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Meaning and Method in the Philosophy of Law

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MEANING AND METHOD IN THE PHILOSOPHY OF LAW†

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[Editor's Note

The editors of THE CATHOLIC LAWYER believe that two purposes may be served by presenting in these pages Monsignor Joseph Graneris' essay on the meaning and method of the philosophy of law.

This essay will serve to introduce to American lawyers other studies by the same author. Those studies, directed to specific problems in the relationship between natural law and positive law, will be presented from time to time in future issues of THE CATHOLIC LAWYER. Monsignor Graneris has authorized Father Cahill to translate and adapt his work for such presentation. The studies are rooted in the author's deep learning of the philosophy of St. Thomas Aquinas. He draws upon that learning, not merely to speculate about natural law or to develop its moral precepts, as most writers in the scholastic tradition have done, but rather to find in natural law the validating and quickening element of positive law.

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† This article, in its original form, was published as the introductory chapter of the author's work PHILOSOPHIA JURIS (1943).

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The essay, presented here out of its original context and in somewhat altered form, serves a more immediate purpose. It delineates clearly the concept of jurisprudence as a complex discipline which draws upon general philosophy, as well as upon legal science and legal history, to develop a reasoned philosophy of what law is and ought to be, and to implement that philosophy in the lawyer's art.

Every inquiry into jurisprudence offers a generalized view of law. The viewpoint taken by any inquirer, in his investigations and in his report of them, has for its major premise the inquirer's philosophy – the meaning he finds in man and the world.

Often, the major premise is inarticulate, in the inquirer's report and even in his own mind, so that one who reads his report is asked to accept the product of a philosophy without knowledge of the philosophy's character, and even without notice of its existence.

With increasing frequency, our contemporary writers in jurisprudence claim that their study of law has no philosophical premises. The disclaimer itself rests upon a philosophical postulate – that a philosophy of law is impossible, or that law is a phenomenon only and is adequately understood without philosophical inquiry.

While the jurisprudential inquirer's viewpoint on law is inspired by his philosophy, that viewpoint in turn directs the choice and use of method in the inquiry. A method whose scope and bent distort the object to be studied, or whose potential for aberration is not realized, can be as misleading to the inquirer and to his reader as a faulty philosophy.]

Philosophy in Learning

ARISTOTLE EXTOLLS THE STUDENT of metaphysics, saying that he is to be numbered among those wiser men "whose learning is not pursued for the sake of utility, but for the sake of learning itself."[1] Yet one should take care not to infer from this statement that the noblest of mental disciplines is to be accounted a useless study. The soul of man, though it is not the slave of his body, sustains the body in life. God does not exist to serve the world, yet the world's existence without God is inconceivable. So also, though usefulness is not the *raison d'etre* of metaphysics, for the science of metaphysics was not developed to serve utility, yet metaphysics is a necessary development of human thought. Metaphysics is born of that necessity by which the human mind is driven, as if by its own weight, to investigate the intimate nature of things and their ultimate causes.

The jurists throw out a question, "What is the use of the philosophy of law?", and the philosophers take it up in all seriousness: "Philosophy is beyond the useful, for it is necessary, indispensable, immanent. Indeed, one does not philosophize because he wants to, but because it is impossible not to philosophize."[2]

The force of this natural desire is so great and so broad, that whatever be the science to which a man devotes himself, he forever feels the insufficiency of his knowledge and is oppressed by that shortcoming, until he pursues his study into the realm of philosophy. The several sciences are like

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[1] ARISTOTLE, METAPHYSICS, Bk. 1, Ch. 1; *cf.* AQUINAS, COMMENTARY, Bk. 1, Lect. 1, n. 32.

[2] MAGGIORE, FILOSOFIA DI DIRITTO 8.

so many sides of a single mountain – from whatever side you scale the mountain, your ascent is imperfect and you are less than satisfied, unless you reach the summit. And that summit, from whatever side or science it be approached, is one and the same. It is philosophy, in which within the natural order of knowledge and prescinding from the supernatural, every science must achieve its perfection.

Philosophy in Life

What has been said about sciences in general is especially true of those which study human action. As long as we merely speculate, there is an apparent possibility of a skeptical approach, or at least one may entertain the illusion that he is not making judgments and choices. When, however, we begin to act, then we begin necessarily to struggle against the precepts of skepticism, and we are conscious of that struggle if our action is truly human. We do not act humanly except by the exercise of choice, we choose nothing except from the desire for a purpose, we do not set up purposes for ourselves unless under the command or influence of a settled way of conceiving and ordering our lives. This *way* is a synthetic or philosophical view of the universe, or this *way* is at least a necessary, though perhaps remote and subconscious, consequence of that view.

Human conduct, because it proceeds from choice, therefore drives the actor, not only out of physical inertia, but also out of that philosophical indifference in which the skeptics try to immure mankind. The spiritual-minded and the materialist, the atheist and the theist, the ascetic and the sensualist, rarely accord with each other in their aspirations or in their conduct, for in willing and in acting every man is led by his concept of the universe, so that his every deliberate action expresses his judgment and his conviction upon the purpose and value of human life and, therefore, upon the ultimate meaning of the universe of things. So true is this, that when *life* is understood in a human and active sense, the common dictum, "one must live first, and then philosophize," must give place to the truer statement, "to live is to philosophize."

It is not to be wondered at that all disciplines which directly study human conduct are under a greater necessity of ascending the high mountain of philosophy. The object they study, human conduct, implicitly contains philosophy, as if in its seed, and our minds, by an instinct of their own, feel that their knowledge of this object cannot become perfect until that implicit philosophy has been made explicit, revealing the meaning and the value of our conduct. A very clear example of this necessity is seen in the study of the law of crimes. Because that branch of the law is concerned with human conduct more evidently, more immediately, and more exclusively, than the other areas of law, the study of criminal law has always maintained more intimate and more manifest connections with philosophy. All jurists recognize the fact that philosophy strongly influences the penal law – that they dispute whether the influence it exercises is useful or harmful is another matter.

We have, in the foregoing, anticipated an objection which may be raised, "all law is oriented toward action, which is far removed from philosophy." In action itself, that is, in the very nature of human conduct, we find the strongest impulse to philosophical thinking, for our conduct grows out of philosophy, it has its foundations in philosophy, and its throws us into philosophical study.

Philosophy in Law and Law in Philosophy

It is indeed true that the lawyer's greatest need is for that art or skill by which he applies legal rules to facts, and that art may seem remote from the labored dicta of philosophers. Yet if that art is to have any solid foundation, it can never tear itself entirely away from philosophy; if it does so, it is reduced to a merely arbitrary and mechanical skill of word-weaving. Certainly, no lawyer is a lawyer of the first rank until he so thoroughly grasps certain philosophical principles that he can use them to clarify the enacted rules of law and apply those rules skilfully.

It is a datum of history that there have always been, between philosophy and law and between lawyers and philosophers, a mutual attraction and a mutual influence. Surely one cannot take too seriously Ulpian's claim which was placed in the very first line of the Pandects, as if it proposed or promised that the Corpus Juris should teach "the true philosophy."[3] But perhaps one should put even less trust in the words of the chief prophet of the modern "pure doctrine" of law, which promise us a jurisprudence uncontaminated by any ideological element, religious or metaphysical.[4]

We cannot blink the fact that many of the most serious philosophers, from Plato and Aristotle to Kant and Hegel, have found law among the objects of their consideration, and have often attributed to it a prime position in their studies. Among these we must count Cicero, who believed that his legal writings found favor because they drew upon philosophical wisdom.[5] Vico, when well advanced in the study of law, found himself compelled to go back to the philosophers, to learn not only moral doctrine but metaphysical discipline.[6] Geny, in his earlier work, could only describe the problems of positive law, and perceived that his powers were limited by a deficiency in philosophical knowledge. Having again studied philosophy, he undertook his great work, in which philosophical principles exercise profound control.[7]

Vico explains more fully the need for philosophy in legal studies in the prologue to his work *De Uno,* "All jurisprudence is rooted in reason and authority, upon these as a basis, jurisprudence professes to apply the enacted laws to the facts. Reason consists in the necessity of nature, and authority in the determinations of lawmakers. Philosophy explores the necessary causes of things, while history tells us what lawmakers have determined. And so the whole of jurisprudence is a coalescence of three parts — philosophy, history and the special art of applying law to facts."

Put in another way, the thorough student of law must have three endowments or accomplishments: a philosophy, which rationally deduces the highest principles of law from the necessary and ultimate causes of the universe; a science, which understands correctly the laws enacted by human determinations made in the course of his-

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[3] "For this cause are we called priests; we worship justice, we profess to know good and evil, separating equity from iniquity, discerning the lawful from the unlawful, making men desire goodness, not only by fear of penalties, but by the exhortation of rewards, professing, if I am not mistaken, the true philosophy and no counterfeit." D. I, 1, 1, § 1.

[4] Kelsen, *The Pure Theory of Law,* 50 L. Q. REV. 474, 480-85 (1934).

[5] CICERO, TUSCUL., Bk. 1, n. 3.

[6] VICO, AUTOBIOGRAFIA.

[7] GENY, SCIENCE ET TECHNIQUE 5, 10, 11, 19.

tory; and an art, by which enacted laws are applied to facts. One who has the science only may be called a jurist; one who has also the art may be an effective counsellor; one who has the philosophy, as well as the science and art, should be called a jurisprudent, for a man is prudent when he knows, not only singular facts and technical procedure, but also the universal principles of reason applicable to the case in hand. Because any student of law quite reasonably wishes to deserve the name jurisprudent, so that his science and skill will not depart from truth and justice, we hold with Cicero that "legal learning [should be] drawn deep from philosophy held dearly."[8]

For a lawyer to give his efforts to philosophical study is no useless enterprise. He will not come back empty-handed from the sources whence are drawn the life of the positive law and the vitality of the lawyer's art. His contact with philosophy will help him to recognize and escape that poorness of spirit which he finds so often oppressing him as he reads legal literature – the writing lacks the salt of philosophy and has lost its savor.

At this point, it seems needful to consider a little more carefully the peculiar character of the philosophy of law, and this we shall do by comparing it with other disciplines of the law and of philosophy, and by determining more closely the precise function and method of the philosophy of law.

Is There a Philosophy of Law?

Some divide philosophy into the pure and the specialized, and assign the philosophy of law to the latter category. This division does not entirely content us, for it creates at least one grave danger, that of confounding philosophy with an empiric application of conclusions drawn from philosophy. Just as science, when it is called "applied," is moribund because it is passing over into a mechanical art in which those who do not know science apply rules imposed by science, so "applied" philosophy loses more and more of the character of philosophy, and takes on the marks of an inferior discipline. Others divide philosophy into the general and the particular. The former considers the intimate character or the ultimate causes of beings in general, and the latter investigates the characteristics and causes of single classes of beings.

We prefer this division to the one suggested above, and we believe that the philosophy of law can be properly listed among the "particular philosophies," for its object of study is not being as such, but that particular historical phenomenon which we call the phenomenon of law.

We feel that this distinction can be maintained, though it is rejected by many moderns, especially the idealists, who say that philosophy has no parts, but only different problems, in whose solution the whole of philosophy is employed; indeed there are some who say that there is only one problem, though it shows itself in many forms, to whose solution the entire powers of philosophy should be constantly applied.

Certainly the parts of philosophy are bound together by a close nexus into a unity that is divided with difficulty; that unity arises from the fixed viewpoint from which the philosopher views any object, and from the constant influence of the principles governing the philosophical process, and this unity explains why in every philosophical system the solution of single problems

[8] CICERO, DE LEGIBUS, Bk. 1, n. 5.

seems to flow with, and almost to be imposed by, a certain necessity from the character and spirit of the system. From this it follows that the so-called particular philosophies do not live their own lives, independent of the general philosophy or outside the complete philosophical system; but one should not infer from this that the existence of particular philosophies is to be denied, provided that their particularity is premised only upon the particularity of the material objects they examine and provided, further, that the nature of that object is such as to require that the philosophical principles, though they remain always the same, shall be applied in a particular way.

Since the phenomenon of law presents characteristics which not only distinguish it from other phenomena, but which suggest peculiar problems to be resolved by philosophical consideration, and which require a special adaptation in the use of general philosophical principles, therefore we may say that the philosophical examination of the phenomenon of law is a particular philosophy or, what amounts to the same thing, we may make of this examination a special treatise, distinct from, though not independent of, general philosophy.

Legal Philosophy and World Philosophy

To clarify the meaning we attribute to the distinction between general philosophy and particular philosophy, it may be helpful to differentiate between the ascending and descending methods of philosophical study. The first rises from a consideration of beings to an investigation of their ultimate causes; the second descends from the ultimate causes to an explanation of beings.

It will occur to the reader that this double method is quite similar to the binary method of induction and deduction which is applicable in general philosophy or in any particular philosophy. In applying this double rhythm to the whole field of philosophy, it seems best that general philosophy take the ascending and particular philosophies the descending method.

In its first stage, philosophy strives to understand the universe of things, speculating about being as such and its most universal causes, of which the ancient philosophers enumerated four: the material, formal, efficient and final causes. In this effort, the philosopher does not tarry in an analytical consideration of single entities, for that is not needed for his purpose, but he views the universe synthetically and then hurries on to the heights of metaphysics; once arrived there, he, in one formula or even in a single word, comprehends the universe, and describes and explains it. Of these formulas, five are used most often in our time: materialism, evolutionism, idealism, pantheism, theism.

An example of this hurried ascent is found in that lucid article[9] of the *Summa,* a brief abridgment of all metaphysics and theodicy, in which St. Thomas ascends by "the five ways," to the first mover unmoved, to the first efficient cause, to the entity per se necessary, to the source of the goodness and perfection of all things, to the supremely intelligent something which directs all things to their ends. He examines no species of beings in any special way, but views them all at once from the most general aspects of motion, efficient causality, contingency, graded perfection, and finality; and from these common marks, as if by public highways, one terminus is reached, namely God, so that the whole

[9] AQUINAS, SUMMA THEOLOGICA, I, q. 2, a. 3.

metaphysical system of St. Thomas takes the character and name of theism.

Since one who has completed this philosophical ascent views in a single glance the whole world's constitution, he is prepared to consider the world's several parts, each in its relation to the whole; this consideration is the task of the return journey, the descent from the summit achieved in the synthetic process; this is the second phase of philosophical inquiry, in which the object of consideration is "this kind of being," the single classes of beings and their particular characteristics, which were neglected during the ascent.

We feel that in proceeding thus, the order of thought and learning is more securely preserved; the ascent to the metaphysical summit is not altogether impossible for one who begins in the analytical way, yet it certainly is much more difficult, as the recent unhappy history of so-called "scientific philosophy" shows; since that philosophy took the analysis of selected classes of beings as its point of departure, it could never break out of the bounds which it imposed upon itself at its inception; for this cause, though it assumed the name "philosophy," it never achieved universality, which is the true dignity and apex of contemplation which characterizes philosophy. Why it could not make that achievement is not hard to understand; unless one has seen a region from its mountaintop, he has difficulty in achieving a clear concept of the region's unity by laboriously plodding each of its ways and by-ways; that is to say, unless one has examined synthetically into the meaning of the whole universe, it will be nearly impossible for him to interpret the universe part by part. These are the reasons why we believe that, to the particular or analytical philosophies, the general, synthetic philosophy, rightly called "the prime philosophy," is a necessary prelude.

The Law of Liberty

When the philosopher, coming down from the mountain-top, begins his analysis, he finds all things divided into two great classes; the first embraces all things ruled by *necessity;* the other, all those which obey the laws of *liberty*. They are, respectively, the realm of *nature* and the realm of *spirit*.

Here, we can ignore all the further distinctions that may be made in the realm of nature, for *the law* which we are to study is not linked with natural necessity but with spiritual liberty. But we must attend to distinctions occurring in the realm of spirit, for they closely touch the object of our study.

First, the philosophers usually distinguish the consideration of *spirit itself* from the consideration of *spirit in its activities,* that is, psychology and its related disciplines, as set apart from the other areas of the philosophy of the spirit such as art, economics, ethics whose object is some activity of the spirit.

These activities of the spirit divide themselves into two classes, according as they have or have not connected with them a sense of *obligation*. Art is typical of the activities which are not connected with this sense; of the other kind there are three principal types: religion, morality, the law. Here we have three objects of philosophical speculation which comprise a distinct sector of the realm of spirit in which our liberty is under the yoke of obligation, and the law is one of these objects.

To state briefly the position of the philosophy of law within the universal philosophy, this discipline of ours is a particular philosophy having for its object one of the

spiritual activities in which the sense of obligation is found.

From what follows it may more clearly appear just what area of the province of activity we have described belongs, respectively, to religion, morality, and law.

The Science of Law — What Says the Law?

Legal studies can be distributed under three headings: science, history, and philosophy. Science considers laws in being, analyzing individual legal rules, explaining their meaning, their effects and their limits, so that Kant could say that the jurist knows only what is law, that is, what is determined by the law of a given time and place.

Yet one must recognize that scientific knowledge is influenced by the human mind's deep seated tendency to rise from the particular to the general. In legal science the effect of this generalizing tendency appears in four distinct phases.

In the first, particular enactments are explained merely analytically and expositorily.

In the second, the enactments which have a common object are collected and coördinated into a sort of unity, as a distinct legal institution, such as the domestic relations.

In the third phase, fundamental principles are drawn from the single enactments and institutions existing in the law of a given society, and from these principles a legal system is elaborated.

In the final stage of generalization, a higher unity is sought out and established by searching several legal systems for those general principles commonly contained and enunciated in those systems. This last step in progressive synthesis or scientific generalization is called, variously, jurisprudence, or the science, the doctrine, or the theory of law. The multiplicity of names is an indication of the legal scientists' uncertainty regarding the scope of their field. That uncertainty will be discussed later.

The History of Law — Whence Came the Law?

History considers laws in their making, investigating the evolution of law in successive times. It has the same generalizing propensity that we found in science. The propensity's effect in history shows itself in a series of stages roughly parallel to the stages of scientific generalization.

We will discuss only the last stage or level of historical study, for that comes closest to the level of philosophy. As historical inquiry broadens and deepens, the investigators manifest an increased intellectual impulse to discover organic connections between the diverse elements of the lives of the several peoples, and more easily find general evolutionary forms which are called the laws of legal evolution. All these discoveries and findings, taken together and reduced to a single system, comprise the highest level of history, called "ideal," or "eternal," or philosophical history, which parallels the theory of law mentioned in the preceding section.

Here, in the ultimate stage of historical inquiry, recurs the uncertainty of denomination mentioned in connection with the last stage of scientific inquiry into law. That uncertainty merits closer examination. It arises because different investigators give different value to the conclusions reached in the ultimate level of science and of history. Some regard the conclusions as mere general formulas, relative and therefore variable, and valid only for the legal systems from which they were drawn. But there are others who ascribe to these conclusions a universal validity, as principles

and doctrines valid always and everywhere, to which all possible legal systems must yield conformity and obedience.

This uncertainty in the interpretation of the ultimate conclusions of legal science and of legal history, while it explains the variety in denomination, reveals also a latent equivocation rooted in unclear perceptions of the concepts and respective boundaries of science, history and philosophy. To bring order out of this confusion, some remarks on philosophy should be added to what has been said on science and history.

The Philosophy of Law — What the Law Is and Should Be

Philosophy is the knowledge of things viewed in relation to their ultimate causes. The philosopher undertakes to explain things, not by their immediate or proximate causes, but by their mediate or remote causes and, thus, by their ultimate causes. This is the mark that fundamentally distinguishes philosophy from science and from history, for those two disciplines inquire into a thing's causes which are immediate and proximate, not into those which are ultimate.

The more remote a cause is within its series, the broader its scope of influence, so that as one's mind rises higher in pursuing an inquiry, it reaches causes which explain an even greater range of things, until it reaches the causes that explain all things and bring all into unity. Thus, an explanation of anything, if pursued to the ultimate, comes to relate that thing to the causes of all things, and to assign that thing to its proper place in the universe. Because philosophy consists precisely in this tracing to the ultimate, one may say that to philosophize on anything is to view it in its universal aspect. Whether the philosopher is treating of the material universe, or of any individual thing, or any class of things, the object he deals with is always taken, at least formally or methodically, under the aspect of universality – each object is considered in relation to the universal complex of beings and the universal causes of things

Because the object of philosophical inquiry is always universal, at least in its formal aspect, it follows that the inquiry's conclusions are universal. They are not limited to any number of things, nor even to things that exist or have existed or will exist, but they extend to all possible within that determined area of being which comprises the material object of the inquiry made by the particular philosophical discipline.

Since the examination of a thing under its universal aspect is naturally calculated to discover the principles or conditions which that thing must obey if it is to accord with the universe, and if the part is not to be at odds with its whole, we may say that philosophy differs from science and from history because philosophy studies law, not as law exists or as law is made, but *as law should be and should be made.* Necessarily, this differentiation is denied by all schools of thought, like agnosticism and positivism, which profess not to know what should be, as well as by those, like idealism, which identify what is with what should be. Kelsen declares that his pure science of law presents "law as it is," without qualifying it as just or unjust. For Hegel, the reasonable was real, and the real reasonable. Of course, neither the science of law nor legal history merely describes existing law – these disciplines evaluate existing law and guide the lawmaking process. They do so, however, only in the light of the proximate causes and circumstances, special or gen-

eral. They can, therefore, indicate how a particular system of law can be improved, or better adapted to the peculiar social attitudes of a given people or to the needs of a certain society. They cannot, obviously, discover the ultimate rules to which any and all enacted laws must conform.

From what has been said, should appear the reason why, though the general science of law and ideal legal history are not in fact philosophical disciples, many persons take them for philosophies. Such science and history have objects and bases that are less than universal – therefore they are not philosophies. Yet, because their objects and bases are extremely general, they closely approach the character of philosophy. Persons who take these two disciples to be philosophies, or who attempt to put them in the place of philosophy, do so either because they are influenced by positivism to ignore or to deny the existence of philosophy properly so called, or because they push beyond the limits of science and history, unwittingly and perhaps unwillingly, and then stray obliquely into the province of philosophical universality. Vico pushed his historical studies of the law into philosophical conclusions. Radbruch remarks upon the legal scientists whose "purely empirical general jurisprudence" purports to do away with the philosophy of law, at the same time that the scientists' writings manifest the inextinguishable human tendency to philosophize.

The Philosophy of Law — Its Functions

Philosophy, then, considers *law under its universal aspect,* and *law as it ought to be.* Here, as in any of the particular or "descending" philosophies, the basic task is to understand the particular object studied and to determine its place in the universe.

The task is approached in two steps: an investigation of law's constitutive elements, and a search for law's necessary relations with the world as a whole.

Through the first inquiry is formed the concept or abstract idea of law or the formal category of legality – the assembled marks, characteristics and essential elements of law yield the definition of law. To define anything is to distinguish it from all other things, giving it its proper place in the order of thought. Therefore, this first inquiry is the *logical function* of the philosophy of law.

The second investigation, which seeks to know the relations between law and all else in the world, though it does not center on the single forms law has taken in history, nevertheless must study law as a thing really existing. It represents, therefore, the *metaphysical function* of the philosophy of law.

The real relations between any one thing and other things fall into two classes or orders – they are relations of either efficient or final causality. To complete his task, the legal philosopher must discover both the *basis of law* and the *purpose of law.* The basis of law is the ultimate efficient cause of law – that which *validates* law, or that which gives reality to the discrimination between law and things which have the name and appearance of law but which are spurious. The purpose of law refers to the purpose inherent in all law and in any system of law. The contemplation of that purpose yields the fundamental, constant and universal rules to which the legal order must yield obedience.

Thus the metaphysical function of the philosophy of law is dual: the *ontological function* is to investigate law's ultimate sources or universal basis; the *deontologi-*

cal function is to deduce from the ultimate purpose of law the necessary rules which govern all human activity in which law is enacted, interpreted or applied.

The Philosophy of Law — Its Divisions

In outline, the philosophy of law is divided as follows:

Philosophy of law
- logical part
  - (on the concept of law)
  - ontological part (on the basis of law)
- metaphysical
  - deontological part (on legal method)

The Philosophy of Law — Its Object

In the scholastic tradition, the philosophy of law studied only natural law. The object of the present study is broadened to include positive law as well. In another respect, however, this study's object is narrower than those contemplated by many of the older writers on natural law. Their deductive elaboration of the several precepts of natural law seems not a proper task for the philosophy of law.

Method in the Philosophy of Law

In general, method is the way by which one arrives at a set goal — in the philosophy of law, method is the route of inquiry which leads to a correct philosophical evaluation of law.

Clearly, the development of the several parts of the philosophy of law will require special discussions of method, so that the present remarks are very general, being directed to the broader lines of development in legal philosophy.

Deductive and Inductive Methods — Their Uses and Abuses

Best known is the distinction between deductive and inductive methods. The *deductive* works down from principles to applications, from the general to the particular, from rules to facts. The *inductive* rises from applications to principles, from the particular to the general, from facts to rules. The one is said to proceed *a priori,* the other *a posteriori.* Philosophical literature and even single works employ the terms analytical and synthetic variously, at times to signify the a priori and a posteriori methods respectively, and at other times in a converse signification.

The *deductive* or *a priori* method in the philosophy of law develops the ultimate elements or the ultimate causes of the legal order out of pure rational principles; the *inductive* or *a posteriori* method searches out those elements or causes among the facts of experience.

Either method involves difficulties and dangers, especially in the philosophy of law. Holding fast to rational principles and neglecting to examine empiric facts, the *deductive* method risks falling into an abuse of abstraction. Being content with formulas extremely indefinite and rather empty, this method views the legal phenomenon from afar, and explains it imperfectly, or even does violence to it, casting it into forms arbitrarily conceived and quite unsuited to the phenomenon. The *inductive* method, with its grasp tight upon historical facts, and straining to extract from them all elements and principles of law (as if law were nothing more than a fact to be described by scientific investigators), leans by its own weight toward positivism.

We have said that these two contrary

dangers are intensified in the philosophy of law. That is so because law is neither a pure doctrine of the ideal order only, to be evolved theoretically, nor a fact only, to be examined and described empirically; rather, law has two elements, one empiric and the other ideal. Law is an idea seeking facts in which it may assume a concrete and historical form, or law is an historical fact having in the ideal order laws to govern it, that is, having an intrinsic necessity to move in obedience to rational principles.

The philosopher cannot speak correctly of law unless he has always before his eyes law's two elements, the ideal examined by deductive method, and the empiric studied inductively. Thus, to guide his inquiry in direction and depth, he cannot rely exclusively and slavishly upon either of these methods, but must combine them, one with the other, to meet the exigencies of the material studied.

Neither method is entirely uniform in its mode of operation. The deductive has more of such uniformity than the inductive, and yet it varies, for example, according as the principles employed are drawn from different sources or are endowed with different values – thus we have the deductive methods called innativistic, critical, idealistic, etc.

The Particularist and Comparative Approaches to Induction

In the inductive method there are more obvious differences which, though they may not constitute distinctly individual methods, at least indicate the tendencies and attitudes which prevail in various schools of philosophy. These differences are manifested principally in the scope of the material studied and the manner of viewing it.

As to scope, the *particularized* method, in which the philosopher draws his conclusions from an analysis of a single legal system, is distinguished from the *comparative* method, in which several systems are analysed.

Particularism is the method to which writers are addicted who, for example, discourse upon the basis only of the Roman Law, as Jehring does, or of the Napoleonic Code, as did most of the French jurists of the nineteenth century. Some natural law writers, like Puffendorf and Wolff, philosophized upon the basis of natural law only, and considered natural law as a code analogous to the codes of positive law, and even as the model of the code enacted in their own time and country.

Comparativism is held so firmly by some writers that they assert that if philosophy of law exists at all, its sole admissible function or basis is the comparative study of different systems of law.

Both tendencies have their vices and their dangers. Theoretically, it is, of course, possible to draw a universal understanding of a species from the analysis of an individual. Practically, however, the slowness of the human mind makes success in the undertaking difficult, for there is serious risk of confounding individuating characteristics with the species' essential elements. Thus, the *particularizing* method in philosophy of law is in danger of reaching conclusions not valid for all legal systems, or of doing no more than picturing or ideally representing the legal system that is taken for the single specific sample. The *comparative* method avoids this extreme narrowness, but has no greater facility in reaching universal conclusions, and so does not achieve a philosophy of law but only a general science of law or an ideal history of law. Those who follow this method are

so influenced by a desire for uniformity that they tend to create fictitious similarities and to ignore differences between the legal systems they examine.

The Dynamic and Static Tendencies in Induction

The *inductive* method varies, according to the manner of viewing the material studied, between the *static* and *dynamic* tendencies. The former argues, as one does in science, from facts viewed in a determined or fixed form, or in a given time and place, without attention to the historical development of the facts. The latter tendency, characteristic of history rather than science, leans in the opposite direction, passing over the unchanging elements of a situation and perceiving only the continuous flow of change. Its conclusions are often extremely flexible and nearly empty formulas, indicating neither the substance of things nor their essential characteristics, but only pointing the alleged direction of the law's evolution.

In the *dynamic* tendency, one can distinguish an *historical* predilection, which pursues facts through every stage of their known development, and a *genetic* preference, which attends only to the mutations that occur in the first moment of development. The *genetic* preference is to study the birth processes of law, either in the early epochs of the lives of the various peoples (so that it is an *ethnological* tendency), or in the law's first manifestations in individual consciousness (a *psychological* tendency).

One who relies exclusively upon *historical* method must collect single facts ad infinitum; logically, he can never rest. Nor can he offer conclusions universally valid, for the basis of facts collected and analysed will never be complete – thus, any conclusion he reaches is less than certain.

The followers of the genetic preference confuse two questions – being asked "What is law?" they answer with a statement of *how law comes to be,* confounding the essence of a thing with the manner of its beginnings. They have another difficulty, which occurs in the selection of primary legal facts, either in the primitive life of society or in the dawning of individual consciousness. In the first stages of any thing's development, the elements of the thing developing usually appear unclearly and intermingled, so that extreme difficulty is experienced in distinguishing various forms, especially forms that are closely interrelated. Then, there is difficulty in selecting the *first* facts which are to be the object of investigation. It is not easy for the ethnologist to say which are the truly primitive peoples and, even after that determination has been made, it is hard to understand and interpret the folkways of people whose cast of mind is so far removed from our own. The psychologist often confuses two sources from which he draws conclusions – the empirical source which is the individual consciousness, and the ideal source which offers universal principles. To confuse these sources is easy, because the principles cannot exercise their influence except through the consciousness of the empirical subject.

These various tendencies are rarely found in isolation, being usually mixed and shifting, so that their respective shortcomings are partly compensated and partly aggravated.

To list the composite methods would be an interminable task. The chief of them are the methods of *comparative ethnology* and *comparative history,* which draw their

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