the entire movement of psychical life simply becomes the duplicate of the physical-corporeal.

The humanistic cosmonomic idea with its characteristic continuity principle here shows up in a naturalistic-geometric-rationalistic type. What is special about Spinoza's conception is only its religious-pantheistic nature, as a result of which his naturalistic rationalism, in contrast to Hobbes, is overshadowed from the start by a mystical intuitive element.

The first consequence of this cosmonomic idea is that Spinoza must treat mechanical as well organic nature, psychology as well as ethics and politics, as an uninterrupted law-conforming causal coherence *more geometrico*. His *Ethica* is accordingly set up entirely in the form of mathematical axioms and deductions. Equally contraband in his rigid geometric worldview are the concept of a psychic force as well as that of purpose and that of miracles. It is important that *sine ire ac studio* ("without anger or bias"), all phenomena in both the natural and spiritual world are grasped as modes of the eternal original law-order of nature *sub specie aeternitatis* ("under the aspect of eternity"). God is, as it were, the infinite absolutized spatial order in which all things are to be intuited as mathematical figures. Not sensory experience but mathematical reason and, in the highest sense, immediate intuition teach us this eternal coherence of all things.

As in Hobbes so in Spinoza, theories of law and politics are grounded in a mechanical explanatory psychology, in which the instinct of self-preservation is assumed to be the central and controlling principle of all individual existence. On this naturalistic drive for self-preservation Spinoza erects his view of natural law, particularly in his *Theologico-Political Treatise* and his *Political Treatise*. The tenor of the first treatise is an absolute separation between science and religion, i.e., a defense of toleration not so much for freedom of worship as for freedom of scientific inquiry.

Spinoza's fundamental thesis is that the power which things need in order to live and work is nothing other than the power of nature as a whole, i.e., the power of God. And since God has a right to everything and God's right is but his unlimited power, it follows that every natural thing has by nature as much right as it has power to live and work.

Thus by "natural law" Spinoza simply means laws of nature, according to which everything happens with necessity. Natural law therefore is the same thing as natural power. Thus the natural right of, say, fish is to swim, and the natural right of larger fish is to devour the smaller ones.

Likewise, man in the state of nature – which in Spinoza, too, is to be understood not as a historical phase but as a logical construct – has as much right as he has power. Nor does it make any difference whether men let themselves be led by irrational desires or by reason, for whether guided by reason or purely by desire, men act only according to the laws of nature, i.e., according to natural law, which forbids only what no one desires and no one is empowered for. Thus Spinoza, like Hobbes, assumes that in the state of nature there is neither justice nor injustice, nor any sin, because here only the laws of nature rule. Since men are by nature filled with the passions of anger, envy and hatred, they have different interests and are by nature each other's enemies. In the state of nature no one is secure about his life. Hence, fear of harm prompts men to yield up their natural right to everything and by contract to transfer it to one person or to several persons (an assembly).

The governors, thus installed, have as much right as they have power. Whatever the will of the state stamps as good and right must therefore be held and viewed as desired by every citizen individually. In other words, this is a case once again of an absolute, nominalistic destruction of the essence of law.

Natural law here becomes a bridge to radical positivism, which believes that only that is law which the will of the government stamps as law. Each citizen retains only that much of his natural right as is required for his immediate needs. The State rules all, including public worship. It has to leave untouched, if it wants to follow reason, only science and internal thought, although by natural law it has a perfect right, insofar as it has the

power, to dominate even these intellectual-spiritual goods. For the rest, Spinoza, unlike Hobbes, is opposed to royal absolutism and his sympathies go out most to a republican form of government as he saw operating in Holland in the spirit of the politics of John de Witt.[1]

The implications of Spinoza's theory of natural law are most apparent in international law. He denies the existence of a law above the states. States live in a *state of nature*. This means that treaties need be observed only so long as they serve a state's interests.

As for domestic political arrangements, Spinoza wants to counter arbitrariness as much as possible by installing broad agencies of control that are to ensure observance of the laws. Nevertheless, there is no room in Spinoza for a state that is bound to the positive laws. He fully shares Hobbes' view that one cannot speak of injustice until a state has been instituted and that the sovereign authority of the state, to which everything is legally permitted, cannot inflict an injustice on its subjects. And the law of nature yields no other rule of conduct for the government than that it not destroy its power through acts that undermine its position among the people – for example, through immoral living, making itself ridiculous in public, endangering legal security, and so on. That state is the most powerful, hence most in harmony with natural law, that is ruled not by blind affects but by reason. Reason furnishes more power than blindly groping affects. In this way Spinoza in the end, from purely naturalistic natural law, makes the transition back to a reasonable political arrangement, his republican ideal. Even so, not even *pacta sunt servanda* binds the government. Whenever it judges that the general welfare demands it, a government has to break its promises, undertakings, and contracts.

A strongly Macchiavellian trait pervades this entire view of law, as when he writes:

> One cannot do one's duty toward one's neighbor that would not become an impiety if it tended to injure the whole state, just as, conversely, there is no impiety against one's duty toward the

1 [John de Witt was "grand pensionary" or government leader in the United Netherlands from 1653 to 1672. As leader of the regent class of urban oligarchs, he was opposed to any "monarchical" aspirations of the prince of Orange and his backers.]

neighbor that would not become a pious act when done for the sake of preserving the state.[1]

Spinoza's natural-law concept of law, no more than that of Hobbes, exhibits any dualism anymore. Law has become identical with state power naturalistically conceived. The same inner antinomy, however, also tears up Spinoza's view of positive law as the consequence of *pacta sunt servanda*. In fact, *pacta sunt servanda* has here become perfectly redundant as a natural-law foundation of positive law. For law is identical with power. When government has the power, it automatically has every right. Spinoza, however, simulates a natural harmony between state power and observance of the rational laws of nature.

2.15 The concept of law in the natural-law theory of Pufendorf. The further development of the theory of raison d'état *as the doctrine of state interests.* Droit de convenance et de bienséance *[the law of expediency and propriety].* Rousset and Naudé

An attempt at reconciling Grotius' idealistic with Hobbes' and Spinoza's naturalistic natural law was made by Samuel Pufendorf (1632-1694). As early as 1667 he had attracted the attention of the scholarly world with his small political tract *The Current State of the German Empire*,[2] which he published under the pseudonym Severinus Mozambano. This work, proceeding from Bodin's concept of sovereignty, referred to the Holy Roman Empire as an irregular amd monstrous body politic on account of its divided sovereignty.[3]

Pufendorf gained great fame as a historian and statesman. The doctrine of *raison d'état*, stripped of its demonic, amoral tendencies, was explicated in the above-mentioned booklet as *ratio status*, the doctrine of state interest. For Germany he defended a cautious policy of balance of power.

Much more extensive was his treatment of the doctrine of *raison d'état* in his great historical work *Introduction to the History of*

1 Benedict de Spinoza, *Tractatus Theologico-Politicus* 19.22.
2 *De statu imperii Germanici* (Amsterdam, 1667).
3 The booklet was published in 1922 in a German translation edited by H. Breslau in the series *Klassiker der Politik*, vol. 3.

the Principal Kingdoms and States Currently Found in Europe,[1] in which he classified state interests into various categories (imagined and real, temporary and permanent). Quite in the spirit of the times, he recommended as a guideline for *raison d'état* a policy of balance of power between the European Powers. In this he followed a purely causal method.

2.16 The deeper causes of the constant conflict between rationalist natural law and the principle of *raison d'état*

After the War of the Spanish Succession (1701-1714) the principle of *raison d'état* operated in international relations in a new natural-law garb. Men spoke of a "*droit de convenance*" (law of convenience or expediency) by which they meant that the public interest of Europe had to break with *historical legitimacy*. When this principle was conceived individualistically solely in the interest of state egoism it was called "*droit de bienséance*" (law of decency or propriety). This principle of convenience was theoretically developed by Jean Rousset de Missy (1686-1762) in his work *Present Interests and Pretensions of the Powers of Europe*[832] and in his periodical *Mercure historique et politique*. It was Rousset who coined the term "*droit de convenance*"; the term "*droit de bienséance*" occurs already in a work by Gabriel Naudé (1600-1653) entitled *Political Considerations on Coups d'état*.[843] The whole theory of *raison d'état* continued to have its scholarly defenders also after the rise of humanistic natural law. However, given the dominance of the naturalistic idea of natural law it was not officially acknowledged as a scientific theory. Although, as we saw, the principle of *raison d'état* surfaced repeatedly in the official natural-law systems themselves as a necessary, almost elementary reaction to abstract mathematical natural law, threatening the entire natural law system with dissolution, yet the theoreticians of natural law were still keen on separating their view of the state from the theory of *raison d'état*. As we shall see below, the constant conflict between abstract natural law and *raison d'état* flowed from the failure to recognize the

1 *Einleitung zu der Historie der vorhehmsten Reichen und Staaten, so jetziger Zeit in Europa sich befinden* (Frankfurt am Main, 1682). Pufendorf wrote it while serving as royal historiographer in Stockholm.

2 *Intérês presens et les prétentions des Puisssances de l'Europe* (The Hague, 1741).

3 *Considérations politiques sur les coups d'Etat* (Rome, 1639).

individuality structure of the state in which historical power-of-the-sword and internal communal law cannot be separated.

Pufendorf's theory of natural law is as casuistic as that of Grotius. He expounds it in his big work *The Law of Nature and Nations*, and in his smaller tract *The Whole Duty of Man and Citizen according to Natural Law*.[1] His theoretical base was the mathematical philosophy of Descartes. He wanted to deduce natural law following the mathematical method, starting from basic propositions that are clear and distinct.

In contrast to the naturalistic school of Hobbes and Spinoza, Pufendorf in principle adopted (albeit with a not insignificant modification) the "idealist" standpoint of Descartes who had posited an unbridgeable gulf between body and mind. Like Descartes, Pufendorf starts from the reality of a substance that has real existence independent of our sense impressions. But whereas Descartes recognizes mind and body separately as substances, Pufendorf holds that the spiritual, in particular the moral, sides of reality (*entia moralia*) are not substances in themselves but *modes* which rational creatures add to natural things or psychical movements and which restrict or regulate the freedom of human acts of the will. With that, Pufendorf acknowledges nature as the necessary basis of the moral world.

Moral qualities bring about only a certain adjustment in the natural psychical world.[2] Thus Pufendorf rejects the Roman-Stoic definition of natural law ("*jus naturale est quod natura omnia animalia docuit*": natural law is what nature teaches all living things). This he does because he wants to distinguish clearly between animal instinct and human reason.

Pufendorf also distinguishes, unlike Spinoza and Hobbes, between obligation and natural compulsion, and he deems natural power an insufficient warrant for wielding sovereign authority. According to Pufendorf there are two grounds that give

1 *De jure naturae et gentium*, 8 vols. (Frankfurt am Main, 1672-1673); *De officio hominis et civis secundum legem naturalem* (Frankfurt am Main, 1673).

2 The theory of the *entia moralia* Pufendorf borrowed from the philosopher-mathematician Erhard Weigel, with whom he boarded in 1657. But he gives an ultra-nominalist turn to Weigel's conception as he denies that the *entia moralia* have a rational existence in themselves. He restricts their validity to temporal communal life and anchors them exclusively in an *impositio*, a command of the will.

rise to a moral duty (among which he includes legal obligations): *either* the person who wants to subject another to his will must have done him a good turn, *or* the latter must have submitted voluntarily to the authority of the former. As well, Pufendorf interprets the principle of accountability as allowing for a distinction between moral acts and psychical events. He has earned real merit for the doctrine of legal imputation.

Seeing as man's natural inclinations, however, cause him to flout his duties, there have to be natural means of coercion that are stronger than his affects and keep him within the bounds of his obligations. That is why Pufendorf considers sanctions a necessary component of every law.

In his theory of natural law Pufendorf tries, in keeping with his more idealist point of departure, to evade the naturalistic view of Hobbes by acknowledging that there is already natural moral law even in the state of nature. He believes he can summarize this natural moral law in these principles: "Do no wrong to those who have not wronged you." "Leave everyone in the peaceful possession of what is his." "Be careful to live up to your contracts." "Be happy to render service to another so far as your duties toward others allow."

Like Hobbes, Pufendorf holds that within the limits of this natural moral law the individual has a right to all things, with this restriction therefore that he must respect someone else's goods. Pufendorf insists on the validity of this natural law in the state of nature because, unlike Hobbes, he will not have the abstract man in nature governed solely by his affects and passions, but places him too under the rule of reason. On the other hand, he adopts Hobbes' position that without coercive force to hold men in check, they are all too inclined to treat each other as enemies. Hence the basic principle from which Pufendorf tries to unfold his entire natural law methodically is still more in harmony with the view of Hobbes than with that of Grotius.

What Pufendorf shares with Grotius is his starting point in the sociable nature of man. However, he deduces the demand of living in community, again with Hobbes, from the self-centered desire for self-preservation and on the other hand from the impossibility of obtaining on one's own everything that a man's existence requires in accordance with his nature. At bottom

Pufendorf shares Hobbes' pessimistic view of human nature, and in this respect his views are in sharp conflict with the more optimistic view of Grotius. Thus the basic rule of his natural law becomes the same principle as in Hobbes, with this change, that also in the state of nature the above-mentioned natural-law principles continue to hold. This basic rule in Pufendorf is that "every one must be inclined, as much as depends on him, to maintain a peaceable relationship will all others, in accordance with the nature and purpose of the entire human race without exception."

Pufendorf believes with Hobbes that if an individual, despite every effort on his part, does not succeed in maintaining such a peaceable relationship with others, he may defend himself according to the demands of the instinct for self-preservation against his hostile fellow-men with any means whatsoever.

In contrast to Grotius, Pufendorf does not base the validity of rational natural law simply on the eternal principles of reason. He bases it on the will of God. Nevertheless, practically speaking he is even more rationalistic than Grotius. Reason is absolutely adequate for Pufendorf to deduce natural law *more geometrico*, independently of any revelation. The will of God corresponds completely with rational nature. As is the case in his precursors, the nominalistic principle of the will pervades Pufendorf's positive law entirely. Positive law depends entirely upon the will of the sovdereign, who is not bound to the laws.

2.17 **The three basic contracts**

To conceive of civil society and of the state of nature, Pufendorf constructs not just, as in Hobbes, (1) a contract among all individuals, but in addition (2) a decision to establish a form of government, and (3) a governance contract which the sovereign enters into with the citizens and they with him.

Pufendorf's natural-law concept of sovereignty follows the absolutistic lines of Bodin in the latter's theory of the dignity and indivisibility of sovereignty and the elevation of the state sovereign above the positive laws, even though he recognizes with Grotius the possibility of constitutional restrictions on governmental sovereignty.

If we now, finally, examine how Pufendorf sees the natural-law essence of law, we find in him a most muddled picture

of what law is. With Grotius he sees the essence of natural law in those duties and rights that are required for a peaceable, rational society. But unlike Grotius he has erased from it the boundaries between law and morality. As a result, it remains an open question whether natural law is also a jural barrier for positive law, or only an ethical barrier. He prefers to dodge the question by assuming that normally positive law will not be in conflict with natural law. Unlike Grotius, Pufendorf views natural law merely as imperfect law which for its validity as an imperative force, as *lex*, necessarily invokes state compulsion, the coercive sanction of the sovereign. Thus for him the sovereign has only an "*obligatio imperfecta*" to observe the norms of natural law. In this way subjective natural right, also as a legal barrier, becomes for positive law no more than an "imperfect law."

In all this Pufendorf closely approximates Hobbes, although he vehemently opposes the idea of a normless state of nature. Hobbes, it is true, without hesitation abolished all natural-law subjective right vis-B-vis the state, but Pufendorf's construction, for all practical purposes, is not far removed from it. That he still talks of natural law as an imperfect law can only be explained from the circumstance that his natural law lacks any boundaries between the jural and the ethical. This whole development at the expense of the strictly jural character of natural law is related to the rise of the sovereignty concept of state absolutism (Bodin, Hobbes). The construction of positive law from the isolated, formalistically conceived natural-law principle of *pacta sunt servanda* remains the axe at the root of the whole rational theory of natural law! It leads the theory into the dilemma, either to sacrifice material natural law qua law to governmental arbitrariness (as in Hobbes and Grotius), or factually to retire positive law in the face of a minutely elaborated code of natural law. This last road is taken by the school of Wolff and Nettelbladt, to be discussed below.

In spite of the fact that Pufendorf traces natural law back to the sociable nature of man, he nevertheless divides his natural-law rules into duties toward oneself and duties toward others. In the first category of duties, which include religious and ethical obligations, the social element is altogether eliminated. But also in the second catergory, ethical duties (the duties of hu-

manity) function alongside jural ones. The duties toward others are said to arise from man's social obligations which are based either directly upon the Divine will or upon human institution (*absolute* and *hypothetical* duties). The hypothetical duties are grounded in hypothetical natural law (property, government, etc.), which is indeed grounded in the sociable nature of man yet still requires a tacit contract (cf. Grotius above).

> The first of the absolute social obligations is:
> "No one should harm another and everyone ought to compensate for any damage done."
> The second: "Everyone ought to respect and treat his fellow-man as someone who is by nature equal."
> The third: "Everyone ought to live sociably with others."
> The fourth: "He who lets another help him should repay him."
> The fifth: "No one should arrogate to himself special rights, but each should acknowledge that the other has equal rights."
> The sixth: "Everyone ought to seek the welfare of his neighbor."

As you can see, the boundaries between natural law and morality are blotted out. The element of coercion in Pufendorf is merely an indispensable element of the positive laws of the state. His concept of natural law is also deficient in that it is not restricted to people's external relations.

Positive law, insofar as it does not sanction natural-law duties, rests purely upon the will of the sovereign to whom the citizens have contractually submitted themselves. Thus it has as little material essence in Pufendorf as in his predecessors. It is merely marked off *formally* as the coercive will of the government and grounded in *pacta sunt servanda*. Pufendorf continues to maintain the dualistic construction between positive law and natural law that we encountered already in Grotius, although he acknowledges that the civil laws contain a good deal of natural law, so that it cannot really be called positive law. Natural law functions for Pufendorf, as it did for Grotius, (1) to supplement gaps in positive law; (2) to hem in the arbitrariness of the sovereign; and 3) to regulate jural relations between those who do not fall under a positive legal order.

The law of nations, which Grotius had made into an independent system of positive law (i.e., arising from treaties or custom), in Pufendorf is deprived again of its independent charac-

ter and derived entirely from the general principle of natural law. Thus Pufendorf does not, unlike Grotius, know a positive law of nations but only a natural law between states. States, he writes, are without a sovereign government above them, hence exist in a state of nature.

In view of Pufendorf's semi-moralistic view of natural law, it is highly doubtful whether his international law is of a juridical nature. In the end, natural law, also in Pufendorf, proves not to be a barrier to *raison d'état* (which is actually the only criterion for public law in humanist natural law). The sovereign is obliged to observe any treaties with other states, according to Pufendorf, only to the extent that they do not come into conflict with the interest of his people.

Nor, as we saw, is Pufendorf that far removed from Hobbes, despite his insistence that natural law is obligatory also in the state of nature, because he does not deem the natural-law duties strong enough in themselves to get people to observe them, but considers rather the coercive power of the state indispensable for that. It is not without justice that Meinecke too puts Pufendorf and Hobbes on the same line,[1] although it must not be forgotten that Pufendorf did not lapse into the naturalism of Hobbes.

2.18 The concept of law in the natural-law theory of Thomasius. The distinction between justice and morality. The influence of Locke

Natural law acquired an even stronger logicistic stamp than with his predecessors in the writings of Christian Thomasius (1655-1728).

Thomasius was not a universal scholar like Hobbes, Spinoza and Leibniz. He was rather an eclectic popularizer of common sense. His relentless separation of natural light and revelation, and his combative, vehement opposition to belief in authority and ecclesiastical intolerance made him one of the most influential "enlightened" figures of the German people. Science and scholarship are of value only to the extent that they enlighten people and so serve the practical goals of life.

1 F. Meinecke, *Die Idee der Staatsraison in der neueren Geschichte* (Munich, 1924). [Cf. Friedrich Meinecke, *Machiavellism: The Doctrine of Raison d'Etat and Its Place in Modern History* (Yale UP, 1957), chap. 9.]

The fact that Thomasius lectured in German and was the first to publish a journal in that language gave him great influence among the unlettered. His early work about bigamy already gained him the enmity of orthodoxy because he dared defend the proposition that monogamy could not be based on natural law but only on a revealed positive law of God or on positive human legislation.

In his *Institutes of Divine Jurisprudence*[1] Thomasius showed himself time and again to be dependent upon Pufendorf and to follow him in taking the sociable nature of man as the point of departure for his views of natural law, although he tied the juridical validity of natural law, even more strongly than Pufendorf did, to the state. In this view he too confused justice and morality. His contract theory is entirely identical to Pufendorf's. However, in his *Foundations of the Law of Nature and Nations Deduced from Common Sense*[2] he consciously broke with Pufendorf and rejected the sociability principle as the point of departure, since he felt its content was not clear or self-evident. This turnabout in his view of natural law was especially influenced by the English Enlightenment. The individualistic, utilitarian texture of Locke's moral philosophy began to take hold of him. Thomasius rationalized the last non-rational natural-law principle, man's social inclination, in a utilitarian sense. He now believed that the state of nature was neither a condition of peace nor a condition of war of all against all, but a mixture of both. Nevertheless, people in the state of nature tend mostly toward war (there is no freedom of the will).

Thomasius next distinguished between natural law in a broad and in a narrow sense. In a broad sense natural law coincides with moral philosophy and comprises three different principles that cannot be subordinated one to another: the virtuous (*honestum*), the proper (*decorum*), and the just (*justum*). The first is the basic principle of ethics in the narrow sense of the word; the second, that of politics; the third, that of the law of nature and nations.

The basic principle of natural law in the broad sense, from which all principles of *honestum*, *decorum* and *justum* are to be

1 *Institutiones iurisprudentiae divinae* (Halle, 1688).
2 *Fundamenta iuris naturae et gentium ex sensu communi deducta* (Halle, 1705).

derived and which is grounded solely and exclusively in the natural reason, reads as follows: "One must do what makes human life long and happy, and omit what makes it unhappy, what promotes death" (*Fundamenta* 6.21). Thus he makes a eudaimonist principle, the individual pursuit of happiness, the foundation of all ethics and of his doctrine of natural law. It indicates Thomasius' fundamental dependence on John Locke, whose sensualist nominalism he accepts on principle.

The basic principle of natural law is the general norm of all acts. It is in agreement with common sense because it satisfies three requirements:

1. It is true because all people love a long and happy life.
2. It is clear because the connection of subject and predicate is understood by all, even by the ignorant and the foolish, since all people want to live a long and happy life.
3. It is adequate because it covers every moral commandment and at the same time provides the key to distinguish the principles of the just, the virtuous and the proper.

> The content of the principle of the virtuous is: "What you would have others do to you, do that to yourself." The content of the principle of the proper is: "What you would have others do to you, do that also to them." The content of the principle of the just is: "What you would not have others do to you, do not do that to others."

These principles, as you can see, are utterly formalistic, and in an ethical sense they are tautological. The principles of the just and the proper promote the happy life by maintaining external peace, and the principle of the virtuous promotes the inner peace of the soul. The first two impose only external duties; the principle of ethics, on the other hand, imposes internal obligations.

The law must constantly be enforced by coercion and is therefore distinguished from ethics —:

1. by its principle – *justum*
2. by its goal or end – maintaining the external peace by delimiting the individual's external spheres of freedom

3. by its formally
binding character – it creates only duties for external action
4. by its sanction – it is maintained by state coercion.

Thanks to Thomasius, the distinction of law and morality as a consequence of the coercive and external character of law has become common coin. It is typical of the increasingly more radical logicistic tendency of humanist natural-law theory that Thomasius thinks he can deduce the basic principle of natural law from the logical *principium exclusi tertii*,[1] in the same way as he replaces outright Grotius' formula "*Homo est animal sociale*" with that other formula "*Homo est animal rationale*." Whereas in his *Institutiones* he still recognized natural law as real *law* and as *obligatio externa*, a jural boundary of positive law, in *Fundamenta* he construes natural law as no more than *obligatio interna* of the sovereign. In other words, it no longer is *law* but only creates *moral obligations*. According to his *law-concept*, after all, the external coercive character belongs to the essence of law, in distinction from morality. At the same time the isolating separation between law and morality in Thomasius has totally disrupted the *law-idea* as well. This was not quite the case in Grotius, who still recognized moral duties, though unclearly, as imperfect legal duties. Thomasius' philosophy of law has in fact become a "general theory of law" and Hobbes laid the foundations for that. That said, it needs to be remembered that Thomasius with his sharp separation of morality and law was chiefly led by political considerations. He wanted to keep all state coercion far removed from internal moral things and particularly from faith and science. Tolerance in religious matters was his political shibboleth. He enthusiastically took the side of the Pietists who were threatened with prosecution by orthodox Lutheran governments, and he deserves much credit for combating torture and witch trials. For Thomasius, the only purpose of the state is to impose law as external demarcation of individual spheres of freedom and to that extent he may be counted among the adherents of the classic natural-law idea of the *constitutional state under the rule of law*, which we shall discuss below and which must

1 I.e., the law of the excluded middle: either of two; a third possibility is logically excluded.

be distinguished sharply from the state absolutism of Hobbes who surrendered even worship to the Leviathan.

The only problem is that the law-concept in the thought of Thomasius, given its nominalist roots, knows no *juridical boundaries* for state arbitrariness and dissolves itself in the well-known internal antinomies of the humanist view of natural law. His idea of the constitutional state – the "just state" – remains a question of ethics and politics, a question of a desirable state, not of the jural nature of the state.

The school of Thomasius, to the best known adherents of which may be counted Gundling, Gerhard and Fleischer, dominated the humanist theories of natural law for a long time.

In reviewing the development of the natural-law concept of law from Grotius over Hobbes, Spinoza and Pufendorf to Thomasius, it strikes us that the view of Hobbes triumphed across the board, at least in principle. Thomasius conceives of the state of nature as a chaos, which in no way could be foundational or binding for the norms of natural law. For him, the ultimate ground for the binding nature of every possible legal obligation is the power of the government. Whenever the government leaves room for liberty, subjective rights arise; whenever it wants to curtail this liberty it makes laws and with that creates legal obligations. This is precisely Hobbes' view, who in rationalistic fashion makes subjective right into a dependent reflection of the law. In Thomasius, law becomes an objective order of the state that people need lest they fall back into the chaotic state of nature. For him, as for Hobbes but not Grotius, the coercive element is the natural-law hallmark of law. Hence the impossibility of a *jural* natural law prior to statehood. In this, Thomasius merely draws the conclusion of Pufendorf's tentative ambiguous standpoint.

2.19 The reaction to trends toward state absolutism in humanist theories of natural law. The theory of pre-state, innate subjective rights. Locke and the constitutional school. The idea of the rule of law. Criticism of so-called "absolute" subjective rights

A strong reaction arose, notably in England, against the trend toward state absolutism which was causing the nominalistic

construction of contract to lead to a juridically boundless concept of sovereignty. This reaction championed a subjective natural right that is born with the individual, or a pre-state innate subjective natural right that may not be juridically violated by arbitrary government actions. It was in this school that the doctrine of *the rights of man and citizen* was worked out. The doctrine would be codified in laws in the American Revolution and the French Revolution, and in the revolutionary and post-revolutionary constitutions it passed into the form of "fundamental human rights."

The doctrine of innate rights, as an individualistic-rationalistic conception, acquired a strong metaphysical-nominalistic stamp, proceeding as it did from the absolutized individual with his absolute subjective rights. Consistently thought through, the theory could not but make every law-concept impossible. After all, the retributive meaning of the jural sphere, as we shall analyze later, is irreconcilable with the idea of absolute rights of the individual, since the very essence of subjective right consists in subjective *legal relationships* that bring legal subjects together in the sense of retribution.[911] Every notion of an "absolute" subjective right places the putative absolute individual with his "absolute right" outside legal relations and the legal community, i.e., outside the jural sphere itself, and therefore as a theory of law it dissolves itself in internal contradictions.

This whole school of humanist natural-law doctrine received a tremendous stimulus from the utilitarian natural-law theory of the English philosopher John Locke (1632-1704).

2.20 **Locke's significance as philosopher and statesman**

In the field of general philosophy Locke is the founder of what is called the empirical or psycho-genetic critique of knowledge. He developed this extensively in his main work *An Essay concerning Human Understanding* (1690). The main thought of this epistemology, which would later be carried *ad absurdum* in David Hume's skepticism and become one of the motifs in the critique of knowledge of Immanuel Kant, is that our knowledge is

1 [The reader is reminded that in Dooyeweerd "retribution" does not stand for punishment pure and simple but in most instances refers to the core of the jural dimension of life, not just when still in a "closed," primitive state in an undifferentiated society, but equally when it is "opened" or "deepened" by moral considerations; see the discussion in *Introduction*, pp. 8-10.]

limited to external psychical sensation and internal "reflexion"[1] and therefore cannot yield adequate knowledge of metaphysical substances.

On this basis Locke combated Descartes' doctrine of innate ideas. In empiricist fashion, Locke taught that "*nihil est in intellectu quod non [antea] fuerit in sensu*": there is nothing in the mind that was not first in the senses. Thus along a completely nominalistic line Locke restricts truth to logical-mathematical insight into the relations of subjective psychical ideas among each other. In this he carries forward the tradition of the humanist science ideal in the mathematical-psychologistic school. In theological respects he was the real synthesis theologian of the Enlightenment who wanted to demonstrate the agreement of the Christian faith with mathematical reason, or, better put, who killed Christian doctrine rationalistically. In political respects he is the founder of the liberal-constitutional theory by which he wanted to justify the political system introduced in England by William III. Locke favored a complete separation of church and state. For the North American colony of the Carolinas he drafted a constitution, in force until 1693, which contained the clause that religion and worship were not affairs of the state.

Locke is also the intellectual father for modern times of the theory of the separation of powers[2] which would later inspire Montesquieu to formulate his doctrine of the *trias politica* as well as the doctrine of the prerogatives of the Crown as executive power, that is to say, of the rights of government which the leg-

1 External psychical sensation is nothing other than the objective direction in the psychical function which, as we know from the *Introduction*, can only be realized by the psychical subject function. Only pre-psychical subject functions can be psychically objectified, but these are unknown to Locke, given his psychologistic standpoint. Hence the whole distinction between psychical subject and object functions becomes a problem in his philosophy. See *Introduction*, Part 3.

2 Locke distinguishes the legislative and the executive power. He does not know a judicial power next to these two, but he does have a so-called "federative power," a branch of government that looks after foreign relations.

islative power has left to the discretion of the executive power and has therefore withdrawn from its own scrutiny.[1]

Locke developed neither a systematic ethics nor a systematic theory of natural law. In psychologistic fashion he wanted to found ethics on research into the mechanism of psychical affect and efforts of the will. And in a utilitarian vein he made the pursuit of happiness the highest moral principle.

2.21 **Locke's theory of natural law**

Locke's natural-law theory, expounded in his *Two Treatises of Government* (1690), became "epoch-making" through the doctrine of innate, subjective, pre-state natural rights.

Grotius had proceeded from the prevailing view of a community of goods in the state of nature and therefore had anchored private property in the social compact, counting it among *hypothetical* natural law, not valid until a state is founded. Even Thomas Aquinas had not subsumed the right of private property under absolute natural law. Locke, however, teaches that while landed property was originally held in common in the state of nature, it is an absolute right of the individual person, through occupying and working the land, to set aside for himself a piece of private property from this communal property.

In this way the right to private property becomes an absolute pre-state natural right. In typical liberal fashion Locke teaches that the whole purpose of the state is simply to provide legal protection of private property and the individual's natural liberty (the ideal of the later Manchester school that was also defended by Kant and Von Humboldt). According to Locke, the freedom of the personality is an inalienable subjective right. Again we see a fundamental difference with the natural-law theories of Grotius, Hobbes, Pufendorf, etc. Grotius, for example, (influenced by Bodin's concept of sovereignty!) drew the conclusion from his contract principle that individuals as well as nations can surrender their natural freedom in its entirety.

And so a new turn was taken by the humanist doctrine of natural law, one that directed the main emphasis to the pre-state

1 Meanwhile we do know that already in the Late Middle Ages Marsilius of Padua made a strict separation between the legislative and the executive power.

subjective rights and simultaneously laid the foundation for the idea of the constitutional state or rule of law in its first natural-law conception, in which the goal of state action is limited to the protection of subjective private rights, individualistically understood. Since Adam Smith, this idea of the constitutional state is also embraced by the individualism of the classical school of economics.

In old nominalistic fashion Locke construes the state out of a social contract between the naturally free and equal citizens and bases the institution of government on the majority principle. In line with the British parliamentary system, the people become the true bearer of sovereignty and therefore the actual legislator. The people is the sole judge of the executive power and may at any time change the constitution, the fundamental law of the state. In so doing, Locke opposes the *oligarchic sovereignty* deduced under Bodin's influence from the contract theory by Hobbes, Pufendorf and Thomasius (and really also by Grotius), to replace it with the principle of *popular sovereignty* that had already been worked out by Marsilius of Padua.

The state of nature is conceived in Locke, no more than in Grotius, as lacking all rights. Rather, it is viewed as governed by a rational law of nature. This law, given that all individuals are free and equal, forbids anyone to infringe the life, liberty and property of others; and when these norms are transgressed this law authorizes anyone to execute punishment as a form of private justice.

In the social contract the individuals have not surrendered all their rights to the government that was instituted by majority decision, but only the right to try cases and the authority to apply sanctions. They use the rights they reserve to themselves in order to protect their innate rights. The fundamental right to life, liberty and property are inalienable and cannot be surrendered.

It is absurd to think that a "rational creature" would have surrendered more of "equality, liberty and executive power" of the state of nature than is required by the end of the state "the better to preserve [for] himself his liberty and property."[1] Soci-

1 This Lockean theory was taken over holus-bolus by the Declaration of Rights of the Commonwealth of Virgiania on 12 June 1776. The oldest doc-

ety's power, says Locke, extends no farther than this end,[1] an end which he then proceeds to identify with "the common good" (a dangerous move, given his natural-law starting point).

The relationship between natural law and positive law in Locke is therefore this, that positive law offers only state protection and state sanctions to the inalienable subjective natural rights. Here, the principle of *pacta sunt servanda*, on which he too bases the validity of positive laws, is no longer destructive for material natural law, because it is no longer understood abstractly but has been given a limited teleological content.

In the meantime, however, this subjective natural-law concept of law gets entangled in other internal contradictions. After all, if subjective natural rights to life, property (from economic activity), and liberty (protected by natural-law coercion) are absolute and inalienable, how then can one arrive at a positive legal order that is to put an end to that absoluteness?

We already pointed out that the absolute interpretation of subjective rights places the absolutized individual outside the legal community and legal society. There is no getting around it: a subjective right is a retributive good that is the resultant of an infinite number of legal relationships involving the legal subject (as well as the member of a communal and a coordinate relationship).

Locke's subjectivistic doctrine of natural law therefore evaporates as soon as state and positive law are erected on the basis of natural law. On the one hand, with its abstract, individualistic idea of the constitutional state his doctrine eliminates the state's foundation in *historical power* (which was at least still maintained in the absolutistic natural-law theories from Hobbes to Thomasius with their concept of sovereignty inspired by the theory of *raison d'état*). As a consequence, his doctrine cannot arrive at a genuine concept of the state. On the other hand, the mo-

ument of its kind, its first article reads: "All men are by nature equally free and independent, and have certain inherent rights, of which, when they enter a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."

1 *Two Treatises of Government*, II, § 131.

ment *raison d'état* unavoidably re-enters Locke's discussions, he comes to make a statement that threatens to torpedo his entire natural-law concept of law: "*Salus populi suprema lex*," he writes, "is certainly so just and fundamental a rule that he who sincerely follows it cannot dangerously err."[1]

Humanist natural law, as a result of its nominalistic root that levels all structural differences, contains the following dilemma: *either* surrender material natural law to the absolute state's power of will (the Leviathan that swallows all natural law); *or* rob of their content both the concept of state and the concept of positive law. In the natural-law theories that elaborate on Locke's motif of inalienable absolute innate rights we do in fact meet with efforts to develop natural law in such detail that there is really no room or content left for positive law. Locke's natural-law theory remained too schematic for him to draw the consequences of his starting point.

It was in particular the school of Christian Wolff, Gottfried Achenwall and Daniel Nettelbladt that based itself on the doctrine of innate rights and extended natural law into such a fulsome casuistry that it became a complete supplement to the order of positive laws. Wolff especially often flouted good taste (e.g., discussing in all seriousness how many horses a citizen of substance could own *jure naturali*.)

Characteristic in this respect, for example, is Nettelbladt's system of "natural-law feudal law (!), which for that matter resembles the "positive system of feudal law" like two peas in a pod.

2.22 The concept of natural law in Christian Wolff and his disciples. The influence of Leibniz. Law as lex permissiva

Christian Wolff (1679-1754), born in Breslau and in his later years professor in Halle, was a student and superficial popularizer of Leibniz' philosophy, and at the same time a typical representative of the German Enlightenment with its brand of arid logic.

Wolff borrowed from Leibniz's monadology (see above, Chap. 1, § 1.8, page 6) its metaphysical individualism, which is

1 Ibid., § 142; see also §§ 144, 158.

but a symptom in the Enlightenment age of the rationalization of individuality by way of infinitesimal calculus[1] discovered by Leibniz. (Incidentally, Wolff excised the very heart of Leibniz's monadology, namely the doctrine of the conscious state of all monads and the related cosmonomic idea of the *harmonia praestabilita* in its tenor of encompassing the entire cosmos.)

Wolff is a logicist who is barely conscious anymore of the quintessence of the assumed creativity of the humanist science ideal, since for him the entire cosmos is the sum total of necessary truths and manifests itself in *logos*. His philosophy is really nothing more than an *ars demonstrandi*, a logical doctrine of evidence which assumes logical truth as a given[2] and believes it can deduce all necessary *a priori* truth from the logical *principium contradictionis*, including the norms of natural law. He worked out his system of natural law in his extensive work *The Law of Nature Treated According to the Scientific Method* and in his smaller work *Institutes of the Law of Nature and Nations*,[3] written entirely in the form of logical syllogisms. The first work especially testifies to extensive knowledge of the field of law and in many places sound jural intuition.

Leibniz, in sharp contrast to his forerunners (among whom he particularly combated Pufendorf) had sought the foundation for natural law in moral love. He resisted above all Pufendorf's nominalistic grounding of law in the will, preferring to have law originate as to content from his metaphysical rational order. According to him, law in no way concerns only external relations, but rather is grounded in love, the love that feels the need to acknowledge the pursuit of happiness and perfection in others in the same way as its own search for happiness.

However, in the fashion of his rationalistic-mathematical cosmonomic idea of *harmonia praestabilita*, the striving after

1 Under the influence of Descartes, who did not yet possess the methodological means to "arithmetize" space, mathematical individualism leads to a universalism that absorbs all individuality. Leibniz, however, arithmetized space. This was the signal for a new reification of individuality.

2 This explains why in Wolff the distinction between *inventio* and *demonstratio*, well known since Peter Ramus, has faded significantly.

3 Christian Wolff, *Jus naturae methodo scientifica pertractatum*, 8 vols. (Frankfurt and Leipzig, 1740-1748); idem, *Institutiones iuris naturae et gentium* (Halle, 1754).

moral perfection dissolves in Leibniz in having reason enlightened through the acquisition of clear, mathematical concepts. The more enlightened one's reason is, the more does love turns the well-being of the other individuals into the content of one's own pursuit of perfection. For in its ideas every monad is a mirror of the universe. The clearer the concepts, the more will the spirit-monad realize that the well-being of others is its own well-being. In this way love as the root of natural law is rationalized in Leibniz.

This love manifests itself negatively in refraining from attacks on the good of another (law in the strict sense, maintained by coercion) and positively partly in the promotion of the welfare of society (equity), partly and especially in the reasonable distribution of goods according to the degree of perfection and the merit of individuals (*justitia distributiva*).

Surpassing all three is honest piety, which from knowing the rational world-order wants to regulate the whole of life according to the conscious harmony of all relationships.

Wolff is fundamentally dependent upon Leibniz, also in his ethics and his doctrine of natural law, although here too he applies a shallow version of his teacher's views. He locates the basic principle of the moral life in the pursuit of perfection, which consists in letting one's acts be guided only by clear, rational concepts and to enlighten one's mind by defining one's ideas clearly and logically. Thus Wolff also deduces his natural law from moral perfection in this sense. In so doing he raises nominalistic individualism to the nth degree because he makes the perfection of the individual the sole ground for the state and all societal regulations. In this respect Wolff enters the framework of the individualistic natural-law doctrine of Locke.

As in Leibniz, so in Wolff, this basic principle of natural law obliterates the boundary between morality and justice. Yet in his concept of natural law he still attempts to demarcate law from morality by looking for the natural-law hallmark of morality in the permissive nature of law. While morality expresses itself only in *leges praeceptivae* and *prohibitivae*, in laws that prescribe and prohibit, the essence of law consists in this, that it manifests itself in the form of *leges permissivae*, permissive laws (*Jus naturae* 1.55). Everybody senses, however, that this formal

demarcation does not prevent that material (content-wise) natural law coincides in Wolff with morality. The principle of moral obligation consists for him in the commandment to work on one's self-perfection: perfection is the only source of happiness. And morality demands promoting moral perfection not only of oneself, but also of others. However, what is a duty is also a right: every individual has the right to ask of everybody else that this right be respected (ibid. 1.608-622). Thus, as there are general moral duties, for that reason there are also innate and inalienable human rights (ibid. 1.64) and with respect to those rights all men are originally equal (ibid. 89-110).

The duty presupposes a commandment; it results in a right and permission. Thus the content of Wolff's natural-law concept of law is looked for in Lockean fashion entirely in the innate absolute human right which distinguishes itself formally from morality only as the permission from the imperative.[1] Actually, right and morality become two sides of the same thing, for in Wolff *permissio* in the final analysis is, rationalistically, merely the reflection of the moral imperative. In this respect Wolff may be called the father of modern imperative theory which makes subjective right a reflection of duty. This entire view of right as reflection of a moral duty took on flesh and blood, as it were, in the enlightened despotism of Frederick the Great. Everybody may demand of the others that they contribute to his perfection, insofar as their pursuit of self-perfection allows (ibid. 1.608).

In general, Wolff sticks to the distinction, given a foundation by Grotius and a fulsome elaboration by Thomasius, between internal and external duties, perfect (i.e., enforceable) and imperfect (non-enforceable) obligations. Like Grotius, however, he recognizes enforcement also in the state of nature. External duties can only be the duties toward others, and these give enforceable rights only in part (ibid. 1.656).

Enforceable is therefore my absolute right to defend myself against anyone who violates my rights. But if we read him correctly, compulsion no longer appears to be a hallmark of natural right in Wolff, although he does acknowledge that it is needed

1 This view was in fact already common for all of realistic scholasticism. Particularly in Thomas Aquinas subjective natural right is merely a reflection of the *lex naturalis*.

to ensure the purpose or end of law and that one's innate rights in the state of nature may be defended as a form of legitimate self-help or private justice.

Meanwhile, the heart of Wolff's concept of law is fundamentally located in the *permissio*, altogether different from Grotius and his followers who lean in the direction of the state absolutism of the Renaissance period.

Wolff is one of the first to distinguish between innate, inalienable, natural human rights and *iura quaesita*, rights acquired on the basis of a specific legal title. The latter are alienable and may be curtailed or even expropriated by the state in the interest of the common welfare.[1] Of the former, Wolff enumerates a large catalog.

2.23 The distinction between innate rights and acquired rights

Jus connatum absolutum in Wolff is the right that flows without any other condition from the rational substance and nature of man. It is a *jus unversale* that is due to man without having to show any title to it. It is also equal for everybody.

Jus acquisitum on the other hand is the right that does not flow from the absolute innate rights and hence not from the rational nature of man. It is the right that bears a hypothetical and singular character (*jus singulare*) and presupposes a contract as its basis and title.

Thus according to Wolff parental authority over children and the buyer's right to the item bought both belong to the *iura acquisita* since both are based on a contract!

> Thus the right of parents over their children arises out of their obligation to raise them, an obligation which is not innate but assumed and presupposes the act of begetting. It is therefore an acquired right. The right of ownership to a piece of merchandise, which someone possesses as a result of a sales contract, presupposes both the introduction of possessions and the transfer of ownership made from the seller to the buyer. It is therefor an acquired right. (Ibid., 1.35.)

1 The distinction between *jus connatum* (inborn right) and *jus acquisitum* (acquired right) is already found in Thomasius in his first work on natural law, when he was still dependent upon Pufendorf.

On the other hand, the right to those things that are essential for life is absolute. In this connection Wolff distinguishes between a *status naturalis,* which is solely regualted by the innate rights and duties, and a *status adventitius,* which is regulated by acquired rights and contractual obligations.

If we now recall that Wolff in the line of Pufendorf distinguishes natural duties and rights in duties toward oneself, toward others, and toward God, and therefore also assumes absolute innate rights outside any relation to other legal subjects, we realize how much the concept of absolute right here implies the negation of the meaning of law.

In his exposition of innate human rights Wolff is intent on inserting into it all the premises that he will presently need for defining the end of the state.

Thus a person has an inalienable right to safety and security, to acquiring sufficient means to live a pleasant and happy life according to the moral demand of perfection. Volume 8 of *Jus naturae* corresponds with this exactly when it locates the content of the end of the state in *vitae sufficientia, tranquillites* (safety on the inside), and *securitas* (safety to the outside).

2.24 The antinomy between natural law and raison d'état, and its causes, in Wolff's doctrine of natural law. His regression into state absolutism. The idea of the police state

In his construal of the state, which he bases in traditional rationalistic fashion on the figure of a contract, Wolff is led, on the one hand by the formalistic *pacta sunt servanda* and on the other by the principle of *raison d'état,* to a form of state absolutism that contradicts his entire natural-law doctrine. And he is one of the first to openly admit it.

He construes the necessity of establishing a state from the inability of individual families to acquire for themselves "the things that make for the necessities of life, as well as its comforts and pleasures, in fact its happiness, and to enjoy a tranquil life as their right." In the absence of a state they are "unable safely to acquire these things . . . nor are they able to defend themselves and their belongings against the violence of others." For this reason Wolff includes in his social contract the clause that all individuals pledge to the community, and the community

pledges to the individuals, to promote the "*salus publica*" consisting of an "adequate, tranquil and secure life," while the state is given the competency to impose mandatory obligations on the citizens.

The sovereignty of the state, which according to Wolff belongs by nature to the people but which it may confer in whole or in part upon a government, is limited only to the *salus publica*, which he expressly characterizes as the *suprema lex* of the state. He deduces this prime principle of state absolutism from the *lex naturale* itself – and this brings about a hopeless antinomy in his concept of natural law.

From the natural basic principle "*salus publica suprema lex*" Bodin and Grotius had inferred a *potestas* and a *dominium eminens* for the sovereign, as a result of which citizens' natural, innate liberty and acquired property may, at the sovereign's discretion, be restricted in the interest of the state. Yet inversely, from the principle of *pacta sunt servanda* Wolff had earlier deduced the natural-law principle that no one may be deprived of his acquired rights against his will, and he had defined the *jura connata* as fundamentally inalienable (*Jus naturae* 2.336). Yet these rights of sovereignty are now being construed as "emergency measures," as a result of which even the natural-law rights of liberty and property may be interfered with.

Wolff here talks of a "legal collision," thus of a real antinomy. But he cuts the Gordian knot with his construction of "emergency laws" that allow exceptions to natural rights. (See ibid. 1.117.)

The basis of this fatal antinomy lies in the individualistic starting point in innate and acquired rights which, as we saw, is irreconcilable with the meaning of the jural order. Humanist natural law is unable to arrive at internal boundaries of competencies because in leveling the differences between individuality structures it also erases the spheres of competency.

Wolff's idea of the state is the idea of the police state of enlightened despotism as it was realized by Frederick the Great, who called himself a pupil of Wolff. This police state meddles with everything for the sake of the welfare of its citizens and the enlightenment of the minds.

Wolff arrives at a fundamental sovereignty of the state over the church, and in an Hobbesian strain barely recognizes freedom of religion. The sovereign has the natural right to appoint the ministers of religion and prescribe the doctrine they are to teach. The only proviso Wolff makes, for the sake of the Roman Catholic religion, is that (where according to his theory a potential division of sovereign rights is possible[1]) the people, when entering the contract of submission and authority, may lift *jus circa sacra* (authority over the church) out of the other sovereign rights and confer it either upon itself or upon a spiritual ruler (read: the pope).

It is of little use that Wolff reiterates the rational *lex naturalis* as a barrier for submission to positive law. After all, the *salus publica*, the moralized principle of *raison d'état*, is itself a *lex naturalis*, and the individual can hardly be accepted as a judge of the demands of state interests. The principle of *raison d'état* lacks all legal limits in Wolff.[2] Even a juridical restriction in the contract whereby the people confer the government upon a ruler is valid only [196] with the tacit exception of state interests (ibid. 8.1.120 f.). In consequence, the fundamental laws of the state, which in distinction from the ordinary positive laws are binding also for the sovereign, are not binding with respect to the principle of *raison d'état*, for "fundamental laws by which a certain way of acting is prescribed are means that promote public safety, and must have sufficient ground, as it were, in this supreme law."

On this score Wolff maintains only one proviso against arbitrary government: the social contract should contain the provision that the people reserve to itself the control over the *salus publica* by demanding that all deviations from the *leges fundamentales* need its consent or the consent of the estates. If the ruler violates the *leges fundamentales* then the subjects need not obey, although obedience is allowed. And if the sovereign encroaches upon the rights of the people or the estates reserved for

1 This is the fundamental contrast with the traditional natural-law concept of sovereignty as taught by Bodin.

2 Cf. *Jus naturale* 8.1.46, fully in line with Bodin: "Qui summum imperius habet, in imperando, seu exercitio imperii prorsus liber est, consquenter eius conscientiae relinquendum, quomodo imperet." See also ibid. 8.6.1044 ff.

them in the social contract, then the people have a perfect natural right to resist. These provisos are reminiscent of earlier constitutional law involving "estates of the realm," provisos that we also encountered in Grotius, Pufendorf and others who for the rest are nevertheless theoreticians of absolutistic sovereignty. In general the *lex naturalis* then still functions as a limit to the obligation to obey, but we saw already how little this means vis-B-vis the absolutism of the *salus publica*. Not obeying on this ground means that one still has to bear punishment.

2.25 **Natural law as a criterion for assessing positive law**

In order to compensate for the lack of juridical weight, Wolff ascribes a second function to natural law: it becomes an ethical-political criterion for assessing positive law.

Like Heineccius already before him and like Nettelbladt in his footsteps after him, Wolff endeavors to deduce the correct positive law from natural law by the method of mathematical demonstration. He elaborates this in great detail into a code, thinking he can do this because positive law on the one hand forms a system and on the other rests on grounds (*rationes legales*) that link it directly to natural law. These grounds are either moral or political or historical; the moral grounds stem from equity and prompt the legislator to adopt natural-law norms without change; the political grounds stem from the demands of state interests and lead to a philosophically justified deviation from natural law; the historical grounds stem from coincidental external motives of the legislator which likewise lead to deviations from natural law, albeit not philosophically justifiable. It is typical once again that Wolff here is intent on creating as much latitude as possible in the commands and prohibitions of natural law for the demands of *raison d'état*. The legislator, according to Wolff, *ought to* proceed from the correct norms of natural law; whoever has wrong views of natural law will also come to incorrect legal norms.

With that, natural law in Wolff turns into an ideal criterion for reviewing positive law, a standard by which one judges which of the many existing systems of positive law is the best. Viewed thus, not even Roman law can pass the test of Wolff's natural law on every detail, even though he still calls it the best among all existing legal orders.

The turn here taken by humanist natural law leads to a shift from the natural-law viewpoint of the *concept* of law to the *idea* of law, a turn that will be completed by Kant and Fichte with their so-called "rational law." In Wolff we still encounter a dualistic function of natural law, functioning as it does, at least formally, on the one hand as a "barrier" and on the other as a criterion for reviewing positive law. This dualism, however, is internally contradictory. For the fact that natural law functions as a criterion for right or wrong laws presupposes that positive prescriptions that are in conflict with it nevertheless conform to the concept of law. But then the same natural law cannot simultaneously be a barrier for the maker of positive law. In other words, natural law cannot both define and review the concept of law.

2.26 Wolff's significance for international law. The construction of the superstate (civitas maxima)

Typical for the individualistic-nominalistic tenor of Wolff's theory of natural law, which despite its dismissal of the will as the deepest origin of law manifests itself in a rationalistic leveling of all internal structural differences, is his construction in international law of the *civitas maxima* as the superstate towering above the individual states. In this, the same mathematical, logicistic leaning toward continuity becomes apparent which in modern theorists of the sovereignty of law leads to the postulate of construing a state's legal order as a logical delegation from international law.

Proceeding from the state (construed individualistically from contracts), Wolff moves on to a *civitas maxima* of a community of states which independently of the will of the states automatically exists by natural law. For every state, like every individual, is duty-bound to promote the well-being of the whole.

The law that governs this community of states by virtue of this obligation is the universally necessary law of nations: *jus gentium necessarium*. The right that this *civitas maxima,* just as every other "*societas*," derives for itself from the *jus gentium necessarium* and establishes in positive law is the general positive law of nations: *jus gentium voluntarium*. These two categories of law together form general international law.

The special law, by contrast, which the states etablish through treaties or customs (*jus gentium pacticium* or *consuetudinarium*) is not a component of international law, no more than individual contracts between private persons belong in private law. Although Wolff, against Pufendorf, here rehabilitates Grotius' theory of international law as a separate branch of law, one can see immediately how the nominalistic law-concept which is able to view positive law only as the "general" (logically, mathematically construed) *will*, breaks through Wolff's view of international law. A treaty between two or more states according to him cannot be a source of law since law has to flow from the "general will." Since he lacks any insight into the structural difference between communal and coordinational relationships, he construes his *civitas maxima* as a superstate, without even asking himself whether there is not an intrinsic difference between interstate relationships and the internal state community.

2.27 The absorption of the theory of innate absolute human rights in the absolutistic concept of the state. The natural-law concept of Rousseau

After Wolff, the gradual shift in the natural-law point of view from law-concept to law-idea as a criterion for reviewing positive law went hand in hand with the gradual resistance to the science ideal in the interest of the personality ideal. The shift to the primacy of the personality ideal already announced itself in Rousseau.

Jean Jacques Rousseaus was born in Geneva in 1712 and died in Ermenonville in 1778. A self-taught man with little training in scholarly methods, his natural gifts and brilliant qualities as an author nevertheless made him the center of the Paris circle of the French encylopedists in which Diderot became his special friend, although he soon came into conflict with the whole circle.

In 1750 he entered an essay competition issued by the Academy of Dijon with a work entitled *A Discourse on the Moral Effects of the Arts and Sciences*.[1] This work established his fame throughout Europe at one blow. It questioned whether the great cultural

1 *Discours sur les sciences et les arts* (Geneva, 1750).

achievements had been beneficial for mankind. It was a passionate attack on the supremacy of the humanist science ideal which had brought the free autonomous personality under its dominion. The contest issued by the Dijon Academy raised a fashionable problem of the Age of Enlightenment, namely: the importance of science and culture for the happiness of mankind.

The French Enlightenment was perfectly democratic and for that very reason desired that mathematical reason speak the final word in the arrangement of all human relationships in life. That is why it expected the happiness and progress for mankind to come from the supremacy of the science ideal.

This cherished dream of the Enlightenment was disrupted by Rousseau as a fundamental delusion. He was of the opinion that the rationalistic culture was the root of all misery in human society, and over against the absence of liberty and equality in the man of culture he put up the golden primeval time when unspoiled man rested as it were at the bosom of nature.

In his *Discourse on the Origin and Foundations of the Inequality among Men*[1] Rousseau taught that culture with its division of labor had caused all inequality and unfreedom and so all misery. In diametrical opposition to Hobbes he argued that not the state of nature but the existing civil society was a "war of all against all." The true state of nature is that of an idyllic peace, in which man, free of social bonds, confined himself to satisfying his natural needs and lived in accordance with the law of nature (an ideal which Voltaire sarcastically caricatured as one that it might induce men to go back to walking on all fours).

In this way the personality ideal, which rationalism since Descartes had located in the *cogitatio*, in Rousseau withdraws into natural sentiment, just as this can be observed simultaneously in the English skeptical philosopher and later friend of Rousseau, David Hume.

Rousseau directs his most bitter attacks against the Enlightenment's rationalistic view of religion, in which he rightly saw a violation of the religious core of the humanist personality ideal. In his preaching of natural religion, which turned against the materialism of the French Encyclopedists as well as against de-

1 *Discours sur l'origine et les fondements de l'inégalité parmi les hommes* (Amsterdam, 1755).

ism (Newton and others), Rousseau does not tire of impressing upon his contemporaries that religion does not reside in the head and that cold-hearted science has no right to assail the sacred content of human sentiment.

Although Rousseau idealizes the state of nature, he still regards it as a lost paradise that can never come back; in fact he considers a cultured state possible in which a person raises himself to a higher stage. For that to happen, however, culture must give back to man the freedom and equality of the state of nature in a higher form. On this natural-law basis he erects his political theory, developed in his famous work *The Social Contract, or Principles of Political Law*,[1] which nevertheless has humanism's mathematical construction of a contract as its organon.

Liberty and equality according to Rousseau, in the style of Locke, are man's innate natural rights which he cannot alienate without getting them back in a higher juridical form. Next, Rousseau applies Hobbes' monistic construction of the social contract to deduce what he considers the only legitimate form of government: the democratic republic, grounded in the inalienable *sovereignty of the people*.

Rousseau rejects every naturalistic justification of authority or of the positive legal order by Hobbes' or Spinoza's right of the strongest. "Strength is a physical quality, and I fail to see what moral effect it can have" (*Social Contract* 1.3).

He furthermore rejects the abstract formalistic view of the principle of *pacta sunt servanda* by which Grotius, Hobbes, Pufendorf and also Wolff had justified even slavery. At this point the view of the inalienable human rights break through: "To renounce one's liberty is to renounce one's quality as a human being, the rights of humanity, even its duties. . . . The words *slavery* and *right* are contradictory; they are mutually exclusive" (ibid. 1.4). And this holds both for the individual and for the whole people. Liberty as well as equality is an inalienable human right and an inalienable civil right.

Rousseau now formulates the problem of constructing the one legitimate form of government as follows:

> The fundamental problem is to find a form of association that defends and protects with all communal force the person and

1 *Du contrat sociale; ou, Principes du droit politique* (Amsterdam, 1762).

> property of each associate, in such a way that each, joining with all the others, nevertheless obeys only his own will, and remains as free as he was before. (Ibid. 1.6.)

This is the problem that Rousseau wants to solve with his "social contract" which leads to the formation of a "general will" and which to be valid must clearly contain the clause that every member alienates all his rights to the state community and in his share in the general will receives back all his natural rights in a juridically higher form: "For . . . since each gives himself entirely, the resulting condition is the same for all; and since the condition is the same for all, no one has an interest in rendering it onerous to the others" (ibid.). The inalienable right to freedom is maintained by the inalienable sovereignty of the people, which can never be conferred upon a magistrate. The "*volunté générale*" (the general will) is as it were the higher collective state of this liberty. Rousseau sharply distinguishes it from the "*volunté de tous*" (the will of all). For the general will has to be exclusively focused on the general welfare and is therefore incompatible with the existence of intermediate communities between state and individual, because they foster particularism. Here Rousseau comes to the motto that would become a slogan during the French Revolution, openly declaring the inner contradiction in his natural-law concept of law: "he will be forced to be free" (ibid. 1.7).

2.28 **The influence of Locke on Rousseau**

One cannot fail to notice the influence of Locke on Rousseau. Rousseau too proceeds from the innate natural rights of liberty, equality and property, and with Locke he deems labor in connection with occupation the sole natural-law ground for property.

> To grant the right of first occupancy to some land requires the following conditions: first, that the land is not already occupied by someone; secondly, that a man occupies no more than is necessary for his subsistence; in the third place, that he takes possession of it not by some empty ceremony but by working and cultivating it, the only sign of ownership which in the absence of a legal title must be respected by others. (Ibid. 1.9.)

Every individual has by nature a right to anything he needs, but the positive act that makes him the owner of any property at the same time cuts him off from all other property. Once he has

acquired his share he has to limit himself to that and can make no further claim to any common property.

> That is why the right of first occupancy, so weak in the state of nature, is respected by everyone in civil society. In this right we respect not so much what belongs to others as what does not belong to ourselves. (Ibid.)

One can see clearly how the individualistic character of absolute innate rights in Rousseau places the individual in the state of nature on his own, all by himself, and isolates him from legal relations with others.

In the meantime, thanks to the social contract the State becomes "master of all property" because the social contract is now "the basis of all rights": the social contract turns private owners into "trustees" for the common weal (ibid.).Their earlier precarious natural-law claims to goods they now regain in the form of legally protected ownership, which however is strictly subject to the law of the common interest.

Because of the social contract, equality under natural law, too, is maintained in a superior form. As we shall see, Rousseau's "general will," which is based on the social contract, absorbs all inalienable natural human rights and becomes the lever for a boundless state absolutism:

> "As nature gives to each man absolute power over all his members, so too does the social contract give to the body politic absolute power over all those who belong to it; and it is this very power which, directed by the general will, bears the name of sovereignty" (ibid. 2.4).

Nevertheless, and this deserves special attention, Rousseau's social contract and law are no longer taken in an abstract formalistic sense, as they were in Grotius, Hobbes, and others, but have been given a natural-law content based on a sharp distinction of private and public interest.

Wolff's fundamental law for the state, "*Salus publica suprema lex esto*" (the public welfare shall be the supreme law) is associated more closely to Locke's doctrine of absolute human rights by Rousseau than by Wolff, who in the end simply accepted the contradiction between the two.

2.29 Rousseau's concept of the volonté générale *and the distinction between law in a formal and a material sense*

We must examine more closely Rousseau's important theory of the general will which pioneered the natural-law concept of state law and which became the first occasion for the distinction, still used today, between law in a material and in a formal sense. For it would seem that there is no question in Rousseau that the general will absorbs the human rights. For his concept of the general will is closely related to his sharp distinction between private and public interest and the resulting distinction between natural human rights and civil rights which he was the first to introduce.

In Locke we find only the concept of innate human rights. By contrast, Rousseau, who on this point again adopts the line of Marsilius of Padua, also had to arrive at the concept of inalienable civil rights because he was the first after this nominalistic medieval thinker to raise the question of the only legitimate form of the state.[1] The reciprocal relationship between human rights and civil rights now becomes a crucial problem in Rousseau's theory.

Besides the state as a public person we have to consider the private persons who compose it and whose life and liberty are by nature independent of it. It is therefore important to distinguish carefully between the rights of the citizens and the rights of the sovereign, and between the duties citizens owe as subjects and the natural rights which they should enjoy as men. (Ibid.)

According to Rousseau it is beyond dispute that every individual surrenders to the state in the social contract only so much of his natural power, property and liberty as is needed for the general welfare of the community. The general welfare, and therefore also the general will, speak only for the body as a whole, not for private individuals.

The first principle of the general will is therefore the absolute equality of all citizens with respect to the needs of the community. The moment the sovereign legislator favors certain citizens

1 In Locke the question of the form of government is merely a question of political desirability, not of legitimacy.

above others – in other words, the moment he grants special privileges like the nobility's tax immunity under the *ancien régime* – the general will becomes a private will and the sovereign exceeds his competence:

> We can see from this that the sovereign power, however absolute, sacred and inviolable it may be, does not and must not cross the limits of the general agreement, and that every man can dispose freely of whatever is left to him of his property and liberty by that agreement, such that the sovereign never has the right to lay a heavier burden on one subject than on another, because the moment a matter were to become private his power would no longer be competent. (Ibid. 2.4.)

The social contract on which all state sovereignty rests, after all, contains the inalterable clause that all citizens are equal with respect to the general welfare. In other words, the general will can never, thanks to its inner unchanging nature, have a private object.

This also makes understandable the meaning of Rousseau's natural-law concept of law. The laws of the state in Rousseau's train of thought must always be expressions of the general will. In other words, they must always proceed from the true sovereign, the people; they are to observe the absolute equality of the citizens and can have as their content only the general welfare.

Thus the laws can never serve a private interest. Nor can it ever be the initiative of an individual person:

Again, we see that as law unites the universality of will with the universality of object, what a man, whoever he be, commands of his own accord is not a law; and even what the sovereign commands on a private matter is no more a law either, but a decree; not an act of the sovereign, but a measure of the government of the day. (Ibid. 2.6.)

In other words, not everything that has the form of a law is according to Rousseau a law in the material sense of the word. There are formal laws that are not genuine laws and therefore not expressions of the sovereign general will; they are nothing but decrees, which as such are not binding laws but merely private acts of the governors, unless such laws simply enforce an existing law in a special case.

Thus it appears that in Rousseau the inalienable human rights as private subjective rights are in no way absorbed into the general will, since in the private sphere of law they are unassailable to capricious acts of government. On the other hand, as we saw, in civil society the *basis* of these human rights has altered. That basis now lies exclusively in the social contract. In other words, the legal source of human rights and civil rights is the same, and as long as the individualistic principle of equality and universality has been satisfied the general will is authorized, on principle, to do anything.

Private human rights in the state extend only so far as the domain left vacant by the general welfare. All boundaries of competency, however, must yield to the general will of the state! In Rousseau, the civil rights as a reflection of the general will of the state are the human rights themselves in the form of universality.

Rousseau himself writes that the decision as to what the public interest demands belongs exclusively to the sovereign people, and he adheres to the well-known nominalistic construction that the general will can do no one any harm in view of the principle "*volenti non fit injuria*."

The boundaries of competency which Rousseau deduces for the state are not real competency boundaries since they are not derived from the intrinsic meaning structure of the state community but are gained, rather, from the abstract individualistic principle of equality which levels all structural differences.

Equality in the sense of civil rights in Rousseau is identical with universality in the sense of the mathematically uniform total sum:

> We should conclude from the foregoing that what makes the will general is not so much the number of citizens involved as the common interest that unites them. For in this institution [of civil society], each citizen necessarily submits to the conditions he imposes on others – that admirable harmony between interest and justice which gives to the common deliberations [of the citizens] the nature of fairness which is absent in discussions of private affairs for lack of the common interest that unites and identifies the ruling of the judge with the interested party. (Ibid. 2.4.)

The common interest here has a purely nominalistic content and is therefore the scepter of a boundless state absolutism.

2.30 Why an authority pact does not fit Rousseau's theory

Based on the same foundation is Rousseau's rejection on principle of any authority contract between people and government, by which he inverts Hobbes' monistic construction of a compact into the inalienable sovereignty of the people.

But why can there be no question of an authority contract, according to Rousseau? Because such a contract between the people and the rulers it installs would no longer be an expression of the general will, but a private act – "from which it follows that such a contract could neither be a law nor an act of the sovereign, and consequently would be illegitimate" (ibid., 3.16). Such a contract, after all, would concern not the generality of the citizens but private persons. Moreover, sovereignty can be transferred by the people to a magistrate no more than it can be restricted by them. "To limit it is to destroy it. That the sovereign can set a superior over itself is absurd and contradictory." (Ibid.)

The absolutistic concept of sovereignty, which from Bodin to Rousseau must reject on principle all boundaries of competence, is simply a radical consequence of the nominalistic law-concept in which law becomes identical with a "general will" that levels all structural differences.

2.31 Why Rousseau must reject the constitutional state and the doctrine of the three powers

Proceeding from this concept of sovereignty, Rousseau cannot but reject on principle both Locke's constitutional, representative system of government and Montesquieu's *trias politicas*, the doctrine of the three powers. Both are irreconcilable with Rousseau's view of the general will and his absolutistic concept of sovereignty. First of all, his sovereign cannot be represented:

> Sovereignty cannot be represented for the same reason that it cannot be transferred. It consists essentially in the general will, and the will cannot be represented. Either it is itself, or it is another. There is no middle term. (Ibid. 3.15.)

The people's deputies are not real representatives, nor can they be. They are merely mandataries or commissioners who can

make no final decisions. "Any law that the people have not ratified is null and void; it is no law at all" (ibid.). The concept of representation, according to Rousseau, comes to us from the feudal system, "that wicked and absurd form of government that degraded the human species and dishonored the title of man" (ibid.). The general will is only formed by a majority of votes, for the majority principle is a necessary consequence of the social contract, which itself can be entered into only by "unanimous consent" (ibid. 4.2).

Secondly, there can be no question of a *trias politicas* in the sense of Montesquieu, because that theory rested on the assumption that sovereignty can be divided, a notion which Rousseau, in line with Bodin, Hobbes, and their absolutistic followers, must on principle reject. The true sovereign ordains that there shall be set up a government of such and such a type, and this act establishes the fundamental law of the state. Next, the sovereign people nominate the magistrates who will be charged with the government so ordained. But this nomination is a particular act, an executive act, one that flows entirely from the law and is subject to the law. Thus the so-called executive power can never be independent of the legislative power. It merely executes the general will manifest in the law: ". . . the citizens, having become magistrates, pass from general acts to particular acts, and from the law to the execution of the law" (ibid. 3.17).

Granted, Rousseau inevitably comes to a separation of legislative and executive power, but never in the sense of mutual independence. The installation of a government by the sovereign people is not a contract, but a law. Those who bear the executive power are not the people's masters but its functionaries. "They can be appointed and removed at the people's good pleasure. . . . Theirs is but to obey as citizens, without having any right to negotiate the terms of their appointment" (ibid. 3.18).

2.32 Rousseau's law-concept is a humanistic law-idea which at the same time serves as a law-concept

If we, finally, try to establish Rousseau's law-concept, it turns out that his natural-law *concept of law* coincides already with the humanistically understood *idea of law*. In his very law-concept he severs the bond with the natural side of reality and looks for the essence of law in abstract ethical freedom. Proceeding with

Locke from the innate absolute subjective human rights of liberty, equality and property, he construes with the aid of a social contract a general will in which these human rights are elevated to inalienable civil rights. The essential content of Rousseau's law-concept is the liberty of the individual person in the sense of self-determination – the autonomy of the human will which the social contract elevates to the level of the general will. With that, the transition has been made from law-concept to law-idea, understood in a humanistic sense.

In the nominalistic construction of the general will the ethical, humanist idea of liberty dissolves in the notion of equality that levels all structural differences. The law-idea functions in Rousseau at the same time as the law-concept, for a positive legal order that does not come up to the standards of his "social contract" and "general will" is not a legal order in his eyes but tyranny and brute force. However, since his law-idea in essence has entered the domain of humanist morality, so that the boundary between law and morality are erased, he cannot help but get caught in the internal contradiction between legal coercion and moral freedom, a contradiction which he formulated in the classic motto: "He will be forced to be free!" For if he indeed wants to continue talking about law, his law-concept cannot dispense with *retributive coercion*. But that coercion cannot be subsumed along with moral freedom under a single logical denominator. In point of fact, moral freedom is sacrificed to the absolutism of the general law when Rousseau with perfect consistency demands also an ethical state censorship (ibid. 4.7) and a compulsory civil religion (ibid. 4.8)!

Nominalistic individualism knows no boundaries of competency for Leviathan.

2.33 The National Assembly's Declaration of the Rights of Man and Citizen

Rousseau's legal and political theory was passed into law by the revolutionary National Assembly of France in the famous *Declaration of the Rights of Man and Citizen*. This declaration was taken to be the real Constitution of France.

Although Rousseau was personally averse to revolutionary violence, his theory became the gospel of the most violent revolution world history had known until that time. The *Declaration*

of 1789 differs from declarations passed earlier in America by its more theoretical character in terms of legal and political philosophy.

Article 1 declares that men are born free and equal in rights.

Article [4 and] 5 reveal the true content of the revolutionary concept of liberty by declaring that liberty consists in the right to do anything the law-maker does *not* forbid, to which is added, in line with Rousseau, that the law can only will the general welfare.

Article 6 declares that the law is the expression of the general will and affirms the inalienable civil right to participate in the making of laws. In the eyes of the law all citizens are equal and are equally eligible to all public dignities, offices and functions, "there being no other distinction among citizens than that of their virtues and talents."

These articles are followed by a series of fundamental provisions about guarantees for personal freedom, freedom of the press, security of person and property (inviolability of ownership), and finally about the separation (of course not the mutual independence) of the legislative, executive and judicial powers.

This declaration of human rights, adopted on 27 August 1789, was incorporated in the French Constitution of 1791 (whose clauses were regarded as the positive application of these principles) and since then in important elaborations of them in subsequent constitutions (1793 and after), until Napoleon expunged them from the Constitution when he launched the Empire (1804).

After the Restoration (1814) they were transferred in the form of "fundamental rights" into the various constitutions of Europe,[1] while the openly revolutionary principles (popular sovereignty etc.) were of course struck out.

1 Cf. in the Dutch Constitution, art. 4 (equality in legal protection of persons and properties), art. 5 (every Netherlander is eligible for public office), art. 7 (no preventive censorship of the printing press), art. 8 (the right of petition in written form to the competent powers), art. 9 (the right of association and assembly), art. 170 sub 1 (no one can be turned away against his will from the judge assigned to him by law), art. 171 (guarantee against arbitrary arrest), art. 172 (guarantee against arbitrary entry into homes), art. 173 (guarantee of the privacy of correspondence), art. 181 and following (guarantees of freedom of religion), art. 208 sub 2 (freedom of education).

In our country a compromise was reached between Rousseau's theory and the *trias politica* doctrine of Montesquieu in the *Algemeene Beginselen en de Burgerlijke en Staatkundige Grondregels* [General Principles and Civil and Political Ground Rules] that formed the preamble to our revolutionary constitution of 1798.

2.34 The positive value of fundamental human rights

The fundamental rights as we know them in our modern constitutions are worthless if they are regarded as *absolute subjective rights of individuals*. We base this judgment on the grounds put forward when we discussed the doctrine of innate rights. But neither should we view them as non-binding, purely political guidelines for the legislator. The positive value of the fundamental rights, which are in no way dependent upon the constitution, can only be understood in the light of sphere-sovereignty and the inviolable boundaries of competence of the state in the formation of law. But more about that later.

3 THE LAW OF REASON. THE FUNDAMENTAL DIFFERENCE BETWEEN HUMANISM'S RATIONAL LAW AND NATURAL LAW

Although, as we have seen, a fundamental shift from law-concept to law-idea was noticeable already in Rousseau and partly also in Wolff, it is customary not to date the rise of so-called "*Vernunftrecht*" (rational law) until Immanuel Kant (1724-1804).

Humanist *rational* law, according to the prevailing view, differs from humanist *natural* law in that the latter always tries in one way or another to derive law from a natural impulse (the social disposition, fear, the pursuit of happiness, etc.), whereas rational law breaks down every bridge to the nature sides of reality and wants to deduce law from the normatively understood rational idea of autonomous freedom. Yet this characterization of the difference is not in every respect correct or clear.

In the foregoing we noted that neither Grotius nor Leibniz nor Wolff believed in a naturalistic concept of law but always chose their starting point in the rational-moral side of human nature. The real difference between natural law and rational law can only be grasped in the light of the primal autonomy in the humanist cosmonomic idea between the science ideal and

the personality ideal as explained above in Chapter I, § 1.9 (page 6).

The theorists of natural law, insofar as they wanted to maintain law as a rational-moral concept, nevertheless looked to the science ideal for support in deriving their system of natural law; and with Descartes they identified the essence of personhood as such in scientific thought (*cogitatio*). By contrast, the theorists of rational law broke with this starting point and switched to the personality ideal, the essence of which since Kant is sought in the idea of moral autonomy, of normative freedom, absolutely independent of all natural experience.

We saw in Chapter I how Kant separated the two realms, nature and freedom, by an unbridgeable gulf, restricting the science ideal to the experience of nature but at the same time demoting nature to the *phenomenon* where the substance, the supra-temporal root of reality, is not to be found (see *Introduction*, pp. 42-45, 67f.). That substance lies rather in the rational-moral idea, which however cannot be grasped by scientific thought – by the theoretical Reason, as Kant would say – but only by the practical Reason in an *apriori*, universally valid faith in reason.

The concept of law according to Kant cannot be a concept of experience, a (natural-)scientific concept, a synthetic (scientific) category or thought-form, but can only be gained from the supra-sensory practical idea of moral freedom. It can only be grasped as a rational idea in an *apriori* faith in reason.

This poses a new challenge for the concept of law. It has to be "pure," that is to say, it has to be gained free of all ties with the nature sides of reality, in fact free of all experience. Yet this "purity" the law-concept has to accept, with complete loss of all material meaning and content. For we know that the meaning of a law-sphere can only grasped in unbreakable coherence in time with the meaning of all other law-spheres (see *Introduction*, pp. 13-21, 94ff.).

Every bit of material content of the idea of freedom in Kant is "conditional," not absolute but empirical, contingent. However, the idea as absolute *noumenon* is necessarily unconditional. For this reason it can only be "pure" form.

Kant made a fundamental distinction between form and matter already in his *critique of knowledge*.[1] The material of knowledge is for him the purely empirical totality of the chaotic psychic-sensory impressions which are ordered by the *apriori* forms of perception (space and time) and of thought (the categories).

"Form" in Kant is always identical with universally valid, *apriori* (i.e., transcendental) law-conformity; and "matter"is always the conditional, empirical-sensory stuff ordered by form. Hence the practical rational idea as *apriori* form of activity must not possess any empirical content or matter,, hence no empirical material purposes or ends. In his *Critique of Practical Reason* (1788) Kant therefore rejected all material moral and legal principles.

Noumenal freedom demands the absolute autonomy of the will, and this autonomy can only reside in the pure form of rational laws for action, which Kant defines in his *categorical imperative*: "Always act so that the maxims[2] of your will could at the same time serve as principles of universal law."

Over against this formal principle of autonomy Kant places all material moral principles (such as self-preservation, happiness, perfection, love, etc.) and rejects them as heteronomous since their content is conditional, dependent upon nature and therefore not upon the moral will itself as absolute lawgiver. The categorical imperative Kant here sets up is an absolutization of the moral function according to its law-side and is therefore indeed logicistic in nature. It is an empty tautology that can be expressed in the following formula: Act morally according to the universal moral law.

The logicistic nature of the categorical imperative becomes most manifest in the application Kant gives to it, where he works in the most meaningless fashion with the logical principle of non-contradiction. He tries to show, for example, that suicide and theft conflict with the categorical imperative because if they were elevated to a "universal moral law for action" they

1 *Kritik der reinen Vernunft* (1781).

2 By "maxims" of one's actions Kant understands the subjective principles on which someone can base his actions, in distinction from the objective practical laws (norms) which can claim universal validity for all men.

would be a logical contradiction. In this way immoral action becomes identical to illogical action.

3.1 Kant's concept of freedom. The influence of Rousseau

For all that, Kant does give positive content to his concept of freedom, namely that of the humanist personality ideal. The practical idea of freedom posits the human personality as the absolute *Selbstzweck* or end-all and be-all. The personality may never be reduced to being a means to an end, not even to a divine end. The absolute human value of a man's personhood ought to be holy to all, even if the man's empirical existence is unholy enough.

The autonomy principle in Kant is likewise humanistic to the core. As logical-mathematical thought (i.e., the mind) is elevated to the level of lawgiver for nature in the domain of natural experience, so the practical reason is the ultimate norm of good and evil in the domain of freedom. It is in conflict with Kant's autonomy principle to let this norm originate in God's sovereign will as the Creator. In the categorical imperative the human personality, as the practical reason, proclaims itself sovereign. In this whole view of normative freedom as autonomy Kant is strongly influenced by Rousseau, whom he greatly admired.

Kant worked out his "rational law" particularly in a book he wrote late in life: *The Metaphysical Elements of Justice*.[1] The application of his rational law to international law came out just before that, in 1795, in his small tract *Toward a Perpetual Peace: A Philosophical Sketch*, in which he deduces in rationalistic fashion the idea of a league of nations from the postulate "War Ought Not to Be."

3.2 Kant's law-concept as law-idea. The distinction between law and morality. Legality and morality. The inner antinomy between coercion and freedom in Kant's law-idea

While the categorical imperative, as applied to inner freedom or the inner disposition, yields the basic principle of Kant's morality, namely acting out of respect for the law, when applied to the

1 *Metaphysische Anfangsgr*ünde *der Rechtslehre*, vol. I one of *Die Metaphysik der Sitten* (Königsberg, 1797).

sphere of external freedom it yields his law-concept which in essence is a law-idea: "Law is the totality of conditions under which the will of one can co-exist with the will of another according to a universal law of freedom." This law-concept of Kant's is usually referred to as the *principle of co-existence*.

Accordingly, the difference between justice and morality is sought by Kant primarily in that morality turns the categorical imperative simultaneously into the motive force of the internal disposition, whereas justice is content with external actions in accordance with the law. Kant expresses this distinction in the concepts of *morality* (acting from a sense of duty) versus *legality* (merely acting dutifully). Legality therefore is the simple conformity (or non-conformity) of an act with the law, regardless of the inner motive of the agent. The moral law cannot, according to Kant, be external; the legal norm can.[1]

In the second place, Kant accepts, in line with Grotius and Thomasius, that coercion or compulsion is the defining feature of law. Hence he gives a further definition of justice: "Justice, strictly speaking, is the possibility of a continual, reciprocal compulsion compatible with everyone's freedom in accordance with universal laws."

This concept of law and justice contains a patent antinomy. Kant defines freedom in a juridical sense as "independence of someone else's compelling will," which is but another way of expressing the idea of autonomy – existence as a *Selbstzweck*, an end in itself. But how can the freedom of the personality, so defined, be compatible with coercive law which precisely ignores this freedom?

Kant tries to resolve this antinomy in a pseudo-logical fashion. The coercive nature of law is the negation of a negation of freedom according to universal laws (injustice) and is therefore positively in agreement with the laws of freedom, just as in algebra a double minus sign gives a number a positive value. The origin of this antinomy in Kant lies in the absolutization of human freedom in a jural and a moral sense. This freedom in the idea of

1 This external nature of the law-idea led Kant to make this typical statement in his tract on perpetual peace: "The problem of political arrangements, it may sound harsh, is even for a people of devils (if they had brains) unsolvable."

the antinomy is not understood in the meaning of retribution and so cannot but collide with legal coercion. For no justice can result from a double injustice in the way a double minus sign in algebra gives a number a positive value, or in the way the negation of a negative judgment in logic leads to an affirmative judgment.

If the negation of the negation of freedom is to square with the Kantian idea of freedom, then it must be settled beforehand that freedom in the sense of absolute autonomy can sometimes be united with compulsion. But this is precisely impossible, because juridical freedom in Kant is not taken in the sense of retribution but in the sense of an external autonomy, from which the possibility of legal compulsion cannot in any way be derived.

3.3 Kant no longer knows law in a broad and a narrow sense. Law in Kant is *jus strictum*

Kant is the first who expressly broke on principle with the view already noted in Grotius who next to law in a narrow sense (*jus strictum*) also recognized law in a broad sense. "Law in a broad sense" is distinguished by Kant in equity and necessity, and he calls it *jus aequivocum* (equivocal law).

Kant does not count equity among objective, lawful law, but among subjective maxims, and he therefore considers equity jurisprudence an oxymoron. And laws of necessity, with its motto "*necessitas non habet legem*" (necessity has no laws), is fully rejected by Kant as an "objective" legal norm. It can at most have grounds in a subjective sense, which precludes punishment, but can never undo an unlawful act in an objective sense.

This elimination of laws of necessity from the "objective" law of reason (i.e., the jural according to its law-side) is of immense import. For we recall that Wolff justified the absorption by *raison d'état* of natural law on the basis of "laws of necessity." Kant's concept of law demolishes all compromise with the principle of *raison d'état*.

3.4 The concept of *salus publica* in Kant

Kant too does acknowledge in his rational political theory the rule *Salus publica suprema lex esto*, but his entire freedom idealism resists inserting into it the Wolffian sense of the well-being and happiness of the citizens. The eudaemonist principle, after all, is heteronomy in Kant and therefore conflicts with the basic

principle of his ethics: autonomy. Kant gives *salus publica* an entirely different content.

As the basic principle of the only rational constitutions, *salus publica* means only that the state must be brought into conformity with the *apriori* legal principles that we are obliged to strive for by a categorical imperative. And despite all this we will see how Kant's idealistic law-concept, which in its root is nominalistic and individualistic, leads to a relentless sanctioning of the absolutism of the "general will" in the positive laws.

3.5 Law is restricted to human relationships. The relation between rational law and positive law in Kant

In the end Kant restricts his law-concept to human relationships and accordingly removes the so-called *jus divinum* from his philosophical theory of law. The relation between rational law and positive law in Kant is anything but clear. Kant himself still refers to his rational law in the traditional way as natural law, and it is undeniable that his detailed exposition sends rational law back to the outlines of the rationalist humanist natural law. Still, his metaphysical starting point in rational law no longer has any natural-law characteristics whatsoever.

Kant characterizes positive law in two ways: on the one hand as statute law that springs from the will of the legislator, as against the natural (read: rational) law that rests purely on *apriori* rational principles; on the other hand, as real law, that is, as law given in experience, law as it obtains in a particular time and place, while rational law "must deliver unchanging principles to all positive legislation."

When dealing with the question, *What is law?* Kant notes that the concept of law must provide the criterion for deciding whether what the positive laws say and want is indeed law and that in order to discover this criterion the jurist should leave the empirical principles of the positive laws and search out the *apriori* source of law in reason (even though the positive laws

can function very well in orienting and guiding the jurist),[1] in order to find the foundations for possible positive legislation. These two characterizations of positive law seem difficult to hold together.

On the one hand, positive law is proclaimed in positivistic fashion to be "the will of the legislator"; on the other hand, rational law is presented as the necessary *apriori* foundation of every positive law. From what follows it will become clear, however, that Kant recognizes rational law only as normative criterion for positive law, just as his law-concept is indeed a law-idea.

Meanwhile, in true nominalist fashion, Kant finds in his rational law a bridge to a relentless sanctioning of the will of the legislator with the aid of the contract theory and the well-known adage, "*Volenti non fit iniuria*," as a result of which he gets caught in the inner antinomy of rational law familiar since Grotius. For the principle of *pacta sunt servanda* and the construction of positive law as the "general will" sanction also those positive laws that happen to conflict with Kant's code of rational law, even as Kant enjoins unconditional compliance with the positive laws. In other words, rational law with him is no longer a barrier for the state legislator. This antinomy acquires a very complex character in Kant because the relationship between rational law and positive law intersect in his theory with that between private and public law.

3.6 The relation of public and private law in Kant. All positive law is for him public law. The classic figure of the rule of law

Kant differentiates his law of nature (read: law of reason) into "natural" and "civil" law. "Natural law," as the law of the state of nature, he identifies with private law; civil law, which guarantees "Mine and Thine" by means of state laws, he identifies with public law.

Evidently, Kant honors the classic liberal idea of the rule of law as we found it developed in Locke, and therefore he looks for the sole end of the state in the protection and sanction of in-

1 In this connection Kant adds the famous saying that is worth committing to memory: "Eine blosz empirische Rechtslehre ist (wie der hölzerne Kopf in Phaidrus' Fabel) ein Kopf, der schön sein mag, nur Schade! dasz er kein Gehirn hat" (A purely empirical [read: positivistic] legal theory, like the wooden head in Phaedrus' fable, is a beautiful head, but too bad it has no brains].

nate and acquired private subjective rights. These rights form the starting point for his natural-law private law, and Kant differentiates between them in somewhat the same way as Wolff.

Innate rights, then, according to Kant, represent the moral capability to obligate others, a power that belongs by nature to every man, irrespective of any legal act. Acquired rights, by contrast, do have a legal act as their precondition. Kant calls the innate mine and thine the *inner* mine and thine and it consists according to hm only in a single right, namely freedom (independence of someone else's compelling will) to the extent that it can co-exist together with everybody else's freedom in accordance with a universal law of freedom.

In this formula, which rests entirely on Kant's law-concept, the individual with his innate rights is at least no longer, as in Wolff, placed entirely on his own but from the beginning is subject to the principle of co-existence and has therefore been relativized as individual in regard to legal *coordinate relationships*, even though Kant as an individualist lacks insight into the supra-individual structure of *organized communities*. In any case, Kant accordingly no longer speaks of absolute innate rights. The one innate right of freedom, according to him, contains—: the right of equality, that is, the right not to be obligated by others to more than one may in turn obligate others (Rousseau); the right to be one's own master (*sui juris*); the right to a good name (because one has committed no injustice to anyone prior to any juridical act); the right to freedom of expression; etc. etc.

3.7 The practical significance of distinguishing the various innate rights for the distribution of the onus of proof

The practical significance of distinguishing all these innate rights as they were taken up in the various declarations of human and civil rights is the distribution of the onus of proof. For whenever the existence yes or no of an acquired right was at issue, the party who disputed such a right could invoke his innate right of freedom (now specified according to its various relationships) and plead the relevant innate right derived there-

from. The opposite party then had to prove his title to the acquired right.

Kant deems all these distinctions philosophically unwarrented as separate innate rights.

3.8 Intelligible property and physical property

Opposite the internal mine and thine (the innate right of freedom) Kant places the external mine and thine, and its definition brings him to a most remarkable view of legal property: "That which is legally mine (*meum juris*) is that with which I am so bound up that the use another might make of it without my consent would injure me." Kant opens his discussion of private law on external mine and thine with these words: "The subjective condition of the possibility of any use at all is possession [*Besitz*]." He then distinguishes between *physical* (empirical) possession, which simply consists in possession with external detention, from *intelligible* or *juridical* possession as possession without detention; and, true to his metaphysical separation between noumenon and phaenomenon, he wants to define the latter without any appeal to sensory experience by taking the object of possession not as a space-time matter but simply as a thing that is logically distinct from the legal subject.

Although this definition naturally ends in a meaningless logicism, still the distinction between physical and juridical possession as possession with and without detention remains important and fruitful.[1]

As we know, in modern civil law, possession without actual detention (*corpus*) is very well possible. The juridical authority over a thing is never identical with physically holding or maintaining it (*manutentio*), a fact that immediately makes sense in the light of our theory of meaning-analogies.

Thus, for Kant, natural-law private right is identical with external mine and thine, and as he embarks on a systematic treatment of this topic he soon relapses, despite his starting point, into the old rationalistic natural-law method of a metaphysical rational law when distinguishing between intelligible and phy-

1 It deserves mention that for Kant the possibility of becoming owner of a *res nullius* ("nobody's thing") through occupation is a postulate of the practical reason. He rejects Locke's theory that only the work of cultivation subsequent to occupation is the natural-law title for ownership. In Kant, all right to ownership ultimately flows from occupation of the soil.

sical possession. He too sets up a material code of natural-law private right and in so doing abandons his transcendental method which was intended to deduce only the ideal *form* of legal phenomena. In his treatment of the second part of his rational law system, which deals with the *apriori* philosophical political theory, he is forced to take a position on the relation between natural (private) law and civil law, and here he tries to build a bridge between the two whereby the unity of his law-concept is preserved, at least formally.

According to Kant, the state of nature can be characterized over against civil society as a condition of law-lessness, because there is no competent judge when rights are in dispute. That is why all possession in the state of nature is only provisional ownership, which does not become legal ownership (property) until the establishment of a civil society with its state sanctions. In this, Kant follows Rousseau, who knows only "possession" prior to the state, not legal "property," since property "can only be based on a positive title" (*Social Contract* 1.8). This at least is in principle the escape route, chosen already by Hobbes, from dualism in the law-concept.

Natural law gains force of law only in the state. Kant, however, remains true to his idealistic standpoint which sees in rational law only an ideal criterion for positive law without attaching to it any real force of law when facing the will of the legislator. With that, Kant escapes at least the antinomy that ensnared Hobbes when he feigned an identity between his natural law and positive law. Kant writes in so many words:

> In terms of form, the law of mine and thine in the state of nature contains the same as that which civil society prescribes insofar as it is viewed according to purely rational concepts, except that in the latter the conditions are spelled out under which they can lead to the exercise thereof.

In other words, Kant too speaks *only ideally* of a "civil state" and "civic legislation" whose genuine unification into a communal body serves as a guiding principle (*norma*), in short, as a state "as it should be according to pure principles of law." So far, therefore, there is as yet no internal contradiction in the relation between rational law and positive law. But the inner antinomy in Kant's rational law becomes starkly evident when from this

rational law, by way of the nominalistic construction of the social contract, he draws the conclusion that positive legislation as the "general will" can do no one any wrong.

3.9 **Kant's view of the social contract**

The social contract by which individuals constitute themselves a state is understood by Kant, essentially like Rousseau, as a compact whereby the people, one and all, *omni et singuli*, surrender their external natural freedom, to receive it back in a higher form as members of the state community (*universi*).

The social contract is here conceived merely as a supra-sensory *idea* of a real contract, an idea according to which the state alone can be taken to be a lawful institution.

Rousseau too saw his social contract as an *ideal* justification of the state, not as an historical fact. But he wanted to see this idea *realized* through the reformation of unlawful political institutions.

On this point Kant undoubtedly thought the same thing, but he stated openly (which Rousseau did not do) that a revolutionary path to realization is fundamentally reprehensible. The social contract is implied in a nutshell already in Kant's "law-idea," in fact constitutes the essential content of it. For this law-idea demanded the delimitation of the domains of individual freedom according to a "universal law of freedom." Now then, according to Kant this "universal law of freedom" is given only in the civil state, whereas the state of nature is a "savage, lawless freedom" which every individual is commanded to abandon by the categorical imperative. The general will as constituted by the social contract is here indeed the legislator of freedom in the sense of Kant's law-idea.

In his *apriori* political philosophy Kant wields the contract principle in the same logicistic way as he employs the categorical imperative in his moral philosophy. He inquires every time whether something is not at variance with the social contract or whether it is logically possible that the people should desire this or that. But as he works out his idea of the state further, Kant departs from the paths of Rousseau's absolutism of popular sovereignty and returns to the theory of the constitutional state as founded by Locke.

3.10 **Kant and the doctrine of trias politicas**

In the manner of purely "rational law" Kant employs a practical syllogism to deduce the doctrine of *trias politicas* (i.e., Montesquieu's theory of the separation, or the mutual independence within their distinctive spheres of competence, of the legislative, executive and judicial powers of government). The syllogism runs as follows: *major premise*: the law; *minor premise*: the command to execute the law; *ergo*: the judiciary.

The legislative power can be granted only to the people's general will. For no legislation must be able to harm anyone, and this is possible only if via the general will, in keeping with the ideas of freedom, equality and independence (autonomy), everyone imposes the law upon himself (*Volenti non fit iniuria*).

Thus, with respect to the three "rationally necessary" powers in the state, Kant formulates the well-known adage: "the will of the legislator about mine and thine is irreprehensible, the executive capability of the highest authority is irresistible, and the verdict of the supreme judge is irrevocable."

3.11 **The inner antinomy in Kant's rational law**

Accordingly, the "general will" of the legislator is not in conformity with rational law on the basis of its material content, but purely in a formal sense as the "general will" of "proper practical reason." With that, this rational law dissolves itself, because it must sanction every content of the general will that is in conflict with the other postulates of rational law. For neither formal autonomy nor the Rousseau-like concept of equality can guarantee the internal supra-arbitrary legitimacy of the content of positive legislation.

Here the nominalistic nature of Kant's law-idea appears as clear as day. He goes so far in sanctioning all governmental arbitrariness that he considers the right to resistance of the old estates "against all reason." On the other hand, after a successful revolution the people have to render the new government unconditional obedience. Meanwhile we have to note that in spite of his individualistic view of the state, which of course knows no inner boundaries of competence, Kant does defend, against Grotius, Hobbes, Rousseau and Wolff and in line with Locke and Thomasius, the separation of church and state.

In his law-idea Kant, with Thomasius, limits legal relationships to those that are susceptible to external legislation. And he believes it would be in conflict with the autonomy of the personality if the state were to concern itself with internal ecclesial affairs and matters of faith. But he does not draw a genuinely juridical sphere of competence for the state. His law-idea, after all, is merely a normative criterion for positive law, not a real legal concept.

Moreover, the contrast *external* and *internal* for distinguishing between justice and morality is altogether undefined as to meaning and is therefore useless. The law is absolutely not indifferent to someone's internal disposition. Think of weighing the measure of punishment off against the degree of guilt of the offender.

3.12 Kant's abstract view of penal retribution

Kant's formalistic, abstract idealistic view of law has made him the father of the so-called classic theory of retribution in criminal law. This theory wants to understand retributive punishment as a strict demand of the categorical imperative, free of all connection with the distinct structure of the state and free of all the other meaning aspects of the cosmos. It understands punishment in the primitive sense of *talio* (an eye for an eye: the punishment should if possible inflict the same damage to the offender as he caused his victim). Kant expresses this abstract idea of punishment – its freedom from all empirical material ends (such as the common welfare, the *salus publica* in the sense of Wolff) – in the adage "*Fiat justitia, pereat mundus*" (let justice be done, though the world perish).

3.13 The true meaning of Kant's law-idea. Law as the individualistic order of peace. Kant's idea of a league of nations

The full meaning if Kant's law-idea does not become clear until his rational-law theory of international law.

According to Kant, who follows Hobbes, Spinoza and Pufendorf in this, the nation-states are living in a state of nature. Consistent with his individualistic view of the relation between the state of nature and the civil state, Kant qualifies this condition as lawless. After all, a general will is lacking in the existing rela-

tions between peoples. According to Kant's law-idea, the state of nature among the nation-states is a state of war, a condition of the right of the strongest, even though it need not always lead to actual warfare.

A categorical imperative that reads: *War ought not to be*, obliges the states to withdraw unconditionally from this state of nature and to enter into a league of nations, in keeping with the idea of the social contract. Kant does not, like Wolff, conceive of such a league as a superstate, a "*civitas maxima*" with sovereign authority over all member states, but rather as an association or federation of states, a permanent congress of states, an association which can be terminated at any time and therefore needs to be renewed from time to time. This congress of states shall judge international disputes in the same way as individuals conduct their lawsuits before the civil judge! All rights of mine and thine belonging to nation-states in the state of nature bear only a provisional character and shall at last peremptorily become true rights in Kant's league of nations.

Not until we have reached this point do we get to know the true content of Kant's law-idea. It is the individualistic-nominalistic idea of an *order of peace*. In Kant, the categorical imperative for states is not: "Let there be peace through justice," but conversely: "Let there be justice through peace." As a result, Kant became the father of idealistic pacifism, which for all practical purpose places peace above justice. The idea of "perpetual peace" is in Kant the highest political good, the ideal end goal of historical development. This nominalistic law-idea is so devoid of insight into the distinctive structural peculiarities of the internal communal law of the state and of disputes in international law that Kant puts the latter on a par with lawsuits between private individuals, similar to the way he defines the state as "a multitude of people under juridical laws."

Kant elaborated on his idea of a league of nations in his essay of 1795, *Perpetual Peace*. At the same time he delivered himself of a moralistic critique of the idea of *raison d'étre* which again revealed how little he understood of the positive value at the heart of this idea.

In Kant, politics dissolves into an abstract individualistic juridical morality. For the rest he views statecraft as a mere matter of technique or judicial method.

3.14 Other representatives of rational law

With his "rational law" Kant created a following. His best known disciples were Schmalz and Rotteck, who like Welcker tried to give Kant's abstract idea of a constitutional state a more cultural orientation, without departing from the liberal standpoint.[1] As a representative of rational law must be mentioned, directly next to Kant, Johann Gottlieb Fichte (1762-1814) in his first period of individualistic rationalism with his systematic study, *Foundations of Natural Law*.[2]

3.15 The anarchistic consequences of the rational-law theory of absolute human rights in Fichte (1793)

In 1793, Fichte preceded his systematic *Foundations* with a very remarkable essay, published anonymously under the title *Contribution to the Correction of the Public's Judgments concerning the French Revolution*, a work he later openly disavowed. It is remarkable because it drew the conclusion from the theory of innate and inalienable human rights, conceived in terms of rational law, that rational law justifies only the state of nature and regards the state, along with the legal order, as in and of itself unjustified and based purely on arbitrary convention. Here Fichte merely drew the radical conclusion from the doctrine of absolute subjective rights, about which we showed earlier that when consistently considered it makes every concept of law impossible.

In this early work of Fichte, the absolute human rights are understood moralistically and rationalistically, as the reflection of the metaphysical absolute moral law of freedom. Acts which this moral law commands me to do are my inalienable absolute rights; acts which that law merely allows me to do are my alienable rights. Here we have the absolute autonomy of the free "I",

1 Cf. Theodor Schmalz, *Handbuch der Rechtsphilosophie: Reines Naturrecht* [Manual of legal philosophy: pure natural law] (Königsberg, 1791) and Carl von Rotteck, *Lehrbuch des Vernunftrechts und der allgemeinen Staatswissenschaft* [Textbook on rational law and general political science], 4 vols. (Stuttgart, 1829-35).

2 Fichte, *Grundlage des Naturrechts*, 2 vols. (Jena and Leipzig, 1796, 1798).

the free personality from which even justice derives, conceived in Fichte "*ad consequentias*" and so "*ad absurdum*."

Whatever the personality has not put to itself as imperative in the autonomous moral law belongs to the domain of free will, of contract and convention. The absolute primal rights flow from the moral nature of man, whereas the acquired rights stem from a contract. But Fichte does not even recognize the validity of the principle of *pacta sunt servanda* vis-à-vis the absolute freedom rights: "It is an inalienable right of man, also unilaterally, whenever he wants, to cancel any of his contracts; unalterability and perpetual validity of any contract is the harshest offense against the rights of mankind as such."

In the line of Locke, Fichte accepts ownership-through-labor (physiocratically conceived) as a pre-state human right, but he denies a *dominium eminens* (supreme ownership) for the state. The state and all positive law belong to the area of pure arbitrariness, the area of convention and contracts. In contrast to all his predecessors Fichte does not regard the social contract as a special one at all, but rather as an ordinary private-law contract, on a par with all others like it. Like the latter, it must leave intact the supreme right of man, that of free self-determination; hence every state law requires the consent of each and every individual without exception. The state really has only one end, namely, to restrict itself more and more as culture progresses, and at last to abolish itself. This idea never left Fichte, not even in his later phases, at least prior to his very last period.

3.16 The absolute separation between law and morality in Fichte's Foundation of Natural Law and the negation of a pre-state natural law. *Anselm Feuerbach*

In his book on the foundations of natural law Fichte, in part under Kant's influence, abandoned his earlier anarchistic theory of the absolute moral rights of man as well as his derivation of rational law from morality. He now declared that there is no natural law at all in the sense of a pre-state or extra-state law, and after 1798 he grounded his entire rational-law system, his

theory of property, and his economic theory on the idea of the state, since "only in the state does anything have force of law."

At the same time he now carried through such a radical separation between law and morality as had never seen its equal in the entire history of natural and rational law. Both Thomasius and Kant, for all their sharp distinction between law and morality, had nevertheless in the final analysis given to both law and morality a common root in a basic principle of ethics. However, Fichte, like Feuerbach[1] in his work *Critique of Natural Law* (1796), also severed this last tie between rational law and morality.

3.17 Fichte and law as logical negative principle of mutuality

Fichte now releases his rational law from the moral "rational purpose" that consists in the duty of the "I" (the free personality) to strive after the absolute. Law rests only on a *negative*, if need be compulsory, acknowledgment and self-limitation of all rational creatures among each other (even if egoism can continue to rule each individual).

No doubt what we see here is the influence in Fichte of Kant's distinction between legality and morality, but he goes further than Kant when he no longer derives rational law from the supreme moral law, but merely from a law of logic. "The concept of law will be required by the logical consistency and truth of thought." One need only recall the *principium contradictionis* to realize that rational beings ought to treat each other not as things but as rational *persons*. Fichte seeks the essence of law as idea simply in the mutuality of all legal relations, in which he no longer recognizes a moral principle but merely a principle of logical thought. The legal duty not to treat each other as things does not hold except on condition of mutuality. This is accompanied by a very negative attitude toward law which we could already notice in his earliest work. No absolute ground can be adduced for law, as it can for morality; it belongs to the realm of rational calculation of interests, to the realm of logical consis-

1 Anselm Feuerbach (1775-1833) was a well-known scholar of criminal law. He is the father of the theory that locates the purpose of punishment in the psychological pressure exerted by the threat of punishment as a preventative measure, a deterrence against crime.

tency. The principle of law is not an absolute but merely a hypothetical principle. However, can a ground be adduced why someone has to be consistent? In this way Fichte in 1796 gives to law an internal antinomic intermediate position between the two domains of natural necessity and moral freedom. On the one hand, law is no mechanical conformity to natural law, because rational creatures, physically speaking, can just well negate as respect each other's freedom. On the other hand, law belongs more to the domain of nature than to the domain of freedom since, in Fichte, law rests only on technical, practical grounds.

In his *Moral Doctrine* of 1798, Fichte retreats from the stark dualism of law and morality insofar as he considers it an absolute duty of conscience to incorporate into the legal life of the state the acknowledgment of property, work, and so on, thus giving law an absolute sanction within morality, though with the proviso that after the education of humanity to universal moral harmony the state as external institute of coercion ought to disappear.

The basic principle of Fichte's moralistic philosophy in this period is to have the whole of temporal reality arise dialectically[1] (i.e., by way of an antinomy through transgressing all meaning-boundaries in thought) from the moral freedom of the absolute "I" *as the root of creation.* Consequently, he also wants to deduce the idea of law dialectically from moral freedom (as the negation thereof) and in so doing accept the antinomy that must necessarily arise for thought.

Implicit in the primal moral right of the individual person to make the whole world serviceable to his absolute end goal is the antinomy that "such infinite freedom would abolish the freedom of all except for that of a single person." To solve this antinomy Fichte accepts a new antinomy: the restriction of everyone's absolute primal right through the contract that acknowledges the freedom spheres of the others. He construes a

1 The dialectic method is always out to grasp the totality of temporal reality by abolishing the meaning boundaries, thus replacing the cosmic law-order with dialectical thought. See Chapter 1, §§ 1 and 9.2.

synthesis between these two antinomic principles – absolute freedom and recognition of each other's right – in the intimate collaboration in the service of the moral end goal: the socially organized ennobling and spiritualizing of nature and the world of the senses. Only from this goal does the empirical individual person derive his moral right of existence.

3.18 Fichte's last period: law as the preliminary stage of morality

Not until his historical, metaphysical period does Fichte abandon his individualistic standpoint and look first of all for the individual as a moment in the totality, taken to be the supra-individual community metaphysically understood. In his *Doctrine of the State* of 1812, in which he adopts this standpoint, Fichte views law as the *means* and *preliminary stage* (*"Vorstufe"*) of the moral community of free personalities. Although he continues to hold firmly to the distinction between law and morality, he no longer views law as a purely arbitrary, conventional order (the standpoint of 1796), but elevates law to a morally justified and therefore necessary preparation for that ideal, almost millenarian, final moral stage when without coercion people will live together in perfect harmony in the "communion of the saints." And in his lectures of 1813 on *The Theory of the State*, published in 1820, the dualism between law and morality is entirely swallowed up in dialectical historical development.

3.19 Fichte's last period: The dialectical resolution of the meaning of law into that of morality

The lectures of 1813 depict a continuous historical unfolding of law into morality and dialectically abolish the boundaries between law and morality in the idea of historical development. The idea of consummated morality now appears as the last dialectical development of the idea of law, the moral kingdom of the "communion of the saints" as a continuation, consummation, and dialectical abolition of the state.

With that, the meaning of law is dialectically "*aufgehoben*" (cancelled, dissolved). Both the moralism of Fichte's earlier period and the metaphysical historicism of his final period have no room for a sovereign meaning of the jural.

4 THE VIEW OF LAW OF THE HISTORICAL SCHOOL. GENERAL CHARACTERISTICS OF THE SCHOOL'S INTELLECTUAL BACKGROUND

Following the disillusionment of the French Revolution in which the individualistic-nominalistic natural law suffered shipwreck, the period of the Restoration saw the entrance of romanticism (Novalis, Schlegel, Schleiermacher, Adam Müller, and others), a movement that found its philosophical focal point in the objective aesthetic idealism of Friedrich Wilhelm Joseph Schelling (1775-1854).

The mathematical science ideal of the humanistic cosmonomic idea, which had also inspired natural law, was dismissed in romantic sentimentalism. The humanist ideal of personality was sought beyond the individualistic conception of Fichte's early period in a supra-personal "community of personalities" (see *Introduction*, p. 70.) Captivating the minds were the problems of nationality, the national soul or folk-spirit, and especially history as the mysterious organic action of supra-personal spiritual forces.

This movement found its consummation and at the same time its rationalization in Hegel's absolute historical idealism. It was in this period that arose the Historical School of Jurisprudence under the superior leadership of Friedrich Carl von Savigny (1779-1861). The school would achieve a definitive victory over the natural-law view of law during the 19th century.

4.1 Gustav Hugo and his critique of natural law and rational law

As the precursor of the Historical School, though certainly not its father, we must mention Gustav Hugo (1764-1844).

Hugo was strongly influenced by Pütter's empirical method (see Chap. 1, § 2.5, page 25, § 2.9) and imbued with Kant's critical philosophy. Epistemologically, Hugo delivered the worst blow to the mathematical method of deduction applied to the doctrine of natural law by demonstrating that every version of natural law turns out to draw its material from historical law (in particular from Roman civil law) and that it is possible with the

same seemingly mathematical consistency to deduce from natural-law principles the most heterogenous systems.

Going beyond Kant's own natural-law system, Hugo in his *Natural Law as a Philosophy of Positive Law* (Berlin, 1798) defended the thesis that just as the thinking mind in itself has only empty thought-forms that have to receive their entire content from experience, so reason can supply morality and natural law with nothing but formulaic, content-less guidelines and critical principles that likewise have to derive their entire content from the historical experience of law. Hugo is very skeptical about the absolute validity of all material legal principles and even combats the logical necessity of the natural-law principle of *pacta sunt servanda*, saying that one can adduce arguments both for and against it. In any case it is foolishness to want to derive the legal system from this principle which itself first has to be deduced from law.

For the same reason, institutions like property, family, and so on, are in no way logically necessary. (In his criticism of existing private-law property Hugo shows strong tendencies toward revolutionary socialism.) One could even imagine a legal order without any private law. General speculations about natural private law are useless for legislation. One might as easily try to distill a medical prescription from metaphysical views about the universal properties of bodies. One should stick to the historical experience of law.

He also fought against the natural-law view of the omnipotence of the law-maker. There is much more positive law than can be incorporated in legislation. For this reason it is foolishness to want to codify all law in statutory laws. Thus Hugo underscored the importance of historical study and leveled heavy criticism, particularly at Heinneccius, of the prevailing unhistorical natural-law treatment of Roman law in his day that was averse to studying the sources.

4.2 Hugo and source criticism. Precursor, not father, of the Historical School. His view of history is without the typical organological feature of romanticism

Hugo insisted that the original and pure Roman law has to be reproduced from the sources themselves, whereas the dominant schools uncritically passed off for Roman law the *usus modernus*. He also laid the foundation for the periodization of the history of Roman law, a study in which he followed the English historian Edward Gibbon.

Although Hugo in this way paved the way for the Historical School, his thought lacked the curious organological feature that would become the hallmark of the school. This approach did not take off until the work of Savigny.

4.3 Savigny: his life and works

Friedrich Carl von Savigny was born in Frankfurt am Main on February 21, 1779, a scion of the old nobility. In 1803 he married Kunigonde Brentano, a fan of Goethe and Schilling. Friedrich Carl got to know Schilling already in 1799 and came much to admire him. His famous work *The Law of Possession* was published in 1803, which placed him at one stroke at the head of scholars of German civil law. In this work he developed his well-known *corpus animus* theory of property in ancient Rome, a theory that proved untenable later, especially as a result of the critique of Jhering, who showed it to be at variance with the ancient sources.

As early as 1806, in a review of Hugo's *Textbook of the History of Roman Law*, Savigny defended the thesis that the "whole science of jurisprudence is nothing but legal history . . . so that a preferential treatment of legal history can be distinguished from every other study of legal science only by the varied seduction of light and shadow."

1814 he published the program of the Historical School in his renowned *On the Vocation of Our Age for Legislation and Jurisprudence*.[1] His two standard works are *The History of Roman Law in*

1 *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (Heidelberg, 1814).

the Middle Ages, 6 vols. (Heidelberg,1815-1831) and *System of Modern Roman Law*, 8 vols. (Berlin, 1840-1849).[1]

Volume 8 of *System*, Savigny placed the doctrine of international private law, for the first time since Bartolus, on a fundamentally new basis which has retained its significance till now. While working on this last volume he was called to head the newly created Prussian ministry of revision of statutes, an office he held from 1842 to 1848 but which bore little fruit for legislation in Prussia except for the law on bills of exchange. He had given up his post as professor for this.

For the rest, as Prussian minister Savigny earned lasting merit by stimulating the Royal Academy of Sciences to publish the *Corpus Inscriptionum Latinarum*. For that matter, Savigny was also acquainted with the practice of law since he was a member from 1819 onward of the court of appeal for common law in the Rhine provinces of the kingdom of Prussia.

Savigny died on October 25, 1861, at the age of 83. By his deathbed stood his friend and pupil, the great linguist and legal historian Jacob Grimm.

4.4 The core of the historical view of law. Law as the organic product of the (initially unconscious) historic folk-spirit

Characteristic of this school, at least in its first period, is that it took historical development to be an immanent regularity of law itself. This was based on its distinctive idea that all law is an organic, at first unconscious, creation of the spirit of a people, the folk-spirit that unfolds in the historical process. No doubt in this respect the romantic philosophy of Schelling put its stamp on the Historical School.

After Savigny in his famous early work *The Law of Possession* had given a sample of critical-historical study of sources, he summarized the program of the Historical School in the above-mentioned little booklet *On the Vocation of our Age*. He did it more rigorously in the article "Ueber den Zweck dieser Zeitschrift" (About the goal of this journal) which formed the opening article in the first issue of the *Zeitschrift fur geschichtliche*

1 The latter title refers to the *usus modernus* of Roman law.

Rechtswissenschaft (Journal for historical legal science), a periodical which he founded together with Eichhorn and Göschen in the year 1814.

According to Savigny, law, like language, has a certain character that is peculiar to a people. Language, morals and law do not lead isolated lives; they are simply natural functions of one and the same people which in nature are inseparably connected and appear as separate properties in our eyes only. What unites them is the shared conviction of a folk, the same sense of inner necessity that precludes any notion of accidental or arbitrary origin.

This organic connection of law with the essence of a folk's character is said to be preserved in its further development, and this development follows the same law of inner necessity. Law therefore grows with a people, unfolds with the people, and finally dies away when the people loses its distinctive character.

The people or "folk" is here taken to be a historical community. Savigny's pupil Puchta identified it with the "nation." Fichte already, in his famous *Addresses to the German Nation*[1] dating from his later period, had located the unity of a nation in its shared history. The "community" comes first; the individual is not recognized except as a member of the community – diametrically opposite the view of individualistic natural law.

A people's shared consciousness – the "folk-spirit" as it came to be called under the influence of Schelling – is therefore the true source of law. In the ongoing development, as the cultural level rises, more and more of the functions of the life of a people are differentiated, and that which used to take place communally now falls as a task on separate estates or classes. A special class is also created for the working out of law, the class of jurists. Law now develops in a scholarly direction, and just as it lived formerly in the consciousness of the whole folk, so it now develops in the consciousness of jurists. From now on, jurists represent the folk in this function of the framing of laws:

> Henceforth legal life is more artificial and complicated in that it leads a double existence, now as part of the life of the people

1 [*Die Reden an die deutsche Nation* were public addresses by Fichte delivered in Berlin in December, 1807, during the occupation by Napoleon's army. They contained a passionate appeal to resist French aggression in the name of a distinctive, unified German people.]

> (which it does not cease to be), now as a special science in the hands of jurists. The combined effect of this double life explains all later manifestations [of law], and we can now understand how its every detail can arise in a completely organic way without any arbitrariness or ulterior motive.

Savigny calls the connection of law with the life of a people the positive element, the separate scientific life of law in the jurist class, the *technical* element in law. In other words, all law arises organically as folk-law (in the form of customs, or rather of manners); that is to say, law is first formed by a folk's customs and conditions and thereafter by legal science, yet everywhere through internal, silently working forces, not through the arbitrary will of a legislator.

In this whole process the task of legislation is no other than to secure the still uncertain forms of folk-law and to create suitable regulations for new political or economic needs. The legislator may even at times have the task to go against the public opinion of the moment and intervene educationally (at that time, for example, in the area of marriage law). Throughout, however, both jurist law and statute law must advance the national tendencies of the folk-spirit or popular consciousness and link up with the organic historical evolution of law. Neither jurists nor legislators can create entirely new law.

4.5 The contrast between the Historical School and the unhistorical rationalism of humanist natural law

The contrast between the view of law in the Historical School and that in the humanist theory of natural law can be briefly summarized as follows: the latter looks for *the supra-arbitrary element in law* in mathematical, natural-scientific thought, whereas the former locates it in the supra-arbitrary unfolding of history. "Reason" as the Archimedean point of humanist philosophy is located by the Historical School in "history"; genuine natural law cannot be deduced from abstract mathematical thought but only from the irrationally conceived unfolding of "reason" in historical development.

In his introductory article in the first volume of the school's journal, Savigny draws a sharp contrast between the two views. This, he writes, is the basic question: What is the relation between past and present, or between becoming and being? Rationalism teaches that "every age gives birth on its own to life and

world, freely and arbitrarily, be it good and happy or bad and unhappy, depending on the degree of insight and strength." By contrast, the historical view teaches that

> there is no perfectly separate and isolated human life. Rather, that which can be viewed as separate, when looked at from another angle, is part of a higher whole. . . . This being so, each age does not arbitrarily produce for itself its own world, but does so, rather, in indissoluble communion with all of the past. Thus every age must acknowledge something as given, *which is nonetheless necessary and free at the same time*; necessary insofar as it is not dependent upon the particular will of the present; free, while it proceeds just as little from some alien will (such as the command of a master to his slave), but is brought forth, rather, by the higher culture of a folk as an ever changing and unfolding Whole (ital. added).

4.6 The irrationalistic view of necessity (law-conformity) in historical development. This has nothing to do with a natural-scientific misreading of the laws of historical development

Historical development asserts itself with inner necessity: "It is not like choosing between good and bad things, so that recognizing a given is *good*, rejecting it is *bad*, yet for all that is *possible*. Rather, strictly speaking, to reject what is given is *impossible*; unavoidably it controls our lives. We may regret it, but not change it."

This view of law and history contains no notion whatever of natural-scientific causality, as Manigk[1] and Stammler[2] still assumed, a fact which ought to be self-evident to anyone acquainted with the philosophical spirit of the circles in which this view of history found acceptance and with the connection it had to the spirit of romanticism. Ponderous debates have been waged about the question whether Savigny may be called a "romantic." Scholars have pointed to his sober, workaday attitude evident in his early work about the right of possession and in the first volumes of his standard work *The History of Roman Law in the Middle Ages* – an attitude totally different from the romantic attitude to life with its cult of feeling.

1 Alfred Manigk, *Savigny und der Modernismus im Recht* [Savigny and modernism in jurisprudence] (Berlin, 1914).

2 Rudolf Stammler, *Ueber die Methode der geschichtlichen Rechtstheorie* [On the method of the historical theory of law] (Halle an der Saale, 1888).

However, German romanticism is not the kind of simple phenomenon whose intellectual-spiritual attitude can be typified with a single external feature. More recent research has shown that the thinker who used to be depicted as *the* romantic philosopher, Schelling, and who undeniably created the specifically romantic categories and gave the romantic worldview its most striking expression, was really devoid of romantic "internality" and was more of an intellectual personality than a man of feeling.

It is highly probable that precisely Schelling, and not (as used to be believed) Hegel, deeply influenced the view of law in the Historical School. Hegel viewed Savigny's opposition to codification a "blasphemy of Reason." That this influence was greater on the school's constructive intellect, Puchta, than on Savigny, will become apparent in the chapter on the sources of law.

4.7 Schelling and romanticism's influence on the view of law in the Historical School

If we want to understand Schelling's philosophy in the light of the cosmonomic idea rooted in the immanence standpoint with its contradictory factors of science and personality ideals, then we must see Schelling's development till 1804 as the second stage on the road to post-Kantian idealism. This school aimed at overcoming the dualism posited by the great Königsberg philosopher between the science and personality ideals, between natural necessity and freedom. The dualistic separation between theoretical and practical reason in Kant, which assigned to each its own domain, and the limitation of theoretical reason in Kant's system through the idea of "*das Naturding an sich*" derogated from the absoluteness of Reason. If within the framework of the humanist cosmonomic idea an absolute unity was to be achieved between mathematical necessity and freedom, then a break had to be made with an analytical mode of thinking which in acknowledging the fundamental logical law of contradiction would ultimately shrink back from the logical inconsistency of an antinomy. In order to grasp the absolute unity of the cosmos, to understand cosmic reality itself as the unfolding of absolute Reason, philosophic thought had to start out on the path of dialectics, to think *through* the finite, limited antinomies

to the absolute synthesis, the root of temporal reality, in which Reason completes its dialectical development in the chain of contradictions and returns to itself. Reason must acknowledge every boundary encountered on the way as having been posited by itself, so that it can also sovereignly step across that boundary. This whole school views the personality ideal of autonomous freedom as the root of creation in which nature too is taken up as a dialectical moment (identity philosophy). Fichte is the creator of this idealistic, dialectic method in his *Wissenschaftslehre* (see Chapter 1, §§ 1 and 9); Schelling carries it forward in his *System des Transzendentalen Idealismus*; Hegel completes and perfects it in his *Logik*.

If Fichte in his first period still thought from the rationalistic, individualistic pole, post-Kantian idealism soon tipped over onto the irrationalistic pole which conceives of law as an independent reflection (within the totality of the community) of individual subjectivity (see *Introduction*, pp. 69 ff.).

Post-Kantian idealism unfolded oddly in tandem with German romanticism. It cannot be said that the many-colored intellectual phenomenon of romanticism was a product of post-Kantian idealism; but the reverse is not the case either. German idealism, however, *passed through* romanticism, and the two influenced each other intensively. Romanticism, which filled the first three decades of the 19th century with its characteristic worldview, can be seen, despite its numerous subtle variations, as a negative reaction to the rationalism of the Enlightenment and a positive appreciation for all the deeper foundations of nature and life, for the individuality and totality of the cosmos that could never be grasped by the concepts and formulas of the mathematical thought characteristic of the period it was leaving behind.

The actual "philosophical" generation of romantics in the heyday of the movement passed through Kant's critical philosophy and at the same time was profoundly influenced by Goethe's art and ideas in which the glorification of individuality and feeling played a central role.

Dialectic thinking, wavering between polar contrasts, is characteristic of this entire intellectual-spiritual movement with

its urge to rise above the contrasts of analytical thought in order to contemplate the world's organic totality in its absoluteness. It loves to talk of the "intuitive knowledge of genius" and regards "beautiful art works" as the highest unity of nature and freedom. Romantic philosophers no longer orient themselves to mathematical natural science but to history and art. They view the organic development of history as the battleground between natural necessity and freedom, the real theater of dialectical tensions in which absolute Reason travels its course through time.

Here, individuality and community enter a higher synthesis in people and nation. The folk-spirit is individual and simultaneously supra-individual. It can never be grasped as a complex of natural-scientific causal factors, but rather as a higher synthesis of still unconscious nature and conscious freedom.

4.8 Adam Müller's romantic theory of the state and its connection with the Historical School

The romantic conception of history received its most characteristic application to political theory in the organic theory of the state of Adam Müller (1779-1829). Müller called the state "the intimate union of the entire internal and external life of a nation into one grand, energetic, infinitely lively and animated Whole."[1] He was one of the first, even before the Historical School became active, to represent the historical, relativistic mode of thought in opposition to the unhistorical rationalism of the Enlightenment philosophers with their individualistic contrast between a fictitious state of nature and civil society.

Wherever we stand, Müller said, we stand in the midst of historical development, "in the center of civil life." As the generations passed on before us, so the world will continue its march after us; and so nothing remains for us but to take into account, before all else, this historical conditionality of our entire existence, also in our political thought and action.

Precisely in Müller, however, one can see the heavy influence of the view of the state held by Schelling in his period after 1801, one that was oriented to the view of the state of Antiquity. Schelling explains the state as the primal and fundamental fact of all social life and ascribes to the state a comprehensive nature

1 [See his *Die Elemente der Staatskunst* [The elements of statecraft], 3 vols. (Berlin,1809).]

embracing all relationships of life. It was a view that could hardly conceal its dialectical tension with the freedom and individuality of individuals and corporations so strongly thrust into prominence by Müller.

"Man cannot be conceived apart from the state," said Müller, in sharp reaction to rationalist natural law; but he also stretched his idea of the state to the nth degree when he qualified the state as "the sum total of the physical and spiritual life of a mass of people," as "the totality of human affairs, its union into a lively Whole." Typically, we find Müller using terms like *Geschichtlichkeit* ("historicity") and *Naturwüchsigkeit* ("naturalness"), concepts that we continually encounter in combination in the historicistic view of law. The point where Schelling's idealism and Romanticism's view of history influenced the view of law of the Historical School, along whatever route this occurred, must be sought in the typical *organological* trait of the theory of Savigny and his followers. This trait sought to unite in more or less dialectical fashion natural necessity and freedom by emphasizing the spontaneous, unconscious "naturalness" of the formation of law at its origin.

4.9 Friedrich Julius Stahl and the Historical School

We find the above trait back in the more or less pietistically accentuated theory of Friedrich Julius Stahl (1802-1861). Stahl defended a legitimist, historical conception of law over against the view of abstract natural and rational law:

> . . . that which the party of legitimacy understands by law [*Recht*] is conventional law, law which in a natural way has become historical law, law that was originally based on custom and tradition, law that rests on different laws [*Gesetze*] from different times, law whose initial stem and foundation are not the effect of human reflection and human initiative but rather the work of nature and history. . . . It recognizes the formally binding nature of laws, but it accords law, even if based not on laws but on tradition, the same respect and an *even higher value*; nor does it attach this reverence to the form but to the inner content of law. It regards law all the more sacred as it has detached itself from laws and validates itself as ready to hand, where no one thinks of its origin anymore.[1]

1 F. J. Stahl, *Die gegenwärtigen Parteien in Staat und Kirche* [The present-day parties in state and church], 2nd ed. (Berlin, 1868), p. 307 (ital. added); idem, *Geschichte der Rechtsphilosophie* [History of legal philosophy], 2nd ed. (Berlin, 1847), p. 579.

Wishing to unite the Christian view of the normative meaning of God's guidance in history with the irrationalistic view of the development of law of the Historical School, Stahl identifies Gods' guidance in history with "that which comes to be, apart from human initiative." This entire view, against which the Calvinist already intuitively must raise objections by virtue of the religious focus of his worldview, is not at all – let it be said here with some emphasis – a Christian view, but stems from humanist idealism. And we can only deplore the fact that on this point a Christian thinker like Stahl came under the influence of Schellingian romantic notions, although it is more or less understandable, given the spirit of the Restoration period and perhaps also the easy susceptibility of his Lutheran worldview to irrational, quietist influences.

4.10 **Schelling's irrationalistic worldview**

All we need to do, finally, in order to see at once Stahl's affinity with the theory of the Historical School, is to analyze in brief outline the idealist and irrationalist view of history espoused by Schelling, dependent as it is upon the humanist cosmonomic idea.

Schelling sees the totality of the temporal world process as the self-unfolding of absolute Reason, which itself is elevated above the finite contrasts. This process is supposedly an uninterrupted series of stages or "potencies" which rises upward from the simplest element in nature to the highest and most complex *work of art*. And so the temporal cosmos turns into a developmental history of the Absolute (the aesthetically defined Reason) which unfurls itself into the organic totality of the universe. The two main phases of this development are on the one hand the history of nature, and on the other the history in a narrower sense of the genesis of the human Spirit. The nature phase is dominated by necessity, by the unconscious; yet already here one can discern "the hidden footprint of freedom." On the lowest rung or potency of the development of nature, namely *matter*, nature finds its one pole, necessity; on the highest rung, the *living organism,* nature finds its other pole: freedom. This course of nature in its different potencies is conceived as an effect of hidden forces (gravity, light as the "principle of the soul," and life), and in no way as a nature-conforming causal process. It is

the first developmental phase of absolute Reason, in which freedom and necessity are sublimated into a higher unity.

On the other hand, although history in the narrow sense is the genesis of the human spirit, the realm of freedom (personality), the sphere of conscious spiritual willing and creating, this freedom nevertheless has as its basis an unconscious potency, a hidden necessity. History by definition demands a dialectical union of nature and freedom that wants to transcend the individual. Individuals matter in history only as beings "who strive after an ideal that can only be realized by the species, never by the individual." The realization of this ideal, which constitutes the sole content of history, transcends all individual action; it is conceivable only when in the course of history a harmony obtains between unconscious natural necessity and freedom of the will, a harmony that is sustained by "fate" or "providence." — Here we have the source of the idea of organological development in the view of law of the Historical School.

4.11 The historicistic nature of the concept of law employed by the Historical School

It is immediately obvious that the Historical School, given its historicistic approach, cannot really arrive at a well-defined concept of law. It attempts to trace the supra-arbitrary material regularity of law, recognizing the latter only in positive law, by examining how law in a material sense *comes to be*, and in so doing the school reinterprets that internal regularity of law itself into an historical law. It teaches that law is the product of the historical spirit of a folk. Yet the school also teaches that language and social customs take their rise from this unique folk-spirit. What then distinguishes law from these other normative spheres? That question is never answered.

Puchta even goes so far as to hold that the very concept of law unfolds itself in history.[1] He can tell us about law, so defined, no more than that it is the "general will" of a nation within a state as a supra-individual community (so not in the nominalistic-individualistic sense). He wants to disqualify contracts and the autonomy of private collectivities as sources of

1 G. F. Puchta, *Cursus der Institutionen*, 3 vols. (Leipzig, 1841; 4th ed., 1853), pp. 17 f., included in his *Juristische Encyclopaedie*.

law. These, after all, cannot have a general will but only a subjective private arbitrariness, from which can derive no "objective law" (legal norms) but only subjective legal relations.

The circular reasoning in the law-concept of the Historical School is that the *history of law* as an anticipatory function of the meaning of the historical modality, presupposes the meaning of the jural itself, just as the *sense of justice* as the jural anticipation of the meaning of the psychical likewise presupposes the meaning of the jural. Consequently, every attempt at deriving the concept of law from historical development lands us in a vicious circle.

4.12 The Historical School versus codification. Thibaut contra Savigny. General features of the codification program at this time. The three great codifications and their link to the natural-law systems of Wolff, Kant, and Rousseau

The irrationalist, organological trait in the view of history of Savigny and his adherents naturally made them averse to the program of codification of their time. This program assigned the legislators the task of arranging all of private law and process law into definitive, binding legal codes. The codification idea was brought to the fore already in the 17th century by some theorists of natural law. In England, Hobbes made a case for it. The *law* is the only form that sovereign *reason* can accept for the formation of positive law. For there is no positive law apart from the state, and the sovereign legislator is the true organ of reason whereby the natural-law constructions can be translated into positive law. In Germany, thinkers like Conring, Leibniz and Thomasius already spoke of the codification of civil law as a demand of natural law. In the Age of the Enlightenment the call for codification became universal. It was the codification idea in its typically humanist, rationalist form, buoyed up by the naive notion that it was possible to have perfect legislation as *ratio scripta* which would make all law-making superfluous. And codification in the sense advocated by the British utilitarian

thinker Jeremy Bentham would wipe clean the slate of all extra-statute law!

In Prussia the codification program based on natural law was realized in the *General Code for the Prussian States* which took effect on June 1, 1792, following the reign of Frederick the Great. Associated with this codification were in particular the names of the jurists Carl Gottlieb Svarez and Ernst Ferdinand Klein. It was proof positive of the enormous practical influence of the humanist doctrine of natural law that dominated not only the method of legal science but also the law-making of the Enlightenment era. It was the Wolffian natural-law system that took on flesh and blood in this codification attempt. Already in its form this code, with its terse, sharply analytical definitions, represents the ideal of the entire period of rationalist natural law, that of mathematical precision. As it arranges the material, the code follows the system of Christian Wolff as passed on by his pupil Joachim Georg Daries (1714-1791). Far more than just private law, it contained penal law, manorial law, commercial law, administrative law, and security law.

Proceeding from the individual person, the material is succeeded in typical natural-law fashion by family law, estate (class) law, church law and state law. Putting human acts and rights on the same level as corporeal affairs such as properties goes back to Nettelbladt. In terms of material it incorporates both Roman and Germanic law. (Since Thomasius, the great opponent of Roman law, the predilection among natural-law theorists for Roman law had greatly diminished.) It takes Roman law to be universal law, but for countless individual cases it follows the Germanic conception of law.[1] And the latter also begins to penetrate under the mask of natural law. This natural law is from the later school of Wolff (Nettelbladt, Daries).

The Prussian commission for drafting the Code was suffused with the Wolffian view concerning the existence of special natural rights for every subdivision of positive law. Thus it tried to stimulate the production of a textbook for the new law that would deal separately with the natural law underlying the

1 [The Prussian Code contained 17,000 articles.]

Code. The results of this theory of natural law are fully incorporated in the Code's section on penal law and family law. The design was to include not only the general principles of natural law but also all the detailed conclusions drawn from it insofar as they were not immediately evident to all. This design gave the Code that half abstract, half casuistic character so criticized by Savigny.

Throughout, the Code is pervaded, in line with Wolff, by the principle of *salus publica suprema lex esto*, and the determination of what is needed for the public good is left exclusively to the free judgment of the sovereign. Also in line with Wolff, the judge is declared to be the mouthpiece of the law, while the interpretation of laws is proclaimed the exclusive right of the sovereign.

If Wolff's natural law provided the basis for the Prussian Code, Kant's rational law governed the *General Civil Law Code for the German Hereditary Lands of the Austrian Monarchy* that came into effect in 1811. This code is particularly linked to Franz von Zeiller, who held the chair for natural law in the University of Vienna and who had already expounded the Kantian system in his book of 1802, *Natural Private Law*. The system distinguishes sharply between justice, morality, and politics, and postulates that a civil code should not impede the individual's freedom of movement any further than is necessary for the reciprocal liberty of all persons.

Opposing the notion that a code should be casuistically complete, Zeiller pressed the Kantian view that a code is truly complete and definitive when the legislator searches for the general in the particular and organizes the results of such research under general, systematically coherent norms.

As a result, the Austrian Code, unlike the Prussian, does not bear a casuistic but instead a systematic and general stamp, while at the same time striving to exclude all material that be-

longs to morality and politics. The plan of this Code follows Kant's division into personal law and thing-law.[1]

The third great codification to be completed under natural-law influence prior to 1814 was the code introduced in France under Napoleon. The project included the following law codes: the *Code civil* (1804; revised in 1807); the *Code de procédure civile* (1806), the *Code de commerce* (1807), the *Code d'instruction criminelle* (1808), and the *Code pénal* (1810).

By far the most important code from this codification was the *Code civil*, the design of which was made by a committee of four: Portalis, Tronchet, Rigot de Préameneu, and Malleville (of whom the first two were the most prominent). Napoleon personally played a role in its realization. Nevertheless, the influence of a specific natural-law system is by far not so prominent in the *Code civil* as it is in its Prussian and Austrian predecessors. Rousseau's ideas of the social contract, of liberty and equality as incorporated in the *Declaration of the Rights of Man and Citizen,* were in no way susceptible, as the men of the Revolution thought, of deducing from them a code that would be "as simple as nature and so clear and plain that every adult citizen shall be able to grasp its provisions without any other aid than that of the natural human understanding."

Composing a Civil Code, already commissioned by the National Assembly by a decree of August 26-24, 1790 (along with the revision of the Code of Civil Lawsuits and the Code of Penal Law), was attended throughout the revolutionary period with insurmountable difficulties.

Three different drafts were successively submitted by Cambacerès (himself fully inspired by Rousseau's natural law), but

1 Kant defines personal law as the system of norms according to which I am "in possession of the arbitrary will of another," that is to say, I have the competence to obligate the other by my will (in accordance with the laws of liberty) to perform certain actions. He subsumes family law under "personal thing-law" insofar as it covers both a right against a person and any possession of that person. Thus, a man acquires a woman; man and woman acquire children, and the family acquires servants: "All this acquisition is at the same time inalienable, and the right of the owner of these things is utterly personal." That Kant also construes a personal right of repossession as a possession can be explained from his view of "intelligible possession" (*possessio noumenon*); see above, § 3.8, pp. 106-110.

all were put aside. Not until Napoleon, who liquidated the Revolution, was this codification successful, but the drafters had drawn their material from legal sources in real history.[1] In the first place, from the highly differentiated customary law of pre-revolutionary France north of the Loire, in which the "custom of Paris" predominated since it was regarded as the common law that could be supplementary if local custom was silent on this or that point; then from Roman law as adjusted by theory and jurisprudence, regarded as the common law in the south of France; then from the royal edicts issued during the reigns of Louis XIV and Louis XV; finally, from canon law (particularly marriage law), the jurisprudence of the *parlements*, and interim legislation. Especially the works of Dumoulin (Molinaeus, 1500-1566), Domat (1625-1696) and Pothier (1695-1772) guided the compilers of the *Code civil* with knowledge of former law.

The influence of Rousseau, who for that matter never gave a detailed system of natural law, manifested itself in the *Code civil* only in the adjustment of this historical legal material to the ideas of liberty and equality as laid down in the *Declaration of Rights* (think of the abolition of the guilds as impediments to commercial freedom, the secularization of marriage, the equality of all citizens before the law, the individualistic freedom of contract, the individualistic view of property rights, etc. etc.).

These then are the codifications that Savigny had in mind when he wrote *On the Vocation of Our Age* against the codification program for Germany. The booklet was aimed at a publication by Professor Thibaut, *On the Necessity of a Common Civil Law for Germany*, which in turn was occasioned by a pamphlet of A. W. Rheberg, *On the Code Napoléon and Its Influence in Germany* (1813). Rheberg passionately opposed introducing the *Code Napoléon* into Germany; he demanded that this French code be abolished in those territories where it had already been introduced (such as in the Rhine provinces) and that the old situation be restored everywhere.

Rheberg's pamphlet was undeniably colored by a kind of reactionary quietism. Thibaut argued in response that it was high time to put an end to the splintering of common private law in

1 This was also true, of course, of the Prussian and Austrian codes.

Germany and that general codes of law should be drawn up, codifying civil law, criminal law and procedural law. Thibaut was no unhistoric jurist, but his interest was focused on the needs of the day, on practical legal jurisprudence. As we saw already in Chapter 1, § 2.12 and 8 (pages 19 ff.), he defended a scientific positivism against both natural law and the Historical School. In a certain sense he was a precursor of modern *Interessenjurisprudenz*. Typical for him is this statement:

> No doubt the introduction of Roman law was a boon to our scholarly industry, especially for the study of philology and history. And the entire baffling mass provided, and still provides, great opportunities for our jurists to practice their sagacity and acumen. Only, the citizen will always insist that he was not created for the jurists, as little as he was created for professors of surgery to have them demonstrate their anatomy lessons on their bodies while still alive.

Thibaut considered Roman law entirely unsuited for Germany. He would only accept the exegetical texts, as illustrations of law-making. Law, he wrote, must live in the heads of judges and lawyers, but with Roman law that will always turn out to be impossible since we do not have the ideas of the Roman people that could render that law into living, vibrant law. The history of law is only a pedagogical aid for legal training, not an intrinsic element of positive law. The academic study of law in the universities could start just as well with a course in Persian or Indian law as with the traditional course in Roman law.

Savigny's *On the Vocation of Our Age* is a vehement rebuttal of Thibaut. He denies that his age is called to codify law, given the lack of historical knowledge needed to distinguish within existing law between the still viable and the dead elements. But he goes further and states that he is opposed to codification on principle, for all time. When jurists have historic mastery of law it is superfluous, and when such is not the case it is harmful. The false opinion that all law can always, or most of the time, be captured in laws he rightly traces back to the rationalist hubris of humanist natural law. However, his principled opposition to codification *as such* stemmed from his underestimation of the integrating, formative task of the lawgiver (to be discussed below). It flowed from the irrationalist, organological character of his historical view of law. That said, it must be acknowledged

that his brilliant mind saved him on this point from the doctrinaire position of his pupil Puchta.

This underestimation of the conscious, formative element in legislation, which takes on an ever broader role in the formation of law as history moves on, gives his sharp criticism of codification an unmistakable note of partisanship. For all that, Savigny occupied a strong position by showing that those drafting the codes lacked insight into the historical development of the Roman source material. And he could only nurse a special grief against codifications insofar as they tried, in truly absolutistic, rationalistic fashion, to degrade customary law into *a legal source dependent upon legislation*. (This was not true of the *Code civil* !) The furthest to go in this direction was the Prussian Code which, as we saw, aimed at being halfway complete and prescribed that when the judge encounters a case not regulated by a law he had to report this, in order that a new act could cover it.[1] But also the Austrian Code contained the clause that custom does not entail a right unless referred to in the law, and it excluded the derogated power of customary law vis-à-vis statutory law.[2] For these reasons alone Savigny could not look kindly on codification. He talked of "the law's invisible environment of judicial practice and doctrine," by which he meant to say that even the most minute regulation by laws must still always follow the line of historical development; if legislators do not want to do this themselves, judges and theorists will take care of it.

4.13 Savigny's appraisal of the reception of Roman law and the development of Roman law

According to Savigny, no anti-national factor had been operative in the reception of Roman law, since such a drastic conversion of the whole of legal life would never have taken place without inner necessity and in any case would not have lasted. The culture of modern nations, Savigny noted, was entirely established under the influence of classical examples. No more than we can eliminate the operation of these influences from our

1 The so-called "référé législative"; cf. Prussian Code, art. 50.

2 Cf. also Articles 3 and 5 in the Dutch *Wet houdende Algemeene Bepalingen* of May 15, 1829, a piece of natural-law theory of legal sources inserted by conceited legislators, an element that Portalis wisely had managed to keep out of the preamble of the *Code civil* !

civilization are we able to remove the operation of the reception of Roman law from the historical formation of our legal arrangements. To cut off the historical thread cannot be done. What we can do is analyze the various cultural elements in the formation of our legal system and so control them, whereas in the absence of historical knowledge they will control us and blindly propel us.

It stands to reason that the research program of the Historical School placed the emphasis on the classical age and not on the time when legal traditions were mingled. It is Antiquity that fascinates Savigny and where he finds the true value of history. In his eyes, as in Gustav Hugo's, prime sources for Roman law are not the Justinian Code but the great classical jurists. Their writings and the development of law up to their time receive the greatest attention. Considered of special importance for the organically unfolding law, next to the ancient formation of customary law, was the judicial activity of the *pontifices*, the practical *iurisconsulti*, the annual praetorian edicts, and the work of the great teachers of law.

The later, chiefly Byzantine, period is quite foreign to the mind of the Historical School. It appreciates the Justinian codification as the erection of a kind of museum, but as a legislative deed it considers it of no value.

4.14 The significance of the Historical School for the knowledge of Roman law

The Historical School acquired undying merit for legal studies by freeing Roman law from the entanglement of natural law and the "*usus modernus*" and restoring it in its purity.

Prior to Savigny, source citations served only as elegant adornment of rationalistic natural-law constructions, and these citations often passed for Roman law when they were no more than a random collection of Roman, Germanic and customary law ideas.

Thanks to the labors of the Historical School it became possible to separate pure Roman law from that which was added and altered as a result of later developments in law. The obverse of the one-sided historical and organological conception of law was the theoretical and systematic study of law. However, it was moved entirely to the background and a gap opened up between theory and practice.

Two things, however, must be kept in mind when judging all of this. In the first place, it is wrong to make Savigny responsible for the neglect of the theoretical and systematic study of law that the Historical School was accused of in a later period.[1] Already in his *Vocation of Our Age* Savigny pointed to the necessity of twofold study: historical and systematic. And in his 8-volume work *System of Modern Roman Law*, in which Landsberg, in tune with the prevailing view, thinks he can detect a cautious retreat on the part of Savigny, Savigny indeed carried out only the second part of his program: a systematic study of law on the basis of the results of historical research.

Secondly, the gulf between theory and practice was initially inevitable, since the prevailing practice had placed itself on a theoretical basis which from a historical point of view was completely untenable. Theorists first had to free themselves from this practice before they could create a theoretical basis that was pure.

4.15 Stahl's attempt at refining the Historical School's concept of law in terms of a Christian philosophy

Stahl, who was himself strongly influenced by Schelling and the Historical School and with the latter called all law *positive law* which originally sprang unconsciously from the spirit of a people, nevertheless realized the philosophical inadequacy of the historical view of law for defining the concept of law and the idea of law. He therefore endeavored, from a Christian (Lutheran) standpoint, to fill this void in a historical theory of law (although without much success, a we shall see). But before we examine this endeavor more closely, we would like to make a few introductory comments about the significance of Stahl as a thinker and a politician.

1 See Alfred Manigk, *Savigny under Modernismus im Recht* (Berlin, 1914); for the opposite view see Hermann Kantorowicz, *Was ist uns Savigny?* (Berlin, 1912).

4.16 The life and work of Stahl and his significance for the anti-revolutionary doctrine of the state[1]

Friedrich Julius Stahl was born in Munich in 1802 from a Bavarian Jewish family and went over to the Evangelical church in 1819. Appointed as extraordinary professor in Erlangen as early as 1832, and afterwards functioning as ordinary professor in Würzburg and Erlangen, in 1840 he became a professor at the University of Berlin. From 1849 he was the leader of the conservative party in the upper house of Prussia, where he excelled as a keen and eloquent debater. A skilled opponent of the ideas of the French Revolution, he defended Protestantism against the accusation by Roman Catholics that Protestantism was the origin of the ideas of the Revolution; at the same time he tried to give a more philosophical definition of Protestantism as an independent political principle.

By resisting the *zeitgeist* he evoked great bitterness in so-called progressive circles, just as was done in our country by Groen van Prinsterer who came under the influence of Stahl after 1848. Stahl died in 1861 in Bad Brückenau. His main work is *The Philosophy of Law in Historical Perspective*,[2] the first volume of which is entitled *The History of Legal Philosophy*, still a standard work in the field. The second volume, *Legal and Political Theory on the Basis of a Christian Worldview*, contains Stahl's own system, which is sometimes unjustly referred to as a "theocratic theory."

Some of his other works are *The Present-day Parties in State and Church* (Berlin, 1863); *Protestantism as a Political Principle* (Breslau, 1853; 4th ed. 1854); *Catholic Refutations* (Berlin, 1854); *The Christian State and Its Relation to Deism and Judaism* (Berlin, 1847); *The Monarchical Principle* (Heidelberg, 1845); *The Revolution and Constitutional Monarchy* (Berlin, 1848; 2nd enl. ed., 1849); *What Is the Revolution?* (1st to 3rd ed., Berlin, 1852); *The Lutheran Church and the Union* (Berlin, 1859); *Legal Science or National Consciousness* (Berlin, 1848; a polemical work directed at *The Uselessness of Law as a Science* by Julius von Kirchmann). Finally we

1 [In this section Dooyeweerd appears eager to warn against some aspects in the anti-revolutionary tradition in which his students were raised.]

2 F. J. Stahl, *Die Philosophie des Rechts nach geschichtlicher Ansicht*, 3 vols. (Heidelberg, 1830-37; 5th impr. 1878; translated into Italian and French).

mention his 3-vol. *Parlamentarische Reden* (Berlin, 1851, 1856, 1862) containing his speeches in the Upper House.

In a political sense Stahl may be called the philosophical founder of the modern *anti*-revolutionary doctrine of the state, which, while accepting the new state of affairs following the French Revolution, nonetheless opposes the *principles of the French Revolution* with the principles of Protestant Christian politics (elaborated by Stahl in a strongly Lutheran and Prussian version) – in distinction from the *counter*-revolutionary political theory of Karl Ludwig von Haller and his followers Friedrich von Gentz, Karl Ernst Jarcke, and others.

In his still important work on *The Present-day Parties* Stahl divided all political parties into parties of the "Revolution" and parties of "Legitimacy." The basic principles common to all versions of legitimacy, according to Stahl, are the following:

1. The divine right of government. Stahl distinguishes absolutists (Filmer, Bossuet, etc.), feudalists (Haller and the circle around the *Berliner Politisches Wochenblatt* and the July Revolution), and institutional legitimists who are proponents of the constitutional monarchy (Stahl himself, et al.).
2. The view of law as a historical growth. Law is not an abstract construction of reason (natural law), nor the will of the sovereign people, but "naturally grown, historically arrived at" law. Customary law that has arisen without human involvement is considered more sacred that legislated law (although legitimists do accept the formally binding force of those laws).
3. The conception of continuity in legal developments. Hence legitimists demand a historical constitution, not a constitution by charter or royal patent, nor an arbitrarily imposed form of government. The law-order "should grow and develop out of the body of the nation and not be traded in as one might a garment or taken apart and reassembled as one might a machine."
4. The conviction that acquired rights are inviolable. The claims of individuals and classes which they once acquired under former law or legal order are inviolable.

5. The maintenance of the natural, organic structure of national life. The party of Legitimacy favors corporations, public bodies of social classes, communes and provinces, and it demands autonomy for these collectivities. It opposes the principle of the Revolution which favors leveling and centralization. Stahl, however, favors the aristocratic principle of natural, organic representation. The farmer is to choose his own hired men, the master his journeymen, the clergyman his parishioners, and so forth. Liberalism and democracy know only atomistic individuals.
6. The demand for a Christian state. "The divine authority of government, the sacredness of historical law, i.e., of law that came about in God's providence, the recognition of a segmentation of society grounded in the divine world-plan – all these things no longer have any foundation if the religion from which they stem is denied public-legal status." Hence no separation between Church and State. (Groen van Prinsterer, too, never really accepted this separation as a fundamental principle, but only as a fact.)

The conservative party of Stahl has the following conception of the Christian state:

a) exclusive public status and public-legal recognition and protection of the Christian church (but which one?);
b) Christian marriage law;
c) Christian elementary education and governance of the Christian school by the church (not a Calvinistic thought!)
d) a test for public office or a seat in parliament in the form of a Christian confession (but which one?).

The significance of Stahl for the anti-revolutionary doctrine of the state is twofold: (1) in defending the *public-legal* (the "republican," as Groen would later call it in a peculiar sense) *nature* of the state, against the *private-legal definition* espoused by the

Hallerians,[1] thus rejecting Haller's naturalistically conceived right of the strongest as the juridical foundation for governmental authority and recognizing the historical basis of the state; and (2) in emphasizing the close connection, in the footsteps of the Historical School, between law and history.

The Calvinistic school of political theory will have fundamental misgivings about Stahl on essential points, namely these:

1. About the personalistic Lutheran tenor of his worldview (more about this below);
2. About his romantic Schellingian view of history in which historical development is understood in an irrationalistic way and "divine providence" is almost identified with God's secret will;

1 Prior to 1848 Groen van Prinsterer was an adherent of Haller's private-legal, patrimonial theory of the state which is still clearly formulated in his book *Unbelief and Revolution* (Leyden, 1847). In 1848 Professor Star Numan drew Groen's attention to Stahl's legal and political philosophy, and under Stahl's influence Groen then broke with the private-legal view and defended the "republican" (i.e., the public-legal) nature of the State. He also adopted Stahl's irrationalistic conception of history and his view about the historical foundation of all law, as seen in a work of the very next year, *Grondwetherziening en eensgezindheid* [Constitutional revision and national concord] (Amsterdam, 1849), pp. 498-503. That said, in Groen's twofold slogan *"It stands written,"* and *"It has come to pass,"* the former (Scripture as revelation) remains more central as a source of truth than the latter. In one of his most successful publications, *Ter Nagedachtenis van Stahl* (Amsterdam, 1862), which first came out as an article in the journal *Nieuwe Bijdragen voor Regtsgeleerdheid en Wetgeving*, Groen accounted as it were for the change in his thinking, although he did emphasize his difference with Stahl ("Stahl was a Lutheran, I remained a Calvinist"). Groen wanted parliament to have a much greater influence on government policy, even as he continued to hold to the idea of constitutional monarchy (in contrast to the doctrine of the supremacy of parliament) and to the sovereignty of the House of Orange. — In reaction to the above-mentioned article, Professor Tellegen of Groningen treated students to a special lecture after the Easter break, which was later published with the title *Stahl; An Address* (Groningen, 1862). The address warned against the ideas of both Stahl and Groen. Groen replied with several copious footnotes and a lengthy Postscript in the published version of his article, *Ter Nagedachtenis van Stahl*, passim, and 77-127 respectively.

3. About his conservative Prussian ideas, his pushback to parliamentary influence in favor of the personal government of the King (*The Monarchical Principle*), which in Stahl is directly linked to his personalistic worldview: the King is the State personified! In Stahl's eyes a republic has something artificial and impersonal about it.
4. About his conception of the Christian State that borrows essential traits from the Lutheran state church;
5. About his disregard of the sphere-sovereignty of the jural modality over against that of the moral modality. In Stahl, law is without a distinctive meaning and principle; it really turns into a consequence of sin, a view that betrays the one-sided soteriological tenor of Lutheranism which sees worldly ordinances as ordinances that "the Christian person" just has to bear and tolerate while he sojourns in this earthly vale of tears.

The universal cosmic significance of Christ as the new root of creation is suppressed in this way of thinking, since in the Lutheran line it sees the redemptive work of Christ as significant only for the inner life of the born-again individual (the Christian person).[1]

Stahl himself recognized the difference with his Calvinist spiritual kin: their emphasis on the legal order over against his personality principle, their republican leanings over against his monarchical principle. Kuyper expressed the difference this way: "Stahl arrives at a constitution from monarchy, we arrive at a monarch from our constitution."[2]

1 In Luther, as a result of his one-sided focus on personal salvation, in contrast to Calvin who puts the glory of God at the center, there remains an unresolved tension between nature and grace, between the temporal cosmos and the Christian religion. Here, the Christian person has nothing to do intrinsically with the laws of God for life in the world, which lies under the curse of sin. His only duty is to try and impregnate his worldly vocation with the attitude of Christian love, but the worldly ordinances as such are separated from the kingdom of God by a wide gulf!

2 A. Kuyper, *Het Calvinisme, oorsprong en waarborg onzer constitutioneele vrijheden* (Amsterdam, 1874), 12 [Eng. trans.: "Calvinism: Source and Stronghold of Our Constitutional Liberties," in James D. Bratt, ed., *Abraham Kuyper: A Centennial Reader* (Grand Rapids, MI: Eerdmans, 1998), 285].

4.17 Stahl's view of law. His personalistic cosmonomic idea

Stahl elaborated a Christian philosophy of law and politics in which the Lutheran worldview is closely tied to the appreciation of history that arose during the Restoration period. The point of departure for his philosophy is the idea of personality, taken in an all-encompassing religious cosmic sense.

The personality, whose essence is the free act, is the root of reality, the fullness of being. Beaming from God as the personal Creator of the world, personality radiates into every nook and cranny of creation. Observable throughout temporal reality is "the pull toward personality."[1]

The human personality stands in two mutually indissoluble relations to the personal Creator, since God's creating activity itself is related to the world in two principal modes: namely, in the mode of creating the world, and in the mode of encompassing the world. The first relation dictates that man as the crown of creation, which is perfect in and of itself, has to bear God's image. The second relation decrees that man can mirror God only from, in, and through God. The two relations are answered respectively by morality and religion. Morality is the perfecting of the human will as such, or the manifestation of the divine being in man; religion on the other hand is man's relationship with God. Thus neighborly love, valor, and so on, are moral character traits, whereas faith and love of God are purely religious.[2] However, in God's world-plan man is not just taken up as an isolated individual but he is also included in the human race as a community. Hence man's communal life necessarily stands in the dual relation mentioned above. The community of man must likewise be religiously united with God as well as be morally perfect. The first case is called by Stahl "the church of God," the second "the moral world."

Resting on God's plan for the human race – the church of God and the moral world – is the structure of human society with the inhering moral ("world-economical") ideas: property,

1 Already here, Schelling's freedom idealism precariously penetrates Stahl's Christian conception of personhood!

2 Here Stahl does not sufficiently see religion itself as the root of all temporal law-spheres; cf. *Introduction,* pp. 47f.

gender duality and marriage, division according to vocation and class, national community and state, religious community and church. Stahl summarizes this religious-moral order with the term "*divine moral world-order*."

The relations in the human community are given already by nature in the form of mutual assistance, procreation, genetic descent, etc. The moral world-order is only its "ideal" order. The foundation of the moral world therefore has a strictly natural arrangement.

The community is to give lasting external expression to the moral, "world-economical" ideas of life's relationships. The individual, however, is to absorb these external forms of life internally and to realize them by a free act and so also individualize and deepen them. In this way Stahl, following Schelling and Hegel, comes to distinguish a community ethos as an external morality (objective ethos) and individual morality as a subjective ethos or [internal] morality. The two, however, insofar as they interact with each other, find their higher unity precisely in the primal communal life which simultaneously realizes itself in both.

Accordingly, given the distinction between subjective and objective morality, the content of morality, too, has a double principle: (1) the idea of the perfect personality oriented to the holiness of the perfect divine personality, and (2) the plan of the moral world oriented to God's counsel for his creation, bound to his divine being. But this does not result in two separate systems of ethics, Stahl assures us, because they interpenetrate each other and cannot be delineated from each other.[1] The content of the institutions of the moral world (marriage, property, contract, state, etc.) is co-determined by the idea of the perfect personality (spiritual purity, justice, love of neighbor); in turn, the content of the idea of the perfect personality is co-determined by the demands of the institutions of the moral world (marital fidelity, civil obedience, etc.).

Now then, individual ethics according to Stahl is held to an ideal of perfection which, even though it may not be attainable, nevertheless must at all times be upheld as an unqualified norm

1 Here we begin to see a dialectical blurring of the boundary between morality and law!

for conduct. However, for the communal life of man – the moral world – we do not have a perfect and firm ideal, and even to the extent that we might have such an ideal it is not an unqualified and immediate norm for action. Stahl imputes this anomaly between individual and communal ethics to sin. While the born-again individual in his internal life conforms, at least in principle, to God's image, the temporal communal life of man remains under sin till the end of earthly affairs, and this manifests itself in an inadequacy of actual communal life as regards (1) the ethical norms that govern it, (2) the factual relationships in it, and (3) the power that rules it.

Re: the ethical norms. While the ideal relation between objective and subjective ethos is supposed to be one of homogeneity and interpenetration, the factual situation is that the fulfillment of morality in the community occurs only in a few. For this reason the communal order, in order to maintain itself, can only be an external and coercive one. This external order is the civil law-order which, while springing from a specific folk-spirit, nevertheless detaches itself from it to become an independent power and remain in force even when the consciousness of the folk has changed.[1] For the same reason, law can realize the moral ideas only in a negative sense. Law has to allow, in fact sanction, what individual morality forbids (immorality, egoism, etc.). As a consequence of sin, law has failed to unfold naturally on both sides (in a subjective and an objective ethos); rather, a breach has entered between morality and law.

Re: external relationships. The external relationships of life, too, which are normed by the legal order, have been disturbed by sin.

Re: the ruling power. Finally, the power that rules communal life no longer answers to its idea. Without sin no external power would have been needed; rather, absolute morality, which is also the essence of man, would also prevail in the community.

In this way the external ordinances of law and state are viewed by Stahl as consequences of man's fall into sin.

1 Here Stahl deviates from the Historical School, which recognizes no law that has not sprung from the folk-spirit!

4.18 **The relation between law and morality in Stahl**

As can be seen, law and morality are related in Stahl as two different sides of the moral domain which, ideally speaking, is not so much divided as torn apart by sin. Morality is the divine ordinance for the unfolding of God's image in man; law is the human ordinance for maintaining God's world-order. Morality contains God's direct commandments; law formally contains the commands of a human government. Morality imposes its demands on the individual person; law imposes its demands on the nation, on the people as a whole. Morality encompasses the whole ethical domain; law encompasses only the external institutions of God's world-order.

These institutions consist of (1) the preservation of the life, integrity, and freedom of the individual person; (2) the expansion of the human race, the family; (3) the shared life of mankind: community, class, and corporation, and their common higher governance according to ideas and goals as a moral realm (the state and the community of states); and (4) the shared relationship with God, the church.

Among the essence of law, the law in a material sense, Stahl counts only those legal rules that aim at the purpose of law, namely the preservation of God's world-order.

These rules are, first of all, God's commandments in the Decalogue, and secondly, the subjective rights that rest on the moral commandments and whose content aims at protecting man's natural existence and personhood (the right to life, property, parental authority, governmental authority, etc.). In Stahl these are the same ethical (world-economical) ideas that form the content of material law and the content of objective communal morality. The only difference is that morality realizes these ideas in their full scope and from their positive side, whereas law realizes them only from their negative side, "only in their outermost limits." Thus in Stahl the distinguishing mark of law over against morality comes down to no more than the criterion already familiar to Thomasius, namely the external and internal nature of law and its appeal to governmental power in the State. For the content of law in a material sense does not differ in Stahl from that of social ethics.

4.19 Law in a formal and a material sense. The idea of the rule of law in its second phase

To this is added a second, most unsatisfying feature about Stahl's concept of law: his untenable distinction between law in a formal and a material sense. This is related to his view of the relation between law and state and the conception of the rule of law as defended by him in concert with Bähr and Gneist, whereby the idea of the "just state" or rule of law entered its second phase. The state according to Stahl is a "moral realm" (i.e., the idea of personality applied to the human community), the realm that is to realize the moral ideas, but only "in the manner of law [*Recht*]." While the classic idea of the constitutional state or rule of law (Locke, Kant, Humboldt) had defined as the sole end of state activity the protection of subjective natural private rights, Stahl declares that the state "qua moral realm," next to maintaining material law, assigns itself numerous other ends and that therefore the idea of the rule of law cannot indicate the end of the state but only the *form in which* the state is to pursue all its ends: "The concept of the rule of law does not refer to a state's duty merely to uphold the legal order without administrative motive or merely to safeguard the rights of individuals; it does not at all refer to the goal and content of the state, but only to the manner in which to realize them."[1] This gives birth in Stahl's theory to a *material* law that has as its principle the Decalogue and the subjective rights entailed therein, and a purely *formal* law that commands the entire field of administrative law (the field of the "executive power"). This dualism in the law-concept that lies at the foundation of the idea of the rule of law is consistent with the distinction – still made today with respect to administrative jurisprudence (verdicts about disputes between government and citizen) – between so-called juridical questions and utility questions. We shall return to this untenable distinction when we discuss the difference between public law and private law.

Stahl – and with him all adherents of his idea of the rule of law – regard administrative law merely as a formal "enclosure"

1 *Die Philosophie des Rechts*, II/1, § 137/38.

within which the government can operate free of material principles of law.[1]

Thus, in Stahl the meaning of law turns out to have been hollowed out across the board. With an untenable concept of purely "formal law" it strays onto the paths of a formalistic positivism for administrative law. The dualism between material and formal law, taken in the sense that the latter really does not rest at all on supra-arbitrary principles of law, dissolves the whole concept of law. The same inner antinomy is found here that we repeatedly encountered in the humanist natural-law theory that "natural law" is a *Schranke* (limit or boundary) for positivistically understood governmental arbitrariness. The whole *Schrankentheorie* is the antinomy incarnate of the dualistic law-concept!

4.20 The relation between history, law, and morality in Stahl

As we have seen, Stahl took over from the Historical School the organological-historical view of the development of law. But since he realized that the development of history as such is not sufficient to define the concept of law and the idea of law, he views organic historical development, which he takes to be normative for the legal order, simply as the historical concretization of the explicit divine commandments of the Decalogue which the legal order as communal order upholds only in an external, negative manner. In that sense he speaks of historical development as revelatory of "secondary" ethical norms that are binding only if not running counter to the explicit moral commandments. This view does justice neither to the sovereign meaning of the norms of historical development itself nor to the sover-

1 *Note well!* Be sure to study this point in my book *De Crisis der humanistische staatsleer* (Amsterdam, 1931), 43 ff. [Eng. trans., *The Crisis in Humanist Political Theory* (Grand Rapids: Paideia, 2010), 67 ff.] Closely associated with this view is the idea that administrative laws are not laws in a material but only in a formal sense and that therefore the Crown, as sovereign, does not need the consent of Parliament on this point. Laband, the founder of the formal-juridical method in constitutional law, who in our country was followed in particular by Buys,, used this construction above all to declare the Crown competent to make expenditures not agreed to by parliament because the budget law presumably was only a formal law. [J. T. Buys was a renowned professor of law in Leiden University.]

eign meaning of the jural. In an ethical-personalistic way Stahl really subsumes all norms under the basic denominator of *morality*. Because he equates "God's guidance of history" with "God's secret counsel" he resorts to the Decalogue to escape a conception of history which essentially turns historical norms into a non-independent reflection of subjective historical facts! Leendertz' study, based on a neo-Kantian dualism between facts and norms (*sein* and *sollen*) hits home, on this point at least, when he levels his critique of Stahl's conception of history.[1451]

5 THE VIEW OF LAW IN POSITIVISM. GENERAL CHARACTERIZATION OF THIS VIEW. ITS ATTACK ON NATURAL LAW AND THE HISTORICAL SCHOOL

The term "positivistic view of law" comprises all those conceptions of law that absolutize in the concept of law the positivity element, the element of human formation (hence the name: *positivism*). In so doing, they understand the material content of law to be free of all supra-arbitrary principles, as purely man-willed.

5.1 General characteristics of the positivist view of law

Positivism must on principle deny all material essential meaning of law. It can attribute to such a material meaning and to supra-arbitrary principles at most a juridically indifferent ethical-political significance, a reflection of the subjective conviction of the legislator. From the outset, the law-concept of positivism must, by definition, be a purely formal one. It must be able to include any and all arbitrary content. Humanist natural law at least looked for fixed supra-arbitrary principles of reason, but positivism across the board knows only variable empirical law at the discretion of the lawmakers, not bound to any material principles.

Accordingly, positivism must in no way be confused with the view that all law is *positive law*, thus that positivity belongs to the *concept* of law (this is also our view, as will appear below), and that there is no separate natural-law legal order next to a

1 Cf. A. C. Leendertz, *De Grond van het overheidsgezag in de antirevolutionaire staatsleer* [The basis of governmental authority in the antirevolutionary theory of the state] (diss. Leiden; Amsterdam, 1911).

positive legal order. In keeping with the last meaning, Savigny and Stahl are sometimes called positivists. Unjustly so, for they only opposed the dualistic view of law espoused by the natural-law theorists. In other words, they taught that all law is positive law, but they were equally strong opponents of the positivistic view that the content of law is arbitrary, free of necessary principles.

The factors that led to the rise of the positivistic conception of law we have already examined extensively in Chapter 1, (pages 54 ff.), where we sketched the development of the views of Rudolf von Jhering. There we saw that in the 19th century the Historical School's romantic, organological idea of historical development gradually tipped over, especially under the influence of Darwin's new evolution theory, into a natural-scientific rationalistic conception of historical development, and how at last positivism was born which identified the "historical" with "history" – with meaningless factual reality.

We then saw how positivism embraced the nominalistic-individualistic conception of human society, in direct opposition to the Historical School which from the start recognized the individual merely as a non-independent moment in the supra-individual folk community. This is how the rising positivistic view of law ended up becoming the radical consequence of the nominalistic tendencies which from the beginning had been present in humanist natural-law theories. Whereas the latter still tried to provide philosophical warrant for its positivistic view of positive law by means of the contract figure and the *pacta sunt servanda* principle, positivism in its first, naive phase emancipated its view of positive law from even this philosophical basis and defined positive law, equated with the "will of the State," as a given that supposedly posed no philosophical problem at all.

Positivism found its scientific creed in Bergbohm's famous work *Jurisprudence and Legal Philosophy* (1892) which not only settled the score with the various schools of natural law but which also with fanatical zeal hunted down every last trace of natural law in the Historical School and in the systematic legal theories of the day.

Bergbohm confronted every conception of law with an inexorable either-or: either law is natural law, even if for a very small part, but then positive law can no longer be maintained; or else all law is positive law, but then not even a minimum of natural law can be kept as part of the concept of law. For positive law and natural law are as incompatible as fire and water.[1]

Bergbohm's grievance against the Historical School of Jurisprudence, even though he recognizes its merit for maintaining historically grown positive law against all natural-law speculations, is that precisely as a consequence of its theory of legal sources, which includes folk-consciousness and legal science, the school was driven back into the arms of natural law. To the only historical view of law acceptable to positivism Bergbohm gives the shallow description that "historical" law merely means that positive law must have been elevated into law through an external deed that factually happened in history.

Such is the fate of Savigny's profound thought, which, although it does recognize only positive law, yet has nothing to do with positivism: it is hopelessly flattened into a tautology. Worse, "history" is simply equated here with the "historical."

Meanwhile, Bergbohm admits that legal science, whose sole field of study is positive law, needs a system of formal legal concepts that are not subject to change but suited instead to take in the complete positive legal material as their content. Among these basic juridical concepts he accords primacy to the law-concept as the very concept of law itself. Only, this concept must be purely formal; it must not be encumbered with material meaning – which is always a natural-law meaning – and can only be gained by always abstracting from the legal material itself.

This basic idea in Bergbohm about the formality of the concept of law has since become a commonplace in the positivistic conception of law.

1 In recent years Hans Kelsen, from the standpoint of critical positivism, elaborated on Bergbohm's either-or against natural law in his small book *Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus* [The philosophical foundations of natural law theory and of legal positivism] (Charlottenburg, 1928), in which he openly acknowledged that hiding behind positivism is a *relativistic worldview* that recognizes no absolute norms for action.

5.2 Genetic and critical currents in positivism

As we saw already in Chapter I, § 2.12 (page 38), positivism divides mainly into two schools, namely the genetic and critical school. The "general law theory," championed by Bergbohm himself, must be seen as the transition to the critical school. It tried to find the formal nature of law by increasing levels of abstraction of legal contents.

The genetic school looks for the formal nature of law in the nature of the formal agency that creates law; it tries to differentiate law from other normative spheres, as it were, by taking law to be the will of a formally qualified authority, for example as the will of the lawgiver, or in a pseudo-sociological sense as the regularly obeyed authority of a dominant social group.

The critical school, which thinks in line with Kant's critique of knowledge, looks, independently of the origin of positive law, for logical criteria of law which as pure forms must be able to be linked to every conceivable content.

The standpoint of both schools is that law has a purely human, empirical or contingent character. They discount the divine nature of law for being transcendent, eternal or metaphysical.

To the extent that they hold fast to the normative character of law, it is taken only as (1) a neutral thought-form, a method of ordering the contents of our sensory consciousness (Stammler, Kelsen, etc.) without binding the human will when formulating what should obtain as law; or as (2) the command (imperative) of a supreme power that is regularly obeyed (Austin, Somló) or acknowledged (Bierling); or as (3) a mass-psychological idea of what ought to be law (the so-called sociological school). One can also say that the critical school (the so-called "pure law theory") is unable to indicate a criterion for the positivity of law, whereas the genetic school does apply a criterion.

The genetic school, however, given its law-concept, can only argue in a circle. It gives a definition of law which already presupposes the concept of law. For if the will of a human authority is to be law, it has to be established that this authority and its will both have the character of law. This school of positivism can unexpectedly escape this circle by giving elements of its law-concept a meta-jural (i.e., non-legal) meaning. But then this so-

called law-concept can no longer fulfill its task, namely to indicate a criterion for distinguishing legal norms from other kinds of norms.

5.3 Circular reasoning in Austin's concept of law

By way of illustration, let us look at how John Austin (1790-1859) defines law in his *Lectures on Jurisprudence, or, The Philosophy of Positive Law* (posth.; London, 1875).

Law, according to this author, is "a command, directly or tangentially provided with sanction, of a sovereign person or corporation directed at one or more members of the independent state community in which this person or corporation is sovereign."

At every point this "definition" presupposes the concept of law that it wants to define. Sovereign, person, corporation, sanction, independence, state community: all are concepts which, if they are to have any jural meaning, must themselves first be determined by the law-concept, since they function with a specific qualification just as much in other normative spheres.

Austin attempts to define what sovereignty is by saying that he assigns this predicate to a specific government which itself does not regularly obey another government and which is commonly obeyed by the mass of individuals united in a given human community. But again, this definition includes concepts such as government, obedience, and so on, that must first be determined juridically before they can take on jural meaning. If they are meant purely sociologically, then for all practical purposes the distinction between law and social norms are abandoned and the concept of law is no longer a concept of *law*.

5.4 The positivistic law-concept of Somló and its intrinsic untenability

Another example of a genetic-positivistic definition is found in the well-known work by Feliz Somló, *Juristische Grundlehre* (Leipzig, 1917). Law, according to this author, are the norms of a conventionally obeyed, comprehensive and constant supreme power, by which he means that a system of norms can obtain as law only when it consists of norms issued by a power which has binding force that is steady and not just for the moment, a power that can implement its norms with greater success than

other powers and whose norms cover a range that is considerable and not just a small area.

The uselessness of this definition is evident in that it tries to indicate the difference between law and other kinds of norms in a quantitative way by degrees of more or less. This loses sight of the fact that every law-sphere is *universal* within its own sphere, i.e., traverses all of life's relationships, that nothing is withdrawn in advance from being regulated by its laws. But then one cannot say that the norms of justice cover a wider area than, say, the norms of manners and customs. It is altogether wrong, for example, to say that only law regulates the payment of debts. Law regulates only the jural side, but the economy regulates the economic side, social conventions regulate the social side, and ethics regulates the moral side of this transaction. Juridically I can fully satisfy my landlord by throwing my rent payment at his feet, but *courtesy* requires certain forms which law cannot indicate, *love* demands a disposition of the heart that is not compatible with a defiant and contemptuous attitude, and the *economy* regulates levels of rental fees by the law of supply and demand.

It is also quite incorrect that only the "legal power" possesses constancy. The same is also true for the agencies in the other normative spheres that work at forming and developing jural principles. For example, the social norms of courtesy and decency do not rest on a whim of the moment but have a historical background in tradition. No norm can obtain without some relative constancy.

And as for the persistence of norms, it is the case that in every law-sphere the human framer of concrete norms, being the sole power, is the most effective power for implementing the norms. There is no legal power in the world to force people to be decent, frugal, logical, diplomatic or charitable. It is also true that the law-spheres bear each other up in this sense, that the sanction of social norms (boycot, shunning, etc.) offers immense support to law. A legal order that rested only on executions would be a colossus with feet of clay.

Somló eliminates the general essence of the various norms to such a degree that he cannot detect any qualitative difference between the concrete types of norms. The only thing he has at

his disposal is a general, quite untenable contrast between absolute and empirical norms, but he forgets that not a single empirical norm can exist apart from a supra-arbitrary principle and on the other hand that all normative spheres require humans to give these principles form and concrete shape. We will discuss this point later (in Chapter 4, section 3).

5.5 The concept of law in Kelsen's critical positivism

Meanwhile, the school of *critical* positivism tries to present the concept of law as a logical condition, under which we can conceive positive law alone as law, hence as a special form of our thinking (category).[1] Kelsen, for example, views law as a special form of "ought to be," and he presents *sein* and *sollen* as two original, utterly different directions of our mind in which we supposedly order all given material. The jural norm is then distinguishable from other norms purely by its *logical* form; it is hypothetical and heteronomous (i.e., not determined by the will of each individual). Its logical form reads: "When A is . . . then B ought . . ." or "If A occurs . . . B must follow . . ." The legal rule distinguishes itself from the autonomous ethical norm through its heteronomous and hypothetical compelling nature by attaching execution or punishment as the juridical consequence to a particular instance of human behavior, the consequence that was established as its condition in the first part of the hypothetical judgment.

The legal rule does not differ from the social norms of courtesy, decency, fashion, and so on, by its heteronomous nature, but by its normative coercive character.

Kelsen conceives of law in terms of formal logic to such a degree that the "ought to be" evaporates into a purely logical-mathematical link between two "facts," A and B. Thus, for example, he considers it a genuine *jural* norm when a heathen society stipulates that whenever a natural disaster strikes, human sacrifices have to made (which the natives themselves regard as a *sacral*, religious demand!).

Accordingly, the "ought to be" part in Kelsen's law-concept does not in any way express a material value; it is nothing but a logical-mathematical link between a condition and a conse-

1 For more on the critical method, see Chapter 1, § 2.12.2, pages 80ff.

quence. It goes without saying that Kelsen nowhere comes close to the modal character of the jural. He tries to reinterpret the concept of law into a mathematical-logical concept while eliminating the [[illegible]] of law. When he formulates the logical form of a natural law, in distinction from the jural norm, as a question of "If A . . . then B," even the word "then" is taken by him in the sense of a natural-causal link between condition and consequence, a link which in positivist physical science (Ernst Mach, *cum suis*) is simply a neutral mathematical association of two "legal conditions" or "facts." In other words, for consistent positivistic thought, the difference between *sollen* and natural-causal *sein* is gone. If *sollen* is nothing but a neutral logical-mathematical relation between two facts, then it coincides with the positivistically understood natural-scientific concept of causality.

Kelsen's students, Friedrich Sander (1889-1939) and Fritz Schreier (1897-1981) have in fact drawn this positivistic consequence from Kelsen's law-concept. And Sander accuses Kelsen of having preserved in his normative view of law an "ethical-political postulate" (the nightmare of the "pure theory of law").

Yet entirely deserved, on this standpoint! For Kelsen himself explains that he still formally accepts law as *norm* because of his Kantian point of departure in which *sein* and *sollen,* the "realm of nature" and the "realm of the spirit," are separated by an unbridgeable gulf.

For the rest, you are referred to Chapter 1, § 2.12, for both the genetic and the critical schools in positivism and its radical rationalistic individualism.