

The Recovery of Historical Law

Friedrich Julius Stahl

THE PHILOSOPHY OF LAW

VOLUME I: *The History of Legal Philosophy*

1A: *The Rise and Fall of Natural Law*

1B: *The Recovery of Historical Law*

VOLUME II: *The Doctrine of Law and State on the Basis of the Christian World-View*

PART I: *General Doctrines and Private Law*

BOOK I: *Philosophical Presuppositions*

BOOK II: *Principles of Law*

BOOK III: *Private Law*

PART II: *The Doctrine of State and the Principles of State Law*

BOOK IV

The Recovery of Historical Law

Volume 1B of the Philosophy of Law:
The History of Legal Philosophy

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WordBridge
PUBLISHING
ἐν ἀρχῇ ἦν ὁ λόγος
AALTEN, THE NETHERLANDS

WORDBRIDGE PUBLISHING

Aalten, the Netherlands

www.wordbridge.net

info@wordbridge.net

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German original: Friedrich Julius Stahl, *Die Philosophie des Rechts: Erster Band: Geschichte der Rechtsphilosophie*. Fifth unchanged edition. Tübingen and Leipzig: J. C. B. Mohr, 1878.

ISBN paperback 978-90-76660-60-8

hardback 978-90-76660-61-5

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PREFACE

The second half of *The History of Legal Philosophy* picks up, logically, where the first half (Volume 1A) leaves off, at the utter failure of liberalism and natural law to engender a functioning social order.

It begins with pragmatic legal philosophy, which has the same root as the natural law theory, but which works in terms of an entirely different plan of action. The result is the mechanical constitutionalism of Locke and Montesquieu. Both of these are based on the presupposition that the law, along with all historical products, are the deliberate creation of men, and when they are not, it is because of man's shortcomings. For "just as both orientations originate in the motive force of human independence and self-activity, so they regard all historical phenomena as human products. The entire age virtually lacks the notion of how something could take shape unless people bring it about, consciously and willingly; that is, unless crude mindless coincidence is what caused it, which would redound to their shame, a sign of their weakness." This mentality, in turn, is the effect of science having "closed itself off to the divine spirit, which guides history" (p. 29).

The pragmatic approach to constitutionalism and politics originated with Machiavelli. Montesquieu was only following in Machiavelli's footsteps when he stripped out the ethical dimension, leaving the mechanical. A product of mechanism, his separation of powers doctrine is only a negative one: it can only restrict power, it cannot direct it. And without a directing philosophy, pragmatism leads to Machiavellianism. "If only man and the mechanical law direct events, only this alternative remains to him: either to make use of any and all means in accordance with this law, or to sacrifice himself, in this case his state. And if he does not desire, indeed is not permitted the latter, only the former remains for him – thus says Machiavelli. It is therefore clear that the phenomenon of Machiavelli does not need to be explained by special circumstances and intentions; it is simply the consistent implementation of the same principle that in general was held to be fitting." The only alternative to this is divine guidance. "If one leaves something of guidance to a higher power, then this whole kind of politics falls to the ground; if, on the other hand, one wishes to take care of

everything oneself, then we inevitably arrive at Machiavelli's point of view" (p. 12).

Despite this, Montesquieu contributed to our understanding of the totality of legal institutions in terms of national condition and situation – climate, temperament, customs, etc. In this he went farther than his predecessors, Aristotle and Jean Bodin: "With them this is mixed with other things, but with Montesquieu this insight and the investigation conducted along its lines are manifest as the sole task of his book; this brings the basic idea itself more vigorously and penetratingly to consciousness, and yields an infinitely greater wealth of results than they were able to accomplish." (p. 14). He bases the various forms of government on various character traits, monarchy on honor, aristocracy on moderation, democracy on virtue; but he also recognizes that religion is more important than any of these (p. 15).

To escape the box of abstract thought in which legal and political philosophy was locked, what was needed was a sea change in approach. This was provided by Schelling, who performed the "Samsonesque act" of replacing the mechanical natural-law philosophy with the organic historical one. Schelling "lifted the temple of the previous philosophy off of its pillars and buried the whole army of enemies, himself included, under its ruins" (p. 58). Himself included – because he, like Moses, stood at the entry to the Promised Land without entering in. Schelling provided the materials to capture and further a historical understanding of law rooted in divine providence, but all the while he remained mired in a pantheistic rut.

The change is wrought through the medium of so-called speculative philosophy, which puts contemplative vision rather than abstract logic at the heart of understanding. As such, it "considers the world to be a free act of the personal God" (p. 138). With the help of speculative philosophy, Schelling and Hegel arrived at the concept of objective will and of the ethical organism, in opposition to hitherto dominant concepts of subjective will and radical individualism. The historical view starts here, as does the recovery of Christian philosophy (pp. 38f.).

Hegel did not take advantage of this. Despite the benefit of acquaintance with speculative philosophy, he remained mired in abstract thinking. In order to avoid the personalistic implications of speculative philosophy, he turned to dialectic and applied it in a new way. "But if abstraction insists on itself, sets

itself up as the measure of things, and declares everything that it does not contain to be untrue, if it maintains that initial data, which is basically only obtained from the inner vision, and rejects everything else, thus casting vision itself as untruthful: how should it be conveyed? In sound minds, through the vision itself; for whoever is in agreement with himself as a whole believes consistently in the vision. But what of him who has given in to abstraction, and puts his trust in it? Through *dialectic*!" (p. 138). In so doing, he cast aside all the gains made possible by Schelling's approach. "Hegel was therefore compelled to give up all of Schelling's uniqueness: the primordial-real, act, life, creation. And so the palladium of Schelling's philosophy is lost, and all the dangers that threatened it at its creation had now to come home to roost. The world once again becomes inactive substance, the logical modalities of which are things; identity is disintegrated into oneness; the ought and individual freedom become a sham; and the goal of all living existence is its extinguishment into nothingness" (p. 59). The result was a lifeless assemblage of results, smuggled in by a fraudulent procedure (pp. 93ff.).

Objective impersonalism makes itself felt most directly in Hegel's predilection for government power.

His doctrine is as little *ultraroyalist* as it is *ultraliberal*; but it is *ultra-governmental*. Everything should be accomplished through ordered (objective) power, the government, while the people accept this consciously and thereby freely; but the reverse may not also take place, whereby a work is accomplished out of the free, innermost personal drives (subjectivity) of the individual, of associations, the people, the estates, whereby the government only leads, sanctions or moderates, while the estates restrain or correct the government. He is an opponent of the free movement which emerges from the unordered and unprepared into order and clear shape, and no less the inviolable rights the holders of which must be brought into connection with the jointly beneficial, through inner conviction. All of this is the necessary result of the system as a whole, which everywhere stands only on the impersonal, substantive, logically necessary, and pushes personality (subjectivity) down into a dependent moment, in itself without content, the only purpose of which is to reflect those things (p. 115).

The free action of independent citizens cannot lead to order, but only to chaos. There must be a guiding substantial (i.e., objective) power to counteract the “subjective” power of an independent citizenry.

Just as everywhere the substance posits the subjective moment only for its own purpose, in order for it to take it back into itself, just so does the government as the substance of the state hold the people and the citizens only as a means of realizing itself through their (seemingly free) labor. Hegel therefore prefers the princely power and even more so the civil servants, in which he finds represented precisely that substantial necessity of state upon which this security of the state mechanism rests, in opposition to the subjective (the people). Accordingly, for him, civil servants should not only be in government, but the assemblies of the estates should also be predominantly composed of civil servants, because they have the “sense of the state,” the governmental sense (p. 113).

In other words, civil servants are the conscious part of the polity, or in modern street parlance, “woke,” and as such they are the only ones capable of steering things in the right direction. De Jouvenel describes it well: “The motive force of society is the general will, which does all that needs to be done, whether or not the individuals who lack consciousness of the end are assenting parties. It is now, in short, a question of inducing in the body social a new efflorescence, the vision of which is possessed by its conscious members only. These latter form ‘the universal class’ in distinction to all the rest, who remain the prisoners of their own particularisms. It is, then, the business of the *conscious part* to do for the whole the necessary willing.”¹

Nevertheless, Hegel did manage to post some significant positive results. Primarily, this came in the form of reasserting the objective principle, by which marriage, the family, the state had intrinsic meaning restored to them, instead of being mere artifacts of individual contracting parties. “In this manner, Hegel victoriously fought the heresies that were widespread at that time: Kant’s doctrine making the freedom of the individual and the mere consideration of the coexistence of people (maxim of coexistence) the exclusive principle of law and state, conceiving of marriage as a mere contract regulating sexual function,

¹ Jouvenel, *On Power: Its Nature and the History of Its Growth*, p. 50.