

A Treatise of Legal Philosophy and General Jurisprudence

Volume 6

A History of the Philosophy of Law from the Ancient Greeks to the Scholastics

# A Treatise of Legal Philosophy and General Jurisprudence

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Volume 6

A History of the Philosophy of Law  
from the Ancient Greeks  
to the Scholastics

Second Edition

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## GENERAL EDITOR'S PREFACE TO THE HISTORICAL VOLUMES OF THE TREATISE

In the preface to Volume 7 of this Treatise, Andrea Padovani and Peter Stein point out that the volume purposely omits to treat the rationalistic natural-law school of the 17th and 18th centuries, this despite the volume being entitled *The Jurists' Philosophy of Law from Rome to the Seventeenth Century*. This is how they explain why Volume 7 does not, despite its title, discuss Grotius (1583–1645) and the so-called natural-law school:

It is not by any accident that we have omitted to treat [...] the rational school of natural law. True, this school must be credited with affording the best innovation that juristic reflection would see in seventeenth-century Europe. But then an enquiry into the doctrines of the natural-law theorists would take us too far from our main focus, which is the *jurists'* philosophy of law. Now, it is well known that not only the jurists contributed to bringing out the new natural law, but also philosopher-jurists and philosophers tout court. Exemplary in this regard is Hugo Grotius. He was not a philosopher and had no philosophical interests properly so called, *yet he grounded the validity of his thought on a whole series of speculative questions* that cannot be ignored. In short, given any problem, such as defining “just war,” the solution for it had to be forged on philosophical grounds, and only then would it find confirmation or validation through the authority of the *ius commune*. This procedure was common to the entire modern school of natural law. [...] The exponents of this scientific movement forsook all interpretive activity (no longer deemed useful) devoting themselves instead to the effort of “discovering” a new law, a law capable of sustaining each nation, and the family of nations, in its future course. The natural-law theorists found that the source of law no longer lay in the *Corpus Iuris Civilis* or the *Corpus Iuris Canonici*, but rather lay in the “nature of things,” the only standard, certain and constant, by which to assess human behaviour. Thus, we no longer see in their treatises any mention of the methods of textual interpretation—no *argumenta* or *loci* devoted to that subject—which for three centuries had been the focus of the commentators and their exegesis. And not just anciently, either: most of the modern European jurists who practised law continued to be faithful to the canons of that long tradition. (Volume 7 of this Treatise, XIV–XV; italics added on first and second occurrence; in original everywhere else)

This passage contributes to illustrating the guidelines adopted in planning out the eleven volumes making up this Treatise, and the historical volumes in particular (Volumes 6 through 11). Indeed, in the preface to the theoretical volumes of this Treatise (Volumes 1 through 5), I indicate, on page XXI of Volume 1, that among the distinctions that from the outset served as guiding principles at the meetings held to plan out the Treatise project was the distinction (tracing back to Norberto Bobbio) between the *philosophers'* philosophy of law and the *jurists'* philosophy of law. Accordingly, the first of the historical volumes—Volume 6, entitled *A History of the Philosophy of Law from the Ancient Greeks to the Scholastics*, edited by Fred D. Miller, Jr. and Carrie-Ann Biondi—is dedicated to the *philosophers'* philosophy of law from ancient Greece to the 16th century, and spans from the early Greek thinkers to early

modern Scholasticism. And the second of the historical volumes, Volume 7 (entitled *The Jurists' Philosophy of Law from Rome to the Seventeenth Century*, and edited by Andrea Padovani and Peter Stein) is dedicated precisely to the subject stated in its title, namely, the *jurists'* philosophy of law, and as such acts as a complement to Volume 6.

Then, too, there emerges from the previously quoted passage by Padovani and Stein a further kind of philosophy of law which came to bear in planning out the historical volumes of this Treatise. In fact, alongside the *philosophers'* philosophy of law and the *jurists'* philosophy of law, we thought it appropriate to introduce the *legal philosophers'* philosophy of law: the philosophy of law par excellence. Prior to the modern era there was no distinct discipline that could be called "legal philosophy": It was only in the modern age that thinkers began to view themselves as legal philosophers.<sup>1</sup>

For a long time, and in particular in the reaction that German legal positivism mounted against it, the "rational school of natural law" (as Padovani and Stein call the rationalistic natural-law theory of the 17th and 18th centuries) was regarded as *the* philosophy of law, meaning the *legal philosophers'* philosophy of law: It was regarded as the *Rechtsphilosophie* par excellence. (*Rechtsphilosophie* is a German expression that, in the light of what I maintain in Volume 1 of this Treatise, would be better translated to "the philosophy of what is right.") In this sense, the philosophy of law of the rationalistic natural-law school was the first classic instance of what I am calling here the legal philosophers' philosophy of law. Now, there are of course theoretical differences that distinguish these legal philosophers from one another, but then they all laid at the foundation of their doctrines a series of speculative questions from which they derived systems of ethics *ordine geometrico demonstrata* (Benedict de Spinoza, 1632–1677) or systems of natural law *methodo scientifica pertractatum* (Christian Wolff, 1670–1754). In other words, citing the title of a work by Wilhelm Leibniz (1646–1716), one of the fundamental aspects characterising the rationalistic natural-law school is a *nova methodus discendae docendaeque jurisprudentiae*, a new method for learning and teaching legal science, a method that leads to a systematic construction or reconstruction of law.<sup>2</sup>

<sup>1</sup> I am using here a formulation kindly suggested to me by Fred Miller, Jr.

<sup>2</sup> "The *Nova methodus* is aimed at reducing law to systematic unity, this by giving legal material an order that ascends to simple principles from which to obtain exceptionless rules. This material is, again, Roman law [it is so in Leibniz's *Nova methodus*, but not with any of the other exponents of the new natural-law theory], the law which at that time [when Leibniz was writing] was in force in Germany as the *ius commune*, but a *ius commune* reordered on the basis of a new method, a method using which the law can be rationalized and hence endowed with the unity which in the Justinianian system it lacked. The system Leibniz envisioned and put forward must be such that, as a complete whole, it provides a solution for each question, and must do so through precise arguments expressed in a rigorous language, on the model of logical-mathematical procedure" (Fassò 2001, 189; my translation; cf. also *ibid.*, 186).



The rationalistic natural-law school—traditionally made to begin with Grotius—developed in the 17th century and received its classic Enlightenment form in the 18th century: It was the first philosophy of law to be considered a legal philosophy par excellence, the legal philosophers' philosophy of law.

The second classic instance of a legal philosophers' philosophy of law in the history of legal thinking was, ironically, German legal positivism itself, which proclaimed the end of the legal philosophers' philosophy of law as embodied in the rationalistic natural-law theory of the 17th and 18th centuries and replaced it with the *Allgemeine Rechtslehre*, that is, with the general doctrine, or theory, of law.<sup>3</sup>

Hence, from the 17th to the 19th century, the legal philosophers' philosophy of law (understood as legal philosophy par excellence) developed in various forms, and took different names, following a formalistic path and taking as well a strong systematic approach: It runs from the so-called natural-law school to the legal positivism of German inspiration.

This last orientation, in turn, German formalistic and systematic legal positivism, reached its most refined version in the 20th century, with Hans Kelsen (1881–1973), who gave us a very sophisticated representation of *the legal system*—a glorious and fragile representation of *das Recht* (“what is right”) *als Rechtsordnung* (“as a system of what is right”) that had the strengths and the weaknesses of a daring cathedral of crystal.

In the second half of the 20th century, Kelsen's formalistic legal positivism spread not only in civil-law countries (even outside of Europe: in Latin America, for example), but also, in some measure, in common-law countries, this on account of the influence that Kelsen's work and thought had beginning from the time of his emigration to the United States. Of course, as is well known, there is a native and very important empiricist legal positivism in Anglophone countries that traces back at least to Hobbes and was then developed in the so-called analytical jurisprudence, whose fathers are Jeremy Bentham (1748–1832) and John Austin (1790–1859).<sup>4</sup>

If we go back now to the observations made at the beginning of this preface, we can see that Volumes 6 and 7 bring out the twofold distinction (tracing back to Bobbio) between the philosophers' and the jurists' philosophy of law in a complementary fashion: Volume 6 (edited by Fred D. Miller, Jr. and Carrie-Ann Biondi) is mainly a history of the philosophers' philosophy of law from the early Greek thinkers to the 16th century; and Volume 7 (edited by

<sup>3</sup> Or again, we might call this the “general doctrine of what is right,” in keeping with the view I argued in Volume 1 (and in particular in Chapters 1 and 14) of this Treatise.

<sup>4</sup> I just qualified Anglophone legal positivism as “empirical” and did so to stress its difference from the German-inspired legal positivism of Europe, which by contrast is formalistic. I will not enter here into any detail, as into American and Scandinavian legal realism, since these matters I leave to the discussion in Volumes 8 through 11.

Andrea Padovani and Peter Stein) is dedicated to the jurists' philosophy of law from Rome to the 16th century, and as such acts as a complement to Volume 6.

In Volumes 8 through 11, dedicated to the period running from the 17th to the 20th century, the underlying distinction is, instead, the threefold distinction sketched above between the philosophers', the jurists', and the legal philosophers' philosophy of law. These three philosophies of law are present in various forms in these volumes, however much not always in explicit distinction from one another, the reason being that the distinction was meant to be a principle for each author to interpret freely, according to his view of the purposes and contents of his volume. Volume 8 is a history of the philosophy of law in common-law countries from the 17th to the 19th century and, as is observed by its author, Michael Lobban, it is "primarily concerned with jurists' and legal philosophers' understandings of law, rather than with those of philosophers." Volume 9 is a history of the philosophy of law from the 17th to the 19th century in civil-law countries. Volume 10 can be considered in the first instance an ideal continuation of Volume 6, and hence a history of the philosophers' philosophy of law from the 17th to the 20th century, but it also discusses some thinkers, such as Grotius and Pufendorf (1632–1694), whose philosophy of law we might properly describe as a legal philosopher's philosophy of law. Volume 11, the last of the Treatise volumes, is concerned with 20th-century philosophy of law overall, in civil-law and common-law countries alike.

For the background leading up to the Treatise, and for the acknowledgements, I refer the reader to Sections 2 and 3 of the editor's preface to the five theoretical volumes, a preface found in Volume 1. The assistant editor's preface, by Antonino Rotolo, also in Volume 1, presents, instead, the editorial rules on which the Treatise is based.

In fine, I should like to take the opportunity of this preface to note that it would not have been possible to carry through the Treatise project without the care and farsightedness of the people at the publishing house (initially Kluwer, now under Springer). I have fond memories of a meeting I had, in 1995, with Alexander Schimmelpenninck and Hendrik Van Leusen. A word of thanks goes also to those at Springer who have since been entrusted with the Treatise project.

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# PREFACE TO VOLUME 6

(SECOND EDITION)

We thank everyone who helped with the creation of this volume, beginning with the authors, who wrote excellent drafts and revised them in response to editorial suggestions. Most of the authors and several discussants convened at two symposia, chaired by Douglas B. Rasmussen, to discuss early drafts and plans for this volume. We gratefully acknowledge the support of the Liberty Fund (and especially Douglas Den Uyl and Emilio Pacheco) for holding these symposia and releasing the copyright of the papers so that they could be published here.

In addition to the authors, the following individuals provided advice and comments on the manuscripts: Kevin Crotty, Richard Epstein, John Haldane, Richard Helmholz, David Keyt, Louis Lomasky, Phillip Mitsis, Charles Nalls, Gerald Postema, Anthony Preus, Sam Silverman, Stephen Sheppard, Christopher Shields, Leonidas Zelmanovitz, and Michael Zuckert.

Mahesh Ananth compiled the initial bibliography and abbreviations, and Galen Foresman and Pamela Phillips corrected the page proofs. The staff of the Social Philosophy and Policy Foundation provided logistical support for both editions of this volume.

This second edition became necessary after questions arose concerning Chapter 14 of the first edition submitted by Martin Stone. We were informed by the Katholieke Universiteit Leuven that, following an investigation of allegations of plagiarism against the author, it had retracted its affiliation with the publication. The unfortunate affair is documented in an article, “40 Cases of Plagiarism,” by M. V. Dougherty, P. Harsting, and R. L. Friedman in *Bulletin de Philosophie Médiévale* 51 (2009), 350–91. The editors extend their apologies to the authors whose work was inappropriately used and to readers who were misled. We are grateful to Enrico Pattaro and to Springer for making every effort to rectify the problem, including the publication of this replacement volume. We also thank Annabel Brett for contributing a new Chapter 14, which is an excellent original treatment of the later scholastic legal philosophers.

Finally, we again express our admiration and gratitude to Professor Pattaro and his staff at the University of Bologna for expertly orchestrating the monumental Treatise of which this volume is a part.

Fred D. Miller, Jr.

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Carrie-Ann Biondi

*Marymount Manhattan College*



# ABBREVIATIONS

## ACRONYMS FOR MODERN SERIES OR COLLECTIONS OF TEXTS

CC	<i>Corpus Christianorum Continuatio Mediaevalis</i>
CSEL	<i>Corpus Scriptorum Ecclesiasticorum Latinorum</i> (Vienna and Leipzig)
CTh	<i>Theodosian Code=Theodosiani Libri XVI</i> (Mommsen and Meyer 1954/ trans. in Pharr 1952, reproduced 1969).
Diehl	Ernestus Diehl, ed., <i>Anthologia Lyrica Graeca</i> (Leipzig: Teubner, 1952)
DK	H. Diels and W. Kranz, <i>Die Fragmente der Vorsokratiker</i> , 3 vols., sixth edition (Berlin: Weidmann, 1951–1952)
IC	F. Halbherr, <i>Inscriptiones Creticae</i> (Rome: Libreria dello Stato, 1935–)
IG	<i>Inscriptiones Graecae</i> (Berlin: G. Reimer, 1873–)
PL	J. P. Migne, ed., <i>Patrologia Latina</i> (Paris: Migne, 1854–1856)
POxy.	B. P. Grenfell and A. S. Hunt, eds., <i>Oxyrhynchus Papyri</i> (London: Egypt Exploration Fund, 1898).
SVF	J. von Arnim, <i>Stoicorum Veterum Fragmenta</i> , 3 vols. (Leipzig: Teubner, 1903–1905)

## ABBREVIATIONS FOR ANCIENT AND MEDIEVAL TEXTS

### **Aeschylus**

<i>Eu.</i>	<i>Eumenides</i>
<i>Supp.</i>	<i>Suppliants</i>

### **Alcinous**

<i>Did.</i>	<i>Didaskalikos</i>
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### **Alfarabi**

<i>Aphorisms</i>	<i>Selected Aphorisms</i>
<i>Virtuous City</i>	<i>Principles of the Opinions of the Inhabitants of the Virtuous City</i>

**Ambrose of Milan**

*Off.*                    *De Officiis Ministrorum*  
*Ep.*                    *Epistles*

Anon. Iamb.        *Anonymous Iamblichi*

**Aristotle**

*An. Pr.*                *Analytica Priora*  
*Ath.*                    *Athênaiôn Politeia*  
*Cael.*                    *De Caelo*  
*Cat.*                    *Categories*  
*de An.*                *De Anima*  
*EE*                    *Eudemian Ethics*  
*EN*                    *Nicomachean Ethics*  
*GA*                    *De Generatione Animalium*  
*MA*                    *De Motu Animalium*  
*Metaph.*              *Metaphysics*  
*MM*                    *Magna Moralia*  
*PA*                    *De Partibus Animalium*  
*Phys.*                *Physics*  
*Pol.*                    *Politics*  
*Rhet.*                *Rhetoric*  
*Rhet. Al.*            *Rhetorica ad Alexandrum*  
*SE*                    *Sophistici Elenchi*  
*Top.*                    *Topics*

**Athenaeus**

*Deipn.*                *Deipnosophistae*

**Augustine of Hippo**

*CD*                    *De Civitate Dei (City of God)*  
*Conf.*                *Confessions*  
*Lib. Arb.*            *De Libero Arbitrio (On Free Will)*  
*Op. Mon.*            *De Opere Monachorum*  
*Enarr. in Psal.*    *Enarratione in Psalmos*  
*Ench.*                *Enchiridion*  
*Ep.*                    *Epistolae*  
*Faust.*                *Contra Faustum Manichaeum (Against Faustus the Manichean)*  
*Iohann. Evangel.*   *Tractatus in Iohannis Evangelium*  
*Questions*        *De Diversis Quaestionibus*

<i>Sermo</i>	<i>Sermones</i>
<i>Sol.</i>	<i>Soliloquia</i>
<i>Trin.</i>	<i>De Trinitate</i>

**Averroes (Ibn Rushd)**

<i>Republic</i>	<i>Commentary on Plato's Republic</i>
<i>Rhetoric</i>	<i>Middle Commentary on Aristotle's Rhetoric</i>

**Avicenna (Ibn Sīnā)**

<i>Epistle</i>	<i>Epistle on the Divisions of the Intellectual Sciences</i>
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**Bible**

Cor.	Corinthians
Deut.	Deuteronomy
Exod.	Exodus
Ezek.	Ezekiel
Gal.	Galatians
Gen.	Genesis
Heb.	Hebrews
Jer.	Jeremiah
Lev.	Leviticus
Macc.	Maccabees
Matt.	Matthew
Neh.	Nehemiah
Phil.	Philippians
Rom.	Romans

**Calcidius**

<i>Tim.</i>	<i>In Platonis Timaeum</i> (Commentary on Plato's <i>Timaeus</i> )
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**Cicero**

<i>Att.</i>	<i>Letters to Atticus</i>
<i>Fin.</i>	<i>De Finibus</i> (On Goals)
<i>Leg.</i>	<i>De Legibus</i> (On the Laws)
<i>ND</i>	<i>De Natura Deorum</i> (On the Nature of the Gods)
<i>Off.</i>	<i>De Officiis</i> (On Duties)
<i>Rep.</i>	<i>De Re Publica</i> (On the Commonwealth)
<i>Tusc.</i>	<i>Tusculan Disputations</i>

**Clement**

<i>Strom.</i>	<i>Stromateis</i> (Miscellanies)
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**Dio Chrysostom**

*Or.* *Orationes*

**Diogenes Laertius**

*D.L.* *Vitae Philosophorum*

**Diogenes of Oenoanda**

*New Frag.* *New Fragments*

**Duns Scotus, John**

*Rep.* *Reportatio Parisiensis*

**Epictetus**

*Diss.* *Dissertationes (Discourses)*

*Ench.* *Encheiridion (Handbook)*

**Epicurus**

*KD* *Kuriai Doxai (Key Doctrines)*

*Nat.* *On Nature*

*Sent. Vat.* *Vatican Sentences*

**Euripides**

*Ba.* *Bacchae*

*Supp.* *Suppliants*

**Gaius**

*Inst.* *Institutiones*

**Gratian**

*Decr.* *Decretum*

**Hesiod**

*Th.* *Theogony*

*WD* *Works and Days*

**Homer**

*Il.* *Iliad*

**Irenaeus of Lyons**

*Haer.* *Adversus Haereses (Against Heresies)*



**Isidore**

*Etym.* *Etymologies*  
*Sent.* *Sentences*

**Josephus**

*Ant.* *Jewish Antiquities*

**Justin Martyr**

*Dial.* *Dialogue with Trypho*

**Justinian**

*Code* *Code (Corpus Iuris Civilis, vol. 2)*  
*Dig.* *Digest*  
*Inst.* *Institutes (Corpus Iuris Civilis, vol. 1)*

**Lactantius**

*Inst.* *Divine Institutes*

**Las Casas, Bartolomeo de**

*De Regia* *De Regia Potestae o Derecho de Autodeterminación*  
*De Úncio* *Del Úncio Modo de Atraer*

**Lucretius**

*RN* *De Rerum Natura (On the Nature of Things)*

**Maimonides**

*Guide* *The Guide of the Perplexed*

**Marcus Aurelius**

*Med.* *Meditations*

**Molina, Luis de**

*Concordia* *Concordia Liberi Arbitrii cum Gratiae Donis, Divinia Prae-  
scientia, Providentia, Praedestinatione, et Reprobatione, ad  
Non Nullus Primae Partis D. Thomae Articulos*  
*De Iure et Iust.* *De Iure et Iustitia*

**Nemesius**

*Nat. Hom.* *De Natura Hominis (On the Nature of Man)*

**Origen**

*Cels.*                      *Against Celsus*

**Philo**

*Leg.*                      *Legum Allegoriae*  
*Mos.*                      *On the Life of Moses*  
*Opif.*                      *De Opificio Mundi*  
*Prob.*                      *Quod Omnis Probus Liber Sit*  
*Spec.*                      *De Specialibus Legibus*

**Philodemus**

*Acad. Ind.*              *Academicorum Index*  
*Herc.*                      *Herculanensia Volumina*  
*Stoic.*                      *On the Stoics*

**Photius**

*Bibl.*                      *Bibliotheca*

**Plato**

*Alc.*                      *Alcibiades*  
*Ap.*                      *Apology*  
*Clit.*                      *Clitophon*  
*Crat.*                      *Cratylus*  
*Ep.*                      *Letters*  
*Erx.*                      *Eryxias*  
*Euthd.*                  *Euthydemus*  
*Gorg.*                      *Gorgias*  
*Hipparch.*              *Hipparchus*  
*Hp. Ma.*                  *Hippias Major*  
*Phd.*                      *Phaedo*  
*Plt.*                      *Politicus (Statesman)*  
*Prot.*                      *Protagoras*  
*Rep.*                      *Republic*  
*Tim.*                      *Timaeus*

**Plautus**

*Bacch.*                      *Bacchides*

**Plutarch**

*Alex. Fort.*              *The Luck or Virtue of Alexander*  
*Contr. Ep. Beat.*      *Contra Epicuri Beatitudinem*

<i>Lyc.</i>	<i>Life of Lycurgus</i>
<i>Sol.</i>	<i>Life of Solon</i>
<i>Stoic. Rep.</i>	<i>De Stoicis Repugnantiiis</i>
<i>TG</i>	<i>Life of Tiberius Gracchus</i>

**Porphyry**

<i>Abst.</i>	<i>On Abstinence</i>
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**Pseudo-Plutarch**

<i>Fat.</i>	<i>De Fato (On Fate)</i>
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**Seneca the younger**

<i>Ben.</i>	<i>De Beneficiis</i>
<i>Brev. Vit.</i>	<i>De Brevitate Vitae</i>
<i>Clem.</i>	<i>De Clementia</i>
<i>Cons. Marc.</i>	<i>Consolatio ad Marciam</i>
<i>Ep.</i>	<i>Epistulae Morales (Moral Epistles)</i>
<i>Nat.</i>	<i>Naturales Quaestiones</i>
<i>Otio</i>	<i>De Otio (On Leisure)</i>

**Salas, Juan De**

<i>Tract.</i>	<i>Tractatus de Legibus</i>
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**Sextus Empiricus**

<i>M</i>	<i>Adversus Mathematicos</i>
<i>PH</i>	<i>Outlines of Pyrrhonism</i>

**Sophocles**

<i>Ant.</i>	<i>Antigone</i>
<i>OT</i>	<i>Oedipus Tyrannus</i>

**Soto, Domingo de**

<i>De Iust. et Iure</i>	<i>De Iustitia et Iure Libri Decem</i>
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**Suárez, Francisco**

<i>Leg.</i>	<i>De Legibus sue de Deo Legislature</i>
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**Tacitus**

<i>Ann.</i>	<i>Annales</i>
<i>Dial.</i>	<i>Dialogus de Oratoribus</i>

**Tertullian**

<i>Anim.</i>	<i>On the Soul</i>
<i>Jud.</i>	<i>Against the Jews</i>
<i>Marc.</i>	<i>Against Marcion</i>
<i>Praescrip.</i>	<i>Prescription of Heretics</i>

**Thomas Aquinas**

<i>Comm. Eth.</i>	<i>Commentary on Aristotle's Nicomachean Ethics</i>
<i>SCG</i>	<i>Summa Contra Gentiles</i>
<i>STh</i>	<i>Summa Theologiae</i>

**Ulpian**

<i>Inst.</i>	<i>Institutes</i>
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**Vázquez, Gabriel**

<i>Comm. STh.</i>	<i>Comentarios a la Summa de Santo Tomas</i>
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**Vitoria, Francisco de**

<i>Comm. STh.</i>	<i>Comentarios a la Secunda Secundae de Santo Tomas</i>
<i>De Ind.</i>	<i>De Indis</i>
<i>De Mat.</i>	<i>De Matrimonio</i>
<i>De Pot. Civ.</i>	<i>De Potestae Civile</i>

**William of Ockham**

<i>Rep.</i>	<i>Reportatio</i>
<i>In I Sent.</i>	<i>Commentary on the Sentences</i>

**Xenophon**

<i>An.</i>	<i>Anabasis</i>
<i>Cyr.</i>	<i>Institutio Cyri (Cyropaedia)</i>
<i>HG</i>	<i>Historia Graeca (Hellenica)</i>
<i>Hier.</i>	<i>Hiero</i>
<i>Lac.</i>	<i>Respublica Lacedaemoniorum</i>
<i>Mem.</i>	<i>Memorabilia</i>
<i>Oec.</i>	<i>Oeconomicus</i>
<i>Smp.</i>	<i>Symposium</i>
<i>Vect.</i>	<i>De Vectigalibus</i>

## Prologue

# NEAR EASTERN ANTECEDENTS OF WESTERN LEGAL THOUGHT

*by Fred D. Miller, Jr.*

Western legal philosophy, like a stream flowing over three millennia, was fed by far-flung tributaries. A major spring was ancient Greek law and legal thought, manifested in a variety of sources, including poets, historians, orators, philosophers, and sophists (see Chapter 1). Greek philosophers made major contributions, including Socrates, Plato, and Aristotle and their followers, as well as the Hellenistic schools of philosophy (see Chapters 2–5). Another wellspring of Western legal philosophy was Roman jurisprudence, presented in a systematic manner by legions of Roman jurists. The combined influence of Greek philosophy and Roman law was evident in the Roman philosophers Cicero, Seneca, Epictetus, and Marcus Aurelius (see Chapter 6). A third important source was ancient Jewish legal thought, arising with the traditional Mosaic code and culminating in the Talmud. Emerging as a Jewish sect, Christianity soon became a separate branch and a distinct and powerful fourth influence on Western European medieval legal philosophers (see Chapter 7). St. Augustine's philosophy of law represented a major confluence of the Greco-Roman and Judeo-Christian streams of thought (see Chapter 8). Another important tradition was Islamic thought, represented by Alfarabi, Avicenna, and Averroes, which directly influenced Jewish philosopher Maimonides and indirectly Catholic philosopher Thomas Aquinas, and presented a fundamental challenge to European philosophers of law in the Middle Ages (see Chapter 9). Finally, the revival of Roman law and the development of Christian canon law, together with the rise of scholastic philosophy in the late Middle Ages, infused new concepts and theories into medieval European law codes and thereby created fertile ground for early modern Western legal philosophy (see Chapters 10–14).

Although Western legal philosophy arose in ancient Greece, the Greeks themselves recognized the existence of far older legal traditions. Aristotle remarks that the Egyptians “are thought to be the most ancient of people, and they have acquired laws and a political order” (*Pol.* VII.16.1329b32–3). The great antiquity of the Egyptian legal system is also accentuated in the story in Plato's *Timaeus* about the visit of Solon of Athens to Saïs in Egypt, where he interrogated priests about early history. The priests told him that “you Greeks are forever children” and “you have in your souls no belief about antiquity handed down by ancient tradition” (*Tim.* 22b4–8). While the Greeks had forgotten their own distant past due to a series of natural catastrophes, the Egyp-

tians, who were sheltered in the Nile valley, retained their history and social arrangement for 8,000 years according to their sacred scriptures. The priests reported that Athens already possessed a constitution 9,000 years before, which resembled the current Egyptian legal system (*Tim.* 23e2–6, 24a2–4; cf. *Laws* II.656d5–657a2).

Later, during the Hellenistic and Roman periods, it was claimed that early Greek statesmen were inspired by Egyptian archetypes. Diodorus Siculus (ca. 80–20 B.C.) mentions reports “in the records of the sacred books of Egyptian priests” that, in addition to Solon, Lycurgus the legislator of Sparta and Plato himself visited Egypt and “incorporated many Egyptian *nomima* (customs or statutes) into their own legislation” (*Library* I.96.1, 98.1). Plutarch (ca. A.D. 45–121) (*Lyc.* 3.6) also cites Egyptian claims, confirmed by some Greek historians, that Lycurgus visited them and copied some of their institutions. On the basis of such texts it has been argued that Greek political and legal philosophy was heavily indebted to Egypt. Whether these events actually occurred, however, is questionable. Lycurgus was a semi-mythical figure about whom little is certain, and there is no early report of him going to Egypt. Solon did visit Egypt, according to Herodotus (490–425 B.C.) (*History* I.29–30), but only after finishing his legislative work in Athens. Herodotus (*History* II.176; cf. Diodorus Siculus, *Library* I.77.5) elsewhere says that Solon copied an Egyptian law against idleness, but this seems to be an error later corrected by Theophrastus (Plutarch, *Sol.* 31.2), who writes that Pisistratus, not Solon, laid down this law. As for Plato, there is no evidence in his own writings or other classical sources that he visited Egypt or had firsthand knowledge of Egyptian laws.<sup>1</sup>

Granted that the claims of direct influence are exaggerated and poorly substantiated, the question remains whether Greek legal thought was stimulated in a subtler, more general way by contact with Near Eastern societies. Greek merchants and mercenaries frequented Egypt by the end of the sixth century, and the Greeks had extensive commercial ties with Asia much earlier than that. Scholars have detected foreign influences in Greek religion, philosophy, and science (e.g., mathematics and astronomy). “In a much broader context, eastern influences helped shape the development of Greek religion, crafts, art and architecture, technology (both civil and military), coinage, and writing. Although more debated, such influences are visible also in social, legal, and political phenomena, such as tyranny, the enactment of written law, and the symposium” (Raaflaub 2000, 51).

<sup>1</sup> Bernal 1987, 53, 103–8, alleges extensive influence based on evidence about Lycurgus and Plato. Lefkowitz 1996, 75–6, 81–2, however, notes problems in Plato’s guarded account of Solon in Egypt (which Critias heard from his grandfather, who heard it from his father), questions the historicity of the later anecdotes, argues that such stories of influence become suspiciously more colorful and detailed over time, and concludes that “[t]he idea that early Greek law was inspired by Egyptian law is a historical fiction.” See also Vasunia 2001.

The question of Egyptian influence is complicated by the fact that the study of Egyptian law presents serious problems of its own. The legal documents of Egypt, mainly kept on papyrus or ostraca, have largely perished, and what has survived is often incomplete and difficult to interpret (e.g., the fragmentary edict of Horemheb from the nineteenth dynasty, ca. 1300 B.C.). Yet a text from the eighteenth dynasty (thirteenth century B.C.) affirms that “everything is done according to what is specified by law” and refers to recorded legal precedents, and “thousands of legal documents of trials, inheritance, and transfers of real and personal property, attest to the functioning legal system” (Brewer and Teeter 1999, 73; see also Théodoridès 1971; Lorton 1995; Jasnow 2003, 255). But it is debatable whether Egypt had a regular system of law courts following genuine legal codes, in the sense of systems of laws promulgated by a king, during most of the dynastic period. There is also a danger of projecting later legal categories (deriving from the Greeks and Romans) back into Egyptian thought, a process no doubt already underway by the Hellenistic period (Kruchten 2001, 279).<sup>2</sup> Nonetheless, some Egyptian legal terms have been thought to offer parallels to important Greek concepts. One such word *hp*, understood to correspond to “law,” is also often used for a “decree,” for example, of a pharaoh, although it has a broader meaning of “rule” or “regulation,” and can even refer to the regular movement of a planet (Kruchten 2001, 277–8).<sup>3</sup> The legal term *hp* came into common usage during the Middle Kingdom (Jasnow 2003, 255). Another word *ma'at* is often interpreted as “justice” or “truth.” In addition to naming a goddess, the word refers to the cosmic order, which holds together the natural world, the kingdom of Egypt, and the individual subject. *Ma'at* has a normative connotation, for the gods placed the pharaoh on earth “forever and ever, judging mankind and propitiating the gods, and setting (*ma'at*) in place of disorder” (Vasunia 2001, 128). In a social context it involves reciprocal justice: “The reward of one who does something lies in something being done for him. This is considered by god as *ma'at*” (Assmann 2002, 128). The extent to which individuals internalize *ma'at* in this life determines their fate in the afterlife (Assmann 1996).<sup>4</sup> *Ma'at* “goes down into the necropolis with him who renders it” (trans. Wilson 1946, 94). In the *Book of the Dead*, during postmortem judgment the deceased’s heart is weighed on a scale against an ostrich feather, a hieroglyphic symbol for *ma'at* (see Taylor 2001, 36, fig. 17). The value of impartial justice is assumed in the

<sup>2</sup> By the end of the Ptolemaic dynasty in the late first century B.C., the Egyptians had an elaborate judicial system. “The entire body of the laws was written in eight volumes which lay before the judges,” reports Diodorus Siculus (*Library* I.75.3). He also mentions the legend that the laws were initially laid down by the first pharaoh Menes (compared to Lycurgus), who had received them from the god Hermes (i.e., Thoth) (*ibid.*, I.94.1). But these phenomena may well reflect Greco-Macedonian influence.

<sup>3</sup> Nims 1948 discusses the later use of *hp* in demotic.

<sup>4</sup> See Tobin 1987 on *ma'at* in comparison to the Greek term *dikê*.

injunction of the vizier Ptahhotep (probably sixth dynasty, 2345–2181 B.C.) to judges to “hew a straight line [...] do not lean to one side” (as quoted in Brewer and Teeter 1999, 73; cf. similar passages in Wilson 1946, 98–100). Similarly, a Middle Kingdom papyrus states that “partiality is abhorrent in god’s eyes” (as quoted in Assmann 2002, 155). The underlying principle of human equality is implied by a pronouncement of the sun god: “I have made each man the same as his neighbor and have prohibited that they do wrong. But their hearts have violated my commands” (as quoted in Assmann 2002, 154).

After the conquest of Egypt (525 B.C.) Darius, king of Persia, ordered his satrap in Egypt to assemble Egyptian sages and compile all the laws of ancient Egypt. Working from 519 until 503 B.C., the commission published a written legal code in Demotic and in Aramaic. There was a basic division into public law, temple law, and private law. This work governed subsequent legal practice in Egypt and may have provided a basis for legislation during the Ptolemaic period including the “code of Hermopolis West” (*POxy.* 3285) from the reign of Ptolemy II Philadelphus (308–246 B.C.) (see Briant 2002, 474; Bowman 1989, 61–6; Mattha 1975).

Ancient Mesopotamia has yielded much more legal evidence preserved on cuneiform tablets and inscriptions on monuments. These include fragmentary records of the law codes of Ur-Nammu, founder of the third dynasty of Ur (ca. 2100 B.C.), Lipit-Ishtar of Isin (ca. 1900 B.C.), Dadusha of Eshnunna (ca. 1770 B.C.), and, most importantly, Hammurabi of Babylon (ca. 1750 B.C.) (Richardson 2000; Driver and Miles 1960; Pritchard 1958, 133–72; Pritchard 1975, 31–41; Kramer 1963, 336–40). The early Mesopotamians had no general word for “law,” but the word *di* in Sumerian (*dīnu* in Akkadian) was used for a lawsuit, trial, or decision, and *nī-si-sai* (*mīšaru* in Akkadian) signified “justice” (Soden 1994, 131; Saggs 1968, chap. 7; Saggs 1989, chap. 8). Justice was upheld throughout the universe by the gods, especially the sun god Utu (Shamash), also god of justice, with the king as his representative. Hammurabi declares, “By the command of Shamash, the almighty judge in heaven and earth, let my justice shine over the land” (E10; as quoted in Richardson 2000, 123). The king was ordained by the gods “to demonstrate justice within the land, to destroy evil and wickedness, and to stop the mighty exploiting the weak, [...] to improve the welfare of my people” (P3; as quoted in Richardson 2000, 30–1; see also Westbrook 2003b, 364). Although ultimately responsible for administering justice, the king could, and generally did, delegate this responsibility to judges who held court in or before temples (Jacobsen 1946, 208–9; Saggs 1989, 170–3; Postgate 1992, chap. 15).<sup>5</sup> Hammurabi proclaimed that his commandments should remain in force unchanged in perpetuity:

<sup>5</sup> Saggs and Postgate reconstruct early Mesopotamian legal procedures. Hammurabi’s code is distinctive in adhering strictly to the *lex talionis* (law of retribution) and prescribing very severe punishments.



“May any king appearing in this land at any time at all in the future heed the righteous commands that I have inscribed on this stone. May no one change the justice for the land which I have ordained and the verdicts for the land which I have rendered” (E14; Richardson 2000, 125). Anyone who violated or emended the code would fall under a curse (E19). Hammurabi’s code evidently influenced later legal codes, including the Assyrian, Hittite, and Jewish.

Persian legal practices may also have had a direct influence on the Greeks who had numerous contacts with the Persian Empire over several centuries. Plato (*Ep.* VII.332b) remarks that Darius of Persia (522–486 B.C.) “set an example of what a good lawgiver and king should be, for he established laws that have kept the Persian Empire to this day” (cf. Plato, *Laws* III.695c; Xenophon, *Oec.* 14.6). Plato here uses the Greek word *nomos* (law) for the Persian word *dāta*. Olmstead (1948, 120–33) argued that Darius promulgated a code with echoes of Hammurabi’s code, so that his legislation might have served as a conduit for much earlier Mesopotamian influence. But later scholars question the existence of a “royal code” of Darius for the entire Persian Empire (see Briant 2002, 510–11, 956–7).

It must be emphasized that even when Greek laws and legal concepts resembled their predecessors’, this does not prove influence. Different societies can independently find similar ways to meet similar challenges, as Aristotle observes:

[O]ne should believe that nearly everything has been discovered often in a great span of time—or rather infinitely often. For need itself is likely to teach the necessary things, and once these are already present, it is reasonable to expect that the things that promote elegance and abundance will increase. And so one should suppose the same to hold for constitutional affairs. And that all such things are ancient is indicated by facts about Egypt. (*Pol.* VII.16.1329b25–32)

Moreover, the Near Eastern view of law was in important respects alien to the later Greek view. The Sumerians and Babylonians (like the Egyptians) viewed “the cosmos as a hierarchically structured state that is ruled, with absolute authority, by the gods under the leadership of the sky god Anu,” and the human king was an agent authorized by the gods and charged with the responsibility of maintaining divine order and justice in his domain. These views implied that virtue consisted in unquestioning obedience to political authorities (Raaflaub 2000, 56–7; cf. Jacobsen 1946). Later, Greek thinkers challenged the top-down model of divinely sanctioned oriental despotism.

### Further Reading

Westbrook 2003a is a valuable comprehensive history of ancient Near Eastern legal systems with separate chapters by specialists on different periods of Egyptian, Sumerian, Akkadian, Babylonian, Assyrian, Israelite, and international law, including extensive bibliographies and excellent indexes. Early

concepts of law are discussed in general histories of the ancient Near East, including Saggs 1989, chap. 9, Soden 1994, and Snell 1997. Frankfort et al. 1946 examines the place of various concepts (including law) in myth before the emergence of Greek philosophy; see Wilson 1946 on Egypt and Jacobsen 1946 on Mesopotamia. Assmann, Janowski, and Welker 1998 includes comparative studies of law and justice in ancient Near Eastern, Egyptian, Jewish, Assyrian, Christian, and Greek traditions. Pritchard 1958 includes translations of some legal documents from Mesopotamia and Egypt.

Breasted 1906–1907 and Lichtheim 1973, 1976, and 1980 are multi-volume collections of translated Egyptian texts, including references to *ma'at* (justice). Sarraf 1984 is an overview of the ancient Egyptian concept of law. Assmann 2002 is a valuable comprehensive study of Egyptian thought including law. Assmann 1996 discusses Egyptian views of justice in relation to the afterlife. Seidl 1942, Théodoridès 1971, Lorton 1995, Brewer and Teeter 1999, chap. 5, Kruchten 2001, and Versteeg 2002 provide concise introductions to ancient Egyptian law. Tyldessley 2000 is an account of crime and punishment in pharaonic courts. Méléze-Modrzejewski 1995 discusses law and justice in Ptolemaic Egypt. See Bernal 1987, Lefkowitz 1996, and Vasunia 2001 for very different views on the question of whether Greek thinkers were influenced by the ancient Egyptians.

A comprehensive recent source is Roth 1997, containing translations of Sumerian, Babylonian, Assyrian, and Hittite laws. Driver and Miles 1960 offers a transliterated text and translation with commentary on Babylonian laws. Yaron 1988 is an edition of the laws of Eshnunna, and Richardson 2000 is a transliterated text and translation of Hammurabi's code. Brief discussions of Mesopotamian law are found in Kramer 1963, Saggs 1968, Oppenheim 1977, Postgate 1992, chap. 15, and Greengus 1995.

Regarding Assyrian legislation Driver and Miles 1935 offers a transliterated text and translation with commentary. Neufeld 1951 and Hoffner 1997 provide texts and translations of the laws of the Hittites. Gurney 1990 includes discussion of Hittite laws and legal institutions.

On the controversy over the so-called code of Darius of Persia, contrast Olmstead 1948 and Briant 2002.