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Epistemology of Normative Sciences

Meta-theory of Law

Coordinated by
Mathieu Carpentier

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Meta-theory of Law

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Introduction

Mathieu CARPENTIER
Institut Maurice Hauriou (IMH), University of Toulouse, France

This book is devoted to the theory of legal theory, which may also be referred to using the barbaric term "metatheory of law". The aim of this emerging discipline is to determine the objective, aims and methods of legal theory (however it might be referred to: philosophy of law, jurisprudence, *Rechtstheorie*, *Rechtsphilosophie* and so on). The aim of the metatheory of law is to establish the conditions of possibility, and the criteria of validity, of theoretical discourses on law. The contributions gathered in this book aim to take stock of the object, methods and aims of legal theory, from a variety of very different perspectives and approaches.

Indeed, the different traditions of legal theory have sometimes seemed to maintain a "dialogue of the deaf" on these issues. On the Continent, that is to say, the countries with a continental (or civil law) legal system, the object of legal theory has seemed to primarily be that of legal science[1], following an essentially epistemological perspective: the aim was to establish the conditions for a science of law that was both authentically *scientific* and authentically *legal* (or *juristic*). This trend culminated in the work of the Vienna School or, in a decidedly different way, the Scandinavian Realists, including Alf Ross[2]. In the tradition of English-speaking countries, the concerns were different, even if they may have been present in the work of someone like Bentham. Hart's successors have mostly been interested not in

1 See, in particular, Shecaira, F. (2015). Legal scholarship and the subject matter of jurisprudence. *Archiv für Rechts- und Sozialphilosophie*, 101, 411–427.

2 See, in particular, Ross, A. and Holtermann, J.v.H. (eds) (2019). *On Law and Justice*, Uta Bindreiter (trans.). Oxford University Press, Oxford.

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the science, but in the *nature of* law, the salient, important, even essential properties of which they try to determine.

Today, this "tale of two traditions" has clearly lost both its force and its explanatory power. Legal theory is subject to increasingly varied approaches and to ever greater cross-fertilization between different traditions. A series of works has emerged attempting to capture these methodological developments[3] and to establish the role and methods of legal theory[4]. The purpose of this book is to follow this trend and to propose elements of a "theory of the theory" of law by questioning the two primary objects of legal theory (the "nature" versus the "science" of law), which are often likely to conflict.

Part 1 of this book draws on contributions that question the methods of legal theory. In this field, methodological questioning is not new[5] and on several occasions there has been talk of a "methodological turn" in the philosophy of law[6]. The end of the 20th century saw legal theorists engaged in argument – or, rather, several arguments – concerning the descriptive character of legal theory as practiced by Hart and many of his disciples. Dworkin's positions[7] in his debate with Hart[8], as

3 See, in particular, Pavlakos, G. and Coyle, S. (eds) (2005). *Jurisprudence or Legal Science?* Hart Publishing, Oxford.

4 See, for example, Dickson, J. (2001). *Evaluation and Legal Theory*. Hart Publishing, Oxford; Leiter, B. (2003). Beyond the Hart/Dworkin debate: The methodology problem in jurisprudence. *American Journal of Jurisprudence*, 48, 17–51; Kramer, M. (2012). What is legal philosophy?, *Metaphilosophy*, 43; Banas, P., Dyrda, A., Gizbert-Studnicki, T. (2016). *Metaphilosophy of Law.* Hart Publishing, Oxford; Leiter, B. and Langlinais, A. (2016). The methodology of legal philosophy. In *The Oxford Handbook of Philosophical Methodology*, Cappelen, H., Gendler, T., Hawthorne, J. (eds). Oxford University Press, Oxford; Lamond, G. (2016). Methodology. In *The Cambridge Companion to the Philosophy of Law*, Tasioulas, J. (ed.). Cambridge University Press, Cambridge.

5 We would like to refer to our study devoted to this subject, some passages of which are reproduced here: Carpentier, M. (2018). Controverses sur la "nature" du droit. *Droit & Philosophie*, 9.

6 See, in particular, Green, L. (2005). General jurisprudence. A 25th anniversary essay. *Oxford Journal of Legal Studies*, 25, 565–580. In general, we refer French-speaking readers to the following excellent study: Chérot, J-Y. (2013). Le tournant méthodologique en philosophie du droit. In *Le droit entre autonomie et ouverture. Mélanges en l'honneur de Jean-Louis Bergel*, Chérot, J.-Y., Cimamonti, S., Tranchant, L., Trémeau, J. (eds). Bruylant, Brussels.

7 Dworkin, R. (1986). *Law's Empire.* Harvard University Press, Cambridge, MA.

8 Hart responded to Dworkin twice: at a symposium in Jerusalem in 1984 (Hart, H.L.A. (1987). Comment. In *Issues in Contemporary Legal Philosophy*, Gavison, R. (ed.). Clarendon Press, Oxford) and in the postscript to *The Concept of Law* (Hart, H.L.A. (2012). *The Concept of Law*, 3rd edition. Oxford University Press, Oxford).

well as the very different theses of John Finnis[9] and Stephen Perry[10], have cast doubts on the viability of undertaking a descriptive philosophy of law, free from any normative or evaluative element. The contributions of Julie Dickson, Brian Bix, Andrej Kristan and Giulia Pravato each return to some aspects of these controversies.

More recently, legal theory has undergone a new methodological turn. Legal theorists, foremost among them being Joseph Raz[11], often assign[12] the task of determining the "nature" of law to their discipline. This undertaking can typically be understood in two ways: in a weak sense, the expression "the nature of X" generally and vaguely means "what X consists of/in"; in a strong sense, however, it is, in many respects, synonymous with "the essence of X". The nature of law is, in this hypothesis, no less than the set of essential properties that make the law what it is and without which the phenomenon studied would not be law. However, whenever lega philosophy sets out to elucidate the nature of law in the strong sense, that is to say, to determine the essential properties of law, it exposes itself to accusations of essentialism, led by authors as diverse as Frederick Schauer[13], Pierluigi Chiassoni[14] and Dennis Patterson[15]. Several contributions to this book attempt either to defend a cautious version of this essentialism (contributions by Julie Dickson and Brian Bix,

9 Finnis, J. (2011). *Natural Law and Natural Rights*, 2nd edition. Oxford University Press, Oxford.

10 Perry, S.R. (2001). Hart's methodological positivism. In *Hart's Postcript*, Coleman, J.L. (ed.). Oxford University Press, Oxford.

11 Raz, J. (ed.) (1994). The problem about the nature of law. In *Ethics in the Public Domain*. Oxford University Press, Oxford; Raz, J. (ed.) (2009). Can there be a theory of law? In *Between Authority and Interpretation*. Oxford University Press, Oxford; Raz, J. (ed.) (2009). Two views of the nature of the theory of law: A partial comparison. In *Between Authority and Interpretation*. Oxford University Press, Oxford; Raz, J. (ed.) (2009). On the nature of law. In *Between Authority and Interpretation*. Oxford University Press, Oxford.

12 See, in particular, Dickson, J. (2001). *Evaluation and Legal Theory.* Hart Publishing, Oxford, p. 19; Shapiro, S. (2001). *Legality*. Harvard University Press, Cambridge, MA; Gardner, J. (2012). *Law as a Leap of Faith.* Oxford University Press, Oxford.

13 Schauer, V.F. (2012). On the nature of the nature of law. *Archiv für Rechts- und Sozialphilosophie*, 98, 457–467; Schauer, F. (2013). Necessity, importance, and the nature of law. In *Neutrality and Theory of Law*, Ferrer Beltrán, J., Moreso, J.J., Papayannis, D.M. (eds). Springer, Dordrecht; Schauer, F. (2015). *The Force of Law.* Harvard University Press, Cambridge.

14 Chiassoni, P. (2011). The simple and sweet virtues of analysis. A plea for Hart's metaphilosophy of law. *Problema*, 5, 53–80.

15 See, in particular, Patterson, D. (2016). Can we please stop doing this? By the way, Postema was right. In *Metaphilosophy of Law*, Banas, P., Dyrda, A., Gizbert-Studnicki, T. (eds). Hart Pubishing, Oxford.

in particular), or go beyond it by modifying its tools, which involves a reconfiguration of conceptual analysis as the preferred method of legal theory (contribution by Pierluigi Chiassoni), or a defense of an complexity-oriented empiricism (contribution by Gregory Bligh).

Finally, several contributions explore certain avenues that are still in their infancy. Thus, Brian Bix intends to set out a roadmap for what might be called the "special" theory of law, or the theory of *branches* of law (such as the theories of constitutional and criminal law). This field (or, rather, fields) of legal theory is booming and is accompanied by an intense metatheoretical and methodological reflection on the topic[16]. Finally, Charles-Maxime Panaccio considers the relationship between legal and political theory, following the work of Jeremy Waldron. The aim is to show how a renewed conception of political theory can enable us to take a fresh look at certain classic problems of legal theory (and in particular constitutional theory), such as the role and legitimacy of constitutional adjudication.

Part 2 of this book reflects upon the role of legal theory as a theory of legal science[17]. The question of the scientificity of legal knowledge has been regularly debated. The study of law has been given many names: *doctrine*, *Rechtsdogmatik*, *jurisprudentia*, legal scholarship and so on, but the exact nature of this activity, which today is the (occasionally contested) prerogative of academic lawyers, remains indeterminate and therefore controversial. The study of law should be described as an authentic *science*, if not in the sense of one of the "hard" sciences, then at least as one of the human sciences – though this is not self-evident. First, such a qualification seems to run contrary to the accepted image according to which the lawyer mobilizes an art (or even know-how) rather than a science (*ars aequi et boni*, according to the formula known to all first-year students); second, it seems to introduce a distance between the object and the science used to study it, as if this object could lend itself to scientific treatment and as if the science in question were not to some extent the producer of the object itself – the study of law sometimes being difficult to distinguish from the very production of law[18]; finally, it assumes that the study of law can correspond to criteria of scientificity and that it is in some way suitable for scientific interpretation.

16 See, in particular, Moore, M. (2000). Theories of areas of law. *San Diego Law Review*, 37; Khaitan, T. and Steel, S. (2020) Theorising areas of law. Unpublished manuscript.

17 For a renewed approach to the issue, reference is made to the following important thesis: Ho Dinh, A.-M. (2018). *Les Frontières de la science du droit*. LGDJ, Paris.

18 See, in particular, Peczenik, A. (2005). *Scientia Juris: Legal Doctrine as Knowledge of Law and as Source of Law*. Springer, Dordrecht.

The contributions in Part 2 of this book attempt to trace the metatheoretical assumptions that accompany the very idea of legal science. Indeed, it is important to question the way in which legal theorists conceive science, on the one hand, and law and the study of law, on the other hand, so that it may or may not make sense to speak of a science of law and to set out its guidelines in terms of epistemological norms (definition of the truth of propositions, coherence of theoretical statements, objectivity in the handling of data, research devices, axiological neutrality and so on). Thus, Eric Millard demonstrates that an empirical theory of legal science, of the type he supports following on from Alf Ross' work, is, in fact, based on metatheoretical assumptions that imply a choice between several scientific theories from science itself. For his part, Jean-Baptiste Pointel returns critically to what has been the keystone of many theories of scientificity since Weber (if not before), namely axiological neutrality, the political and ethical stakes of which he shows as sometimes unsuspected. Did not Kelsen himself recognize that the choice of a theory of law and a scientific reconstruction of a particular branch of law could be a political choice[19]?

The theory of legal science is undoubtedly also based on a metatheory of law – and not simply a metatheory of science. Thomas Hochmann thus shows, on the basis of an analysis of the internal dissensions from the Vienna School, the extent to which the theorist's conception of law – as being capable of understanding defective norms, in other words, in a sense, capable of being qualified as contrary to a higher norm – determines the conception he has of the very possibility of a science of law.

Second, it is possible to question the boundaries of legal science: Véronique Champeil-Desplats notably questions the relationship between social sciences and legal science; Xavier Bioy and Thomas Escaich Dubourg defend the usefulness of recourse to Ricoeur's hermeneutic philosophy for legal science, within which interpretation plays a key role.

Finally, the last two contributions in this book consider the relationship between legal science theory and legal reasoning theory in different ways. David Duarte highlights the role of inference to the best explanation (a mode of reasoning sometimes called abduction) within legal science, while theories of scientific reasoning frequently emphasize its importance in scientific discovery. Fabio

19 On the subject of the choice between the two variants of the monistic theory in international law, Kelsen writes: "Which of the two theses deserves preference? This is a question without a properly legal answer [...]. One can only decide in consideration of metalegal elements – ethical and political ideas." (Kelsen, H. (1925). Les Rapports de Système entre le droit interne et le droit international public. *Recueil des cours de l'Académie de droit international de La Haye*, 14, 313).

Shecaira shows the role of legal science *within* legal reasoning, including the way in which judges use arguments from legal doctrine, which requires a fresh look at the theory of the sources of law.

The contributions gathered in this book contribute to an ever-increasing reflection in contemporary literature on the theory and methods of legal theory and/or legal science. In doing so, they do not claim to be encyclopedic, nor to offer purely tertiary literature on these issues. This would, moreover, have been impossible, given that these questions, which have occupied theorists for half a century, have given rise to a mass of writings, theses and theoretical positions. While, for the most part, the contributions in this book give an overview of the state of the art within which they take place, they each bear the mark of their authors' specific perspective and approach. More than a sum, it is a kaleidoscope, reflecting the diversity of questions that arise in the metatheory of law. We hope that this book will help to provide some answers to the fundamental metatheoretical question: "What is the point of legal theory?"