Studies in the History of Law and Justice 22
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Gianfrancesco Zanetti
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Handbook of the History of the Philosophy of Law and Social Philosophy

Volume 1: From Plato to Rousseau

Springer

Studies in the History of Law and Justice

Volume 22

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Gianfrancesco Zanetti • Mortimer Sellers •
Stephan Kirste
Editors

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Preface

This *Handbook of the History of the Philosophy of Law* is the product of the global republic of letters and more specifically, the International Association for the Philosophy of Law and Social Philosophy. The Internationale Vereinigung fuer Rechts- und Sozialphilosophie (IVR) has promoted solidarity and the exchange of ideas among the world's philosophers since 1909. This Handbook reflects the efforts of philosophers in every school of legal and social thought and every corner of the world. More specifically, it reflects the leadership of Professor Gianfrancesco Zanetti and his colleagues at the University of Modena and Reggio Emilia: Professor Thomas Casadei and Professor Gianluigi Fioriglio, who both generously supported this project, and the rest of the Modena team—Michele Ferrazzano, John Patrick Leech (who helped to polish the English translation of some entries), Rosaria Pirosa, Serena Vantin, and Gianmaria Zamagni. Professor Zanetti is the Section Editor for Legal History in the *Encyclopedia of the Philosophy of Law and Social Philosophy*, published under the auspices of the IVR and the General Editorship of Professor Stephan Kirste and Professor Mortimer Sellers, the authors of this Introduction. The *Handbook of the History of the Philosophy of Law* arises from decades of shared effort that created the *Encyclopedia.*

The global nature of the cooperation that culminated in this *Handbook* and the *Encyclopedia* from which it derives took on a new meaning in the midst of the universal Covid pandemic through which we have suffered for more than 2 years and from which we have not yet fully emerged. The disease that threatened all humanity reminds us of the fundamental unity of human fate and human society that informs—or should inform—the law everywhere. The editors and contributors to this volume took great comfort and pleasure from the solidarity and common purpose of their fellow scholars in other nations, and the constant correspondence with distant and sequestered colleagues, united nonetheless in a common purpose of understanding law and society.

One happy benefit of the growth of computer technology has been the ability of those quarantined at home to reach across the world for knowledge and encouragement. This chance to be enlightened by the insights of others recalls the inspiring

epistolary exchanges of the eighteenth century that produced the great *Encyclopedie* of Denis Diderot. New and fortunate in this emergent era, we have also lectured and spoken directly with one another's students—and our own—from the safety of our libraries at home. This experience more than any other made clear the necessity that a *Handbook of the History of the Philosophy of Law* should accompany the *Encyclopedia.* We must know better the scholars who have gone before, including those of other nations, and different schools of thought or points of view. We, our colleagues, and our students are hungry for such knowledge. This *Handbook* will provide it.

No Handbook can be complete. There is a necessary and inescapable conflict between comprehensive coverage and convenience. Much was omitted from this collection that could have been included, including perhaps some subjects and scholars who ought to have been included, but were not. Here too the advance of technology provides some comfort. This *Handbook* appears in the bound paper volumes you now hold in your hand. These give it the presence and utility that justify its name. But there is also the vastly larger *Encyclopedia*, which exists in an ever-expanding, ever-corrected, ever-existent electronic form. Perhaps, this *Handbook* will turn you also to the broader project, to which you and scholars like you may yourselves contribute, by noticing its failures and omissions.

Above all, this *Handbook* is a tribute to the hard work and persistence of Professor Gianfrancesco Zanetti. As the *Encyclopedia* Section Editor for Legal History, he worked tirelessly for the broadest and most complete coverage. As primary editor of the *Handbook,* he brings it rigor and exactness. As a lifelong member and frequent participant in the scholarly projects of the IVR, he has contributed to the global sense of fellowship and good purpose that brings the consolations of philosophy to those who seek them everywhere. Legal and social philosophy study to understand and improve our relationships with other human beings. Nothing matters more to the value and felicity of our transient humanity.

Baltimore, MD, USA — Mortimer Sellers
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Abelard, Peter

Stephan Ernst

Introduction

Peter Abelard's comments on human action, on his ethical judgment and the questions of guilt and sin, can be found in his *Ethica Scito te ipsum* (E), in his *Commentary on the Epistle to the Romans* (R), as well as the *Dialogus inter Philosophum, Judaeum et Christianum* (D), also referred to as *Collationes*. His central thesis is that the outward deed is not decisive for the ethical evaluation of an action; an outward deed is neither good nor evil in itself but indifferent, killing a human being, sleeping with someone else's wife, and misleading someone with a false statement; all these examples do not constitute sins (E I, 16, 4). Rather, what defines the ethical quality of an action, apart from the agent's *consent* to it, is mainly their *intention* which can only be judged (except by God) by the agent's *own conscience* and remains hidden from other people.

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Consent

According to the *Ethica*, the precondition, on the basis of which an action can be described as sinful or culpable, is found in the agent's free consent (*consensus*) to evil and, thereby, the contempt of God (*contemptus Dei*) (E I, 3, 1–2). Although, Abelard claims, in a public sense, the word "sin," e.g., in the context of "original sin," may also denote punishment for a sin committed or sinful deeds (R 164, 354–165, 393; E I,13, 3–6), in the proper, moral sense of the term (before God), there can be no guilt without consent to evil. Neither vices (*vitia*), which incline us to evil, nor ill will (*mala voluntas*) constitute in themselves moral guilt or sin. Guilt occurs only if one consents to them, consciously and without being subject to coercion. Free decision-making (*liberum arbitrium*) – which he defines, following Boethius, as an "independent judgment regarding one's will" – lies therefore not in our capacity of directing our will toward this or that, but in the decision, that is the judgment of reason, on the basis of which we give our consent (ThSch, 536–537). Yet, neither the outward doing of evil (*opus*) nor the desire linked to specific actions contributes anything to the culpableness or scope of the guilt (E I,14,1–2). On the other hand, mere consent to an evil action may already constitute sin, namely, if one is prepared to commit it at a suitable opportunity (E I, 9, 7–8). And what is decisive is the intention of doing good. The intention alone, as opposed to the outward deed or will, will be judged by God (E I, 29, 5) and counted toward the deed and rewarded if realization is not possible ("intended action," Marenbon 1997, 256).

Intention

But whether or not an action can be described as good or bad in an ethical sense depends not only on the agent's consent but also on their intention. Abelard uses the example of Judas' betrayal to show that one and the same action can be carried out with different intentions by different agents and may hence be evaluated in different ways: God the Father, Jesus, and Judas the traitor all perform one and the same action. Given their intention, however, God's and Jesus' actions are good, whereas the traitor's action is bad. Similarly, the legal execution of a criminal can either be motivated by efforts to bring about justice, or by hatred, and can therefore be either morally good or bad (E I,17,1–5). In his *Dialogus*, Abelard provides an extensive analysis of the question as to when one acts with good or with bad intention. His starting point is the insight that the term "good" cannot only be used as a descriptive adjective (good horse, good craftsman, good thief) but also in the sense *that* a good or bad thing *exists*. One could say it is good *that* a bad thing exists and it is bad *that* a good thing exists (D II, 201–202). Thus, it may be good that God wants evil things to happen in this world (D II, 210). What is decisive about the moral evaluation of an action is not that something good or bad (*bonum/malum*) is done but rather that it is done *in a good or bad way* (*bene/male*). It is in this sense that

Abelard uses the expression that something is done with a good intention: ". . . bene, id est bona intentione" (D II, 212).

Again, Abelard uses the example of Judas' betrayal to reveal his criterion for establishing whether something happens in a good or bad way: the Father's and Son's actions are carried out with good intention, accepting the evil of the crucifixion for the sake of human salvation and thus for *rational reasons* which may justify that evil (D II, 219; see also E I, 19, 2). The traitor, on the contrary, acts in a bad way and with a bad intention because he does not want the crucifixion for rational reasons but for the sake of money (R 105, 303f). Good intention thus consists in not being guided by self-interest but by God's will, thus acting on the same reason and with the same intention as God wishes. By contrast, the bad intention consists in doing something not for the same reason for which God does it, although Abelard also stresses the limitations of human rational insight into the reasons behind God's actions (D II, 219). Human beings can be mistaken about whether the reason behind their action is in accordance with God's intention and thus really justifies the evil to which it contributes.

Conscience

The resulting question of how it is then, nevertheless, possible to act with good intention is answered by Abelard in his *Commentary on the Epistle to the Romans* as follows: even if an action is only mistaken to be in accordance with God's intention, it does not constitute guilt so long as one does what one's *conscience*, subjectively, identifies as the reasonable thing to do so that one lives in accordance with one's own conscience (R 180, 156–181, 163). Only those who act against their own conscience (*contra propriam conscientiam*), and do what they themselves identify as bad, act morally badly and commit a sin (R 77,18–20; 205, 617–619). Sinning means not to do what we believe we should do as well as not to omit what we believe we should omit (E I,10, 2). For Abelard, those who killed the martyrs or Christ (even though, objectively speaking, they may not have acted well or commendably) are hence not guilty in the proper sense. In this context, he points to the concept of unconquerable ignorance (*ignorantia invincibilis*) (E I, 45, 1). The scope of their guilt would have been greater, had they acted against their conscience (E I, 45, 4). In this process, the function of conscience is to assess whether or not we really do what we subjectively see as reasonable, if we are thus formally guided by our own reason and rational reasons – which could be seen as presaging Kantian philosophy (Enders 1999) – or if other, selfish motivations determine our actions. Evaluating intention in this way, Abelard claims that conscience cannot err (R 86, 343–347).

Ethics, Reason, and Law

With these considerations, Abelard determines moral guilt and sin, in the proper sense, solely in relation to inner moments of free consent, of intention, and of subjective judgment of one's own conscience. This has led to the charges of ethical subjectivism and relativism and, of a simple ethics of conviction, brought against him by his contemporaries (Bernhard von Clairvaux) and found as well in earlier scholarship. In contradistinction, it was stressed that some actions are already bad *in themselves*. More recent research has pointed out, however, that Abelard does not in any way deny the existence of an objective basis for ethics (Van den Berge 1975) but that his concern is the subjective mediation of morality (Honnefelder 1992). Abelard himself also emphasizes that an intention cannot be described as good if it only appears this way but only if it is good in reality (E I, 36, 5).

Abelard's objective basis for ethics can be found, for example, in the fact that an action is performed with good intention (*bene*) only if the reason to act can justify the concomitant evil and is therefore a *rational* reason. As a consequence, acting against one's own conscience also means, for Abelard, acting against *one's own rational insight* which commands us to do good and avoid evil (R 205, 219–223). There is no other way of gaining insight into the morally good, except through one's own reason and the *natural moral law* inherent in it. The written laws of the Old Testament – and the Ten Commandments, specifically – are also developments of the *lex naturalis*. These laws are valid because reason agrees with them from its own principles (R 208, 730–733; 207, 694f).

The significance of one's own rational insight as a measure of moral value in Abelard's work is also reflected in the fact that, in his *Dialogus*, he acknowledges, as one of the first medieval theologians, the independence of the ancient philosophical doctrine of virtue and integrates it with Christian ethics. Categorization of the virtues – understood, with explicit reference to Aristotle, as the "best habits of the soul" (*habitus animi optimus*) (D II, 111) – is modelled after the pattern of the cardinal virtues. However, Abelard excludes prudence from the list of moral virtues as it may also be used with bad intention (D II, 115–116). Only through *justice* which is not directed toward one's own benefit but, under the guidance of reason and natural law, toward the *common good* (*communis utilitas*; see also Marenbon 1997, 304–310) can good intention be established (D II, 118–119).

Moreover, Abelard points to the fact that it is not enough to obey commandments and laws, literally, since the legislator's intention must always be taken into account as well (E I, 18). As a consequence, it may sometimes be necessary to act against the literal law or that sometimes the validity of laws will vary according to place and time (R 310, 431–436).

Orientation toward the common good also determines – as Abelard states in the *Ethica* – the outward evaluation of human action in a legal context, for instance (see E I, 24). A woman who, out of love, takes her child into bed with her in order to warm it, but smothers the child in her sleep, is not guilty in the proper sense. Nevertheless, she will be legally punished, although, as Abelard claims, not for

reasons of guilt but for the sake of preventing others from acting similarly. In the same vein, a judge, who knows that a person, accused by his enemies, is in fact innocent but cannot legally dismiss the false witnesses during the trial, must convict and punish the accused. According to Abelard, in both cases the decisions are made for *rational* reasons: this is not about punishing actual guilt but about preventing public harm and damage to the common good as well as avoiding public offense. The degree of punishment also depends on such reasons. So, it may happen that, in obedience to the law, someone is punished legally but not justly and that the law is carried out but justice, indeed, is not done.

Generally speaking, Abelard's works reflect a confirmation of the validity of culture-, time-, and socio-specific conventions and, particularly, a validation of external jurisdiction. This is also evident in his respect for ecclesiastical authorities and the penance rules of his time (Luscombe 1974, 82–84).

Conclusion

So, as much as Abelard acknowledges the significance of a legal judgment of actions, he also transcends this human evaluation in his theological-ethical valuation. In his *Dialogus*, he therefore relativizes the virtues and stresses their insufficiency regarding the actual, highest good (*summum bonum*) of humankind. Only the greatest love for God, which can never be acquired but only granted by the grace of God, can be described as *summum bonum* and true human bliss (Perkams 2001).

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Al-Ghazali (Abū Ḥāmid al-Ghazālī)

Hannah C. Erlwein

Introduction

Abū Ḥāmid Muḥammad b. Muḥammad al-Ghazālī was born in Tus in the region of Khurasan in Persia in 1058 CE. For his education, he moved to the cities of Jurjan and Nishapur. There, he studied with one of the leading theologians of his time, Abū ʻl-Maʿālī al-Juwaynī (d. 1085). Al-Juwaynī instructed al-Ghazālī in the creed of one particular theological school, the Ashʿariyya, which he would remain faithful to until his death.

In 1085, al-Ghazālī joined the court of the Seljuq vizier Niẓām al-Mulk. A few years later, in 1091, Niẓām al-Mulk appointed al-Ghazālī teacher at one of the colleges he had founded, the Niẓāmiyya college in Baghdad, where al-Ghazālī taught law according to the Shāfiʿī school to a large number of students. During this time, he also engaged deeply in the study of Islamic philosophy.

In his autobiography, *The Deliverer from Error* (*al-Munqidh min al-ḍalāl*, composed between 1107 and 1109), al-Ghazālī recounts that, after a few years of teaching at the Niẓāmiyya college, during which his popularity grew, he fell into a spiritual and psychological crisis.

Unable to continue his teaching activity, he left Baghdad and spent the following years traveling, in search for a solution to the existential problem of how one could attain certainty about one's convictions. This was when al-Ghazālī turned to the

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more mystical tradition of Islam, Sufism, realizing that true knowledge of God was not attained by the intellect alone, but also by mystical experience.

In 1106, he resumed his teaching position, at the behest of the new vizier Fakhr al-Mulk, at the Niẓāmiyya college in Nishapur. After only 2 years, al-Ghazālī retired to his native Tus, where he died in the year 1111 (Campanini 1996; Griffel 2009, 19–59).

Al-Ghazālī's Significance in Islamic Intellectual History and Beyond

Al-Ghazālī was a truly prolific writer. He wrote works belonging to several branches of science as understood in his time, including theology, philosophy, Sufism, jurisprudence, and logic. This is reflective of the fact that in his life he went through different phases in the search of knowledge of God and the world.

In the academic literature, al-Ghazālī is frequently credited with having contributed to transforming the Islamic theological tradition (*kalām*) into a "philosophical theology" (Griffel 2009; Shihadeh 2005), by introducing ideas germane to the Islamic philosophical tradition (*falsafa*) into it. In the centuries before al-Ghazālī, theology and philosophy had largely existed side by side, and their encounters were more characterized by opposition. Islamic philosophers, such as al-Kindī (d. 873, known as "the first philosopher of the Arabs") and Ibn Sīnā (Avicenna, d. 1037), were fascinated by Greek philosophical ideas, which had become accessible to them thanks to the "translation movement" taking place in the eighth and ninth centuries (Gutas 1998). They believed that philosophy expressed the same truth as revealed religion (in the form of the Quran), and consequently developed whole philosophical systems, which were a synthesis of Greek philosophy and Islamic ideas. Islamic theologians, on the other hand, placed their focus on authoritative Islamic sources, such as the Quran and traditions going back to the Prophet Muḥammad (*ḥadīth*). They were suspicious of Greek philosophy, which they regarded as foreign and "un-Islamic." For centuries, Islamic theologians and philosophers were divided not only over the sources of knowledge, but also about concrete doctrines and tenets. Al-Ghazālī's significance lies in inaugurating a trend among theologians to make use of philosophical arguments, concepts, and ideas in their *kalām* works. To name but one example, al-Ghazālī incorporated aspects of the philosophical theory of secondary natural causality into his own theory of causality, and thus broke with the traditional theory of causality of his school, according to which God is the only cause in the entire universe and the appearance of causes in nature is an illusion (i.e., occasionalism) (Adamson 2007; Griffel 2009).

Al-Ghazālī in fact engaged with philosophy to such an extent that his *The Intentions of the Philosophers* (*Maqāṣid al-falāsifa*), an exposition of their main doctrines and arguments, caused Christian thinkers in the medieval ages to consider him a philosopher. Al-Ghazālī, however, did not regard himself as a philosopher,

and in his autobiography he explains that he wrote *The Intentions of the Philosophers* in preparation for his aim of refuting certain philosophical doctrines in *The Incoherence of the Philosophers*. Despite al-Ghazālī's critical stance towards certain aspects of philosophy, its influence on his thought is evident.

Philosophy of Law and Social Philosophy in al-Ghazālī

Even though al-Ghazālī taught law and wrote several legal works, his relevance for Islamic jurisprudence takes second place to his relevance for theology and Sufism. This is how both classical Islamic thinkers and modern-day academics perceived him (Rudolph 2019, 67–68). Nevertheless, law did play an important role in al-Ghazālī's thought as a means of ordering society. Till the present day, jurisprudence and Islamic law as the expression of God's prescriptions for humans have enjoyed a special status in Islamic societies. In the minds of many Islamic scholars, past and present, adherence to God's prescriptions is a prerequisite to attaining happiness in the hereafter.

In his exposition of legal theory in his most famous work of jurisprudence, *The Distillation of the Science of the Legal Principles* (*al-Mustaṣfā min ʿilm al-uṣūl*), al-Ghazālī followed the traditional approach taken by the Ashʿarites, the theological school he adhered to. The Ashʿarites subscribed to the so-called divine command theory or divine voluntarism, according to which moral values and legal prescriptions are grounded in God's revelation; they did not exist before God stipulated them. The Ashʿarite position was contrary to the position espoused by another theological school, the Muʿtazilites. They upheld an objectivist position, according to which moral values are real properties of some actions, which can be discerned by human reason, independent of revelation. The same is the case with some legal prescriptions, according to the Muʿtazilites. Following his school's tradition, al-Ghazālī wrote in *The Distillation*: "If there is no statement on the part of the Lawgiver [i.e. God], then there is no judgement. Thus we say: Reason cannot declare anything good or evil . . . and there is no judgement of actions before the arrival of the [revealed] law" (al-Ghazālī 1993, I, 177; Hourani 1985; Reinhart 1995). This shows how closely legal theory was intertwined with theological positions.

Despite insisting that all moral values and legal assessments go back to God's stipulation through revelation, al-Ghazālī highlighted that humans have a natural tendency (*al-ṭabʿ*) to think in moral categories, independent of revelation. He did, however, not infer from this that humans recognize moral values intrinsic to actions (as the Muʿtazilites did). Rather, the human tendency to label actions "good" or "evil" simply points to an inclination (*gharaḍ*) to call something desirable or beneficial "good" and something undesirable or harmful "evil" (al-Ghazālī 1993, I, 179–199, 184). For the exposition of legal theory as part of the science of jurisprudence, al-Ghazālī did not regard this understanding of moral values in terms of personal inclinations as relevant, since he insisted that Islamic law rests entirely on the two authoritative, revealed sources of the Quran and Prophetic traditions.

Al-Ghazālī also affirmed, following the tradition, consensus (*ijmāʿ*) as the third authoritative source of law, and analogical reasoning (*qiyās*) as the fourth and final source. He emphasized that the two sources, while arriving at moral and legal judgment about cases not explicitly covered by the Quran and Prophetic traditions, ultimately rest on them. Al-Ghazālī employed legal and moral categories to classify human actions which were in his time well-established among jurists and theologians, that is, obligation, permission, prohibition, reprehensibleness, and desirability, as well as good and evil (al-Ghazālī 1993, I, 18–19).

In the academic literature, it is highlighted that al-Ghazālī was particularly eager to bring together logic as a branch of philosophy with jurisprudence. He insisted that Aristotelian logic was of great use for jurists, as it would allow them to reach legal judgments through syllogisms that would bring about certainty. Aristotelian logic became known to Islamic scholars in the wake of the translation movement since the ninth century but did not play as important a role in jurisprudence as it did in the rational sciences.

In his *Miḥakk al-naẓar fī al-manṭiq* (*Touchstone of Reasoning in Logic*), al-Ghazālī expressed his critique that jurists often used premises and assumptions in their legal reasoning that did not live up to the standards of Aristotelian logic, and could not bring about certainty and universal validity. In al-Ghazālī's analysis, this was the reason why the law, expounded by jurists belonging to the different legal schools which had emerged over time, was little consistent and seemed open to all sorts of challenges.

It has been suggested in the academic literature that al-Ghazālī wished to overcome this situation and to rest the law on a more certain basis. His strategy was to show that the four sources from which the law is derived (i.e., the Quran, Prophetic traditions, consensus, and analogy) engender certainty as defined in Aristotelian logic, and that legal arguments can be expressed in syllogistic form.

While al-Ghazālī thought that a firm grasp of Aristotelian logic was the prerequisite for proper legal reasoning, he did not require jurists to always express their arguments in syllogistic form. He said this with particular reference to analogical reasoning. Jurists could continue arguing that "date wine is intoxicating, so it is prohibited, in analogy to grape wine," instead of converting it into a syllogism, "every date wine is intoxicating, and everything intoxicating is prohibited, hence every date wine is prohibited" (al-Ghazālī 1993, I, 116–117; Opwis 2019; Rudolph 2019).

Later influential jurists, such as Ibn Qudāma (d. 1223) and Sayf al-Dīn al-Āmidī (d. 1233), followed al-Ghazālī's example and made use of Aristotelian logic in jurisprudence (Hallaq 1990). Despite this, it appears that in every-day legal practice, formal logic was not used widely (Opwis 2019, 112).

Law and Ethics in Society

Ibn Rushd (Averroes, d. 1198), an important philosopher and jurist who wrote a commentary on al-Ghazālī's *al-Mustaṣfā* entitled *Mukhtaṣar al-Mustaṣfā*, expressed his view that the traditional Islamic science of jurisprudence corresponds to ethics in the Greek philosophical tradition. Both sciences share the purpose of teaching people what the good life is. In contributing to organizing proper life in society, they are both parts of the higher science of politics/governance (*siyāsa*). Al-Ghazālī held a similar view, but he thought that the role of the jurists was to instruct only the common people and the masses, while the intellectual and spiritual elite would be instructed by true scholars with special access to knowledge. Al-Ghazalī therefore followed the notion, common among Islamic philosophers but also other Islamic groups, that society is divided into the common people and the elite, who are distinguished by their intellectual capabilities (al-Ghazālī 1964, 329; Rudolph 2019, 72, 79–80).

In al-Ghazālī's view, not only jurists had an important role to play in society in that they contributed to figuring out the details of how God wanted humans to live; in his estimation, the same was true of theologians and, later on in his career, Sufis. In *The Incoherence of the Philosophers*, he charged the philosophers with disregarding Islamic law, leading others astray, and putting social order at risk (al-Ghazālī 2000, 1–3). Al-Ghazālī was equally critical of certain Sufis who thought that in perfecting their spiritual practice, adherence to the religious law had become irrelevant. Nevertheless, al-Ghazālī did agree with the Sufi principle that humans should have complete trust in God, and shun the transient, material pleasures of society (Campanini 1996, 256).

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Alighieri, Dante

Diego Quaglioni

Problem

Life: Dante and the Legal Culture of his Times

Dante Alighieri (1265–1321) was a Florentine philosopher and poet. Although the exact date of his birth is unknown, in his writings there are plenty of autobiographical references that show him involved in political life and in the struggles of his times between Guelphs and Ghibellines. Exiled from Florence, where he was one of the city priors in 1301 affiliated to the White Guelphs, he was sentenced to death and never came back, supporting with his writings the political program of pacification of Italy led by Emperor Henry VII and traveling during 20 years through central and northern Italy until his death in Ravenna. He is the greatest Italian poet of all time, and his *Divine Comedy* is widely considered the most important poem of the Middle Ages. He is also the author of a number of learned *Epistles* and of some doctrinal works, written partly in Italian (*Convivio*) and partly in Latin (*De vulgari eloquentia*, *Monarchia*). Among these latter, *Monarchia* is the only doctrinal writing Dante completed (see Petrocchi 1983; Gorni 2008; Santagata 2011; Indizio 2013; Inglese 2015).

Although not much is known about Dante's education, his works can be said to represent a great contribution to philosophical, political, and legal doctrines between the end of the thirteenth and the beginning of the fourteenth century, and constitute a

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major cultural heritage in the West, destined to operate for centuries. As recently put by Justin Steinberg, "unlike his contemporary, the poet-jurist Cino da Pistoia, it is improbable that Dante had any formal training in civil and canon law, and his sporadic references to specific legal texts are concentrated in doctrinal works such as *Convivio* and *Monarchia*. On the other hand, as a convicted criminal and former public official, Dante was immersed in the legal culture of his day, and the *Commedia* is permeated with contemporary juridical rituals of everyday experience: deterrent and retributive punishment; testimony and confession; litigation and sentencing; special privileges, grants, and immunities; amnesties and pardons; and a variety of forms of oaths and pacts. These enactments of the life of law – not his explicit citations of legal doctrine – represent the poet's most profound statements about law and justice" (Steinberg 2013, 1–2). So Dante's celebrated poem, the *Comedìa* or *Divine Comedy*, has been judged a masterpiece whose "literary-theoretical framework is simultaneously and manifestly a legal one" (Steinberg 2013, 1). Therefore Dante's poem reflects the whole complexity of the legal doctrines and debates within the *ius commune*, especially from the point of view of criminal law (so much so, that the *Divine Comedy* may be considered as a criminal law treatise in form of a poem), with its characteristic use of the *contrappasso*, that "'fearful symmetry' of the language and images" by which Dante "celebrates the transparency of the law as it is stamped on the souls' bodies" (Steinberg 2013, 45; see also Steinberg 2014). In this powerful imaginary representation in which "the two worlds," the earthly world and the otherworldly world, "resemble each other," Dante's poetry and Dante's doctrine unfold "in a suggestive parallel with contemporary legal discourse" (Steinberg 2013, 141–143).

Although this point of observation, not in contrast with the traditional idea according to which Dante "does not present a unified theory of practical doctrine of law," nor with the idea that "his general conception of law, both divine and human, reflect current analyses presented by theologians, by the written corpus of Roman law, and by glossators, lawyers, and jurists" (Armour 2000, 557), the problem of Dante's relation with his doctrinal points of reference in the legal field remains open (see Di Fonzo 2016), because if it is true that Dante "had far greater things on his mind than thinking like a lawyer" (Ross 2015, 369), it is even more true that his great visions "did not prevent him from thinking 'like a jurist'" (Quaglioni 2015, 509).

Dante as a Philosopher-Poet: The Convivio

A larger account of Dante's tendency to face great legal-philosophical themes is revealed openly in the *Convivio*, "a great work with an encyclopedic vocation with which Dante intended to consolidate and revive his mission both as a philosopher-poet" (Inglese 2015, 86) and as a mediator between the great scholars and the public of those, men and women, who did not know Latin. That is the reason why the *Convivio* (literally, "The Banquet"), has been defined as the attempt to offer "a

philosophy for the laity" (Imbach 1996). Written in the same years as *De vulgari eloquentia*, probably between 1304 and 1305, the treatise with which Dante exalted the vernacular as a "natural" language, relegating Latin in the role of an "artificial" language, the *Convivio* is also unfinished: only 4 of the 14 projected treatises survive, each of which is introduced by a doctrinal composition in verse (a *canzone*). In perfect opposition to the Aristotelian tradition for which metaphysics is the queen of all sciences, Dante accorded preeminence instead to moral philosophy. As Ruedi Imbach has put it, "it seems indisputable that this transformation of the philosophical project, which culminates in the primacy of practical reason, is directly related to the function that Dante attributes to philosophy: intended for a laic public, it must primarily help men to lead a human life worthy of the name, a life in conformity with the moral and intellectual virtues so perfectly described by Aristotle" (Imbach 1996, 138). Furthermore, it can be said that the great novelty that marks the *Convivio* is Dante's full and enthusiastic adherence, in the fourth treatise, to the doctrine of the universal empire (or *monarchy*) necessary for the good of the human race and rightly belonging to Rome: "Not only that: the legal foundation of the Empire is echoed by Dante [. . .] in the will of God, which determined the entire universal history so that the story of the two holy peoples, the Hebrew and the Roman, conspired to prepare the world for the advent of Christ and for reconciliation between mankind and its creator" (Inglese 2015, 87).

Dante's Political Philosophy: The Monarchia

The same is true for Dante's political philosophy. The wisdom that Dante imagines for the laity is distinguished by a clear predominance of practical reason. This affirmation is confirmed in a third philosophical work of Dante, the *Monarchia*, written in Latin. This treatise, at once political and philosophical, deals with the political consequences of the relation between reason and faith, a problem that at the dawn of the fourteenth century "presents itself as that of the relationship between the Papacy and the Empire" (Imbach 1996, 138–139). Dante's *Monarchia*, probably written between 1312 and 1313 – just before the unlucky end of the Italian campaign of Henry VII, the emperor that Dante had welcomed for he was bringing peace and justice (Santagata 2012, 257–261; Indizio 2013, 257; Quaglioni 2014, 828–837) – offers an original reinterpretation of the long standing imperial tradition spanning between the Middle Ages and Modernity. It is Dante that echoes and re-elaborates the concept of imperial sovereignty, writing that the empire "is the jurisdiction that includes in its scope any other secular jurisdiction" (*Monarchia*, III x 10), and defining even earlier, in the *Convivio* (IV iv 7), the imperial sovereignty in terms of a universal, supreme, and sacred political function (*officium*) that announces the emergence of a modern conception of sovereignty: "And this office par excellence is called Empire, without adding anything, because it is the commandment of all the other commandments. And so he who is placed at this office is called Emperor, because he is commander of all commanders, and what he says to

everyone is law, and for all he must be obeyed, and every other commandment takes vigor and authority from that of him." For Dante, law is the salvific foundation of human society, a bond of human relations as relations of justice, and the emperor is the executor iustitie (Monarchia II x 1), i.e., the executor of the fundamental premise of every action and way of being concerning human relations.

Dante's treatise on political theory was written, just as Prue Shaw has put it, "in the moribund language" which Dante rejected "in favour of the vernacular when writing at full creative pressure," and it expresses ideas which have been descried sometimes "as backward-looking, utopian and even fanatical" (Shaw 1996, ix). Contrary to all this, Dante's *Monarchia* "is not a work of theory divorced from practical experience of politics; rather, it grows out of painful personal experience of political life, and a thwarted desire to participate effectively in the public life of his native city. In another sense, though, the treatise is purely theoretical. Dante is arguing about principles and the conclusions to be drawn from them. The arguments are abstract, concerned to elucidate fundamental truths. At no point does he consider how his conclusions might be implemented in practice" (Shaw 1996, xi).

Dante's Legal and Political Ideals

Dante's *Monarchia* is divided into three main questions, which form the three books of the treatise: first, is monarchy necessary to the good state of the world; second, have the Roman people acquired by right the universal monarchy; and third, does the authority of the universal monarch depend on God immediately or by a minister or vicar of God. The first question develops the philosophical arguments which demonstrate the logical and ontological necessity of the existence of a unique and supreme temporal power as the universal principle of order, that is as a sovereign guarantee of the highest degree of development of humanity in justice, freedom, and peace. The second general question responds to the need to prove the legitimacy of the Empire from the historical point of view, as a providential and miraculous outcome of a contest between peoples in which God's will appears clearly. The third and last *quaestio* addresses the ecclesiological-political dilemma if the Empire descends immediately from God or through the supreme ecclesiastical authority. Dante solves the problem by stating that imperial power derives immediately from God, even though a legitimate reverence to the superiority of spiritual authority over secular power is due to the Roman pontiff. Therefore *Monarchia*, "so often described by later historians as backward-looking and hopelessly unrealistic as a solution to the problems of his age – an age when the restoration of an empire was becoming as increasingly remote likelihood as perceptions of national identity and state boundaries were hardening – was nonetheless judged sufficiently dangerous by his immediate and near contemporaries to merit a detailed rebuttal by a Dominican friar (c. 1327), a ritual burning on the orders of a higher prelate in 1329, only a few years after Dante's death, and, in the fullness of time, a place in the Vatican Index of prohibited books (1554)" (Shaw 1996, xxxii–xxxiii). In spite of that, not only

Dante's treatise inspired the great Florentine philosopher Marsilio Ficino to make a translation in 1468 but also many jurists of the following generation to praise its theories and the Protestant and humanist printers at Basle to make its first print in 1559, together with its first translation into the German language by Basilius Johann Herold, just 5 years after been placed on the Index. Its influence lasted until the beginning of the twentieth century, when Hans Kelsen made it the subject of his first monograph (Kelsen 1905).

Dante's Philosophy of Law

Dante's contribution to philosophy of law can be better underlined if one pays attention to what the author says in the second book of the treatise, when he tries to demonstrate, not only on historical basis but also on a strict philosophical argument, the lawful origin of the Roman Empire. As Peter Armour has put it, "ultimately, for Dante, *ius* is identical with God's will, and *ius* in practice must be whatever reflects and is consonant with God's will; hence God's operations, revealed in the history of the Roman people, were visible signs which proved that its world jurisdiction (the *imperium*) was acquired not by force but *de* iure" (Armour 2000, 558). In *Monarchia* II ii 4–6 Dante says that it is clear that law, being a good, exists first of all in the mind of God; and since everything which is in God's mind is God, and since God most wants himself, it follows that law is wanted by God as being something which is in him. And since God's will and what God wants are the same thing, it still follows that the law itself is the divine will. And further, it follows that the law in wordly things is nothing but an image of the divine will. From this it follows that everything that does not conform to the divine will cannot be a law in itself, and whatever conforms to the divine will is precisely this law. So, Dante says, "to ask oneself if something has been done by law, no matter how different the words are, is to ask oneself if it has been done according to what God wants." This presupposes therefore, that what God wants in the society of men must be considered true and authentic law.

This full identification of the law with the divine will – a clearly voluntaristic thesis (see Fassò 2001, 222–223) – serves as a premise for the long demonstration of the legality of the Roman Empire through the miracles performed by God and witnessed by the greatest writers of poetry and history. Dante writes that the right of Rome to reign over the world will be deduced from incontrovertible signs and from the authority of the wise men ("ex manifestis signis atque sapientum auctoritatibus"), since the will of God is invisible in itself, but the invisible things of God, according to saint Paul in his Epistle to the Romans (1, 20), "are understood and perceived through the things he has done," just like the wax, that bears impressed the seal that remains hidden (Monarchia II ii 7–8). Moreover, in *Monarchia* II v 1 Dante says that anyone pursuing the good of public affairs pursues the goal of the law, and explains that this consequence is proved because "law is a real and personal proportion in the relationship between man and man, which, if

conserved, preserves society, and if it is corrupt corrupts it." Dante refuses the definition of *ius* given in the Digest (D. 1, 1, pr.: *ius est ars boni et aequi*, that is "law is the art of knowing what is good and just"), because it does not say what the substance of law is, but "it only describes law through the notion of its use." Finally, Dante gives the reason for his own definition of law, writing (*Monarchia* II v 2): "If therefore our definition actually includes both the substance and the effect of law, and the purpose of any society is the common good of the affiliates, necessarily also the good of every law will be the common good; and it will be impossible for there to be a law that does not pursue the common good." The proof is supported by a quote from Cicero's *De inventione* (I, 68–69), according to which laws must always be interpreted in the direction of the utility of public affairs, because "if the laws are not directed to the usefulness of those that are subjects to the laws, they are laws only in name, in fact, they cannot be laws, since the laws bind men to each other for the common good" (*Monarchia* II v 3).

Dante finally arrives at the conclusion, confirming that anyone who pursues the good of public affairs, pursues the goal of the law, and arguing that if the Romans then pursued the good of public affairs, the affirmation that they pursued the end of the law will be true (*Monarchia* II v 4). And it is at this point that Dante offers a long series of quotations from the ancient authors, partly from the philosophers, partly from the historians and partly from the poets (Cicero, Livy and Virgil in the first place), identified as the most authoritative testimonies to proof of the providential and salvific role of Romans in their assumption of the universal empire: "That the Roman people has pursued the aforementioned good by subduing the whole world to himself, is declared by his actions, in which all greed that is always contrary to public affairs is banished, and by loving universal peace together with freedom, that saint, pious and glorious people, shows that he has set aside his own particular interests to procure public ones, for the salvation of mankind" (*Monarchia* II v 5).

A New Definition of Law

With these arguments Dante receives and at the same time transforms a long doctrinal tradition concerning the great theme of the bonum commune, cherished by the moralizing literature of the Specula principum, that goes from Aquinas' De regno to Gilles of Rome's De regimine principum. If the idea of the identity of the bonum rei publicae (Cicero's salus rei publicae) with the very purpose of law belongs to the theological-political tradition, the novelty of an almost aphoristic formulation of this problem must be recognized to Dante. The idea that law cannot be altered (corrupted) without corrupting society is a theoretical acquisition that only partly refers to the sources of Dante, first of all to that Digest, criticized precisely the for its "description" of the law as attributed by Ulpian to Celsus. The notion of law put forth by Celsus and interpreted by Ulpian to the effect of making law the one and genuine moral philosophy (vera philosophia) does not provide for Dante – who nonetheless gave a vulgarized version of it in the Convivio (IV ix 8: "law as a written

reason is the art of good and equity") – a true definition in the Aristotelian sense, because it does not capture the substance of what one would like to define. The definition in Monarchia means "to center the 'quid est' and the 'quare' of the law, which the words of the ancient jurists had only touched, as if they were concepts that escaped a precise definition or because they were universally known as presupposed or abandoned to the intuition of whoever reasoned on them" (Fiorelli 1987, 83). It is therefore necessary to note the anti-accursian character of this passage of Monarchia, because it is precisely Accursius who declares, in one of his glosses to Justinian's Digest and Institutes, his opposition to the jurists of the previous generation who, like the old Pillio of Medicina, denounced the absence of an appropriate definition of law in the Digest (Quaglioni 2011, 44–45).

Dante's opposition to Accursius' Magna Glossa – something akin to the announcement of the later humanistic attitude – can be equally found in the works of some jurists of the same generation of Accursius, as for instance Odofredus, who in his Lectura super Digesto Veteri also speaks of Celsus' definition in terms of a simple "description," or as the French jurist Jacques de Revigny, master of Cynus of Pistoia (Dante's friend par excellence): it is precisely Jacques de Revigny, as still recalled in the middle of the fourteenth century by Alberico of Rosciate, who on the basis of Placentinus' judgment rejected the hostility of the Accursian Magna Glossa and spoke of Celsus' definition as valid only quo ad effectum, an expression that Dante seems to echo directly (Quaglioni 2011, 44–45).

Discussion

A Systematic Mind

It is therefore not difficult to admit that in the whole of his vast and composite work, Dante shows a strong and persistent will to offer a theoretical framework widely involved in the philosophy of his time, but also addressed towards a systematic conceptualization that reveals itself above all where his moral philosophy is expressed in a new and original vision of law and society. It has been written, by one of his most recent biographers, that "Dante has a systematic mind, aims at organicity and coherence. The ability to ascend from specific and particular experience data to ever higher levels of generalization is the trait that defines him more than any other. A theoretical fire devours it" (Santagata 2011, 17). Dante's "sense of law" is not only close to the Roman law tradition that in his time lives vigorously in schools and in practice. In the past, as an understandable reaction to the ideological distortions of the period between the two world wars, the refusal to look at Dante's work from the point of view of legal and philosophical aspects was widespread (see for instance Vinay 1950 and 1962). A never ceased undervaluation of Dante's participation in the legal culture of his time continues to appeal even to no more reliable interpretations of some passages of *Monarchia*, such as in the second book (II ix 20), where we find the famous warning ("sileant," "let they keep silence")