



UNIVERSITATEA DIN BUCUREȘTI
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Doctor Honoris Causa

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The object of my curiosity is public law because of its dialectic relationship with public authority. It provides for a field of engagement (fight it? use it? identify with it?) as well as a path to understanding society and the individual as a part of it. Public law was once exclusive to the type of social organization called the “state.” This exclusivity is no more: supranational and international organizations wield competences that transform them into institutions of public authority. Sketching the public law features of different settings and their interplay, hence, might help to illuminate and to develop our postnational constellation. For the discipline, this calls for an identity of public law tout court, fusing domestic, supranational, and international public law.



Laudatio | Armin von Bogdandy

Demersul de azi al Universității noastre face posibilă recunoașterea și la București a meritelor unui eminent intelectual public german, personalitate de referință în dreptul public comparat și strălucit teoretician al metamorfozelor dreptului european.

Întregul parcurs profesional al distinsului nostru oaspete dovedește cu prisosință că granițele dogmatice sunt fluide și permeabile: între dreptul constituțional legat de stat și constituționalismul dincolo de statul națiune, între drept și discipline conexe, între atașamentul față de legea fundamentală a statului-națiune și prioritatea tratatelor Uniunii. Profilul academic și opera Profesorului von Bogdandy validează totodată speranța că raționalitatea științei juridice poate contribui la construcția unei lumi europene mai prospere, mai tolerante, mai deschise.

Armin von Bogdandy a urmat în paralel studii de drept și filosofie la Freiburg, Roma și Berlin. Le-a continuat printr-un doctorat la Freiburg și apoi prin abilitarea la Freie Universität Berlin (1996), cu o teză privind delegarea legislativă în dreptul constituțional comparat (*Gubernative Rechtsetzung*). După obținerea *venia legendi*, a predat și cercetat la FU Berlin, EUI Florența, Humboldt-Universität zu Berlin. Din 1997, este profesor la Goethe-Universität Frankfurt iar din 2002 Director, apoi co-Director (împreună cu Prof. dr. Anne Peters) al Institutului Max Planck de Drept Public Internațional și Comparat Heidelberg (MPIL Völkerrecht). Profesorul von Bogdandy a predat la numeroase universități și a ocupat de-a lungul timpului poziții instituționale de vârf (de exemplu, președinte al Consiliului de Cercetare German și membru al Consiliului Științific al Agenției Europene pentru Protecția Drepturilor Fundamentale). Este *Doctor Honoris Causa* al Universidad Nacional de Córdoba, Argentina (2020/21), Eötvös Loránd University Budapest, Hungary (2020) și Universidad Nacional de Tucumán, Argentina (2017).

Contribuția sa esențială în domeniul dreptului european, dar și în cele ale disciplinelor conexe (în special teoria politică și constituțională) rezidă într-o abordare sofisticată a „juridificării” CE/UE, prin care a lansat interpretări noi ale evoluției dreptului Uniunii. Termenul ca atare de *arie constituțională europeană*, definită ca zonă de convergență/suprapunere și focalizare a garanțiilor constituționale și cvasi-constituționale naționale, internaționale (Consiliul Europei) și supranaționale (Uniunea), a fost lansat de Profesorul von Bogdandy. Uniunea este o structură com-

pozită, hibridă, parțial constituționalizată și deci parțial analoagă statelor sale membre. Ea oscilează între o organizație internațională și un stat federal, folosind instrumente și concepte ale statalității, adaptate cadrului ei propriu (prioritate și efect direct, echilibru al puterilor, reprezentativitate, cetățenie, monedă, drepturi fundamentale etc). Cadrul de referință este rezultatul unei dialectici prin care instrumente și discursuri supranaționale (e.g., constituționalism sau stat de drept) sunt într-un permanent proces de adaptare și dialog, reinterprețate și rafinate prin prisma răspunsurilor, provocărilor, limitărilor provenind din planul dreptului constituțional intern. În egală măsură, dreptul constituțional intern și practicile statalității se redefinesc la rândul lor în cadrul acestui complex proces de sinergie.

Prin lucrări de prim rang, profesorul von Bogdandy și-a legat numele de școala constituționalistă a dreptului comunitar (acum european). În acest sens, tratatul de *Drept constituțional european* coordonat împreună cu Jürgen Bast (*Europäisches Verfassungsrecht*, Springer, traducere în limba engleză *European Constitutional Law*, C H Beck/Hart Publishing) a influențat semnificativ felul în care sunt abordate evoluțiile strict juridice și paradigmele de interpretare post-Maastricht. Tot în acest sens merită menționată seria de tratate, unele deja apărute, altele în curs de apariție, în cadrul proiectului monumental *Ius Publicum Europaeum*, la Editura Universității Oxford, în seria editorială *Max Planck Handbooks in European Public Law*. Fiecare volum abordează comparativ, prin studii extensive, o axă a dezvoltării și transformării statelor UE, în planurile sistemelor de contencios constituțional, evoluției și configurației (*Gestalt*) constituționale, statului administrativ.

Von Bogdandy este un universitar mereu prezent în dezbaterile relevante ale momentului. Un impact major l-a avut nu doar la nivel teoretic, ci și în cadrul practic al discursurilor și acțiunilor instituțiilor Uniunii propunerea, rafinată de von Bogdandy și colaboratorii săi, de adoptare a unui mecanism *Solange*-inversat (*reverse Solange*). Printr-o serie de lucrări, aceștia au susținut convingător că derapajele la nivelul Statelor Membre ar putea fi cenzurate, prin raportare la instituția cetățeniei europene, atunci când practici interne nu corespund cu standardul de protecție a drepturilor fundamentale în cadrul spațiului constituțional european (în principal Carta Drepturilor Fundamentale a UE). Argumentul preia logica instrumentului național german instituit prin cele două decizii celebre

ale Tribunalului Constituțional German, din 1974 și 1986 (*Solange I și II*, i.e., „atâta vreme cât”). Instanța de contencios constituțional german verifica Comunitatea de atunci cu măsura constituțională a dreptului intern. Alte exemple sunt cartea editată cu P. Sonnevend la editura Hart, în 2015 (o comparație între implicațiile largi ale crizei din Ungaria, post-2011, și ale celei din România, din vara anului 2012) sau recentul volum apărut la editura Springer și dedicat studiului dimensiunii juridice a conflictelor, tot mai accelerate post-2015, dintre instituții ale Uniunii și Consiliului Europei și actuala majoritate politică din Polonia.

Inclusiv ca urmare a dublei sale formări, Armin von Bogdandy integrează în abordările sale elemente metodologice și conceptuale transdisciplinare. Un exemplu îl constituie lucrarea recent apărută la editura Suhrkamp, *Strukturwandel des öffentlichen Rechts – Entstehung und Demokratisierung der europäischen Gesellschaft* (Transformări structurale ale dreptului public – Apariție și democratizare a societății europene). Pornind de la mențiunea termenului de „societate” în Art. 2 TUE, autorul propune o reconstrucție conceptuală a structurii de legalitate, dar și de legitimitate a Uniunii.

Titlul este, recognoscibil, un omagiu adus lui Habermas, dar argumentul, ca multe alte teze ale distinsului nostru oaspete, constituie o confruntare liberal-pluralistă cu tăioasele dihotomii ale lui Carl Schmitt. Predispoziția de a integra în argumente sau proiecte opinii care nu corespund tendinței generale se distinge între multele și înaltele calități ale oaspetelui nostru, în cea mai bună tradiție inspirație iluministă. Într-o societate pluralistă, constituționalismul liberal trebuie să rămână o realitate vie, generată de apărarea principiilor liberale pe „piața” academică, instituțională și socială a ideilor.

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Today's endeavour is yet another recognition of the great merits of our guest, foremost theorist of European Union constitutionalism and noted public intellectual in the European public sphere (or, as the Professor proposes, fledgling European society).

The laureate's career is a demonstration that borders, both physical and conceptual, are fluid and negotiable: between state-bound fundamental law and constitutionalism beyond the nation-state, between legal science and related disciplines, between national constitutional and European identities. Conversely, his work is also an expression of the hope, more necessary now than ever over the past decades, that law and legal science can contribute to the creation of a better, more tolerant, more inclusive, more open world (if only within the confines of a part of our continent).

Armin von Bogdandy read philosophy and law in Freiburg, Rome, and Berlin. He continued with a doctorate in Freiburg and *Habilitation* in law at the Free University of Berlin, with a thesis on legislative delegation (*Gubernative Rechtsetzung*) in comparative public law. After *venia legendi*, he lectured at the Free University of Berlin, Humboldt University, and EUI Florence. Since 1997, he has been a Professor at the Goethe-Universität Frankfurt and, since 2002, Director, then co-Director (jointly with PhD Prof. Anne Peters) of the world-renowned Max Planck Institute for International and Comparative Public Law in Heidelberg (MPIL Völkerrecht). Professor von Bogdandy held numerous lectureships around the world, has served among others as a member of the Scientific Committee of the German Research Council and of the EU Fundamental Rights Agency's Academic Council. He is the recipient of honorary doctorates from the University of Budapest in 2020 and the universities of Tucumán and Córdoba in Argentina (2017 and 2021, respectively).

His merits in the field of European constitutionalism are too many to be exhausted in the space of a short *Laudatio*. It is certainly worth noting that this very point of conceptual and methodological ingress into the evolution of Europe (namely, the constitutionalism and constitutional law approach) is tributary also to Professor von Bogdandy. He has coined and promoted for example the term *European constitutional area*, to showcase the way in which the current legal discourses are created by cross-hybridization of concepts and instruments at the interface deriving from overlapping national, supranational (EU) and international

(Council of Europe) guarantees. The European Union itself is a composite structure, partly constitutionalised and thus partly analogous to its member states. It evolves in a zone of constant negotiation between the logics of international cooperation and supranational federalism, using concepts and instruments initially originated in the confine of the nation state (separation of powers, representative democracy, currency, supremacy, recently even “European sovereignty”, fundamental rights, and citizenship). The meanings of these instruments are constantly adapted and fine-tuned in a dialectical process by which the Union normative self-representations are influenced by and simultaneously have a major impact on the fundamental laws of national state components.

Professor von Bogdandy has had, for the better part of the last two decades, a major role in conceptualizing and even in driving this process. His volume, co-edited with Juergen Bast, *European Constitutional Law*, is now a canonical book on Union constitutionalism and helped normalize the very discipline *European Union constitutional law*, which would have been considered provocative or even outlandish a mere decade and a half ago. More recently, he, along with a group of Heidelberg collaborators, fronted an influential proposal which turns the diffident-conservative national logic of identity limitations to Europe on its head. The “reverse Solange” proposal consists in using European citizenship and the argumentative framework of the German Constitutional Tribunal’s reservations in the 1974 and 1986 *Solange I* and *II* decisions, in order to counter and limit *national* deviations from a core of common European fundamental rights guarantees. In the same vein, of influential and timely adherence to juridical phenomena, one could mention his edited collections on crises in Hungary and Romania (co-edited with Sonnevend and published in 2015) and the more recent co-edited collection on the vagaries of post-2015 Polish backsliding (published last year with Springer Verlag).

Also as a result of his multidisciplinary training as a philosopher and as a lawyer, Professor von Bogdandy has always approached law in ways that transcend bland legal doctrine but remain in essence foundational and juristic. A splendid example of fundamental research of this nature (*Grundlagenforschung*) is his recent book, a result of many years of reflection, entitled *Structural Transformations of Public Law – The Appearance and Democratization of European Society* (*Strukturwandel des öffentlichen Rechts – Entstehung und Demokratisierung der europäischen*

Gesellschaft, published in 2022 with Suhrkamp). The study, whose title is a recognizable homage to J. Habermas, proposes a reconstruction of the European legality and legitimacy paradigm, starting from the reference to “society” in the second clause of Art. 2 TEU. The argument of the book, as those of many other works by our distinguished guest, is also a sub rosa pluralist confrontation with Carl Schmitt’s sovereign nation-bound, powerful conservative dichotomies.

The engagement with rational criticism of liberal-constitutional tenets and the acceptance that mainstream daily verities must be always open to critical scrutiny are among the most laudable of Professor Armin von Bogdandy’s many merits and qualities. In a liberal, European, open society, truth must not be allowed to fall into stale dogmatism or rote ideology but always remain the product of rational, good faith defence of liberal principles on the marketplace of ideas.

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Curriculum vitae | Armin von Bogdandy

Armin von Bogdandy este co-director al Institutului Max Planck de Drept Public Comparat și Drept Internațional din Heidelberg și Profesor de Drept Public la Universitatea din Frankfurt/Main. A absolvit în paralel studii de drept și filosofie la Freiburg/Breisgau, Roma și Berlin, apoi un doctorat în drept la Freiburg (1986) și abilitarea în științe juridice la Universitatea Liberă din Berlin (1996).

A fost membru al Consiliului Științific German (*Wissenschaftsrat*) și al Consiliului Academic al Agenției Europene pentru Drepturi Fundamentale. A fost cercetător invitat la New York University School of Law, European University Institute, Xiamen Academy of International Law și la *Universidad Nacional Autónoma de México*, printre altele.

E laureat al Premiului Leibniz (2014), al *Premio Internacional “Hector Fix Zamudio”* (2015), “*Mazo*” (gavel) al Interamerican Court of Human Rights (2015) și al premiului decernat de Academia Berlin-Brandenburg (2008) pentru rezultate excepționale în domeniul fundamentelor științelor juridice și economice.

I s-au acordat titluri de Dr. h.c. de către Universidad Nacional de Córdoba, Argentina (2020/21), Universitatea Eötvös Loránd din Budapesta (2020) și Universidad Nacional de Tucumán, Argentina (2017).

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Article | Armin von Bogdandy



Armin von Bogdandy

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Armin von Bogdandy grew up in the Ruhr area, studied in Paris, Rome, Freiburg (first state exam in law, Dr. jur.), and Berlin (M.A. in philosophy, second state exam, Habilitation), then became Jean Monnet Fellow at the EUI. He spent 5 years at the Goethe-Universität, Frankfurt/Main, before becoming director at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg. He is President of the OECD Nuclear Energy Tribunal and member of the Scientific Committee of the European Union Agency for Fundamental Rights; he was member of the German Science Council. He has been Global Law Professor at NYU School of Law in 2005 and 2009.

Henri Cartier-Bresson's *Photoportraits*¹ contains a picture of Carl Gustav Jung and one of J. Robert Oppenheimer, the scientists² among this book's great and good. His shots usually reveal a sublime essence, and so they do for science: both men are gazing intensely, yet their eyes are not fixing on anything. To be sure, scientists need to be curious, but this is not their

specificity and, accordingly, not Cartier-Bresson's subject. Jung's and Oppenheimer's gaze, concentrated but somewhat lost, is turned inward. These pictures capture a scholar's defining state; the arduous, but joyous process of reducing a messy something to a conceptual or mathematical pattern that provides for a deeper understanding of reality, including the cognizant self.

The object of my curiosity is public law because of its dialectic relationship with public authority. It provides for a field of engagement (fight it? use it? identify with it?) as well as a path to understanding society and the individual as a part of it. Public law was once exclusive to the type of social organization called the "state." This exclusivity is no more: supranational and international organizations wield competences that transform them into institutions of public authority. Sketching the public law features of different settings and their interplay, hence, might help to illuminate and to develop our postnational constellation. For the discipline, this calls for an identity of public law *tout court*, fusing domestic, supranational, and international public law.

This text presents ten formative books in the order I studied them, but from where I stand today. It is a reconstruction certainly influenced by the wish to be coherent and continuous. One might be surprised by the number of philosophical texts. To some extent, this is because I also studied philosophy. But there is a nonaccidental reason too; philosophy is a discipline centered on great books. Legal scholarship, by contrast, relies on a web of academic texts that are far more interchangeable; there is no "canon" the intimate knowledge of which is considered essential. The longing to write a lasting book is rather vain, as in most sciences.³ I take this as a liberating insight. A legal scholar's role is to nurture his or her contemporary debate, unafraid of being overcome.

1. Immanuel Kant, Kritik der reinen Vernunft (Critique of Pure Reason)

Shortly after enrolling at university, I started attending Wolfgang Wieland's courses on German idealism, in particular, on Kant's *Critique of Pure Reason*. On no other book did I spend as much time. Through the *Critique*, Wieland taught how to approach a great text; there is no shortcut between the surface of words and the depths of meaning. The joy of real understanding is preceded by the pains of textual labor. For

every passage one must distill the core idea, the structure of the thought, and the basic argument; it is a slow process. Another lesson to be grasped was the portrayal of conceptual clarification and system building as vital academic activities on the road to scientific insight.

One might question the *Critique's* relevance for legal scholarship. However, it has been a driving intellectual force behind the unfolding of legal scholarship in Germany. Friedrich von Savigny was deeply indebted to German idealism.⁴ Legal scholarship's striving for a system underlying the multifariousness of norms and judgments finds here its finest basis. Accordingly, the ontogenesis of my scholarship simply follows the phylogensis of the discipline. Of course, the comprehension of a legal system has evolved. Once it tended to be crypto-idealistically understood as inherent in the law, whereas today systems are mostly seen as constructions for ordering and managing, and their role is far more circumscribed. This, though, does not diminish system-orientation as such:⁵ it remains axiomatic that scientific knowledge requires a system.

2. Bernd Rüthers, Die unbegrenzte Auslegung. Zum Wandel der Privatrechts-ordnung im Nationalsozialismus (The Limitless Interpretation: On the Mutation of the Private Law Order during National Socialism)

Law school in Germany usually conveys an utterly technical understanding of law, and legal scholarship appears focused on patterns in order to solve complicated cases according to a largely autonomous (and somewhat obscure) rationality. Rüthers's book was liberating, as it revealed the study of law as a path to understanding social reality. By sketching the operation of the German civil code under three different political regimes—the Wilhelminian Reich, the Weimar Republic, and, above all, the National Socialist dictatorship—it provides a gripping, deeply troubling narrative of German vicissitudes in the twentieth century, down where life occurs. The book substantially advanced the understanding of my country, and of the legal order as part of a social totality. The isolated province of positive sources, doctrinal schemes, authoritative concepts, and technical skills emerged as part of a far broader landscape; law evolved from being a set of technical rules to a social, and morally ambivalent, institution.

The book also stands for courage as a value of scholarship. Against the almost unanimous view at the time, it points out that legal positivism (formalism) cannot be charged with the failure of many jurists to withstand the Nazi assault. Twisting the rules in anticipatory obedience is exposed as a rather common feature. In fact, the antiformalists, many of whom were still powerful when the book appeared, took the lead. By contrast, formalist arguments were used, rather, to protect the persecuted. Although it shows the limits of legal determinacy, the book makes a potent argument for formalism. My skepticism regarding natural law thinking and similar theories of justice was fortified.

3. Hagen Gülzow, Strafrecht: Band 1, Allgemeiner Teil; Bände 2 and 3, Besonderer Teil, Selbstverlag (Course on Criminal Law: volume 1, General Part; volumes 2 and 3, Special Part, published by the author)

Mastering the final law exam in Germany essentially requires the application of schemes and technical skills to hard cases. Most students take private courses in their last year, largely taught by attorneys, to prepare, and many attribute their lawyering tool kit to their *Repetitoren* (which is a bit, but not completely, unfair). Hagen Gülzow, a criminal defense lawyer as well as external faculty at a police academy, opened up to me the logic of legal argument.

A core element of a legal system's legitimacy is its circumspection when analyzing an issue, together with the argumentative justification of any decision. Gülzow's course revealed the manifold schemes as condensed wisdom on how to find the relevant norms and issues, an absolutely crucial legal qualification. Good schemes are a prime product of legal scholarship, a pinnacle of an elaborate doctrine. Moreover, the so-called legal methods were explained and applied as what they are: flexible tools of justification. Gülzow's course was a splendid introduction to the operation of the German legal order and conveyed the joy of the craft.

4. Immanuel Kant, Zum ewigen Frieden. Ein philosophischer Entwurf (Perpetual Peace: A Philosophical Essay)

I passed the state examination and went on to pursue a doctorate. Kant's *Perpetual Peace*, little studied in 1984, appeared to be a promising topic to combine philosophical and legal interests. Its impact was as formative

as it was unsettling. His argument for a moral duty to strive for a truly public international order is compelling. The same holds true for his treatment of the domestic and international order, seen as two sides of the same coin, heralding the fusion of domestic and international public law. Although presenting a skeptical anthropology, he deconstructs personal payoffs as the sole criterion of individual action to the benefit of a nonutilitarian approach, based on the capacity of generalization and the capacity to conduct oneself according to maxims. He presents a trenchant critique of mainstream international law, while advocating the judicialization of all politics. Affording the individualistic view of society universal reach and founding universalism on a most advanced theory, Kant lays, I understood later, the groundwork for constitutionalism as a general paradigm for public law. The gap between this vision and political reality appears as the setting for meaningful individual commitment.

Nevertheless, I decided not to dedicate myself to Kant. Something was disturbing, and something was missing. With hindsight, I realized that his vacillation between a true world federation and mere federation of free states was the expression of a deep moral problem and of a conceptual trap I could not address adequately,⁶ but which continue to haunt me. Moreover, the Kantian law tilts so much toward what ought to be that it risks losing the capacity to provide insight into social reality and, hence, of the situated self.

5. Georg Wilhelm Friedrich Hegel, *Naturrecht und Staatswissenschaft im Grundrisse. Grundlinien der Philosophie des Rechts* (A Compendium on Natural Law and the Science of the State: Basic Elements of the Philosophy of Law)

I turned to Hegel. Again, my scholarly ontogenesis followed the phylogenies of the German discipline of public law. The challenge was to decipher the Hegelian concept of statute law in light of the theoretical groundwork developed in his *Science of Logic*.⁷ If Kant's *Critique* had been difficult, Hegel's *Logic* tested the outer limits of my endurance. The law of the legislator and the law of nature, it emerged, flow (in Hegel's thought) from the same concept; both reveal a (not *the*) deep structure of reality ("Logic of the Essence") and are to be developed in light of one foundational principle ("Logic of the Concept").

Of the *Compendium's* many lessons, the most influential was that freedom is the best basis for any adequate construction of law in modern times. It is the freedom of the individual, but of a historically and socially situated self. Any adequate understanding of the self requires the study of the objective spirit, and the study of the structure and principles of law, in particular, public law, is one main avenue to its cognizance (history being the other). Contrary to many others, I distilled an emancipatory concept of law. In 1986, in the shadow of the Berlin Wall and after much hesitation for fear of being ridiculous, I concluded my dissertation stating that the *Compendium*, according to my reconstruction, presents the march to freedom as irresistible: advocating reform but predicting liberal revolution if reform does not materialize.

Despite its emancipatory potential, Hegel's philosophy of law promotes with fearsome vigor conventional German attitudes. To be part of the mainstream is a virtue; the public administration merits trust; the state provides the guiding totality of an individual's existence. Hence there is, different from Kant, far too little space for personal transformative engagement.

6. Joseph H. H. Weiler, Il sistema comunitario europeo. Struttura giuridica e processo politico (The European community system: Legal structure and political process)

In 1989, Eberhard Grabitz, a leading professor of European Community law, hired me. Working for European integration seemed a promising way to combine Kantian commitment with Hegelian realism. Grabitz passed on his enthusiasm for participating in the development of a body of law that could then be used in a good fight for a right cause: to embed a uniting Germany, not completely free of nationalist reconsiderations, within a progressive Europe.⁸

For all the fun and excitement, the dearth of strong concepts and systematic exposition was disconcerting. I was operating in thick fog when by pure accident I hit upon Weiler's *sistema*: it was the only aesthetic volume on a book shelf.⁹ Rarely have I read an academic text with such thirst for knowledge; from page to page, the fog lifted and true understanding emerged. The positive texts, core judgments, legal doctrines, common knowledge, and mainstream insights from political science, namely, the well-known bits and

pieces, which so far were for me but a disorganized jumble, were reined in by powerful concepts and brought into an order that made sense of these bits and pieces *because it showed them in their interrelatedness: voilà*, the essence of a true system. Moreover, the text, although rather implicitly,¹⁰ provides for a normative vision where a Kantian and a Hegelian tradition might meet: a true transnational public order that is entrenched in reality and does not do away with a situated self. An embedded, yet progressive, project for the postnational condition came into sight.

7. Hans-Joachim Koch and Helmut Rießmann, *Juristische Begründungslehre* (A Theory of Legal Argumentation)

The importance, the nature, and the modes of dealing with legal indeterminacy form a core issue of legal scholarship, affecting the discipline's identity and legitimacy, as does the associated controversy. Sure, it is hard to find a scholarly text nowadays defending the so-called positivist (formalist) position that the application of a positive rule to a concrete case is fully determined by that rule. Yet much controversy remains. Whereas for some the legal form is but a charade, others search for a path to rationalize and domesticate the exercise of formal power. Koch's and Rießmann's *Theory of Legal Argumentation* makes the case that a deductive mode of reasoning is possible and constitutionally required in a democratic society.

The book reconstructs the various aspects of the problem with the contemporary apparatus of formal logic and language theory. It introduces powerful concepts that fix the flux. But the most important contribution is the proof that vagueness (which is what indeterminacy is for them) and discretion, both necessary and welcome though not overarching features of any legal order, put burdens of argumentation on the deciding institution. If the positive source does not yield a decision free from doubts, it is possible to adduce additional grounds that can substantiate that decision. Vagueness and discretion are competences, but they should come at a price. Any legal decision can be fully argued, that is, *all* necessary premises can be laid open, and there is a normative expectation that the authorities, be it courts or administrative agencies, do precisely this. If they do not, it is one of the finest tasks of legal scholarship to reconstruct legal decisions to lay those further premises open and to critique them. For this essential task, a doctrinal system is indispensable,¹¹ and the doctrinal embedding of the courts' operation

remains an important normative project. Many decisions of the European Court of Human Rights, the European Court of Justice, and the Federal Constitutional Court would be more rational if they were more doctrinal,¹² but that requires scholars to work likewise.

8. Niklas Luhmann, *Das Recht der Gesellschaft* (Law as a Social System)

Conceptual clarification and system building (and maintenance) are at the heart of most basic research, but philosophers are often best in clarifying the clarifications and checking the operational logic and directional thrust of systems. This needs to be done anew for every historic constellation, calling for innovation in other disciplines. Like many of my generation, I felt lucky that two great and antagonistic thinkers did this work for the Bonn Republic, giving us the freedom of perspective. For me, the core text is Luhmann's 1993 book, read with Jürgen Habermas's 1992 *Between Facts and Norms*.¹³

Although presenting two opposing concepts of reason, their concepts of law share many features that nurture my understanding. For example, today's complex law is best understood employing a communicative paradigm; law's primary roles are the reduction of social complexity and the stabilization of normative expectations; this stabilization occurs mainly through general norms; ever-growing functional differentiations represent basic thrusts of social development; the political system does not sit at the pinnacle of society but is one system among others; law and politics are different social spheres operating under different logics; the coupling of politics and law occurs mainly through the legislature; the enactment of law and its application are categorically different processes; there is a world society. Yet, given the antagonism between these opposing visions, it is left to the reader to decide if there is only a functional rationality, or whether there remains a noninstrumental, overarching rationality leading to further emancipation.

9. P. S. Atiyah and Robert S. Summers, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions*

Comparison is a prime path to orientation and insight into most human activities, thus comparative law presents an equally fine method of

scholarship; it features prominently in my second book. Atiyah's and Summers's book provides a wonderful example how to do it and what can be achieved. I turned to the book with little knowledge of American and British law and received not just a useful introduction but a lasting lesson on law in general and the potential of legal comparison. It also proves the Hegelian point that law is a formidable route to understanding social reality.

The book shows what one should look at when engaging in comparisons, such as the way framing rules and crafting judgments; the operation of parliaments, administrations, and courts; the sociology of the judiciary; the bars and law schools; the modes of reasoning; academic publishing; theories and anecdotes, history and policies. That is also what needs to be studied if law is conceived of as an institution. Most impressively, the authors fit all this into 432 pages, forming a pleasantly written, coherent whole. The trick is to work with theoretically reflected concepts. There is nothing more practical than sound theory.

10. Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960*

One classical genre of the novel is the bildungsroman, epitomized by Goethe's *Wilhelm Meisters Lehrjahre* (Wilhelm Meister's Apprenticeship). It takes the reader on a long, twisting, and captivating journey through the ups and downs of life, thereby providing for her edification, personal development, and maturing. A bildungsroman leaves a mark on a thankful reader. Like many scholars of my generation,¹⁴ I acknowledge Koskenniemi's mark, in particular because of the journey I undertook through his *Gentle Civilizer*. It stands for a type of scholarship that involves the entire self, and it nurtures the hope that one might still produce texts that can leave a visible trace in our discipline's history, best by forging its future memory.

Koskenniemi revealed my meandering between Kantian and Hegelian elements as the individual representation of my (and the German) discipline's phylogenies. The German mode comes out as a specific strand of thinking, though not an idiosyncratic one. The global marketplace of ideas needs many voices to fulfill its promise; accordingly, both advocating yet also evolving a specific tradition in light of contemporary

challenges and other traditions can be a meaningful contribution to that marketplace. The global condition can sharpen a sense of identity, which is creative and hence beneficial if embedded in a dialogical mode.

For the project of fusing international, supranational, and domestic public law, the *Gentle Civilizer* exhorts not only their common moral ambivalence but also the emancipatory potential of the legal form. For the German tradition, its plea for formalism raises the prospect of defending doctrine through the reasoning of one of its most trenchant critiques. Yet, the book ends with the gesture of Adorno's and Horkheimer's *Dialectic of Enlightenment*. It leaves the reader alone, as do most great books, but propels him further along that wonderful process pictured by Cartier-Bresson.

- 1" Henri Cartier-Bresson, *Photoportraits*, Thames and Hudson, London 1985, 118, 237.
- 2" The identity of a German law professor is that of a *Wissenschaftler*, a broader term than "scientist," encompassing those dedicated to law, to the humanities, and to natural phenomena.
- 3" Max Weber, *Wissenschaft als Beruf* [Science as Profession] (1917/1919), in *Max Weber Gesamtausgabe*, Band 17, Mohr, Tübingen 1992, 71, 85.
- 4" Joachim Rückert, *Idealismus, Jurisprudenz und Politik bei Friedrich Carl von Savigny* (Idealism, Jurisprudence and Politics with Friedrich Carl von Savigny), Gremer, Ebelsbach, 1984, 232 et seq., a text from the shortlist for this article.
- 5" A fine recent example: Eberhard Schmidt-Aßmann, *Das allgemeine Verwaltungsrecht als Ordnungsidee* (General Administrative Law as a Project for a System), Springer, Berlin, 1998, short-listed.
- 6" Jürgen Habermas did the job, *Kants Idee des ewigen Friedens* (Kant's Idea of Perpetual Peace), 28 *Kritische Justiz* 293 (1995), short-listed.
- 7" Georg Wilhelm Friedrich Hegel, *Wissenschaft der Logik* (Science of Logic), Nürnberg, Schrag, Volume I 1812, Volume II 1813.

- 8” Eberhard Grabitz, *Europäisches Bürgerrecht* (European Citizenship), Europa Union Verlag, Köln, 1970 (!), 110 et seq., short-listed.
- 9” The most important parts are laid out in Joseph H. H. Weiler, “The Transformation of Europe,” *Yale Law Journal* 100 (1991), 2403.
- 10” His “Transformation of Europe” is more explicit in this respect, 2474 et seq.
- 11” For an outstanding explication for an American audience see Alexander Somek, *The indelible science of law*, I.CON 7 (2009), 424, 431 et seq.
- 12” For an elaboration, see Bernhard Schlink, *Abschied von der Dogmatik* (The demise of doctrine), *Merkur* 60 (2006), 1125, short-listed.
- 13” Jürgen Habermas, *Faktizität und Geltung* (Between Facts and Norms), Frankfurt am Main, Suhrkamp 1992, short-listed.
- 14” See *Regards d’une génération sur le Droit International*. Emmanuelle Jouannet, Hélène Ruiz Fabri, Jean-Marc Sorel (eds.), Paris, Pedone, 2008.

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