

## THE PHILOSOPHY OF LAW RECONSIDERED

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*Abstract: This paper constitutes a brief overview of Western philosophy of law, with special emphasis on its putative (at least to some) originator, Hegel while not forgetting the importance of law for a number of more classical Western philosophers. It takes note of the contribution of the legal positivist, Hans Kelsen, to elevating the importance of international law – somewhat paradoxical, given the traditionally cosmopolitan outlook of natural law, which Kelsen despised – and then goes on to criticize the tendency of many textbooks, especially those published in the United States, to concentrate in a quite provincial way on, above all, American Constitutional Law, comparable to the concentration on then-contemporary Prussian institutions in Hegel's *Philosophy of Right*. It urges greater attention, in the future, both to international law, with its global context, and to legal systems other than those of the United States and the United Kingdom, particularly to those of non-Western countries.*

I appreciate the opportunity offered to me by the Editors to make a few comments by way of an overview in connection with this special issue on the philosophy of law. It will be my own overview, to be sure, one with which no doubt some specialists in the area will disagree, but in fact I am persuaded that a surprisingly large number of philosophers who have had some contact with contemporary literature in legal philosophy will agree with me. I think it very fitting that a journal like this one, committed to a global vision of philosophy, should devote an issue to this topic.

In the textbook histories of Western philosophy, the origin of the idea of legal philosophy as a distinct sub-specialty is commonly ascribed to Hegel's *Philosophy of Right*, thus assigning this field a relatively recent birthdate as philosophical sub-specialties go. True, Kant's work, *Metaphysische Anfangsgründe der Rechtslehre*, to which John Ladd's English translation gives the inaccurate title, *The Metaphysical Elements of Justice*, preceded Hegel's by

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more than two decades, and interest in the nature of law was already a salient phenomenon among the Ancient Greeks: Plato's last major work was entitled *The Laws*, and in his *Politics* and elsewhere Aristotle strongly advocated what we call "the rule of law." Among Medieval writers such as Aquinas the notion of "natural law" and the question as to how it is related to positive law – a question that had great resonance among Twentieth Century legal philosophers and that is central in at least one of the contributions to this journal issue – were topics of great importance. Still, Hegel's work is treated as somehow seminal for later Western philosophy of law, and John Austin's defense of what came to be called "legal positivism," *The Province of Jurisprudence Determined*, published just over a decade later (in 1832), is usually assigned the same seminal status for the Anglophone world.

It would be difficult to exaggerate the importance, for this entire field as it has developed in the West, of the fact that *Recht* and comparable words in most Western languages beginning with Latin (*jus*; *diritto* in Italian, *derecho* in Spanish, *droit* in French, etc.) can mean both "right" and "law," depending on the context, whereas in English the basic meanings of these two words are sufficiently distinct so as to allow Hobbes famously to have maintained, perhaps with some exaggeration but in any case with clarity and conviction, that "law, and right, differ as much, as obligation, and liberty; which in one and the same matter are inconsistent."<sup>1</sup> So, although Hegel's book is most frequently called *The Philosophy of Right* in the English-language literature, it can just as well be called *The Philosophy of Law*. Actually, the full title was a double one: *Naturrecht und Staatswissenschaft im Grundrisse – Grundlinien der Philosophie des Rechts* – natural law and political science in outline, and basic elements of the philosophy of law (or "of right"). Thus Hegel, in the first word of the full title, aligns himself with the tradition of natural law, which, however, he very broadly and somewhat unhelpfully defines near the outset as "law from the philosophical point of view."

The overall structure of Hegel's work is such as to elaborate an entire political theory (or "political science," understanding that "science" in Hegel's German was broader in scope than the same word often has in modern English), beginning at the level of "abstract right" and moving on through individual morality ("*Moralität*") to social ethics ("*Sittlichkeit*") with its culmination in the State and ending, as the last of the three sub-divisions of the latter, with "world

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<sup>1</sup>*Leviathan*, Chapter XIV, third paragraph.

history.” In other words, this work is comprehensive indeed, with universalistic aspirations. Nevertheless, there are individual sections and sub-sections of it, such as the treatment of class divisions (far removed from the employment of the same concept in the work of Hegel’s successor Marx!) and of the police and the corporation under the general category of “civil society,” as well as the account of “Constitutional Law,” beginning with “the Crown” and including “the Estates,” which constitutes most of the section on “the State,” that it would be very difficult if not impossible to comprehend without some prior knowledge of the actual institutional arrangements of early Nineteenth-Century Prussia. In other words, it is in certain respects, in certain parts, highly provincial – a criticism that Hegel would have dismissed on the basis of his conviction that his world, the one that he depicted, embodied the highest achievements of world history up to that time and that the Prussian constitutional structure, including its “constitutional” monarch and its quite old-fashioned, aristocratic “Estates,” was the highest form of the modern State.

True, Hegel here does, contrary to some popular misinterpretations of his thought, consider all states, including his own, to be transient and ultimately subject to the “judgment” of World History, and just before his final section on this topic he includes a very short one (less than four pages in length) on International Law. Although some contemporary Hegel scholars contend that he was preparing the way for a more global vision, impossible in his day but made possible since then precisely because of all the developments that have taken place in world history over the past nearly two centuries, what he actually says about international law can for the most part only be characterized as “dismissive,” since he regards national sovereignty as absolute, at least in his own time, thus relegating the core principles of international law to the status of a mere “ought-to-be.”

During those intervening years the philosophy of law in the West has flourished, relatively speaking, with many names and various movements (the Scandinavian School, H. L. A. Hart, American legal realism, feminist jurisprudence, etc., etc.) being prominently associated with it. It is not my purpose here to review that history even perfunctorily. I would, however, like to take special note of one of the most prolific writers in this pantheon, Hans Kelsen, precisely because he paid more attention than most to international law. This is quite paradoxical in a sense, because the cosmopolitan Kelsen was a strongly committed positivist, who regarded natural law as simply nonsense, while natural

law theory in its origins (in Cicero, for example) had emphasized its universality, its trans-national character (*jus gentium*). Kelsen's approach was highly formalistic, and this made it possible for him to suggest that, at least theoretically, one could just as easily conceive of the international legal framework as conferring recognition on individual legal systems as of the latter retaining full sovereignty and conferring only as much limited validity on elements of international law as they pleased. Kelsen's legal positivism was extremely popular among Continental European legal theorists prior to the Second World War, but the tragic personal and social dilemmas that it created for its adherents with the ascendancy of Naziism (since Hitler's assumption of emergency powers, while of course it resulted in an enormous and terrible change in so many aspects of everyday life, was effected within the framework of the existing Weimar Constitution) laid the groundwork for a strong backlash against legal positivism after the war, particularly in Germany.

Let us "fast forward" from that time to the present. The philosophy of law continues to flourish as a subject of study in the West, especially in the United States and other Anglophone countries. However, although many of its practitioners would no doubt be shocked to see their work characterized in this way, the provincial spirit, as I have identified it, of Hegel's legal philosophy, albeit without many of its more redemptive universalistic elements, continues strongly to haunt this field. One way of verifying this claim is to consider the textbooks that dominate it. One of the most popular is the one edited by the late Joel Feinberg and, in later editions, Jules Coleman, now in its ninth edition with a third editor, Christopher Kutz, added. It is long, hefty, substantial. The titles of its major sub-divisions are redolent of major law-related philosophical issues – "the nature of law," "justice," "rights," and the like – and a few excerpts have been included, in various editions, from figures in the history of Western philosophy, mostly Scottish or British (Locke, Hume, Bentham, Mill), with just a soupçon of non-Anglophone authors, namely Plato and (most recently) Kant, Aquinas, and Beccaria being added to the mix. But to all intents and purposes this textbook, like a number of others, would better be entitled *Philosophy of American Law*, or even *Philosophy of American Constitutional Law*, rather than *Philosophy of Law*. In fact, its provincialism makes Hegel's seem mild by comparison.

The United States Constitution is an interesting document, with a quite interesting history and a strong ongoing influence on the affairs of the country for which it serves as the founding document – in large measure because of its

vagueness, or open-endedness if one prefers, combined with the very strong role played by the Supreme Court as the ultimate resort (something not made entirely explicit in the original document itself) for those seeking judicial review of legislation. In the first century of the country's existence, Supreme Court decisions overturning or reaffirming legislative acts were comparatively few in number, although some were extremely important historically speaking; more recently, they have become fairly numerous. So the American legal process, with additional input from the English common law tradition and additional complexity due to the United States federal system with the individual states retaining considerable rights, is well worth detailed philosophical study because of the extent to which fundamental aspects of human activity, some millennia-old and some deeply affected by recent technological and other changes, are among its central concerns. However, this does not by any means justify the pretense, so strongly reinforced by most of the American textbooks themselves, that virtually everything that is most important for philosophers to understand about law is to be found in the legacy created by United States Constitutional history – especially by, as textbook editors like to put it with a cloying sense of intimacy, “SCOTUS”<sup>2</sup> – with a little input from the British legal tradition. But why should a country that even now is home to only one-twentieth of the world's population, and that used to boast of its “exceptionalism” as something great but that is now also exceptional in many ways that are either dubious (military power) or simply disgraceful (percentage of citizens in prisons), be treated, in these books and in the university courses which they feed, as the locus of “the rule of law,” with other legal systems being dismissed as either unimportant or more or less contemptible?

Questions of international law have become increasingly important in world affairs since World War II, and there is in fact a good deal more philosophical interest in them now, or so it seems to me, than in the past. But this is only beginning to be reflected, and so far only marginally, in what passes for mainstream legal philosophy in the United States. And, when it *is* so reflected, a continuing bias in favor of an American-oriented cultural, social, and political perspective is all too evident. A particularly egregious illustration of this is the late John Rawls's short late-in-life work, *The Law of Peoples*. In it, he abandons any thought of applying his “theory of justice,” from his work with that title, to

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<sup>2</sup>Supreme Court of the United States.

the international arena, he suggests that states severely deficient in material resources are often themselves to blame, he tries to create a vague three-level hierarchy among liberal peoples, “decent” but non-liberal peoples, and “outlaw states,” he advocates the maintenance of an arsenal of nuclear weapons by the “good” states, and, in short, makes it abundantly clear that, in his mind, his own country and a handful of its allies are nearly ideal in a world of otherwise inferior “peoples.”<sup>3</sup> The importance of this illustration for reinforcing my point lies in the fact that, while Rawls was not himself a legal philosopher in the narrow sense and not someone who discoursed at length on American Constitutional issues, his work was taken extremely seriously by many of this group (most notably, perhaps, in the late Twentieth Century by the late Ronald Dworkin), and his *magnum opus* was one of the most widely read and translated philosophy books of that era. Some of his followers or early admirers, of course, have been rather dismayed by some of the features that I have mentioned in *The Law of Peoples* and have tried to save Rawls (*their* Rawls) from himself by extracting principles from his core thought and taking them in less chauvinistic directions. But it is not easy, as long as one is still somehow within the Rawlsian orbit, to escape the atmosphere of late Twentieth Century American hegemony of which his work from *A Theory of Justice* onward is redolent. (*A Theory of Justice*, although it does not purport to be aimed at justice within any specific country, imagines a “constitutional convention,” discusses “conscientious refusal” and civil disobedience within an obviously American framework, and so on.)

One well-known non-Anglophone philosopher with whom Rawls had some dialogue is Jürgen Habermas, who himself undertook a long venture into legal philosophy in his book, *Between Facts and Norms*, published in German in 1992. While, perhaps inevitably, there are moments in this work at which readers unfamiliar with the German-language literature on legal philosophy and the German legal tradition are left somewhat at sea, such moments are relatively infrequent, and in fact Habermas pays considerable attention, perhaps too much, to American writers, especially to Dworkin. So the range of thinking about the law remains fairly restricted within the Habermasian context, but at least it is not

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<sup>3</sup>I have elaborated at length on some of the deficiencies of this book in my article, “Rawls’s *Law of Peoples* and the New World Order,” in *Democracy in a Global World: Human Rights and Political Participation in the 21<sup>st</sup> Century*, ed. D. Chatterjee (London, etc.: Rowman & Littlefield, 2008), pp. 187-199.

nearly so narrow as that range still remains within the literature to which Anglophone students are typically introduced. In other words, it is a step in the right direction.

All that I have written up to this point should be regarded as illustration and as prologue. The central message that I wish to convey to readers of this special issue is simple but, I hope, profoundly important: The philosophy of law of the future needs to become much more global in scope than it has been up to now. It must take seriously the various experiments with the rule of law that have been and are being undertaken throughout the world, East and West – the failed as well as the successful (however success is to be measured). The Anglo-American legal tradition has tended to receive enormous “press” in recent years; but it, too, is just one historical experiment among many. Political decolonization ranks as one of the most salient phenomena of the mid- to late Twentieth Century; philosophical decolonization, in the philosophy of law as in many other areas, must be the task of the decades to come.