A TREATISE OF LEGAL PHILOSOPHY AND GENERAL JURISPRUDENCE

Editor-in-Chief: Enrico Pattaro

Volume 8

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

Michael Lobban

Springer

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The Jurists' Philosophy of Law from Rome to the Seventeenth Century

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The Jurists' Philosophy of Law from Rome to the Seventeenth Century

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Springer

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ISBN 978-94-017-9878-5 ISBN 978-94-017-9880-8 (eBook)
DOI 10.1007/978-94-017-9880-8

Library of Congress Control Number: 2005283610

Springer Dordrecht Heidelberg New York London

Printed on acid-free paper

Springer Science+Business Media B.V. Dordrecht is part of Springer Science+Business Media (www.springer.com)

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PREFACE

There is no body of legal norms, however produced, that is not in some way predetermined by a vision of the world and of human society. From the beginnings of civilization, human beings have given law the function of ensuring a peaceful coexistence and tranquillity within their communities. The notion of order carries within it the concept of proportion. In the words of Dante Alighieri, "law is the proportion between man and man in relation to things and people [*realis et personalis hominis ad hominem proportio*], and this proportion, if kept in balance, will keep human society healthy, and if spoiled will spoil the well-being of society [*servata hominum servat societatem et corrupta corrumpit*]." This means that relationships among people, or among people and things, must share the values specific to their time and place. Any set of values that prevail in the collective consciousness (whether these values are religious, or ethical in a broad sense, or economic) will receive wider protection than other values that are considered to be less important. The distinction between individual goods and collective goods will produce a hierarchical order capable of guiding decisions when conflicting interests are at play.

Even though ethics and law constitute two distinct spheres of human knowledge and activity—at least they do so in Western civilization—they have appeared for millennia to be bound up by a necessary relationship. Ethics served as a guidepost, showing the way for law and pointing out the ends to be sought. We have historical evidence that this was going on even before the Greeks framed the organically structured discipline that would take the name of "ethics." Even in the most ancient civilizations, and in those that followed—some of them incapable of working out complex theoretical systems, as was the case in Europe during the early Middle Ages—precise moral dictates were set forth (often drawing inspiration from religious precept) that informed norms more properly describable as legal. Even here, law cannot be said to have escaped the reach of philosophy. Indeed, for humans, to exist is to philosophize, even though philosophizing does not always mean doing philosophy. For us to philosophize is to face our destiny with eyes open, and clearly setting out the problems arising out of our relationship with ourselves, with other people, and with the world. It is not so much a matter of developing concepts or theoretical systems as it is a matter of making choices and committing ourselves by living a true, genuine, and reasoned life. If, as Plato would have it, we cannot live as humans without living as philosophers, then philosophy accompanies us from the beginning, when we first get the light of consciousness. Certainly, in this necessary "philosophizing" that we do, we are helped out a great deal by the professional philosophers, by the technical

work they do—we can rely on centuries of tradition, experience, and myth. The doctrines developed over the centuries have provided the indispensable tools with which to understand ourselves and the world around us, enabling us to come to a clearer perception of the tasks we must accomplish, both as individuals and as members of a social organism. If we look at the recent efforts made to deny the guiding force that ethics exerts on law, we will find that, whatever the reason for such a denial, there is always a theoretical argument—and hence a philosophical basis—offered in justification. Nor could it be otherwise, considering that in thought lies the specific nature of humans.

If, then, every legal system, every set of values, written or unwritten, is modelled on a certain set of ideal norms that precede it, the same can be said to be true in the science of law. Certain lawgivers like Justinian have wished that their work be forever free of interpretation and commentary (Tanta, 21: "nemo [...] audeat commentarios isdem legibus adnectere"), but their wishes have proved ineffective and fallacious. Any text that others must understand will necessarily have to be interpreted. Hermeneutics is the inescapable light in which human knowledge is bathed. Thus, jurists have had to explain every collection of legal norms. They must determine their applicability to the matter at hand—to the facts presented by life, facts themselves requiring interpretation in their own turn. Indeed, when events happen that are relevant to law, the jurist must extract a meaning from them—the meaning attributed to them by the social environment—and then must bring that to the legal case in point. This interpretation which the jurist is entrusted with does not confine itself to figuring out the meaning the norm initially had in the historical and social context where it was conceived. The jurist must also find out whether the norm took on a further social meaning (even if unintentionally). Can it, for example, be applied to other conflicts or situations beyond those the norm was initially designed to settle. This kind of interpretation—evolutional interpretation—has always characterized Western law and continues to do so. In the age of *ius commune*, from the 14th to the 16th century, the jurists' activity became even freer and more creative. For it became the practice to interpret concrete facts by turning to Justinian's *Corpus Iuris* on the one hand and canon law on the other. Sometimes the two would converge in their interpretation. Sometimes they would go their separate ways. Justinian's compilation, authoritative and venerable, was nonetheless the mature fruit of a bygone society, individualistic and still pagan (despite the touchups made by Justinian); canon law was the new legal system introduced by Christianity—it brought along the spirit of a world bristling with lively new social aggregations and unforeseen economic forms. The law of the Church could certainly not do away with the law of ancient Rome. It continued, rather, to shape and influence the law because of its unquestionable technical sophistication, as well as for its comprehensiveness. Justinian's *Corpus Iuris* treated a vast number of legal problems and regulated many legal institutions, from marriage to contracts

("omnia inveniuntur in corpore iuris"). Many institutions, such as matrimony, contracts, trials, and inheritance, regulated matters in which the moral teachings of the Church had to be taken into consideration. In these cases the popes and the jurists introduced norms different from those found in Justinian's *Corpus Iuris*. It was precisely on these points that the jurists focused their effort, ready to "freeze" Roman law and usher in canon law, deemed more equitable, modern, and flexible. The dialectic internal to the *utrumque ius* system—in which there coexist two universal systems of law in force—can be likened to that which operated under the Roman praetorship or the Court of Chancery: the one tempered *ius civile* with *ius praetorium* and the other common law with equity. But unlike the praetor and the chancellor, the continental jurist in medieval and protomodern Europe was not invested with any public function. Rather, the continental jurists created a new law. They did so on the basis of the scientific knowledge they were credited with having, and without in principle striving for any office, magistracy, or official position. They attempted instead to achieve an *opinio communis*, a convergence, the widest that could be had, with the opinions of other jurists, whether prominent or not. They generally showed a great sense of responsibility in their interpretation of the law, because they realized that there was no such thing in Europe as a single, supreme lawmaking body capable of filling the gaps and fixing the problems of interpretation and fact in the *ius commune*. They took pride in their work, knowing as they did that they belonged to a group that was honoured and heeded by emperors, kings and princes.

These reflections on the *ius commune* are sketchy, but they constitute an indispensable premise without which we would not be able to understand the relationship that took shape between jurisprudence and philosophy. The jurists of the day found they had made themselves into philosophers: They had to guarantee that the freedom they exercised in formulating the law rested on a critical reflection on the methods of argumentation and on the values to be affirmed in deciding cases one way or another. Judges had to distinguish the honest (*honesta*) from the useful (*utilia*) and could not bypass the jurists' interpretation and its philosophical backing; they couldn't choose not to rely on it, said the humanist Leon Battista Alberti († 1472): "ea re fit ut philosophum esse iudicem oporteat" (De iure, 2). Even those interpreters who seemed less interested in theory and who staunchly defended the strictest conformity to the law showed (at least in deed, by the outcome of their activity) that they adhered to a specific view of their task as jurists and of the ends entrusted to law. Iohannes Bassianus is the glossator who in the latter half of the twelfth century caused the science of law in Bologna and Europe to do an about-face; he did so condemning his predecessors for their metaphysical flourishes, and propounding a self-referential knowledge: "legistis [...] non licet allegare nisi Iustiniani leges" (the jurists are not allowed to allege anything but the laws of Justinian); and yet neither he nor his followers, Azo and Accursius above all,

could help proclaiming that jurisprudence is itself philosophy. In fact they did more than that: They proclaimed, taking their cue from Dig. 1.1.1, Inst. 1.1, and Dig. 1.1.10.2, that jurisprudence is true philosophy, the science of right and wrong. That being the case—jurisprudence is "philosophy," it is "science"—it will have to show it can proceed by the soundest methodology. It is little wonder, then, that Bassianus himself, as the sources reveal, was well versed in the arts of the trivium (comprising grammar, rhetoric, and dialectic) and used these disciplines in the service of law ("extremus in artibus").

Certainly, the Roman jurists had begun to organize their juristic opinions using logical and conceptual instruments at least as early as Quintus Mucius Scaevola (ca. 140 to 82 B.C.). The method of formulating definitions and then rules, and grouping legal phenomena under different types, seemed to satisfy the Ciceronian ideal of taking the *ius Quiritium*, the ancient law of the farmers and shepherds who had settled along the Tiber's riverbanks, and imparting an order to this venerable repository (*in artem reducere*), a prescientific law that had grown up as an incoherent assemblage.

With the Bolognese rebirth of the early twelfth century, the dialectic method made its way ever more profusely and penetratingly into the work of the jurists. As the new logic was revived, the Platonic method of division gave way to the Aristotelian syllogism, a methodology that was capable of much greater coherence and insight. In the second half of the 13th century and throughout the 14th century, the Aristotelian epistemology expounded in the *Posterior Analytics* forced every science, including jurisprudence, to address the preliminary question of its *principia propria*, the principles proper to it and from which would issue all further knowledge. The jurists committed themselves to the task of putting a definition on every legal concept and ascertaining the *ratio* and *sensus* of each *regula*, its grounding principle beyond the letter of Justinian's text. They tried to build a strictly deductive knowledge and sought to emulate the certainty of the physical and mathematical sciences. This became the stuff on which Italian jurisprudence would focus until the late 17th century, and Andrea Errera provides a detailed, perspicuous analysis of the endeavour. Meanwhile, in the rest of Europe, and especially in France and Germany, there began a lively debate of a different sort, but a debate that has no mention here. While some interpreters, such as Sebastian Derrer and Johann Nicolaus Frey, seemed in large part to follow in the footsteps of the commentators, others polemicized against them and their intransigent Aristotelism. They took up Italian humanism and the writings of Pierre De la Ramée, a method more adherent to the ordinary processes of knowledge, to philology and historiography, in rejection of all abstract, formalistic forms of knowledge.

It is not by any accident that we have omitted to treat those scholars here, who formed what would come to be known as the rational school of natural law. True, this school must be credited with affording the best innovation that