Legisprudence

Practical Reason in Legislation

Luc J. Wintgens

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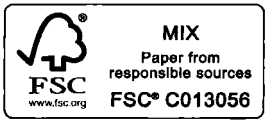

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Series Editor's Preface

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.

Tom Campbell
Series Editor
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Contents

Introduction

Current legal theory is premised on the central role of the judge in contemporary legal systems. Although this evolution has contributed much to a vibrant understanding of law, it has also left the role of the legislator largely ignored and under-theorised. Legal theory routinely takes the law as 'just there', and limits its theoretical undertakings to law as a 'given'. Law, it claims, is the result of political decision-making. But once law comes into force, it can be somehow miraculously separated from politics. And the realm of politics is impure – unlike law's 'neutral' and 'objective' methods of reasoning and decision-making.

This book takes a different view on law and legislation and in this process it offers a radical shift in the theoretical thinking about law. It argues that practical reason in legislation comes to the practice of reason throughout the process of legislative law-making. It establishes 'legisprudence', by contrast to jurisprudence, as a legal theory of legislative law-making. Where does the law come from? What are the premises of a theory that considers law separated from politics? What does it mean for a legislator to be bound to the rules of a constitution throughout the process of legislation? Does the constitution consist of rules to be followed by the legislator or is its role merely confined to be a political programme?

At first glance, it may seem puzzling why contemporary legal theory fails to take legislation seriously. The quantity and quality of legislation has become a central topic in the public discourse of Western democracies. There are common complaints about the exponential increase in the volume of legislation coupled with a striking decrease in its quality. It is by no means obvious what can be done to get contemporary democracies out of this predicament. We typically think of politics as the realm of power, not reason. Decisions are made by vote, and it is political interest, rather than the force of the better argument, that determines how representatives vote. Politics is a power game, resulting in compromises that are framed into a legislative or statutory structure. This power game seems to have its own logic, the results of which most of the time outweigh any other form of logic.

This book rejects this common wisdom about the nature of politics and its outcome: legislation. It provides a new perspective, which I call 'legisprudence', the rational creation of legislation and regulation, hence, practical reason in legislation. In doing so, I use the methods, theoretical insights and tools of current legal theory and philosophy of law. But it puts these tools, which have been deployed in the past to deal with judicial interpretation and application of statutes, to a new use: the creation of law by the legislator.

Within this new approach, a variety of new questions and problems – for example, the validity of norms, their meaning, the structure of the legal system, and so on – are raised. Traditionally, these questions are approached from the

perspective of the judge. However, when shifting our attention from the judge to the legislator, the same concerns arise but in a slightly different form – in what sense must the legislator take the systematicity of the legal order into account? What counts as a valid norm? – to mention but a few.

However important it is to state these questions about the role of legislation, answering them requires an incursion in the philosophical roots of legal theory. Indeed, I argue in this book that it is no accident that the legislator is the missing actor of contemporary legal theory and philosophy of law, despite the undeniable importance of legislation in modern democracies. My diagnostic is clear: the reason for the disregard of legislators are the long decades of legalism in legal reasoning. For generations, lawyers have been taught that everything happens behind the veil of sovereignty as far as legislation is concerned, and behind the veil of legality when it comes to the execution of legislative acts.

These veils teach ignorance about the possibilities of an alternative theoretical reflection on rule-making. Claims to sovereignty silence debate about alternative ways of regulating society. Sovereignty is sovereignty in silence.

Consider the familiar scenario: rules come from the sovereign; they are valid or invalid; if they are valid, they must be obeyed; the state can legitimately coerce those who disobey. In this linear scenario, questions of law's efficacy, effectivity, efficiency, or rational acceptability are not in order.

The time has come to move beyond this simplistic, albeit influential, account of the fundamentals of political power. We must rethink legislative prerogative and articulate a new conception of sovereignty.

This book explores the contours of a theory of legislation called 'legisprudence' as a rational, principled theory of legislation. Rational legislation focuses on the role of practical reason in the creation of legal norms upon which norm givers are considered not merely political actors but legal actors as well.

I said that legalism in legal reasoning is responsible for the disregard of legislators in the legal theory. We cannot, however, uproot legalism without reaching further into the philosophical assumptions on which it is premised. Early modernity provides the privileged spectrum to explain why the lack of a theory of rational legislation that gives a place to law in a social context is not an accident. We cannot shift the paradigm that underlies legal thinking unless we explore in more detail the deeper roots of law's basic concepts and core assumptions about the nature of the subject, rationality and freedom, as well as law's authority.

In this respect, the argument of the book provides a larger view on what is generally considered the Modern period of philosophy, exploring these basic concepts and assumptions. While there is general agreement that Descartes is the initiator of what is called 'Modern' philosophy, this view is supplemented with a brief outline of these concepts in pre-modern philosophy, mainly focusing on the nominalist position of the impossibility of the existence of universals outside the mind.

Upon this position, the nature of law shifts from insight into the nature of justice to a normativist characterisation of law as a command including a moral

obligation to obedience. This transition is briefly illustrated on the basis of the major claims of the work of some representative doctrines. These doctrines support the view that law mainly consists of norms containing rights and duties externally imposed on subjects having to follow them. This is initially typified as 'legalism', presenting law and law-making as an a-contextual expression of a sovereign's will.

A more fundamental analysis and critique of this legalistic pattern of thought is preceded by a contextual interpretation of individualism, rationalism and freedom that paves the way for a legisprudential understanding of law and legislation. Put differently, the idea of law and legislation in context requires us to revisit their a-contextual understanding rooting in pre-modern and Modern philosophy. The critique of legalism builds on the idea that a proper understanding of the concepts of the subject, rationality and freedom must proceed by putting them in a context of participation.

To begin with, the contextual interpretation of the subject proceeds on the basis of a critique of the solipsistic cogito, thus enlarging the 'conception of the self' in the cogito to the idea of a subject having a self-conception. The latter approach is elaborated on the basis of the theory of symbolic interactionism, according to which the subject emerges throughout interaction with others. The subject's self includes a social as well as an individual pole. By articulating these two poles, an attempt is made to take seriously the subject as an autonomous moral actor.

Secondly, the contextual interpretation of rationality criticises Descartes' idealisation of it, that is, its decontextualisation that obscures the fact that it is historically situated. This situatedness shows rationality to be rather a matter of contextual argumentation referring to reasonableness than self-revealing rationality that operates as demonstration or calculation.

Third, since legislation is about rules, and rules are about individual conduct, they impact on freedom. Legisprudence as a theory of rational rule-making therefore needs a theory of freedom, that relies on a contextual interpretation of it. The contextual interpretation of freedom then joins the contextual interpretation of the subject and rationality. Freedom as a practical concept allows for different conceptions or concretisations. Conceptions can be conceptions *of* freedom or conceptions *about* freedom. The former are the subject's own concretisations of freedom, while the latter are someone else's to which the subject is submitted. Conceptions of freedom relate to the social subject's moral autonomy upon which they can frame their interactions with other.

In order to take the social subjects' moral autonomy, I argue that norm-givers have to provide arguments for why their conceptions about the subjects' freedom have priority over the subjects' conceptions of freedom, thus diminishing the latter's autonomy. At the background of this duty to provide arguments lies the idea that the social subjects should be taken morally seriously, and cannot be expected to surrender their capacity to act on their conceptions of freedom to the state. The further elaboration of legisprudence follows upon this approach to freedom.

Upon the contextual interpretation of individualism, rationality and freedom, the argument proceeds with a focus on the characteristics of legalism the origin of which is sketched in the beginning of this book. The main critique of legalism is that it has impeded the emergence of a principled theory of legislation in that it limits, generally speaking, law to orders or commands of the sovereign. It obliterates practical reason in legislation. The separation of law and politics as the main strategy of legalism takes law to be a-contextual. Here as elsewhere this view on law and legislation is shown to rely on a foundationalist approach to thinking. The main characteristics of what is called strong legalism take law to consist of norms of the state that have a universal form providing them with unquestionable legitimacy.

As a critique of legalism, legisprudence builds on the contextual interpretation of rationality, subject and freedom in order to focus on practical reason in legislation. The articulation of practical reason in legislation proceeds on a distinction between legitimacy on the one hand and legitimation on the other. Legitimacy is an a-contextual aspect of norms issued by sovereigns that are considered *ipso facto* irrefutably rational.

This idea is proper to strong legalism. Legitimation for its part refers to a process of active justification of norms by the sovereign, thus arguing why it is more rational to organise freedom on these norms than on the subjects' own self-regulative interaction. This is the basic premise of legisprudence. Legisprudence distinguishes between legislation as a product and legislation as a process.

The distinction between legitimacy and legitimation is a novelty this book wants to emphasise by providing a twofold interpretation of the idea of the social contract.

The first is the proxy version of the social contract upon which subjects give a proxy to the sovereign to issue subsequent limitations of their freedom or norms. From the 'moment' of the contract onward, the sovereign is *ipso facto* legitimated in substituting conceptions about freedom for conceptions of freedom. On the proxy version, the sovereign can legitimately, that is, without further legitimation, transform any propositional content into a true norm.

The second interpretation of the social contract is labelled the 'trade-off' model. On this model, the subjects trade off conceptions of freedom for conceptions about freedom. This comes to saying that the substitution of conceptions about freedom for conceptions of freedom must be justified by the norm-giver. No rule can be held legitimate if this justification or legitimation is lacking.

Legisprudence as a theory of rational legislation builds on the latter model, and can be taken to rely on three major intertwined points: freedom as principium, that forms the basis for principles of rational legislation, that finally can be concretised in duties of the norm-giver.

The principle of coherence is the first principle of legisprudence. It requires that norms make sense as a whole. The principle of coherence thus identified is elaborated in a theory that I propose to call the 'level theory of coherence'. The minimal level of coherence$_0$ requires that norms are not self-contradicting. The level of coherence$_1$ requires norm-givers to give reasons why norms are changed or not changed, thus installing coherence over time. Third, legislators are to

argue on the level of coherence$_2$, or the level of coherence of the system, in that their rules must make sense as a whole within the system. Finally, the level of coherence$_3$ refers to the fact that a legal system depends on theories that are not themselves law, but to which legislators must refer in order to justify their norms.

This level of coherence, typically, refers to theories like the rule character of norms, the separation of powers, and others, all of which, so it is argued, refer to freedom as principium. In this sense, the level of coherence$_3$ has a recursive impact on the other levels of coherence, as well as on the three other principles of legisprudence. This impact is elaborated by arguing that the principles of legisprudence, upon their connection to freedom as principium, constitute each other's context. In that respect, it is argued that they are not to be taken in a lexical order but in a contextual setting.

Social subjects are initially free and capable to rationally organise their freedom in a context with others. It follows that they are primarily to act on conceptions of freedom. A substitution of a conception about freedom for conceptions of freedom can only be legitimate if it is legitimated or justified as an alternative for failing social interaction. This is the second principle of legisprudence, called the principle of alternativity.

The third principle of legisprudence is the principle of temporality. The limitation of freedom on a conception about freedom must be justified as 'on time'. Any justification is, however, embedded in a context, because rationality as reasonableness is context related, and therefore historically situated. This involves that if the justification of a norm is successful it will only be temporarily so; that is, norms can become obsolete. The principle of temporality then requires an ongoing justification over time, and not only on the moment that a norm is issued.

The fourth principle of legisprudence is the principle of necessity of the normative density. Rules should not automatically contain sanctions as the strongest from of normative density. If sanctions are included, this requires a specific and supplementary justification why weaker alternatives (information campaign, incentives, labelling, covenants and so on) are not withheld.

While the principles of legisprudence are concretisations of the idea of freedom as articulated earlier, they can still be more concretised as duties of the norm-giver. Upon the requirement of the justification of norms, the duties that are identified in this respect include: the duty of relevant fact-finding, the duty of problem formulation, the duty to weigh and balance alternatives, the duty to prospection or the duty to take future circumstances into consideration, the duty to monitor the issued norms, the duty to retrospection, and the duty to review. The fulfilment of these duties comes to showing how a norm-giver arrived at the concrete norms he or she is issuing.

The requirement of the justification of norms, the principles of legisprudence, and the corresponding concrete duties of the norm-giver, so the argument ends, support a rationality control by constitutional and administrative courts. This process of rationality control does not however affect the political or value choices

made through legislation, but focuses on the concrete argumentation of the norm-giver upon the principles of legisprudence.

This approach to the rationality of legislation opens a new perspective on the problematic exponential increase of legal systems and the decreasing quality of legislation in most European democracies. Upon the requisite that a norm-giver considers more seriously his way of creating norms and the requirement to show how he did by justifying his norms legisprudence has the potential to contribute to an improvement of the quality of legislation. The improvement of the quality of legislation as the main purpose of legisprudence may be expected to result in a decrease of legislative norms, since better norms need less corrections, adaptations and changes.

In addition to the involvement of practical reason in legislation in line with the requisite of its justification, norm-givers show that they take legal subjects as moral agents more seriously, since they support legal obligation with justificatory reasons. In doing so, legisprudence expands the realm of legal theory so as to include legislative activity that is submitted to a rationality control. In this respect, the legisprudential approach advocated in this book provides legislation with a deeper justification by subtracting it from political law-making as a power game, and by connecting it to the legal theoretical model of argumentative justification calling the legislator to account for his rule-making. In this respect, the project of legisprudence has a practical bearing on the predicament of contemporary democracies by stressing the legislator's responsibility for legislation that goes beyond mere political accountability.

Books are rarely the product of the author's solitary cogito, and so it is with this one. I have generously benefited from interaction, intellectual and otherwise, with many. Numerous are the friends and colleagues who have contributed to it in one way or the other. I will not enter into a detailed description of their contribution which would be an impossible enterprise. Suffice it to mention their names with the hope that they will recognise some of their thoughts, reflections, critiques and encouragements somewhere in the book. Since the regime of strict liability applies to the content of this book, they are not responsible for its final content.

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Luc J. Wintgens
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Chapter 1
The Metaphysics of Legalism

Introduction

In an attempt to characterise the nature of Modernity, Hans Blumenberg (1983) has argued that there is something irreducibly original about it, while Karl Löwith (1970) claims that its intellectual *Gestalt* is a secularisation of Christian theology. Both seem to have it at least partly right. Descartes' *cogito* is prima facie an irreducible novelty, while 'sovereignty' in a Modern context is no doubt related to late mediaeval divine omnipotence. Following the latter, the claim that Modernity is a radically new period in history, in that it comes up with new problems, needs to be qualified. It is a different way of 'understanding understanding', a new form of consciousness of the perennial problems of philosophy.

As far as legalism is concerned, which is the main issue to be explored in this chapter, it is usually related to Weber's articulation of the relation of capitalism and Protestantism (Weber 1992). On his contraction of legality and legitimacy, Weber is held to be the initiator of legalism in that all norms that have the form of rules are therefore legitimate. It combines the rational organisation of labour with rational book-keeping, both of which are freed from any religious or superstitious beliefs. For capitalism to flourish, a stable and predictable legal system is needed. The easy conclusive step would be to assert that capitalism is 'caused' one way or the other by Protestantism, the combination of which calls for a rational legal system consisting of predictable rules. Legalism can be characterised as 'the ethical attitude that holds moral conduct to be a matter of rule following and moral relationships to consist of duties and rights determined by rules' (Shklar 1986: 1), no matter where these rules come from (Bankowski and Schafer 2007: 34). I will most of all dwell on the first part of the expression, that is, that normativity is a matter of rule-following. The content of these rules and the determination of moral relationships as rights and duties require a different study which will be a matter for the future.

The main claim of this chapter is that legalism is not an invention of Modernity. On the contrary, it is a metaphysical concept that has its roots in late mediaeval theology. For legalism, it is rules that are important, not where they come from. From there it spreads into political and legal philosophy going along with both jusnaturalism and positivism.[1] Far less is it the spin-off of positivism. The opposite

1 Haggenmacher (1983: 472–3) identifies a type of jusnaturalism that is both legalistic and positivistic in the *Decretum Gratiani*. The *Decretum* (twelfth century) was part of the *Corpus Iuris Canonici*, that retained legal force until 1917, when it was

is true. Whilst legalism may give rise to positivism, it is not, however, conceptually related to it.

I will not enter into the discussion sparked by the Weber thesis. Protestantism and capitalism may have met upon some favourable historical circumstances, so that the former may have strengthened the influence of the latter, both combining into legalism.[2] More interesting for our purposes however is the exploration of one of the basic roots of legalism, that is, nominalism.[3] In this respect, I propose to explore nominalism as the metaphysical setting for legalism, in which mediaeval nominalism in both its philosophical and theological versions plays a key role.

Nominalism has many variants and articulations (Largeault 1971: 7–43). The revival of the interest in it, combined with its positive assessment since the middle of the last century, is at odds with the critical evaluation of nominalism as a degeneration from late mediaeval scholastics, more specifically Thomism.[4]

While the renewed interest in nominalism saw its importance in the focus on logic rather than metaphysics, Heiko Oberman has drawn attention to the fact that 'Nominalism is not a doctrinal unity, but a common attitude, on some points at least, of remarkably different strands' (Oberman 1960; see also Michalski 1927; Vignaux 1948). An aspect of this common attitude which is crucial is the interpretation of

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replaced by a new Code. Haggenmacher's interpretation of Grotius for its part considers his jusnaturalistic theory as both legalistic and voluntaristic (ibid.: 520). As regards legalism in contemporary natural law philosophies, see Johnson 1987. Shklar for her part (1986: 106) argues that 'The argument between natural lawyers and positivists is thus essentially a family quarrel among legalists.' She adds to that that both the positivist and the natural law program are equally legalistic (ibid.: 123).

2 Max Scheler (1964) has suggested an intellectual relationship between Franciscan rationality, hence nominalism, and the emergence of capitalism. On the relationship between nominalism and economics in the classical era (Hume, Smith et al.) see Largeault 1971. For an empirical test of the Weber thesis that Calvinist Protestantism induced capitalism or adherence to individualistic free-market principles, see Barker and Carman, 2000.

3 The aspect of mediaeval religion and Protestantism is often neglected in Weber's scholarship; see Kaeler 1996.

4 For the renewed interest in mediaeval thought last century, see the excellent overview of Knowles 1947. A survey of the most important scholarly work is found in Courtenay 1990: 11–24. On nominalism as a reaction *vis-à-vis* mediaeval Thomism, see Villey 2003: 204 ff. On the idea that late mediaeval philosophy is a disintegration and decline of philosophy in general, see among others, Gilson 1955: 489: ' ... the consequence of Ockhamism was to substitute for the positive collaboration of faith and reason which obtained in the golden age of scholasticism, a new and much looser regime in which the absolute and self-sufficient certitude of faith was only backed by mere philosophical probabilities.' See also Gilson 1999: 25–72. This position is criticised in, among others in Oberman 1978: 80–93 (pointing to the myth of the 'Thomist phalanx'); Moody 1958; Ginascol 1959; Leff, 1956; Lindbeck 1959. For a recent view on the decline or disintegration of post-Thomist metaphysics, see Bastit 1997.

God's omnipotence, from the thirteenth century onwards (Oberman 1960). This new interpretation had a particular influence on the position of the Church, as well as on Christian metaphysics. Protestantism, with legalism in its wake, may be considered a conceptual offspring of nominalism. What are usually held to be the characteristics of Modern philosophy as Descartes initiated it – individualism, rationalism and freedom – are actually products of late mediaeval theology in which nominalism takes root. They are, as I will argue throughout this chapter, conceptually related. In chapters 2, 3 and 4, I will come back to individualism, rationalism and freedom respectively and offer a contextualised interpretation of these concepts.

Nominalist Metaphysics

On a rough characterisation, a nominalist metaphysics deals with language and discourse while realistic metaphysics deals with things themselves.[5] The latter therefore claims to provide a direct access to reality while the former only provides an indirect one; I will call them 'direct access' and 'indirect access' theories respectively. The difference between direct and indirect access theories is the location of concepts, that is, as being respectively outside or inside the mind. This involves adopting a metaphysical position in that it affects the whole of reality and its ontological status.

Like its realist mediaeval forerunners, nominalism considers the relationship between theology and philosophy to be a hierarchical one. In this respect, philosophy includes the belief in God as the highest cause, that is, the source of being of all beings. The *credo in unum Deum omnipotentem* is capable of different rational explanations, depending on the relationship between intellect and will in the Supreme Being. The realists' interpretation boils down to God's unique access to the *lex aeterna* containing the order of the world. Upon revelation, God has made part of the *lex aeterna* accessible through the *lex divina* expressed in the Scriptures.

On Aquinas' view for example, *ens et bonum convertuntur*: what is is at the same time what it ought to be.[6] This is at its maximum in God or the *Ens realissimum* on whom all being depends. Any being forms part of the totality, the

5 This stems from the first version of nominalism in Abelard; see Vignaux 1931: 717–33; Largeault 1971: 79–93. A reference work in the history of philosophy is Coppleston 1993a for the controversy concerning universals up to Duns Scotus, and Coppleston 1993b after that period. See also Cranz 1974: 95. Referring to Abelard's positions, Cranz writes: ' ... the mind 'legislates' concepts through which it can think *about* things' (italics in original). For a similar position, see Ozment 1974: 78.

6 Aquinas, 1898: q. XXI, a. 2 ('Utrum ens et bonum convertantur secundum supposita'), 8: ' ... impossibile est aliquid esse bonum quod non sit ens; et ita relinquitur quod bonum et esse convertuntur.'

relation with which provides its *telos*. The order of totality is the harmony God created. He does create what he creates because it is the best possible world he could create. Whether he created the world according to a first plan or *lex aeterna*, or whether he first developed a plan on the basis of which he then started creating, is of the utmost philosophical importance.

If the order of the world coexists with God it is therefore true. What matters in a realist – mainly Thomist – metaphysics is that God acts according to a plan that, logically speaking, precedes action. If God creates the world without a pre-existing plan, or when he acts according to a plan resulting from his own will – this is roughly speaking the version adopted in Spanish Scholastics in the sixteenth century – the status of reality is fundamentally different. Creation without a pre-existing plan is generally speaking what characterises the nominalist approach.

A fundamental metaphysical issue related to this point concerns the relationship between God's intellect and his will. It is a philosophical evergreen *par excellence*: is what God orders good because he wants it or does he order it because it is good? This problem is known as the Euthyphro problem (Plato 1943: 35 ff.) to which I will return later in this chapter. This question again articulates an aspect of the difference between nominalism and realism. If God wants what is good, he wants it because it is good. This is what the realist position comes to. If, on the contrary, what God wants is good, and it is good because he wants it, we face the nominalist position.

Apart from the distinction between direct access and indirect access theories, and the Euthyphro problem, there is yet another way of characterising the differences between realism and nominalism. This consists in saying that what the faithful believes in – that is, God – can turn into the object of rational thinking. The faithful believes in God as a matter of revelation and tradition, including the authoritative interpretation of the content of faith by the Church. Another perspective is that the faithful believes in God and recognises his dependence upon God as a matter of irrational submission to the source of all Being.

Both positions can be combined with a rational inquiry into the nature of God. This is different from the religious perspective and the personal relationship this involves between God and the faithful. From the nominalist perspective, the two perspectives are not only compatible; they are mutually dependent. The realist may however object that an inquiry into faith apart from authority and tradition is heretical.

What characterises nominalism at this stage is the articulation of thinking as a purely *human* experience. It involves the unfolding of the rational capacities of a limited mind. It is limited because it is created. Without creation it could not exist unless it is God's; and because God is unique, only he can be as he ought to be, that is, perfect. Nominalist metaphysics therefore takes a critical attitude toward human reason, the speculation of which in scholastics is no longer considered rationally warranted. The revealed truth of Christianity in other words should no longer be obscured by speculation.