

PREFACE TO VOLUME 9

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Damiano Canale

*Bocconi University, Milan
Department of Legal Studies*

Hasso Hofmann

*Humboldt University, Berlin
Faculty of Law*

A Treatise of Legal Philosophy and General
Jurisprudence

Vol. 9: A History of the Philosophy of Law in the Civil Law
World, 1600-1900; Vol. 10: The Philosophers'
Philosophy of Law from the Seventeenth Century to Our
Days.

Editor-in-chief: Pattaro, E. - Canale, D.; Grossi, P.;
Hofmann, H.; Riley, P. (Eds.)

2009, XXXVII, 752 p. In 2 volumes, not available
separately., Hardcover

ISBN: 978-90-481-2963-8