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Philosophical Questions and Perplexing Cases in the Law

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Je ne sçaurois laisser passer cette occasion sans vous entretenir, Monsieur, de quelques meditations que j'ay eues depuis que je n'ay pas eu l'honneur de vous voir. Entre autres j'ay fait quantité des reflexions de jurisprudence, et il me semble qu'on y pourroit establir quelque chose de solide et d'utile, tant pour avoir un droit certain (ce qui nous manque fort an Allemagne et peutestre encor en France) que pour établir une forme de procés courte et bonne.

Leibniz to Arnauld, 14 July 1686 (G II 60).

Sed juris incertitudini mederi difficilius est. [But to remedy the uncertainty of the law is harder]

Leibniz to Kestner, 5 September 1708 (D IV, 3, 254).

Foreword

Why translate two of Leibniz's first academic writings, the works of a young university student? The most obvious answer is: because this young student was Gottfried Wilhelm Leibniz. But there are also other, less obvious reasons.

The most important of these reasons is the genuine intellectual interest these writings elicit, and in particular the freshness and originality of Leibniz's reflections on what we have called "legal puzzles." These fall under a range of legal issues to which Leibniz in these two short works applies his logical skills (still developing but already considerable, given his amazing precocity). There are puzzles resulting from cases of apparent conflict between law and philosophy (the latter broadly understood to comprise not only metaphysics but also mathematics, the empirical sciences, and theology). These puzzles sometimes arise from the fact that the same terms are used in different ways in philosophy and in law. Other times the puzzles arise from the fact that a certain principle is assumed to have universal application, while its use is only justified under particular pragmatic conditions, or from the fact that lawyers and jurists work within a defective conceptual framework. Some puzzles result not from an apparent conflict between law and philosophy but from the need to provide a deeper logical analysis of a conceptual issue. And finally there are cases which provide proper legal puzzles, i.e., those cases whose solution is doubtful because of the convoluted logical form of dispositions (expressions of intent) or because of a conflicting priority relationship. In addressing all these different kinds of puzzles, Leibniz always dissects the problem with the greatest clarity, disentangling its different aspects, and then proposes solutions, always reasonable and sometimes surprising. And he does not refrain from peppering his intellectual acrobatics with some humorous comments.

We will not comment here on the specific issues addressed in the two works, since we have included extensive comments introducing each section of our translations. These comments we have provided to make Leibniz's reasoning more accessible to the contemporary reader, who might have some difficulty extracting our young lawyer-philosopher's subtle analyses from his writings, cast in the style of the legal and philosophical commentaries of the time. But we believe that these puzzles should be considered not merely as an object of philologico-historical

interest, but also and especially as living examples of legal-philosophical reasoning, whose understanding requires an active engagement, rewarded by the intellectual enjoyment of following the processes of Leibniz's brilliant mind.

Another reason for translating these two youthful writings is that they usually receive little attention in works concerned with the development of Leibniz's thought (see, for instance, Mercer 2001: 24, 45–6, and Antognazza 2009: 61–2, 65–6), and therefore these writings remain largely unknown. On the other hand, these early writings by Leibniz (among the few works by him published during his lifetime) have recently attracted increasing scholarly interest. From 1998 to 2009 there appeared the first modern-language translations of Leibniz's *Doctrina conditionum* (Leibniz 1998), *Disputatio juridica de conditionibus* (Leibniz 2002), *Nova methodus discendae docendaeque jurisprudentiae* (Leibniz 2003, 2012), and *Disputatio de casibus perplexis in jure* (Leibniz 2009). In the same period, Leibniz's youthful legal dissertations increasingly came under the focus of many Leibnizian scholars (among whom Armgardt 2001, Roinila 2007, Dascal 2008, Boucher 2008, Thiercelin 2008, Vargas 2008, Johns 2009, and Thiercelin 2011). But there still does not emerge from this body of work a comprehensive picture of those dissertations and of their role in Leibniz's intellectual development. We hope the present translations will contribute to completing such a picture.

The volume has been jointly edited by its three authors, who have translated the two Leibnizian works. Alberto Artosi and Giovanni Sartor have written the Introduction (apart from Sect. 2), as well as the comments introducing the single sections of Leibniz's two works. Bernardo Pieri has written Sect. 2 of the Introduction, the Bio-Biographical Note and the footnotes and endnotes, and has also prepared all Annexes. A special thanks is owed to Filippo Valente for copy-editing the entire volume. Moreover, we are happy to include Stuart Brewer's essay, "Law, Logic and Leibniz: A Contemporary Perspective," which provides a much needed link to the current jurisprudential discussion.

Abbreviations

A G. W. Leibniz, *Sämtliche Schriften und Briefe*, ed. German (formerly Prussian) Academy of Sciences at Berlin. Darmstadt: Reichl, 1923- (reprint Hildesheim: Olms, 1972-). Cited by series, volume, and page, e.g., A VI/1 347.

AG G. W. Leibniz, *Philosophical Essays*, ed. and trans. R. Ariew and D. Garber. Indianapolis: Hackett, 1989.

D *Gothofredi Guillelmi Leibnitii Opera Omnia. Nunc primum collecta, in Classes distributa, praefationbus et indicibus exornata*, ed. L. Dutens, 6 vols. Genevae: Apud Fratres de Tournes, 1768 (reprint Hildesheim: Olms, 1989). Cited by volume, part, and page, e.g., D IV, 3, 253.

FC G. W. Leibniz, *Nouvelles lettres et opuscules inédits*, ed. A. Foucher De Careil. Paris: Durand, 1857 (reprint Hildesheim: Olms, 1971).

G *Die philosophischen Schriften von Gottfried Wilhelm Leibniz*, ed. C. I Gerhardt, 7 vols. Berlin: Weidmann, 1875–90 (reprint Hildesheim: Olms, 1965). Cited by volume and page, e.g., G II 60.

GR G. W. Leibniz, *Textes inédits d'aprés le manuscrits de la Bibliothèque Provinciale de Hanovre*, ed. G. Grua. Paris: Presses Universitaires de France, 1948 (reprint New York: Garland, 1985).

L G. W. Leibniz, *Philosophical Papers and Letters*, ed. and trans. L. E. Loemker, 2nd ed. Dordrecht: Reidel, 1976.

R G. W. Leibniz, *Political Writings*, ed. and trans. P. Riley, 2nd ed. Cambridge: Cambridge University Press, 1988.

Introduction

Biographical Background

Gottfried Wilhelm Leibniz was born in Leipzig on July 1, 1646, into an orthodox Lutheran family steeped in academic and legal tradition. His father was a professor of moral philosophy at the local university, where he also served as registrar.[1] His mother was the daughter of a renowned lawyer,[2] and after her parents died, she came under the guardianship of the distinguished law professor Quirinius Schacher. His maternal aunt was married to the eminent jurist Johann Strauch, who would exercise a considerable influence in shaping Leibniz's legal vocation.[3] In 1661, Leibniz enrolled in the University of Leipzig, where in 1662 he received a bachelor's degree in philosophy, for which he wrote his first academic dissertation. This work was submitted in the canonical form of a disputation[4] held in June 1663 under the chairmanship of Leibniz's first teacher, Jakob Thomasius,[5] and was

[1] This university post may be to account for the frequent misconception that Leibniz's father was (or was *also*) a lawyer.

[2] Wilhelm Schmuck, whose legal library was incorporated into the library of Leibniz's father.

[3] Johann Strauch is mentioned in Question VII of the *Specimen* as "the most noble Dr. Strauch, now Proto-Syndic at Brunswick, my relative and very honoured patron". In Leibniz's early legal writings, Strauch is also mentioned in the *Disputatio juridica de conditionibus* (see note 8 below) and in the *Nova methodus discendae docendaeque jurisprudentiae* (A VI/1 347).

[4] The *disputatio* was the standard method of examination for access to the various academic degrees. It consisted in a public discussion of a number of theses, with one disputant arguing *pro* and the other arguing *contra* (a closely related issue is addressed in Question II of the *Specimen*)—all this under oversight of a chairman whose role was to ensure compliance with the rules of disputation.

[5] Jakob Thomasius (1622–1684), the father of Christian Thomasius, was professor of rhetoric, dialectic, and moral philosophy. He is mentioned in Question VIII of the *Specimen* as "our Illustrious Thomasius, my preceptor and highest mentor," and again in Question XII as "our Thomasius ὁ θαυμάσιος" (a witty pun on the word *Thomasius*, spelled *thaumasios*, meaning "wonderful," so as to give "wonderful Thomasius"). Thomasius is also mentioned in *On Perplexing Cases*, IV, a propos of "a course he taught in 1662 in Leipzig on Machiavellism." On Thomasius and his importance to Leibniz's intellectual development, see Mercer (1999: 28–32).

later published under the title *Disputatio metaphysica de principio individui* (Metaphysical disputation on the principle of individuation).[6] The *Disputatio metaphysica* inaugurates the series of Leibniz's early publications, to which the works here translated belong. The following passage illustrates the way education was set up at German universities when Leibniz was studying in Leipzig:

> Like most of his learned countrymen, Leibniz's first published works were versions of the academic disputations required to mark the various major stages of his higher education. Although many of the students who matriculated in seventeenth-century universities chose to sidestep formal degree studies for one reason or another, the ordinary formal course of study began with a Bachelor's degree in the general "arts" or "philosophy" course and then followed this with higher degrees in philosophy or – far more normally – with Bachelor's, Master's and Doctoral degrees in one of the three "higher faculties" of theology, law, or medicine (Antognazza 2009: 57).

In October 1663, Leibniz went back to Leipzig after a summer term at the University of Jena (where he met Erhard Weigel).[7] Faced with the dilemma whether to complete his studies in philosophy or move on to one of the higher faculties, he decided to do both, simultaneously enrolling in the law faculty of his native Leipzig, where he began his legal apprenticeship under professors Quirinius Schacher and Bartholomaeus Schwendendörffer. As Leibniz himself would later recall in his biographical sketch: "I felt that my prior study of history and philosophy made jurisprudence very easy to acquire, so that I had no difficulty in understanding the laws, and since I needed not linger over theory, which I despised for its easiness, I turned my attention to the practice of law" (FC 383). He adds that he was intrigued by the role of the judge, but that he despised the lawyers' chicanery, and that for this reason he had never wished to plead in court.

In 1664, Leibniz earned his Master of Philosophy, and that same year he defended and published his dissertation, *Specimen quaestionum philosophicarum ex jure collectarum* ("Specimen of Philosophical Questions Collected from the Law"), in which he brought his recent legal training to bear on his philosophical interests. In the meantime he visited his uncle Johann Strauch in Brunswick. The illustrious scholar was struck by the young man's rare talent and warmly

[6] A VI/1 3–19. The work addressed the classic Scholastic issue of the nature of individual substance.

[7] Erhard Weigel (1625–1699) was professor of mathematics and astronomy. He is mentioned in Question XVI of the *Specimen* as "the Illustrious Weigel, professor of Mathematics in Jena, my preceptor and revered patron", as well as in *On Perplexing Cases*, II, where Leibniz mentions Weigel's main work, *Analysis Aristotelica ex Euclide restituta* (1658): see note 54 below (on Weigel, see also notes 32 and 52 below). For an account of Weigel and his influence on Leibniz, see Mercer (1999: 33–35). Interestingly, in Question VII of the *Specimen* Leibniz mentions another professor at Jena, one "Dr. Posner, professor of Physiology in Jena," along with his work *Dissertatio de principatu partium*. This Posner is Caspar Posner, Sr. The work cited is almost certainly Posner's *Disputatio physica de principatu partium in corpore animalium*, published in Jena in 1663. According to Busche (1997: 104), Leibniz's reference to Posner may be evidence that during his summer semester in Jena he attended Posner's medical seminar.

encouraged him to pursue the study of law.[8] In September 1665, Leibniz earned his bachelor's degree in law, for which he wrote the dissertation *Disputatio juridica de conditionibus* (Juridical disputation on conditions) under the supervision of Schwendendörffer.[9] A few months later, on March 17, 1666, he earned his habilitation in philosophy with the first part of what was to become the *Dissertatio de arte combinatoria* (Dissertation on combinatorial art),[10] published in the same year.

Immediately thereafter, he turned to the study of law, working on his dissertation for the degree of Doctor of Law. Astonishingly, the law faculty refused him the title for reasons that are unclear: perhaps the scheming of some older students or the dean's wife's ill will toward Leibniz.[11] As a result, in October 1666, Leibniz transferred to the law faculty of the University of Altdorf (near Nuremberg), where in short order he completed and submitted his doctoral dissertation, *Disputatio inauguralis de casibus perplexis in jure* ("Inaugural Dissertation on Perplexing Cases in the Law"). In February 1667, at the age of 21, Leibniz obtained his doctor's degree and, having declined an offer for an academic position,[12] he set off for Frankfurt. On his way there, "from a guesthouse to the other, without books," he wrote his first (and only) jurisprudential treatise, *Nova methodus discendae docendaeque jurisprudentiae* (A new method for learning and teaching jurisprudence),[13] through which he planned to gain favour with the prince elector of Mainz. Indeed, this new work made such a good impression on the prince elector that he enlisted the young scholar in his service by appointing him assistant to his *Hofrat* (court counsellor), Hermann Andreas Lasser, who was working to reform the electorate's legal code. In 1669, at the age of 23, Leibniz was appointed assessor (i.e., judge) to the High Court of Appeals,[14] notwithstanding his Protestant persuasion (the court of Mainz was Roman Catholic). This was the first of a series of increasingly prestigious offices he would hold as a jurist.[15] In the same year, he collected his first three legal dissertations into a single volume under the title

[8] See Strauch's letter to Leibniz of 6 July, 1665 (A VI/1 124). Leibniz acknowledges his debt to Strauch in the preface to the *Disputatio juridica de conditionibus* (A VI/1 101).

[9] The disputation was held in two sessions, in July and August 1665, and published in the same year under two separate titles: *Disputatio juridica de conditionibus* (A VI/1 97–124) and *Disputatio juridica posterior de conditionibus* (A VI/1 125–50).

[10] A VI/1 163–230.

[11] Aiton (1985: 65).

[12] This is Leibniz's first manifestation of that "preference for a career in the world rather than in the academy" (Mulvaney 1994: 413), a preference that would keep him away from the universities throughout his life.

[13] A VI/1 259–364. The reference to the extemporaneous writing of this work ("*inter diversoria, sine libris*") is on p. 292. See also Leibniz's letter to Placcius of 10 May, 1676 (A II/1 260).

[14] This was the electorate's highest tribunal.

[15] *Hofrat* in Hanover in 1677, *Geheimer Justizrat* (privy counsellor of justice) in Hanover in 1696 and in Brandemburg in 1700, privy counsellor of justice to the Russian tsar Peter the Great of Russia in 1712, and *Reichshofrat* (member of the Imperial Aulic Council, one of the empire's two higher appeals courts) in 1713.

Specimina juris (Specimens of the law). This ends our story.[16] In the following sections we offer an overview of Leibniz's early legal thinking. But first, in order to provide the proper setting, we will paint, at least in outline, a picture of the state of the law in early modern Europe.

Law in Leibniz's Time[17]

When Leibniz made his debut as a jurist, the legal landscape in Western Europe was marked by divergent, albeit concurrent, trends. On the one hand was the advent of new sources of law, especially the legislation enacted by national monarchies, coupled with the disruption of the medieval ideal of the unity of the *respublica christianorum* (republic of Christians) brought about by the Papal Schism – two forces that had been conspiring to undermine the *ius commune*, leading to its progressive confinement to the role of a mere complement to the different *iura municipalia* (i.e., the municipal laws of states and cities). In Germany, in particular, no sooner did the *ius commune* reach its heyday – with its reception through the institution of the Imperial Chamber Court (the (*Reichskammergericht*)[18] – than its influence began to wane. Even so, partly on account of the empire's inherent weakness, and partly on account of its fragmentation into a plurality of states subject to powerful municipal particularisms (every city had its own senate, council or parliament, and courts), the judges became increasingly powerful, so much so that they lost sight of the keen medieval awareness of the judge's subordination to the law.[19] On the other hand, those concerned to secure the certainty of the law often pinned their hopes on the absolutist pretensions of the sovereigns, who at that time, especially after the Peace of Westphalia (signed just 2 years after Leibniz's birth), were keen to appropriate the law by reducing it to their own authoritative statements. This process had started in the late fifteenth century and can be regarded as epitomized by the fate of the closing remark in Bartolo da Sassoferrato's *Tractatus de regimine civitatis*: "So we see that some things concerning the tyrant

[16] Leibniz's Mainz period ended with his departure for Paris on 19 March, 1672. He would never return to Mainz.

[17] This section is by Bernardo Pieri.

[18] The Imperial Chamber Court was among the first central courts of the empire. It was established in 1495 by Emperor Maximilian I (1486–1519) at the request of the Diet of Worms, which sought to restrain the emperor's personal influence in legal (and especially feudal) matters. Indeed, half of its members were lawyers trained in Roman law, so as to offset the number of those who were members by hereditary privilege, and through this composition the court was instrumental in the final adoption of Roman law as the common law of the Empire, in the form of both the Justinian *Corpus iuris* and the exegetical and doctrinal works of the medieval jurists.

[19] The power of the supreme state courts was such that the judgments they delivered were mostly based on what came to be known as the principle of "equitable arbitrariness" (*secundum conscientiam*).

pertain to the jurists" (*ideo de tyranno aliqua ad juristas spectancia videamus*).[20] This remark, appearing in Bartolus' fourteenth-century manuscripts, disappeared from the printed editions, reflecting the modern princes' unwillingness to submit to the jurist's judgment and to grant jurists an area of exclusive competence (Bellomo 1994: 215).

Roman law had been under attack for over two centuries. First came the sixteenth-century rationalists, who called into question the classic Roman partition of law into the three domains of *personae*, *res*, and *actiones* (respectively dealing with individuals and their family relationships; with things, property, and contracts; and with the means by which to claim and protect rights),[21] and who in the footsteps of the Scuola Culta,[22] and drawing on the humanistic canons (reevaluated most notably in light of Melanchthon's work), objected to the arrangement of the Pandects on the ground that it was in such disarray as to make them ineffective. It was Johann Apel (1486–1536)[23] who led the way, by inspiring new attempts to systematize the Pandects, especially on the part of Sebastian Derrer († 1541),[24] Melchior Kling (1504–1571),[25] and Conrad Lagus (1500–1546).[26] Lagus was among the first to reclaim the philosophical dimension of the law,[27] a dimension he viewed as linked to its positive one (which he termed "historical"), in that "the form of the institutes of positive law derived from the natural source viewed as a necessary foundation" (Birocchi 2002: 15). To this end Lagus invoked the old distinction between a *ius naturale primaevum* (the law common to all animals) and a *ius naturale secondarium* (the Romans' *ius gentium*, which like other jurists he called *ius divinum*)[28] and claimed that the latter included not only what had been laid down in the Scriptures but also what "springs from the judgment of reason" (*ex iudicio rationi nasci*).[29] In this way, the law's systematic order came to be viewed as the realization of God's design through human reason.

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[20] The critical edition of Bartolus's treatise is found in Quaglioni (1983).

[21] This partition would also be criticized by Leibniz in the *Nova methodus* on the ground that it is a factual, not a legal, partition (A VI/1 295–9).

[22] The term *Scuola Culta* designates the humanistic strand of legal science, which paved the way for the application of philology and of historical critique to the study of law.

[23] Author of *Methodica dialectices ratio ad jurisprudentiam adcommodata* (Norimbergae, 1535) and of *Isagoge per dialogum in quatuor libros Institutionum* (Wratislaviae, 1540).

[24] Author of *Iurisprudentiae liber primus, instar disciplinae institutus et axiomatibus magna ex parte conscriptus* (Lugduni, 1540).

[25] Author of *Enarrationes in libros IV Institutionum* (Francoforti, 1542).

[26] Author of *Iuris utriusque traditio methodica* (Francoforti, 1543). This work was published without the author's permission. He replied the following year with a *Protestatio*. On this whole affair, see Theuerkauf (1968: 200 ff.).

[27] He did so with Johann Oldendorp, author of *Iuris naturalis, gentium, et civilis eisagoge* (Cologne, 1539).

[28] This distinction is also espoused by the young Leibniz in Question VIII of the *Specimen*.

[29] Lagus (1543: 11), quoted from the Lyon edition of 1566.

Along a similar path, the natural lawyers of the seventeenth century worked out an objective and rational conception of natural law entailing a sharp distinction between law and theology.[30] Indeed, there are still in Grotius deep influences of the theologians of the School of Salamanca,[31] as well as traces of the method of the Scuola Culta (Birocchi 2002: 169). But with Thomas Hobbes (1588–1679), Spinoza (1632–1677), and especially Samuel Pufendorf (1632–1694) and his most prominent follower, Christian Thomasius (1655–1728), the need for a separation between law and theology became a cornerstone of the natural law doctrine, along with the belief that the law's basic principles should be approached scientifically through the application of mathematical methods.[32] To "define" and to "systematize" became widely accepted scientific imperatives, and the certainty of the law was increasingly understood as something that could be attained *more geometrico*.[33]

The systematic construction of natural law as the science-based "law of reason" was supposed to replace Roman law,[34] but jurists still received a predominantly Romanist training, and Roman law, especially in Germany, was firmly rooted as the common law of the land in judicial practice.[35] Although by that time this common law could no longer be identified with the Justinian *Corpus iuris* (still less with

[30] The seventeenth-century revival of natural law is part of a more pervasive cultural process begun at the outset of the sixteenth century with the publication of Jacopo Sannazzaro's internationally renowned poem *L'Arcadia* (1502). Drawing inspiration from Virgil's *Bucolica* (in turn inspired by Theocritus), Sannazzaro depicted the idyllic world of shepherds and nymphs as a moral allegory meant to conjure up an imaginary Golden Age. The fondness for this fanciful world is evidenced by the wide success attained by literary works like Torquato Tasso's *Aminta* (1573), Giovan Battista Guarini's *Pastor fido* (1590), and Giovan Battista Marino's poems (which were translated into English, German, and even Dutch), as well as by emblematic paintings like Nicolas Poussin's *The Shepherds of Arcadia*, not to mention an endless series of musical works.

[31] The theological school of the University of Salamanca was founded by Francisco de Vitoria (1492–1546) and included among its leading figures the theologian-philosopher-jurists Domingo de Soto (1494–1560) and Francisco Suarez (1548–1617). The school sought to reconcile Aquinas's thinking with the humanistic view of man and his relation to God.

[32] An example was the view of both Pufendorf and Weigel that moral entities (*entia moralia*) were subject to mathematically determinable laws, precisely in the manner of physical entities. On Weigel, see note 52 below. Pufendorf's "geometric" approach to jurisprudence (in his *Elements of Universal Jurisprudence*) is mentioned by Leibniz (together with Hobbes's *Elements of Law and of Citizen*) in the *Nova methodus*, II, 6 (A VI/1 295).

[33] Although Leibniz would himself embrace this view, he was always consistently hostile to the idea of a separation between law and theology because of his belief, first stated in the *Dissertatio de arte combinatoria* (A VI 190) and then in the *Nova methodus* (A VI/1 294), that theology is part of a universal jurisprudence embracing laws both human and divine.

[34] In the fragmented Germany, it was especially Hermann Conring (1606–1681) who made the case against Roman law, with his influential *De origine iuris Germanici* (Helmstedt 1643), eulogizing a purportedly native German law founded on time-honoured customs uncorrupted by Roman law. Conring, an eclectic scholar of Aristotelian lineage, established contacts with Leibniz after receiving a copy of the *Nova methodus*, and he also corresponded with Leibniz in the 1670s.

[35] See note 18 above.

canon law, which had entirely lost its vitality),[36] the latter survived as the *ratio scripta* of the law,[37] providing the underlying legal unity the new centralizing states were still unable to establish. Even so, throughout Leibniz's long legal career, Roman law remained the object of conflicting stances. Whereas Georg Adam Struve (1619–1692), in his 1670 *Jurisprudentia romano-germanica forensi*, endeavoured to fit the principles and institutes of German law into the dogmatic and institutional scheme of Justinian law, Pufendorf and Christian Thomasius carried on Conring's effort to lessen the influence of Roman law on German judicial practice.[38] Toward the end of his life, Leibniz took up a correspondence with Heinrich Ernst Kestner (1671–1723),[39] who in *De statu jurisprudentiae, necessariaque juris naturalis et civilis conjunctione* (1699) had invoked Leibniz in support of his criticism of Roman law and his preference for natural law and traditional German law (G 682). Leibniz replied that, although the Roman laws have much that is "obscure, perplexing and redundant," they must be considered the basis of the law: going back to ancient German laws, with their innumerable traces of barbarism, would be tantamount to feeding on acorns after having harvested corn (*inventa fruge glandibus vesci*). On the other hand, the body of the Roman laws could be reduced to a few general rules "in which both equity and meaning would appear in a clear light" and "all the variety of cases" would be "encompassed as if it were encircled with toils."[40] That is what Leibniz had dreamed of from the time he "first set [his] feet in the paths of jurisprudence,"[41] and what he kept on dreaming of for the rest of his life. In his last letter to Kestner, written just a few months before dying, Leibniz reaffirmed all the basic tenets of his lifelong meditation on law:[42] his admiration for the Roman jurists and the quasi-geometrical subtlety of their reasoning, an admiration first expressed in the preface to *De conditionibus* (A VI/1 101); his assimilation of Roman law to natural law, a view expounded as

[36] In the sixteenth century, canon law had "lost its primacy as a normative science", and owing to its increasing positivization, it "was turning more and more into an ecclesiastical discipline" (Prodi 2000: 190).

[37] This is probably what Leibniz was referring to in his letter to Kestner of 1 July, 1716, where he commented that "in the meantime [. . .] the best course is to consider the corpus of the old laws as having for us the force not of law but of reason (*vim non legis, sed rationis*) and, as the Gauls say, of great Doctor" (D IV, 3, 269). On Leibniz's exchange with Kestner, see note 39 below and the text corresponding to the note.

[38] According to Thomasius, the German peoples could dispense with Roman law because natural law and the law of nations, being the "dictate of right reason" (*dictamen rectae rationis*), were independent of Roman law (a position emphatically rejected by Leibniz), and the basic principles of law became established among these peoples before they even had any notion of Justinian law.

[39] D IV, 3, 253–69 (additions in G 681–99). This exchange lasted from 1708 to 1716, the year of Leibniz's death.

[40] Leibniz to Kestner, 5 September, 1708 (D IV, 3, 253–54). See Kestner's reply of 12 September, 1708 (G 682–85).

[41] Leibniz to Hobbes, 13/23 July, 1670. See full quotation at note 58 below.

[42] Leibniz to Kestner, 1 July, 1716 (D IV, 3, 267–69). It is odd that in summarizing this letter, Dascal (2008: 73, note r) misdescribes it having been written by Kestner to Leibniz.

early as in the *Nova methodus*;[43] and the need for a "concise, clear, sufficient new Code" that would bring order and certainty to the confusing multitude of laws, a code he had been concerned with enacting as a legal reformer,[44] ever since the days of the *Nova methodus* and his collaboration with Lasser.[45] It is now time to follow Leibniz in his first forays into jurisprudence.

The Quest for Certainty: Leibniz contra Judicial Discretion

When Leibniz wrote the *Specimen*, no particular connection was seen to exist between law and philosophy, still less between law and such domains of knowledge as physics and mathematics. Hence, the *Specimen* can rightly be regarded as the first evidence of Leibniz's impressive intellectual independence and originality. The young scholar's bold contention was that law needs philosophical underpinnings. For, as he writes in the Preface, "many places in [the] law would be an inextricable labyrinth without the guidance of philosophy." Having argued this point, he reexamines a variety of questions drawn from Roman law in a progression from logic to metaphysics going through mathematics, physics, physiology, and zoology.[46] This might not seem enough to conjure into being even the barest outline of a legal conception. But a careful reading of the text reveals the direction the young scholar was already taking. Leibniz's most important remark appears in Question II, where he discusses the vexed issue of the allocation of the burden of proof:

> Thus it is necessary to extract the truth from the deeds and from what has been proved in whatever licit way, so that the matter can be decided. From which it follows that the burden of proof should be imposed upon the party that can discharge it most easily, in order that the matter should not remain without a decision.

Two years later, we find Leibniz holding, with Plato, that

> in any state whatsoever a judicial matter is the better treated, the less is left to the discretion of the judge (*in arbitrio judicis*).[47]

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[43] See Sect. 5 below.

[44] Equally important for him, in advocating for enactment, was that this would do away with (or at least drastically downscale) judicial discretion in the interpretation and application of the law.

[45] See Leibniz's statement of the three requirements for a new legal corpus in the *Nova methodus*, II, 21 (A VI/1 306–7) and his 1668 project for a systematic reformulation of Roman law, *Ratio corporis juris reconcinnandi* (A method for restoring the body of law), probably written with Lasser (A VI/2 93–113). On Leibniz's codification projects, see Berkowitz (2005).

[46] The model for this endeavour is clearly the system of the sciences set out by the so-called Herborn encyclopaedists, and especially by Johann Heinrich Alsted in his 1630 *Encyclopaedia*. Alsted is mentioned in the Preface to the *Specimen* (another important Herborn philosopher, Johannes Althusius, is mentioned in *On Perplexing Cases*, I and IX). On the influence the Herborn encyclopaedists had on Leibniz, see Loemker (1961).

[47] *Dissertatio de arte combinatoria*, 39 (A VI/1 189, L 82).