The Concept of Law from a Transnational Perspective

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For my parents

Series Editor's Preface

The objective of the Applied Legal Philosophy series is to publish work which adopts a theoretical approach to the study of particular areas or aspects of law or deals with general theories of law in a way which focused on issues of practical moral and political concern in specific legal contexts.

In recent years there has been an encouraging tendency for legal philosophers to utilize detailed knowledge of the substance and practicalities of law and a noteworthy development in the theoretical sophistication of much legal research. The series seeks to encourage these trends and to make available studies in law which are both genuinely philosophical in approach and at the same time based on appropriate legal knowledge and directed towards issues in the criticism and reform of actual laws and legal systems.

The series will include studies of all the main areas of law, presented in a manner which relates to the concerns of specialist legal academics and practitioners. Each book makes an original contribution to an area of legal study while being comprehensible to those engaged in a wide variety of disciplines. Their legal content is principally Anglo-American, but a wide-ranging comparative approach is encouraged and authors are drawn from a variety of jurisdictions.

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Preface

This book can be read in a variety of ways. Starting with the second part and skipping the third, it can be read as an essay in analytical jurisprudence arguing for a legal pluralist reconstruction of H.L.A. Hart's theory. Concentrating on the first part, it becomes a critique from a legal positivist's perspective of Jürgen Habermas's critical social theory. Overall, the book expounds the relevance of a thorough reflection on the concept of law for an improved perception of the phenomena we face in a globalized world. To understand them it is necessary to draw on a variety of disciplines and intellectual traditions, though jurisprudence may hold a central place in this endeavor. Incidentally, the book also reflects philosophical cultures I encountered during my studies with Jürgen Habermas representing the tradition of grand theory and H.L.A. Hart as the founding father of contemporary jurisprudence. I have found insights in both traditions and believe there is an underlying current connecting them, or at the very least, a way to bring them into dialogue.

From an external point of view, studying philosophy seems to be nothing more than sitting around and ruminating, sometimes reading, rarely writing. The internal point of view can only be attained when sharing it with like-minded people. I am lucky to have met those people who have inspired my work and encouraged me to write this book. I would like to thank all those who made it possible, in particular Prof. Dr. Günther Abel for urging me to embark on legal philosophy, the Friedrich Naumann Foundation for granting me a scholarship, Prof. Thomas Pogge for inviting me to do research at Columbia University, and Prof. Dr. Weyma Lübbe for providing me the opportunity to work at Universität Leipzig. My friends in Frankfurt, Freiburg, New York, and Berlin helped to make the endeavor a worthwhile experience. I am most grateful to Prof. Leslie Green whose encouragement showed me that I am on the right track and Prof. Dr. Dietmar von der Pfordten who supported me in the final stages of the project. The book is, however, dedicated to the two people who did over the years the most in supporting me with their love and never lost patience with the intricate course of my studies: my parents.

THEORISING THE GLOBAL LEGAL ORDER

This book aims to capture an exploratory approach to theorising the global legal order. Avoiding any brand loyalty to a particular academic perspective, it brings together scholars who contribute a variety of insights covering quite different topics and viewpoints. It sets itself the target of producing a distinctively legal theory of global phenomena, which is capable of illuminating the path of law as an academic discipline, as it confronts a bewildering array of novel situations and innovative ways of thinking about law. The broad base of perspectives found among the contributors, combined with a helpful commentary from the editors, makes the book an ideal Reader to introduce a subject that is becoming of increasing importance for academics, students and practitioners, in law and related fields.

Introduction

The impetus to write this book was spurred on by a discrepancy I observed between legal theory and legal practice. When studying legal history, one reads about the importance of canon law for the development of the Western legal tradition, the various semi-autonomous legal systems of cities, universities, fraternities and merchant's guilds, and the intricate alliances and commitments holding these entities together in a constitution-like transnational order. Currently, lawyers and political theorists inform us about the increasing competences of transnational legal regimes on the European and global scale and the influence of Non Governmental Organizations or private legal regimes. However, in "general legal theory" or "jurisprudence,"[1] these practices and developments hardly feature at all. Instead, discussions usually set forth from the implicit assumption that state law is the focal point of all reflections. This is true for most approaches developed in the course of the renaissance of legal theory subsequent to H.L.A. Hart.

One might be tempted to think these are simply two very different issues and one has to choose between either conceptual or socio-political analysis. Yet, the demarcations between these approaches are neither clear-cut nor required by any logic of the subject matter either. The debate between H.L.A. Hart and Ronald Dworkin with its various coloraturas has rather shown that the way law is conceptualized is essential for understanding the practice of legal institutions, and courts in particular. Hence, through the Hart/Dworkin debate, the tension between jurisprudence and legal practice is already recognized, though only in a specific area. For this debate focuses on the circumstances of a contemporary constitutional state (in effect, the United States), though neither cases from premodern times nor contemporary transnational developments feature prominently. One might get the impression these issues are outside the reach of general legal theory, which, however, does not mean they are under-researched. On the contrary, there are given ample discussions on these topics and philosophical traditions dealing with them.

The easiest way to apprehend them is apparently to leave jurisprudence to its own devices and move on to traditions, which are more receptive toward sociological insights and contemporary developments. Jürgen Habermas's critical social theory suggests itself to be the place to turn to since its very program is to integrate insights of social sciences into legal philosophy. The discrepancy between

1 I use "jurisprudence" or, insofar as it goes back to Hart, "analytical jurisprudence" synonymously with "general legal theory." Sometimes when referring to Dworkin's writings, for instance, I will use the term "legal theory." The generic term encompassing all these and other approaches is "legal philosophy."

legal theory and practice thus seems to be resolved or at least accounted for, albeit in a different tradition. Indeed, when studying the works of Habermas, one finds a wealth of sociological reflections and political analyses bearing upon history and the contemporary postnational constellation—only there is little consideration of general legal theory. When delving deeper into Habermas's theory this turns out to be a crucial shortcoming that vitiates his entire program. Thus, the discrepancy between general legal theory and practice cannot be averted by retreating to a different tradition either. It is a conundrum that calls for a systematic discussion. My thesis is that the respective shortcomings can be overcome by working on both fronts. General legal theory needs to be remodeled so that it can account for a broader range of phenomena while critical social theory needs to be sharpened by apprehending general legal theory. This will be shown while passing through the theories of Habermas and Hart.

I will start by demonstrating how an inadequate reflection on the concept of law runs through the work of Habermas and precludes a more sober analysis. In this part I will argue mainly historically to show that Habermas's theoretical concepts obliterate certain transnational phenomena. For Habermas's style of philosophy, this is the appropriate way to argue since he claims to reconstruct social processes against the background of a normative theory. However, a close reading of *Theory of Communicative Action* and *Between Facts and Norms* demonstrates that Habermas cannot redeem his claim, for in both cases his concept of law is too restrictive. From a historical perspective, traditional phenomena of transnational law, such as the law of the Roman Catholic Church, the guilds, or business associations, are systematically disregarded in favor of a state-oriented interpretation of history. In his fully developed legal philosophy, he has to take the "legal form" as a given. Since he presupposes only state-like forms of associations, Habermas is unable to explicate what kinds of groups can constitute themselves in this way and how their possible interrelations are to be conceived. The consequences of this presupposition are shown in the course of examining Habermas's political analyses of the "postnational constellation." In his political writings, Habermas alleges that globalization is a form of system integration merely driven by economic imperatives while, on the other hand, he tries to reenact his discourse theoretic model by calling for further constitutionalization of the "pluralist world society." A more detailed analysis of contemporary phenomena of transnational law, however, shows that Habermas's reading rather precludes a critical analysis of the legal processes and moreover undermines his own foundation.

Since the critique of Habermas is based on a systematic point, it exhibits not only an idiosyncratic failure but reveals a fundamental problem. It is at this point that H.L.A. Hart's general legal theory analysis comes into play as a starting-point for a more thorough reflection of the concept of law. To do this, however, requires reconstructing the theory so that it becomes a truly general legal theory capable of elucidating the aforementioned phenomena. While arguing conceptually I will show how Hart's main arguments can be systematically rebuilt to attain a picture

of law as consisting of interrelated legal systems. To this end, I will reconstruct Hart's analysis while developing four theses:

1. It is possible to speak of law at the level of primary rules.
2. Secondary rules institutionalize practices. As a consequence, legal systems evolve; though they need not be municipal legal systems.
3. Legal systems can either rely on conditioned force or on unconditioned force. Relying on conditioned force means that the ultimate sanction is exclusion from the system, whereas sanctions in systems relying on unconditioned force may be enforced against the will of a person. As legal systems are not necessarily bound up with unconditioned enforcement, different legal systems can coexist even within one territory (for example, church law and state law) and relate to each other.
4. To be able to distinguish different legal systems from the point of view of descriptive legal theory, it is necessary to introduce a third kind of rule (in addition to Hart's primary and secondary rules), which I call "linkage rules." To clarify the notion of linkage rules and establish its place in the legal system, I will review Hart's account of international law and his discussion of Hans Kelsen's theory of the unity of national and international law.

The ensuing picture makes it possible to conceive not only of established or official legal systems such as states or international treaty regimes but also of unofficial ones. It is thus a suitable framework for analyzing transnational phenomena. I also draw attention to the limits of the Hartian framework insofar as his thin notion of a minimal content of natural law does not provide a comprehensive normative guideline; a legal system can satisfy Hart's criteria to "function" while deliberately excluding some from its protection. Nevertheless, the account may suffice to inform an—albeit skeptical—self-understanding. Instead of presenting a global history of moral progress driven by ongoing constitutionalization, it urges us to take a piecemeal approach and consider the various linkages between legal systems and their specific functions and values.

Since the way I approach Hart's theory by exposing an unsolved puzzle within Habermas's critical reconstructive theory and the reading I present of Hart's theory are both unorthodox, I close by explaining how the argument features within the wider jurisprudential literature dealing with law from a transnational perspective. To this end, I show that the tradition of jurisprudence ensuing from Hart has been shaped by two tendencies; on the one hand by limiting jurisprudence in the line of Joseph Raz to a pure conceptual endeavor and, on the other hand, by rejigging jurisprudence, as Ronald Dworkin does, as part of applied moral philosophy. Both authors miss the sociological dimension in Hart's theory and therefore present a distorted account of jurisprudence as either being completely detached from social developments or not being a genuine philosophical discipline at all. However, this rendering of the tradition has not gone unchallenged. Notably, Brian Tamanaha and William Twining have developed accounts of general jurisprudence that

avoid the limitations found in Raz and Dworkin. Even though both Tamanaha's and Twining's approaches resemble the kind of criticisms and inquiries I will present throughout this book there remain decisive differences. Tamanaha aims at developing a general jurisprudence that is applicable to diverse social fields, though in the end he conflates philosophical analysis into a framework for sociological description. Twining, who also wants to open the tradition of jurisprudence towards the social world, realizes this danger in Tamanaha. However, he renders general jurisprudence merely as a collection of different approaches and topics. What is missing in Twining is the idea of a philosophical tradition as an organizing principle and way to make sense of the diversity already found in our tradition. The hermeneutic reconstruction of Habermas and Hart is thus a way to save jurisprudence as a philosophical discipline. As it reckons with tensions between social and official regulation and with the need for a dialogue between different (Western) philosophical traditions, it is at the same time a way to invite readings from non-Western points of view. Hart's pledge that we may use a sharpened awareness of words to sharpen our perception of the phenomena is thus completed by the aim of furthering an understanding of ourselves in dialogue with others.

PART I
Habermas's Understanding of Law

Analyzing Habermas's writings requires dealing with a complex field of theoretical approaches, which have been gathered over time and synthesized into his work. As the aim is to draw attention to one central issue, which runs throughout Habermas's theory, it will be necessary to range far afield.

First, the position that law occupies in Habermas's *Theory of Communicative Action*[1] will be discussed in brief. The discussion will concentrate on Habermas's historical exposition of the changing role of law in society. It will be argued that Habermas's exposition distorts a number of historical facts and has thus led to the result that transnational phenomena remain systematically underexposed. Secondly, the critique will be carried over to Between Facts and Norms[2] where the same limitation to the national sphere appears in a different guise. Finally, the effects of both theoretical prefigurations for Habermas's analyses of the postnational constellation will be diagnosed.

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1 Jürgen Habermas, *Theorie des kommunikativen Handelns* (Frankfurt am Main: Suhrkamp, 1981); English translation: *Theory of Communicative Action*, trans. Thomas McCarthy (Boston, MA: Beacon Press, 1984), hereinafter cited as TCA. References to Habermas's works will be given for the English and the German edition. The first page number will always refer to the English edition, the second page number after an oblique stroke to the German edition.

2 Jürgen Habermas, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts*, 2nd edn (Frankfurt am Main: Suhrkamp, 1994); English translation: *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, 2nd edn, trans. William Rehg (New Baskerville, MA: MIT Press, 1996), hereinafter cited as BFN.

Chapter 1
Law in the Theory of Communicative Action

The Outline of the Theory

The *Theory of Communicative Action* is Habermas's magnum opus. It includes reflections on philosophy of language, social philosophy and to some extent political philosophy, while dealing with a whole range of classical and contemporary writers from sociology and philosophy. For the present purpose it is, however, not necessary to follow Habermas's intricate line of thought throughout the whole book. As the aim is to reveal how the theoretical concepts feature in sociological analyses it suffices to introduce those concepts without worrying much about their derivation. But first, it is to be noted that Habermas pursues a specific approach to social theory. The theory is meant to be a critical theory of society, that is, a theory that explains not only the genesis and pathologies of modern society but one that provides a normative point of view as well. Habermas maintains that only when a normative point of view is included in a social theory can the rationale of the evolution towards a modern society be profoundly understood. For this reason, he has developed a theory of communicative action which forms the basis for a critical theory of society. The theory may be outlined by introducing the most important theoretical concepts: communicative vs. strategic action, rationalization of lifeworld, and the uncoupling of lifeworld and system. The basic level of his theory is a theory of action. Habermas distinguishes between two kinds of social action: communicative action and strategic action.[1] Strategic actions are actions aimed to influence others for the purpose of achieving a certain end. The goal of communicative action on the other hand is not to influence others for personal gains, but to reach a consensus or mutual understanding as a basis of action. For this reason, communicative action requires engaging in the deliberation of the definition of situations as well as the guiding norms and principles. Strategic action and communicative action are not merely two separate types of actions but are in fact specifically related. Habermas claims that communicative action is the original *modus operandi* and that strategic action presupposes the existence of communicative action.[2] Only with this conjunction can a coherent social theory be based on communicative action without it breaking up into two separate components.

The link between the theory of communicative action and social theory is mediated through the concept of the lifeworld. Habermas argues that claims raised

1 TCA 1: 285/385.
2 TCA 1: 288/388.

in communicative action are often unquestioned or not critiqued, since they are nestled within the contours of an undisputed, shared lifeworld. However, as no claim or assumption is absolved from being criticized or questioned deliberation required by communicative action is the only way that the lifeworld can be integrated. Therefore, the "symbolic reproduction of the lifeworld" through communicative action demonstrates that modern societies can be rationally integrated without the need to make use of premodern religious certainties or the simple reliance on unsubstantiated values or beliefs. Habermas calls the changeover from premodern integration based on religious certainties to modern integration ultimately based on communicative action "rationalization of the lifeworld."[3]

The rationalization of the lifeworld is only one aspect of the overall process of rationalization that characterizes modern societies. The other aspect is the differentiation of society in various subsystems, especially the economy and state government. According to Habermas, the reason for this is that coordination cannot always be reached based on communicative action. Therefore, the "nonsymbolic steering media [of] money and power" facilitate coordination on the basis of strategic action, for example, exchange of goods for monetary profit and/or reaching binding decisions regarding bureaucratic efficiency.[4] In contrast to the social integration of the lifeworld, Habermas calls this second type "system integration." He holds that modern societies must be conceptualized as both lifeworld and system.[5] Lifeworld and system, as theoretical concepts, are not simply two aspects of societies: rather they mark two distinct social spheres.

The uncoupling of lifeworld from system is thus a concurrent "symptom" of modernity. Habermas does not see the uncoupling as problematic *per se*, but only when the subsystems have repercussions on the lifeworld to the effect that the communication potentials of the lifeworld are being eroded or calcified. Habermas refers to this process as the "colonialization of the lifeworld." He argues that "the media controlled subsystem of economy and state intervene in the symbolic reproduction of the lifeworld by monetary and bureaucratic means."[6] The colonialization of the lifeworld is finally the focal point of the *Theory of Communicative Action*, in which Habermas attempts to bring together historical and systematic investigations. Habermas himself admits that up to this point his theory has provided little empirical evidence, and especially "statements about an internal colonialization of the lifeworld are at a relatively high level of generalization."[7] Hence, he has put the theory to the test by analyzing the development of law in modern society, which ultimately leads to the colonialization of the lifeworld. The development of law thus plays a crucial role in Habermas's attempt to demonstrate the usefulness in making a distinction between lifeworld and system to serve the

3 TCA 1: 340/456.
4 TCA 2: 183/272.
5 TCA 2: 118/180.
6 TCA 2: 356/522.
7 TCA 1: 141/203.

aims of a critical social theory. The account Habermas gives of this development can therefore be used to assess the overall theory.

For Habermas, law is a system that rests on the presupposition of strategically acting individuals.[8] The very characteristic of modern law in contrast to premodern law is that it does not merely transform previously established institutions, based upon a traditional ethos, but that it establishes institutions (subsystems), which, for this very reason, exhibit no remnants of forms of communicative action. The decoupling of law from the lifeworld has, on the other hand, the effect that modern law is in need of justification or, in other words, the system needs to be "anchored" in the lifeworld. To this end, Habermas has assessed the decoupling and subsequent anchoring of system and lifeworld as a sequence of "thrusts of juridification." The empirical evidence provided for this process of juridification will be the focus of the analysis here. For the sake of argument, Habermas's basic concepts, including their historical and systematic derivations will be taken as a matter of course. The detailed analysis of the empirical evidence is nevertheless a good place to assess the impact and reach of the theory. For in Habermas's work, empirical evidence is not merely an application of an abstract theory, but social analysis is the pivotal point of a critical theory of society: to provide a normative reconstruction of real social developments. It would be a mistake to read Habermas as either providing just a few theoretical concepts which may be used in just any context or as only developing normative guidelines. The idea of a critical theory is to show that normative standards form already constitute part of the lifeworld and can be revealed in sociological analyses. Hence, it is useful to concentrate on these analyses.

The Thrusts of Juridification Under Scrutiny

In the development of modern societies from the eighteenth century onward, Habermas distinguishes four "global thrusts of juridification." According to Habermas, the first thrust led to development of the bourgeois state during the era of Absolutism, the second thrust of juridification led to the constitutional state of nineteenth-century Germany, the third to the rise of the democratic state and the fourth to the social and democratic state. These thrusts of juridification are used by Habermas as "analytical terms,"[9] which means they do not always correspond with particular legal developments. However, this reservation should not exempt Habermas from all empirical objections, as the analysis of the juridification thrusts is in itself the only way to prove the more general theoretical claims. Objections based on the perception of historical developments must, therefore, be admitted insofar as they draw attention to systematic deficits at the theoretical level. For this reason, historical facts that do not fit into Habermas's account of juridification thrusts will be examined. The general line of the critique will be that to serve a

8 TCA 1: 260/352.

9 TCA 2: 359/528.

rather restricted concept of law Habermas has omitted transnational legal aspects that might put into question the paradigm of the nation state as the end of historical development.

The Absolutist State: System Decoupled from the Lifeworld

Habermas sees a first thrust of juridification occurring in Europe during the era of Absolutism: "It can basically be understood as an institutionalization of the two media through which the economy and state were differentiated into subsystems."[10] Thus, the state and the economy are seen as subsystems, which are systematically integrated but at the same time detached from the lifeworld. The subsystem of the economy is further characterized as "strategically acting 'legal persons' who enter into contracts with one another."[11] "Modern law," bearing the features of positivity, generality and formality, is said to be merely a means to facilitate "legal persons" to enter into contracts, acquire, dispose, and bequeath property. The state, being the other component of the system, is defined by the "monopoly on coercive force as the sole source of legal domination. The sovereign is absolved from orientation towards any particular policies or specific state objectives."[12] The state and the economy are thus the two systematically integrated subsystems. Habermas goes on to argue that from the perspective of the system, the lifeworld can only be negatively characterized as "everything that is excluded from the system and left to private discretion ... [Its] essence lies in the corporatively bound, status-dependent conditions of life which had found their particularistic expression in feudal laws concerning persons, profession, trade and land."[13] This state of affairs where two systematically integrated subsystems are decoupled from the lifeworld is the starting-point for the subsequent juridification thrusts, "a lifeworld which at first was placed at the disposal of the market and absolutistic rule little by little makes good its claims. After all media such as power and money need to be *anchored* in a modern lifeworld."[14]

Several points in the analysis, taken as a historical description, are striking. Habermas seems to imply that lifeworld and subsystems can be clearly separated and that the usage of modern law is sufficient to characterize the subsystems of state and economy. Consequently, the symbolic reproduction of the lifeworld through communicative action can only take place, according to this notion, outside the subsystems as well as outside the law. But this analysis is hardly an empirical reconstruction of law and society in Europe during the Absolutism period. Taking German territories as an example, it can be shown that the social and legal situation was indeed very different. Germany during the era of Absolutism

10 TCA 2: 358/525.
11 TCA 2: 358/525.
12 TCA 2: 358/525.
13 TCA 2: 358/526.
14 TCA 2: 359/527, italics in original.

was not a nation state; instead, it was composed of over 350 different territories (kingdoms, principalities, bishoprics, and free cities) ruled by an emperor who held hardly any power.[15] The situation in Germany was not exceptional but rather typical when compared to the number of nation states existing in Europe nowadays. Few of the nation states in current existence had yet been established as unified and distinct territories during Absolutism. Considering the various types of authorities in Germany, it should be noted that most of them did indeed proclaim themselves sovereign. This did not mean that "the sovereign [was] absolved from orientation towards any particular policies or from specific state objectives,"[16] as Habermas describes it. The claim to sovereignty was due to the Westphalian Peace Order, which laid out the basic constitutional principles for the era of Absolutism in Europe.[17] Examining certain aspects of the Peace of Westphalia reveals that Habermas's claim needs to be significantly qualified.[18]

The Peace of Westphalia was not simply a multilateral peace treaty between distinct states pursuing "strategical interests," but would bring about a new order, for it served at the same time as the constitution of the Holy Roman Empire.[19] Certainly, it covered all elements of an ordinary multilateral peace treaty between sovereign states: naming of the parties, regulations regarding territory, establishing cessation of hostilities, rules concerning treatment of prisoners of war, reparations, and so on. Having been concluded not only between the major countries, but also between the emperor and the estates of the Empire (*Reichsstände*) represented by 15 German princes, it was to be a treaty within the Empire as well.[20] The treaty united the emperor, the princes, and the European powers in a specific way. Nearly all the European states were part of the treaty, even those that did not participate in the fighting. For this reason, the whole treaty cannot be seen merely as the

15 Only recently have historians started to pay attention to the Empire as a genuine historical entity rather than conceiving it as an anachronistic remnant of the Middle Ages or a strait-jacket for the emerging nation states. For a history of the Empire between 1648 and 1806, see Karl Otmar von Aretin, *Das Alte Reich: 1648–1806*, 3 vols (Stuttgart: Klett-Cotta, 1993–97).

16 TCA 2: 358/525.

17 Alfred-Maurice de Zayas, "Peace of Westphalia," vol. 4 of *Encyclopedia of Public International Law* (Amsterdam: North Holland, 2000), 1465.

18 For general overview of the Peace of Westphalia, see Fritz Dickmann, *Der Westfälische Frieden*, 6th edn (Münster: Aschendorff, 1992), Konrad Repgen, *Dreißigjähriger Krieg und Westfälischer Friede* (Paderborn: Schoningh Repgen, 1998). The treaty is reprinted in Konrad Müller, ed., *Instrumenta Pacis Westphalicae. Die Westfälischen Friedensverträge* (Bern: Herbert Lang, 1975), Abbreviations: IPM = *Instrumentum Pacis Monasteriense* (Peace treaty of Munster), IPO = *Instrumentum Pacis Osnabrugense* (peace treaty of Osnabruck).

19 On the constitutional function of the peace treaty, see Dickmann, *Westfälische Frieden*, 5–9 and Aretin, *Das Alte Reich*, 17–21.

20 The regime of coalitions is analyzed in: Ernst-Wolfgang Böckenförde, "Der Westfälische Frieden und das Bündnisrecht der Reichsstände," *Der Staat* 8 (1969): 449–78.