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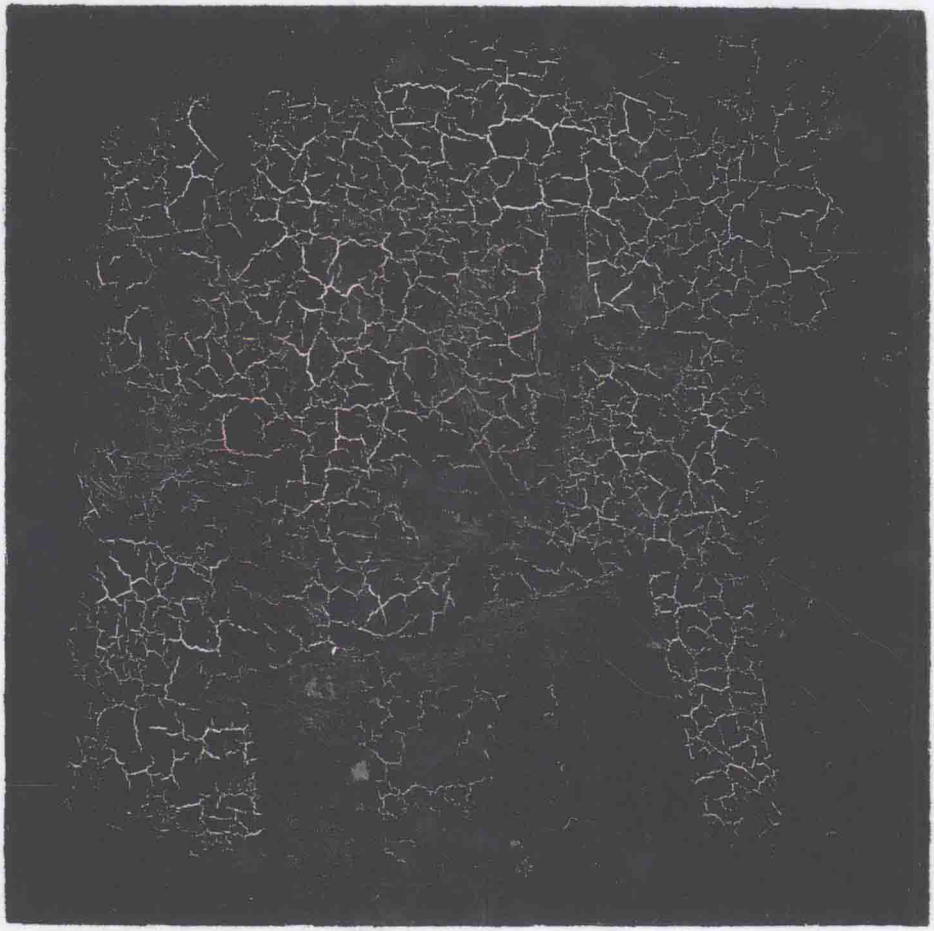

METAPHILOSOPHY OF LAW

Edited by Paweł Banaś, Adam Dyrda
and Tomasz Gizbert-Studnicki

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METAPHILOSOPHY OF LAW

Methodological and metaphilosophical disputes in the contemporary philosophy of law are very vivid. Basic issues remain controversial. The purpose of the book is to confront approaches of Anglo-Saxon and continental philosophy of law to the following topics: the purpose of legal philosophy, the role of disagreement in legal philosophy, methodology of legal philosophy (conceptual analysis) and normativity of law. We see those areas of legal metaphilosophy as drawing recently more and more attention in the literature. The authors of particular chapters are internationally recognised scholars rooted in various traditions: Anglo-Saxon (Gerald Postema, Dennis Patterson, Kenneth Ehrenberg, Veronica Rodriguez-Blanco); Southern-European (Riccardo Guastini, Manuel Atienza); Nordic (Torben Spaak); German (Ralf Poscher); and Central-European (Jan Woleński, Tomasz Gizbert-Studnicki, Adam Dyrda). They represent different approaches and different backgrounds. The purpose of the volume is to contribute to the cross-cultural discussions of fundamental issues of philosophy of law.

CONTENTS

Part IV: Theoretical Disagreement in Legal Philosophy

The Philosophy of Legal Philosophy: An Introduction

PAWEŁ BANAŚ

While the question 'What is law?' (or its concept) remains probably the most significant to legal philosophy, the problem of how this question should be answered constitutes an area of inquiry for the philosophy of legal philosophy (legal metaphilosophy or the metaphilosophy of law).[1]

Even if core, this problem is far from being the only one the philosophy of legal philosophy is expected to deal with. And this is not unlike any other field of philosophy; on the contrary, whatever the subject of philosophical investigation, metaphilosophical inquiry concerns the way any particular philosophy is or should be done. In many cases, this leads to aiming at elucidation of presuppositions present in different philosophical theories. To the extent to which such elucidation is often one of the aims of descriptive metaphysics, or ontology (of a given philosophical discourse, including legal philosophy), this can be seen as perhaps inherently metaphilosophical.

Today, however, due to the pragmatic turn in Anglo-American philosophy, debates in metaphilosophy are propelled significantly by the vast interest in metaethics (with metaphysics being treated as somehow secondary, despite being fuelled by Peter Strawson, Willard van Orman Quine and Saul Kripke). How can such a development be explained? The roots of contemporary metaphilosophical investigations can probably be traced to somewhere between the beginnings of analytical philosophy and logical positivism. What early analytical philosophers and logical positivists had in common (among many other aspects) was a kind of aversion towards normative ethics. Although analytical philosophy eventually dropped the critical approach to metaphysics which members of the Vienna Circle shared, it inherited from them a view that philosophy is somehow continuous with science. Alas, even today, many, if not most, analytical philosophers focus on descriptive rather than normative aspects of philosophy, including metaphysics or ontology.[2]

[1] This introduction is a part of a project funded by National Science Centre of Poland (UMO-2012/07/N/HS5/00999).

[2] When it comes to descriptive metaphysics, the tradition here might as well be described as 'Kantian'. In fact, Strawson was Kantian, although modern (and descriptive) metaphysics arguably owe more to Quine.

Now, along with the neo-pragmatic wave in Anglo-American philosophy has come a widely held interest in those aspects of inquiry that deal with 'real' rather than strictly academic problems that bear little practical value. When it comes to philosophy, there has never been a field closer to such problems than ethics. Many contemporary pragmatists (neo-pragmatists or 'post-analytical' philosophers), however, share an analytical background and, hence, the aversion to normative moral philosophy. This may justify the growing popularity of descriptive metaethics and, as a result, metaphilosophy itself.

To do justice to continental philosophy, it should also be noted that the analytical philosophers who dominated Anglo-American tradition were not the only ones who turned to metaphilosophy. Figures such as Martin Heidegger or Gilles Deleuze with Félix Guattari were absorbed with the question 'What is philosophy?' In addition, critical theory and Jacques Derrida's deconstructive approach towards philosophical discourse propelled a number of undoubtedly metaphilosophical debates, problems and ideas (even if they were perceived from a totally different angle).

If the above so-so story about origins of contemporary interest in metaphilosophy is even only partially true, then the puzzle remains: why is the philosophy of law so resistant to metaphilosophical influence? After all, many philosophers of law see themselves as analytical and dealing with issues of vast practical importance (so closely connected to metaethical inquiry). Again, apparently those who represent more critical views on legal matters received much more influence from general philosophy and tend to be much more metaphilosophical than their analytical colleagues. That said, however, this volume does not deal with such continental approach to legal philosophy.

To reiterate, it remains a puzzle as to why those traditions of legal philosophy that share some analytical background seem not to pay as much attention to metaphilosophy as one would expect, given its impact on general philosophy. This does not mean that there are no lively ongoing debates; on the contrary, hence the editors of this book decided to present certain metaphilosophical issues. These issues, first, constitute serious problems for the field and are currently discussed among legal philosophers; and secondly, they may prove interesting to those who would like to go 'deeper' into the classical, 'first-level' theories of law of Hans Kelsen, Herbert L.A. Hart or Ronald Dworkin, as well as those inspired by them. The intrinsic aim of this volume is to promote metaphilosophical inquiry, or at least metaphilosophical awareness, among legal scholars.

What are the 'second-level' questions legal metaphilosophy asks? What should one be dealing with if one is to probe the philosophy of law 'from above'? The most striking metaphilosophical question is undoubtedly 'What is legal philosophy?', that is, 'What is its status?' or 'Is legal philosophy a science?' (and if so, what kind of science?). A similar level of generality is represented by the following queries: 'What is (or *should be*?—in the end, metaphilosophers are not completely free from normative claims) its methodology?'; 'What is the actual point in doing legal philosophy?'; and 'What do legal philosophers strive for in their investigations?'

(or again, 'What *should* they strive for?'). All these general problems tend to pertain to the field itself and not to particular theories.

Another question, still general but usually concerning 'first-level' theories, pertains to metaphysical presuppositions present in those theories and the particular methods they employ. As for the latter, the status of conceptual analysis still draws the most attention in the literature (which to some extent mirrors similar debates in general philosophy). From the metaphysical point of view, followers of the Hartian approach tend to see law as somehow related to social facts of some kind. Yet they rarely offer any 'deep' explanation concerning the ontological status of either legal or social facts and the relation that is supposed to hold between them.

There are also more detailed, field-specific problems of a metaphilosophical nature. Two of them seem to be the source of most controversies. First, there is the question of the range of legal theories (can there be 'one' general legal philosophy or should a more parochial/regional approach be taken?). The second question concerns the possibility of providing a descriptive (as opposed to a normative) legal theory. With the latter comes a natural controversy of what 'descriptive' and 'normative' mean.

Finally, there is another issue, clearly metaphilosophical, of how differences between various legal theories can be settled. This is the problem of 'theoretical disagreement', which is discussed quite vividly in general philosophy as well. It is an example of metaphilosophy done from an epistemological angle, an approach that has become increasingly popular among legal metaphilosophers.

Although this volume is by no means exhaustive when it comes to the problems of legal metaphilosophy and positions presented in the literature, it was conceived to offer a picture pertaining to a significant area of the field. Its advantageous design features authors of particular chapters representing varying traditions and, hence, different approaches to legal philosophy (still, however, with an analytical background) that can be positioned against each other: Anglo-Saxon (Gerald Postema, Dennis Patterson, Kenneth Ehrenberg, Veronica Rodriguez-Blanco); Southern European (Riccardo Guastini, Manuel Atienza); Nordic (Torben Spaak); German (Ralf Poscher); and Central European (Jan Woleński, Tomasz Gizbert-Studnicki, Adam Dyrda).

In chapter 1, Gerald Postema offers a critical (and constructive) view on jurisprudence, which he wants to see as a 'sociable science', both externally (open to interaction with other modes of inquiry) and internally (ie 'synechist' in Peirce's sense when it comes to methodological orientation). He sees analytical philosophy of law as 'unsociable' (ie somewhat closed within its own methodology and mentality inherited from John Austin, Austinians and Hart). This chapter presents a perspective on how jurisprudence and its status was (historically), is (contemporarily) and should be perceived.

Riccardo Guastini, in chapter 2, deals with methods and purposes of analytic legal philosophy, which he sees as devoted to two main assumptions: first, that philosophy consists in the logical analysis of language; and secondly, that law is but a set of linguistic entities (rule-expressing sentences) enacted by the law-giving

authorities. Yet, he suggests, there are two different faces of legal philosophy: it either focuses on answering 'questions of law' or sees its job as analysing the language of the law.

Dennis Patterson devotes chapter 3 to Gerald Postema's article entitled 'Protestant Interpretation and Social Practices'. First, he aims to show how different approaches to legal philosophy failed to identify its nature or essence. Eventually, he argues that they all missed what should indeed be a way of doing jurisprudence. According to Patterson, it was Postema who offered a model paradigm of how jurisprudence ought to be done (with understanding of the practice at the core of this new methodology).

Following these three chapters, which are devoted to different perspectives on the status of law and its methodology (as seen from the most general point of view possible), come four chapters that, although still quite general, discuss metaphysical presuppositions of given legal theories and critically evaluate the method of conceptual analysis.

Jan Woleński, in chapter 4, discusses the place of a naturalistic perspective in legal philosophy. Naturalism is a position that won much popularity among contemporary general analytical philosophers, yet it remains much less popular among philosophers of law. Woleński tries to show that by defending naturalism in epistemology, one could show that the problem of naturalising legal philosophy can, in fact, be reduced to the problem of naturalising semantics—which is in no way different from any other area of philosophy.

In chapter 5, Torben Spaak tries to critically evaluate an application of the so-called Canberra Plan to the philosophy of law. The Canberra-style method of conceptual analysis draws from the works of David Lewis and Frank Jackson.[3] The general idea behind the Canberra Plan is to clarify the concept by referring to its place in the network of concepts and see whether there is any descriptive property that corresponds to that concept so analysed. Spaak shows what kinds of problems this method of analysis must face when applied to legal discourse.

Chapter 6 by Tomasz Gizbert-Studnicki discusses, from a metaphysical angle, the social sources thesis that legal facts are ultimately determined by social facts alone. He considers three possible candidates for the dependent relation that is supposed to hold between legal and social facts: reduction, supervenience and grounding. He argues that while reduction and supervenience accounts fail, the grounding account looks quite promising if certain issues are solved. Another important thread of the chapter is Gizbert-Studnicki's claim that the sort of analysis applied by analytical legal philosophers is conceptual analysis in its modest Jacksonian role.

Kenneth Ehrenberg in chapter 7 addresses the classical Humean problem of how one can come to a normative conclusion starting from descriptive premises. He notes that if law is to be completely explained by the fact of its creation, it may

[3] It also draws from Frank Ramsey and Rudolf Carnap.

be problematic to justify the normative conclusions legal philosophers tend to make, namely, that it ought to be followed. The solution Ehrenberg offers depends on perceiving law as a kind of social artefact.

Chapters 8 and 9 offer perspectives on much more detailed metaphilosophical problems that can be seen as quite distinctive for legal philosophy.

In chapter 8, Manuel Atienza discusses possibility of regional legal philosophies. The regionality he has in mind should not be confused with the parochialism of legal philosophy (when there is no compatibility between such 'local' legal philosophy and its more general version). Atienza's answer is that, indeed, such regional philosophies are possible, if only certain conditions are met.

Chapter 9 by Veronica Rodriguez-Blanco is devoted to a classical problem of legal philosophy, that is, descriptive versus normative dichotomy. What she deals with in particular is the distinction between the description of an action and its normative characterisation. Rodriguez-Blanco claims that the primary conception of intentional action is normative all the way through. In this chapter, she focuses on intentional action as being primarily from the first person, or deliberative, point of view and therefore forward-looking.

The last two chapters of the book are concerned with the vividly discussed problem of theoretical disagreements. They focus especially, but not exclusively, on theoretical disagreements (as distinguished by Dworkin from merely empirical ones).

In chapter 10, Ralf Poscher argues in favour of the agonistic account of legal disagreement which, as he tries to show, fits well with recent evolutionary accounts of reason and has much explanatory force. According to Poscher, the rationality of legal disagreements lies in secondary effects for legal practice, something a single-right-answer account is unable to grasp.

Finally, Adam Dyrda, in chapter 11, debates Dworkinian theoretical disagreements as disputes among epistemic peers relying on the so-called 'equal weight view'. Dyrda argues that one cannot point to theoretical disagreement being an essential element of a certain practice and simultaneously, with full confidence, subscribe to a certain theoretical solution (a particular concept of law). Dyrda claims that such disagreement can only be resolved in a pragmatic, that is, practical manner.

Editors of this volume would like to thank all the participants in the 'Philosophy of Legal Philosophy' Conference, held in Krakow on 22 and 23 May 2015, who contributed vastly to the content of this book. Among those who deserve the most credit are the commentators on the conference papers (on which chapters of this volume are based): Sebastian Baldinger, Andrzej Grabowski, Bartosz Janik, Maciej Juzaszek, Andrei Kristan, Marcin Matczak, Tomasz Pietrzykowski, Paolo Sandro, Marek Smolak and Tomasz Stawecki. For the sake of form, it should also be noted that the author of this introduction was also a commentator.

This volume as a whole and the above-mentioned conference constitute parts of a research project co-financed by National Centre of Science (Poland), based on decision number DEC-2013/09/B/HS5/01023.

Part I

Status of Legal Philosophy

1

Jurisprudence, the Sociable Science

GERALD J POSTEMA*

Jurisprudentia legis communis Angliae est scientia socialis.

Sir Edward Coke

I. *Vera Philosophia*

At the close of his report of *Calvin's Case*, Coke wrote that jurisprudence is a sociable science, 'sociable, in that it agreeth with the principles and rules of other excellent Sciences, divine and human'.[1] Admittedly, it was the jurisprudence of the English common law that he so fulsomely characterised in this way, but his explanatory gloss invites a less insular application, echoing as it does the instruction opening the *Institutes*: '*Iuris prudentia est divinarum atque humanarum rerum notitia*' ('Learning in the law requires knowledge of things both divine and human').[2] Unwittingly, perhaps, Coke appropriated for English common law a Renaissance ideal of jurisprudence, based on a medieval gloss on the opening of the *Digest*: the idea of jurisprudence as *vera philosophia*.[3] This may well have been an expression of the intellectual imperialism of Renaissance jurists, more academic snobbery than accurate description,[4] but, as often happens, profession tended to shape performance, or at least it shaped the expectations and ambitions of the practice of Renaissance jurisprudence. Jurisprudence strove to be a sociable

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[1] See Coke, 7 Reports 28a in Coke (2003: 231–32). Echoing Coke, Hanoch Dagan writes, '[i]f any discipline should be willing to incorporate insights from its neighbors, if systhesis is to be an acceptable, indeed important, part of the self-understanding and the disciplinary core of any academic field, it is law' (Dagan 2012: 171).

[2] *Institutes*. 1.1.1.1, Birks and McLeod (1987: 37); see also *Digest* 1.1.10.2 (Ulpian, Rules 1), Watson (1998: 2).

[3] Accursius glosses *Digest* 1.1.1.1: 'Civilis sapientia vera philosophia dicitur'. See Kelley (1976: 267–79). See also Kelley (1990: 56–61). My sketch of the Renaissance ideal of jurisprudence as *vera philosophia* leans heavily on Kelley's rich portrait.

[4] See Kelley (1976: 269).

science. 'There is nothing either human or divine', wrote a Renaissance student of jurisprudence, 'which the jurist does not treat and which does not pertain to civil science'.[5]

This ambition was as complex as it was bold. Following Ulpian's lead, it refused to relegate jurisprudence either to pure speculation or to mere practice.[6] Jurisprudence was a science, a matter of knowledge and of theoretical understanding, not merely an applied art or practice of prudence innocent of theory. It was regarded as the very heart of theoretical studies, drawing to itself all that the traditional sciences of theology, metaphysics and moral philosophy, as well as the newly emerging humanist sciences of philology and hermeneutics, had to offer. No less resolutely, however, it refused to abandon its foothold in the life of practice. 'Jurisprudence consists not in speculation but in action', wrote one fifteenth-century jurist, just after invoking Accursius's notion of *vera philosophia*.[7] Rather than reject philosophical reflection, he and other Renaissance jurists sought to locate it in concrete human life and experience. Law, on this view, embraced most comprehensively and penetrated most profoundly the practical dimensions of daily life, while philosophy was most true to its vocation, and was most engaged in human life, when its reflections were anchored in the social life acknowledged, comprehended and informed by and informing law. Jurisprudence, *vera philosophia*, was neither serene speculation nor pure prudence, but the point at which the theoretical and the practical intersected. Neither subordinating practice to theory nor theory to practice, jurisprudence, at its 'sociable' best, sought to integrate them.

Such, at least, seems to have been the Renaissance ideal, the ambition. However, if humanist critics are to be believed, performance often fell short of profession. Guillaume Budé, for example, complained that, if we understand law to be 'the art of goodness and fairness', as Ulpian taught,[8] then it must be the job of the jurist 'to philosophize on this point'.[9] Yet, judged by this standard, 'the study of law has degenerated from its original state. Today there are no longer jurisconsults, or philosophers', Budé wrote, 'but only lawyers (*iurisperiti*)'.[10] A student of twentieth-century English law made the same observation in response to Coke's praise of the common law. '[M]odern Common Law has ceased to be "sociable"', he wrote. 'It is impatient of other kinds and systems of law, and does not eagerly claim kinship with moral science or natural reason'.[11]

This complaint indicts with even greater justice the dominant practice of jurisprudence in the common law world since the late nineteenth century. Analytic

[5] See Francois le Duoaren (1509–59), *Opera Omnia* (1598) as quoted in Kelley (1976: 269). '*Civilis scientia*', like *civilis sapientia*, Kelley tells us, was, at the time, the conventional term for academic jurisprudence. See Kelley (1988: 86).

[6] See Kelley (1976: 267–70) and Kelley (1988: 84–95).

[7] See Kelley (1976: 270), quoting Claude de Seyssel, who had just written: '[C]ivil science is the true philosophy, and it is to be preferred to all other fields because of its purpose'. See ibid 267.

[8] '[I]us est ars boni et aequi', Digest. 1.1.1 (Ulpian, Institutes 1), Watson (1998: 1).

[9] See Kelly (1976: 269).

[10] Quoted in Kelley (1976: 268).

[11] See Latham (1949: 511).

jurisprudence began as self-consciously, even militantly, 'unsociable', and its matured and much sophisticated descendant, *fin de siècle* analytic legal philosophy, remained largely if not exclusively so. Legal philosophers joined the *iurisperiti* in the jurisprudential ranks, but they have little to say to each other. As one who has long participated in this enterprise, and recognises its remarkable richness, I nevertheless have become increasingly aware of its equally remarkable rootlessness. It may be time, in this period of self-conscious attention to jurisprudential method, to press beyond the current limits of this debate over method to a reassessment of the ambitions of jurisprudence and of philosophy's role in it. I hope to expose for our critical attention not an explicit methodological doctrine, but rather a certain widespread but not always or entirely self-conscious mentality. Yet, although I will offer critical remarks about contemporary Anglo-American legal philosophy, my aim is not critical but constructive. To this end, I seek in the next few pages to recover something of the ideal of jurisprudence as a sociable science, to retrieve as much as our disenchanted age can be challenged to embrace or at least to entertain of the ambition of jurisprudence as *vera philosophia*.

II. Policing the Borders of Jurisprudence

It is widely believed that HLA Hart wrought a profound transformation of jurisprudence, at least the jurisprudence practised in the English-speaking world. He brought a moribund activity of dubious intellectual and pedagogical value and blinkered vision, it is thought, into the brilliant light of sophisticated but sober contemporary philosophy, directing it to providing the conceptual resources for a revitalised general, sociologically aware, theory of law. There has been much debate, especially intense in the last decade or two, over the nature and merits of this transformation and the direction it set for analytic legal philosophy, but few dispute its profundity. Yet a careful review of the movement of analytic jurisprudence over the course of the twentieth century yields a somewhat different picture.[12] From this vantage, the changes Hart made were, in some respects, superficial. The more profound transformation, a transformation of the project and ambitions of philosophical jurisprudence, was wrought by Austin, or rather by Austin as understood by Austinians at the end of the nineteenth century. The revitalised and redirected jurisprudence of Hart, and the half century of writing in the Hartian tradition, is heir to, and still largely lives on, this Austinian estate.

Already by the first decade or so of the twentieth century, analytic jurisprudence, practised in Britain and the Commonwealth, had challenged most of the main dogmas of Austin's theory of law. Curiously, however, these dogmas survived the challenges, not because of their intrinsic appeal or theoretical soundness, but because no serious, systematically articulated and defended competitor took their place as

[12] I briefly sketch here the story which is told in detail in Postema ch 1 (2011: 3–42).