

TABLE OF CONTENTS

A Note on the Authors	XI
General Editor's Preface to Volumes 9 and 10 of the Treatise	XV
Preface to Volume 9	XIX
Chapter 1 - <i>Scientia Iuris</i> and <i>Ius Naturae</i>: The Jurisprudence of the Holy Roman Empire in the Seventeenth and Eighteenth Centuries (by Merio Scattola)	1
1.1. Introductory Remarks	1
1.2. Main Characteristics of Legal and Political Thought in the Early Seventeenth Century	2
1.2.1. <i>An Academic Discipline</i>	2
1.2.2. <i>Jurisprudence and Politics</i>	5
1.3. Legal Doctrine in the Early Seventeenth Century	7
1.3.1. <i>Dialectics and Law: The System of Academic Teaching</i>	7
1.3.2. <i>A Topological Philosophy of Law</i>	9
1.3.3. <i>The Transformation of Jurisprudence in the Seventeenth Century</i>	12
1.4. The History of Natural Law in the Late Seventeenth and Early Eighteenth Centuries	15
1.5. The Epistemology of Modern Natural Law	28
1.5.1. <i>The Method of Rational Calculation</i>	28
1.5.2. <i>The Principle of Natural Law</i>	29
1.5.3. <i>The History of Natural Law as the History of Its Principles</i>	32
1.5.4. <i>Rational Constraint</i>	37
1.5.5. <i>The Enforcement of Natural Law in Political Society</i>	39
Chapter 2 - French Legal Science in the 17th and 18th Centuries: To the Limits of the Theory of Law (by Jean-Louis Halpérin)	43
2.1. Domat and the Systematic Construction of the Law	48
2.1.1. <i>Didactic Intentions</i>	51
2.1.2. <i>The Traité des lois and the Foundations of Natural Law</i>	53

2.1.3. <i>Duties and Successions: Necessary Liaisons between Men</i>	56
2.1.4. <i>Public Law, an Accessory or a Necessary Complement to Civil Law?</i>	60
2.2. Pothier and the Systematic Description of Private Law	61
2.2.1. <i>The Sources of the French Law System</i>	62
2.2.2. <i>The Subjects of a General Part of Private Law</i>	66
 Chapter 3 - Conceptual Aspects of Legal Enlightenment in Europe	
(by Maximiliano Hernández Marcos)	69
3.1. General Idea of the European Legal Enlightenment	70
3.1.1. <i>On the Concept of the Enlightenment in Europe</i>	70
3.1.1.1. The Temporalisation of History	72
3.1.1.2. The Conceptualisation of the Metaphor of Light	73
3.1.1.3. Enlightenment as Politicisation	76
3.1.2. <i>Structural Aspects of the Enlightened Conscience of Law. Panoramic Overview</i>	77
3.2. The Obscureness of Jurisprudence	84
3.2.1. <i>The Twilight of the Justinian Myth</i>	87
3.2.2. <i>The Struggle against Obscurity in Judicial Interpretation</i>	89
3.2.2.1. The Canon of Literal Interpretation	90
3.2.2.2. Authentic Interpretation and Recourse to the Legislator	94
3.3. The Natural Light of Reason in Jurisprudence	96
3.3.1. <i>From Natural Law to the Science of Legislation</i>	97
3.3.1.1. The Historical Formation of the Science of Legislation: the State as a Legislator and the Rationality of the Sovereign Will	99
3.3.1.2. Criteria of Rationality and Forms of Development of the Science of Legislation	102
3.3.2. <i>The Meanings of Law</i>	108
3.3.2.1. The Law as a Mandate	108
3.3.2.2. The Law as a Necessary Relation	112
3.3.2.3. The Law as a General Will	116
3.3.3. <i>The Space of Private Rights: Natural Liberty and Civil Liberty</i>	118
3.3.4. <i>The Lights of Reason of Criminal Law</i>	124
3.3.4.1. Basic Doctrinal Lines of Criminalist Culture: A Historical Balance	125
3.3.4.2. Concerning New Concepts of Crime and Punishment	131

Chapter 4 - The Many Faces of the Codification of Law in Modern Continental Europe

(by *Damiano Canale*)

	135
4.1. Codes and Codifications: An Overview	135
4.2. Three Discursive Levels	137
4.2.1. <i>Legislative Technique</i>	137
4.2.2. <i>Legal Theory</i>	138
4.2.3. <i>Legal Philosophy</i>	140
4.3. Natural Law and Codification	141
4.4. An Alternative Framework	144
4.4.1. <i>Three Theses</i>	144
4.4.2. <i>State, Civil Society, and Codification</i>	146
4.5. The French Model (Code Civil, 1804)	149
4.5.1. <i>Theoretical Background</i>	150
4.5.1.1. The Heritage of French Legal Science	150
4.5.1.2. Natural Law and Revolution	152
4.5.1.3. Legislation as Education to Social Morality	154
4.5.1.4. Portalis's Reading of Montesquieu's Science of Government	155
4.5.1.5. Did Bentham Influence the French Path to Codification?	157
4.5.2. <i>The Constitutional Plan</i>	158
4.5.3. <i>Structural Features</i>	160
4.6. The Prussian Model (ALR, 1794)	164
4.6.1. <i>Theoretical Background</i>	165
4.6.1.1. Christian Wolff and the German Rank Society (<i>ständische Gesellschaft</i>)	166
4.6.1.2. The Wolffian School: From Practical Philosophy to the Science of Legislation	167
4.6.2. <i>The Constitutional Plan</i>	169
4.6.3. <i>Structural Features</i>	171
4.7. The Austrian Model (ABGB, 1811)	174
4.7.1. <i>Theoretical Background</i>	175
4.7.1.1. Catholic Natural Law and Legislation	175
4.7.1.2. Zeiller's Reception of Kant's Philosophy of Law	176
4.7.2. <i>The Constitutional Plan</i>	178
4.7.3. <i>Structural Features</i>	179
4.8. Conclusion	182

Chapter 5 - German Legal Science: The Crisis of Natural Law Theory, the Historicisms, and “Conceptual Jurisprudence”

(by Paolo Becchi)

	185
5.1. Introduction	185
5.2. Gustav Hugo and the Crisis of German Natural Law Theory	186
5.2.1. <i>From Natural Law Theory to the “Philosophy of Positive Law”</i>	186
5.2.2. <i>A Few Comparisons with the Late Natural Law Tradition in Germany</i>	188
5.3. Thibaut and Savigny: The Polemic on Codification	192
5.3.1. <i>Premise</i>	192
5.3.2. <i>Thibaut’s Position</i>	192
5.3.2.1. Political Background	192
5.3.2.2. Codification as a Way to Supersede “Legal Particularism” and Simplify the Legal Framework	194
5.3.2.3. Legal and Political Ideology	197
5.3.3. <i>Savigny’s Criticism</i>	200
5.3.3.1. Meaning and Limitations of an Interpretive Guide	200
5.3.3.2. The Historicity of Law and the Role of the Jurists	201
5.3.3.3. Legislation and the Jurists’ Law (<i>Juristenrecht</i>)	203
5.3.3.3.1. The Law	203
5.3.3.3.2. The Jurists’ Law	205
5.3.3.3.3. The Problem of Interpretation: A Brief Overview	207
5.4. Hegel, Law, and the Jurists	209
5.4.1. <i>The Traditional View</i>	209
5.4.2. <i>A New, and Different, Start</i>	212
5.4.3. <i>The Judge and the Law</i>	215
5.5. Puchta and the Autonomy of Legal Doctrine	218
5.5.1. <i>Premise</i>	218
5.5.2. <i>A Formally Equal Law</i>	219
5.5.3. <i>A “Pure” Science of Law</i>	221

Chapter 6 - Science of Administration and Administrative Law

(by Luca Mannori and Bernardo Sordi)

	225
6.1. Definition of the Topic and Problems of Method	225
6.2. Between the Middle Ages and the Modern Age: The Primacy of Justice	226

6.3. The Seventeenth and Eighteenth Centuries: The Growth of Public Tasks	229
6.4. The Seventeenth-Eighteenth Century: The Formation of Commissarial Bureaucracies	232
6.5. The Language of the Revolution	234
6.6. The Invention of Administrative Law	237
6.7. In Search of the “Rechtsstaat”	242
6.8. Administrative Law and Science of Administration: Towards the Primacy of the Legal Method	248
6.9. The Slow Emergence of Administrative Law in England	252
6.10. The Discovery of <i>Service Public</i>	254
6.11. Development and Decline of State Interventionism	256
 Chapter 7 - Constitutionalism	
(by Maurizio Fioravanti)	263
7.1. Foreword	263
7.2. Constitutionalism of the Origins	266
7.3. Constitutionalism of Revolutions	274
7.4. Constitutionalism of the Liberal Age	286
7.5. Conclusions: A Look at the Twentieth Century	296
 Chapter 8 - From Jhering to Radbruch: On the Logic of Traditional Legal Concepts to the Social Theories of Law to the Renewal of Legal Idealism	
(by Hasso Hofmann)	301
8.1. Preface	301
8.2. Rudolf von Jhering's Discovery of the Purpose in Law	302
8.2.1. <i>Life and Works</i>	302
8.2.2. “Constructive Jurisprudence” according to the “Method of Natural History”	303
8.2.3. <i>The Crisis—The Struggle for Right</i>	306
8.2.4. <i>From Legal Formalism to Legal Naturalism</i>	308
8.2.5. <i>The Question of Legal Positivism</i>	310
8.2.6. <i>An Evolutionary Theory of Law</i>	313
8.2.7. <i>Importance and Impact</i>	315
8.2.7.1. Jhering as a Precursor	315
8.2.7.2. The Modern School of Criminal Law, the Free Law Movement and Jurisprudence of Interests	317
8.2.7.3. Sociological Jurisprudence (Roscoe Pound)	318
8.3. Social Theories of Law (“Legal Naturalism”)	319

8.3.1. <i>The Legal Theorists of the New “Scientific School” in France</i>	319
8.3.1.1. François Géný	319
8.3.1.2. Léon Duguit	321
8.3.1.3. Maurice Hauriou	322
8.3.2. <i>Adolf Merkel’s Allgemeine Rechtslehre (General Theory of Law) as a “Positivistic Philosophy of Law”</i>	324
8.3.3. <i>Jurisprudence in the Class Society—Anton Menger’s “Jurists’ Socialism”</i>	327
8.3.4. <i>Otto von Gierke’s Social Law of Associations</i>	331
8.3.4.1. Gierke’s Position and Importance	331
8.3.4.2. Life and Scientific Development	332
8.3.4.3. Central Topics: The Actual Body Corporate and the Development of the Law of Associations	335
8.4. Towards Legal Neo-Idealism	337
8.4.1. <i>Josef Kohler’s Criticism of Jhering in the Name of Metaphysics</i>	337
8.4.2. <i>Fritz Berolzheimer’s Neo-Hegelian “Real Idealism”</i>	342
8.4.3. <i>The Purpose of Law as a Value—The Neo-Kantian Beginnings of Gustav Radbruch and the End of the “Long 19th Century”</i>	347
8.4.3.1. Roots	347
8.4.3.2. Radbruch’s Review of the 19th Century	350
Bibliography	355
Index of Subjects	399
Index of Names	401

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