

## **PREFACE**

### **PHILOSOPHICAL METHOD, POLICY DESIGN AND THE INTERNATIONAL LEGAL SYSTEM: FROM HUME'S PPLD TO HEGEL'S**

#### **PPLD: NAVIGATING THROUGH THE 'JUNGLE' AND RELAXING THE 'DEAD HAND' OF PHILOSOPHY IN LEGAL AND POLICY STUDIES**

Peter Winch<sup>1</sup> argued in 1958 that even though 'social scientists' since the mid-nineteenth century have been trying to "emancipate themselves from the dead hand of philosophy", that "...any worthwhile study of society must be philosophical..."<sup>2</sup> Further, quoting Ayer, he emphasizes that "it is by its methods rather than its subject-matter that philosophy is to be distinguished from other arts or sciences."<sup>3</sup> In terms of the legal 'sciences', the implicit warning is that to seek more essential knowledge than that offered by positive practice takes one into what H.L.A. Hart called the "forbidding jungle of philosophical argument".<sup>4</sup> There, the researcher becomes involved with confusing details that are unnecessary to the 'science' of the law.

In this, the second book of my series on PHILOSOPHICAL METHOD, POLICY DESIGN AND THE INTERNATIONAL LEGAL SYSTEM, I once again proceed into this jungle with the conviction that only with an understanding of the philosophical logic and content at the core of legal practice is it possible for one to have an essential grasp of public policy or law. While there are many ways to do this, I advocate *Philosophical-Policy and Legal Design* [PPLD]. Instead of the continued reliance on the exclusive application of scientific method and its positivist paradigm to public affairs, PPLD takes philosophy-as-method seriously. Utilizing the specific Philosophical Method of R.G. Collingwood,<sup>5</sup> it allows one to deduce *Paradigms* for the study of law and policy based upon the reconfiguration of Enlightenment philosophical arguments about practical reason and human agency.<sup>6</sup> This technique combines both philosophical rigor and practical accessibility in the attempt to map Hart's jungle and enliven the hand of philosophy in policy and legal studies.

PHILOSOPHICAL METHOD, POLICY DESIGN AND THE INTERNATIONAL LEGAL SYSTEM, uses PPLD to illuminate the origin, current dilemmas and future of the international legal system, through an application of the philosophical arguments, respectively, of David Hume, G.W.F. Hegel and Immanuel Kant.<sup>7</sup> In the previous volume, *An Evolutionary Paradigm For*

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<sup>1</sup> (1958, 1)

<sup>2</sup> (1958, 3)

<sup>3</sup> (1958, 4)

<sup>4</sup> (1983, 21)

<sup>5</sup> (Collingwood, 1933; 1940)

<sup>6</sup> (Gillroy, 2000; 2006; 2008; 2009; 2012; 2013; 2017)

<sup>7</sup> It is important to understand that these philosophical arguments were chosen only after extensive study of a variety of different philosopher's approaches to practical reason and human agency. They are being used

*International Law: Philosophical Method, David Hume & The Essence Of Sovereignty*, I utilized Hume's PPLD to characterize the origin and essence of the concept of sovereignty in terms of the dialectic balance between four Systematic Policy Precepts (SPPs) each derived from legal rules of recognition, adjudication and change. Here, the genesis of the international legal system can be found in international social conventions that emphasize effective control of territory as based on the process-norm of Justice-As-Sovereignty.

But before making a detailed application of Hegel's PPLD to the current dilemmas of the international legal system in this volume, I will use this preface to revisit PPLD as this technique has evolved since the publication of the first book in the series. I will do this through an examination of three distinctions, made imperative by PPLD, that not only render it a distinct approach to the application of philosophy to policy and legal affairs, but a superior vehicle for navigating Hart's jungle in the name of a lighter and more dexterous philosophical 'hand'.

The first distinction is that between a *philosopher* and their *argument*. The second distinction is between *philosophy* and modern *theory*. The third distinction is between traditional approaches to international law where one theory is used as a foundation for the entire evolution of the international legal system, what I call *Theoretical Monism*, and PPLDs focus on mapping different stages of the evolving legal system on different foundational arguments, what I call *Philosophical Pluralism*. During the exposition of these three distinctions I shall also consider the role of Collingwood's philosophical method and the components of a philosophical-policy paradigm as these have evolved since the publication of the first book in this series. Overall, these distinctions form the basis for my argument that PPLD better recognizes transnational law as a dynamic and open system with an evolving philosophical foundation that requires three, rather than just one, philosophical arguments to explain, in sequence, its past, present and future.

### **THE PHILOSOPHER V. THEIR PHILOSOPHICAL ARGUMENT**

The first distinction necessary to the justification of PPLD as a technique for policy and legal studies is between a philosopher and their philosophical argument. Assuming that the philosopher, as a person, is a creature of their time and context, PPLD also demands that we consider their argument to be distinct from that context and applicable outside of it. If their argument truly reflects a specific and logically intact characterization of the essence of what it is to be human and reason practically, and we remain human practical reasoners, then its status as a principled argument or particular characterization of the logic of practical reason applied through human agency, exists separately from the philosopher and the applications they made during their lifetime. Not restricted by the contextual and time-sensitive applications made by the author, the argument, guided by the author's systematic logic, can be applied to circumstances, issues, and socio-political

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because their specific parameters best illuminated the specific and distinct characteristics detected in the origin, current dilemmas and perceived future of transnational legal practice.

problems outside the contextual frame of reference in which the philosophical argument was originally written.

Specifically, a philosopher (in our case an Enlightenment philosopher) is a contextual thinker but simultaneously offers a timeless and contextually neutral *systematic logic of concepts*. This logic of concepts exists as a system of premises about the human condition and it, consequently, transcends the specific circumstances of its writing as a stand-alone conceptualization of applied practical reason. By its definition as an argument about *human* agency, it should continue to have the power of application beyond its context. This power lies in the essential explanation of the particulars of a status-quo law or policy as well as in deciphering the shortcomings of practice and in assessing alternative logics of concepts for change that would ameliorate these shortcomings.

The positivist tradition, however, is to assume that a philosophical argument is a static and closed system, where its 'truth' is limited to the life-time and context of the philosopher. From this perspective all that Hume or Hegel or any philosopher can offer, for example, international law, is contained in small sections of their exegesis so designated. But this assumption, which conflates the philosopher and their argument, denies the fact that philosophy, before the twentieth century, was considered a comprehensive effort to analyze and understand the human condition as a whole, not just within one's specific time and place. PPLD suggests a more comprehensive imperative that characterizes a philosophical argument as a dynamic system whose logic of concepts is meant to provide an independent and timeless definition of human reason and its imperatives for agency that can be universally applied to illuminate legal/policy practice.

From this perspective, the philosophical systems of Hume and Hegel can offer contextual applications within the greater environment of a systematic and comprehensive argument about the evolution of human reason and agency in law. While these logics of concepts are being tested by their applications to practice, they are neither generated by, or limited to, that practical context. In this way, PPLD provides a means for deciphering and making alternative systematic and comprehensive philosophical arguments available for application to contemporary and future questions of public policy and law.

For PPLD, it is what Hume or Hegel have to say about the essence of human thought and agency, not their particular analysis of the international policy and law of their time, that provides the essence of their thought and a fundamental basis for its application to contemporary practice. In Hegel's case, I am assuming that his philosophical system, taken as a whole, creates a map of how his logic of human consciousness as practical reason becomes real in the world. This map was used by Hegel to analyze our progress through 1820, and to establish the trend toward the self-determination of Peoples within the institutional structure of the European state. Employing PPLD, what I am doing is, first, taking that philosophical map, independent of any specific problem or context, and establishing it as an essential logic of concepts about the assent of right in human reason and agency. Then, second, I am applying this systematic philosophical logic of concepts about the human experience to judge how its entailments fit or illuminate the context and possibilities for international law in the interceding period from 1820 to 2020, and beyond.

Neither a reinterpretation of Hegel, nor in the 'spirit' of Hegel's work, PPLD is a combination of both. It is the application of his logic, as a whole system or *logic of concepts*, to a new context, a new era. Most specifically, my focus is not on Hegel or his argument about any specific application *per se* but on the logic of the philosophical system itself, and what it can tell us about how policy and law have evolved into their current state of affairs. Hegel's logic of concepts is treated as a blueprint for the development of right in human consciousness not only within the context of his time but transcending it into a future which is now our past. By taking its systematic nature seriously, I will create, in the pages that follow, a paradigm reflecting Hegel's argument for the essence of law that can be used to both understand the current dilemmas of the international legal system and design policy to alleviate them.

What does an Hegelian logic of concepts tell us about how international law has and should have developed since 1820? What dilemmas does it suggest we should anticipate, and what tools does it suggest are best to promote Hegel's *Idea of Freedom* in our context, two hundred years later? If the truth of the progress of self-consciousness as freedom through history continues to create the rules and institutions by which we live, then what can it tell us about the legal progress of humanity in the past two hundred years?

#### THEORETICAL V. PHILOSOPHICAL ARGUMENT

The second distinction prompted by PPLD is between the modern definition of theory and the nature of Enlightenment philosophical argument. This distinction builds upon the first between the philosopher and their philosophical argument and reassesses the task of that argument in policy and law. The contention is that what characterizes a *philosophical*, as opposed to a *theoretical*, argument is that the former values comprehensive scope over narrow focus and the illumination of the essence of the law's inherent logic of concepts over an exclusive concentration on the parameters of its superficial or empirical structure.

To address the need for philosophical logics of concepts to undergird alternative policy paradigms, we shall look to a philosophical era where reason and agency were universally agreed to be the fundamental sources for human institutions. During the Enlightenment, theory and practice, normative and empirical, reason and passion, individual and collective, citizen and state, and most importantly, law and society were presumed to be intrinsically interdependent and created by the application of *practical reason* in the world. All legal, social, political and economic ideas and institutions, as well as their history and future course of development were all tied together by the way we, as humans, think and then turn those thoughts into effective action in the material world. No matter what component or 'corner' of the social fabric one wanted to study, the philosopher, during the Age of Reason and the Enlightenment that followed, began with a set of premises or presuppositions about who we are as individuals, how we act collectively and how this agency creates society with all of its many characteristics, both normative and empirical.

A careful study of this era of philosophical argument proffers many varied sets of premises about what practical reason is, how it is made evident in agency and how and to what extent human action accounts for the social world. By utilizing a cross-section of these arguments, PPLD allows one to see how distinct sets of presuppositions make comparative arguments about reason and agency that can then be mapped onto practice to test the fit between philosophical substructure and factual superstructure. Using PPLD, one can examine alternative philosophical-policy paradigms through their ability to decipher the essence of practical reason in contemporary legal and policy practice. This type of philosophical illumination is advantageous for anyone trying to understand where the modern international system came from, why we have the problems and opportunities we are now experiencing and what future course of development might be most persuasive or advantageous, given different fundamental philosophical characterizations of human reason and agency.

However, it is not this definition of philosophy but a more pedestrian idea of theory that has, and still does, characterize the study of politics, law and policy. The idea of philosophy as either a 'jungle' or a 'dead hand' began in the mid-nineteenth century. Since then, in terms of the world of law and policy, we have been trained to reject all philosophical argument that came before the onset of social scientific positivism as anachronistic and inapplicable to our 'modern' circumstances. Instead, the convention is to construct narrow inductive and fact-based theoretical arguments for specific problems or areas of study pertinent to a explicit discipline. The core assumption is that 'proper' theory addresses a distinct corner of practice, detached from and systemically independent of all others. This corner is then assumed to be understandable without reference to a logical-moral substructure, which, even if it existed, is considered to be either inaccessible or unimportant.

With the modern concentration on theory rather than philosophy, the only use found for the comprehensive philosophy of the past is in excising pieces of a philosopher's argument (e.g. Hobbes 'state of nature') to be used within theoretical structures to make a specific point (e.g. the anarchy of international relations). This practice, however, ignores the fact that each of these harvested pieces are components of a greater, systematic philosophical logic of concepts and cannot illuminate by application independent of this integrated latticework of interdependent ideas (e.g. the endless circular confusion about the existence and/or implications of international 'anarchy').<sup>8</sup>

By resurrecting whole systematic philosophical argument, PPLD allows the policy analyst to transcend these circular and unanchored social science arguments, reintegrating an imperative to seek and decipher the philosophical essence of transnational policy and law. In this way we not only illuminate the wider context of these theoretical corners, but connect them and demonstrate how a fuller philosophical understanding of the conceptual

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<sup>8</sup> See, (Wendt 1999) where he uses three 'cultures of anarchy' that he names for Hobbes, Locke and Kant with only a vague connection to detached components of each of these philosophical arguments, the integrity of which is ignored in the name of positivist simplicity.

essence of policy and law renders a higher degree of clarity in the analysis of the specific problems of contemporary legal practice. Uniquely, PPLD assumes that a more adequate route to empirical knowledge is through understanding the whole philosophical essence of the reality that acts as both the starting point and standard of truth for positivist policy and legal studies. This requires a systematic understanding of policy and law as constituted by both a *substructure* of philosophical presuppositions and a *superstructure* of factual practice. It is this dialectical interrelationship that is the point of departure for PPLD.

To reverse positivist theoretical convention, I will depart from specific theoretical efforts to understand international policy or law in isolation, taking a more comprehensive and systematic perspective, and assuming that all legal practice is, in affect, a manifestation of *practical reason* as expressed through *human agency*. Specifically, in order to implement PPLD as a means of utilizing Enlightenment arguments as tools for a deeper understanding of law and policy, I will supplement the intellectual confinement and comfort of scientific reasoning with a set of assumptions and methodological categories that better fit the distinct, dynamic and dialectic realities of the human context.

Explicitly, I will address the need for philosophical as opposed to scientific method by utilizing the work of R.G. Collingwood that employs a set of methodological assumptions specifically fitted for the *human* as opposed to the *natural* world. His philosophical method as a vital component of PPLD, helps transform more comprehensive philosophical arguments characterizing practical reason and human agency into paradigms reflecting alternative substructures for application to the evolving superstructure of the law.

Thus, before discussing the third distinction prompted by the use of PPLD, that between Theoretical Monism and Philosophical Pluralism, let us examine Collingwood's Philosophical Method.

#### **PHILOSOPHICAL METHOD: A POINT OF DEPARTURE FOR PPLD**

PPLD begins with the *Philosophical Method* of R.G. Collingwood.<sup>9</sup> According to Collingwood, contemporary social theorists start with two axioms that prejudice all the logic that follows. First, that scientific method is adequate to understand humanity, and second, that proper analysis starts with the empirical facts of the matter and inducts from these specifics to a general theoretical model fitting the pre-existing problem under scrutiny. From Collingwood's perspective, this technique both narrows and prejudices the act of theorizing. But, he suggests that supplementing scientific method with a prior *philosophical method* better accommodates the conditions and character of humanity and its evolving context.

Collingwood contends that assessing humanity in terms of scientific method commits a category mistake. His philosophical method offers a set of assumptions or premises complementary to scientific method but independent and prior to it for consideration of human reason-in-agency. Collingwood's work is not just one among many

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<sup>9</sup> (Collingwood, 1933; 1940)

philosophical methods,<sup>10</sup> but an effort to describe the true assumptive structure required to understand the distinct context and requirements of the human sphere as opposed to the order of the natural world.

Collingwood points out that these assumptions about the human context reflect how we think and act as persons which makes them a necessary prerequisite to the analysis of any philosophical argument about us or our institutions or practices. They are thus considered a required foundation/methodology for any practical and accurate illumination of social, political or legal affairs. The attractiveness of Collingwood's philosophical method is in its effort to describe humanity as a product of nature but much more. Its utility lies in the persuasiveness of its premises, distinctions and assumptions. However, even if one would rather avoid discussion of the 'truth' or necessity of his method, to take Collingwood seriously one only need assume that humans, while of the natural world are capable of transcending it, and that this transcendence is based upon our unique capacity to reason and our ability to be moral agents in the world. Employing PPLD is merely based on the contention that distinct 'human' categories and assumptions are a reasonable point of departure for the study of the human condition and the policy and law it creates.

Specifically, R.G. Collingwood's Philosophical Method is based on the premise that human beings think dialectically, not eristically.<sup>11</sup> That is, we process the world around us not as single isolated concepts or impervious standards, but by how concepts interact with one another to produce more refined results. This is not eristic or confrontational thought, where the structure of a conceptual scheme is closed and must be maintained or defeated by other completely independent and self-sustaining conceptual arguments. Dialectic thinking and argument assume conceptual schemes to be open and interdependent where the clash of ideas is a positive step in the eventual synthesis of a more complete understanding of the subject being considered.

Given the dialectic logic of human affairs, the investigator should seek the core of their applied philosophy in the essence of human action with a focus on universals rather than particulars. This recommends that one examine the law in terms, not of any one specific component but, architectonically, as a whole interrelated logical system of concepts. Philosophical method assumes that the concepts of this holistic logic will not be classifiable into exclusive categories for 'scientific' study but will overlap dialectically. For example, one is not able to study allocation without distribution, intervention without sovereignty, or more generally, theory without a simultaneous consciousness of practice, that is, studying the normative dimensions of a question implies understanding their overlap with the empirical parameters of the issue.

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<sup>10</sup> "Although some might argue that others, such as the later Wittgenstein, have taken a similar approach in some respects, my view is that Collingwood said it first and said it clearest. I think that he presents a strong and clear statement of the view that a) philosophical concepts are not empirical concepts and b) that the concepts and approaches typical of natural science are inappropriate to the study of self-understanding beings, i.e. humans" (James Connelly, May 29, 2017. Private Correspondence with Author)

<sup>11</sup> (Gillroy 2013, Chapter 1)

Also, these dialectically overlapping conceptual logics are presumed to be organized into a *metaphysics* of what Collingwood calls *absolute* and *relative* presuppositions. While an absolute presupposition is the core concept or idea that provides the base principle giving a human system its character within the argument, the relative presuppositions are those concepts necessary to the full manifestation of this character. Lastly, philosophical method assumes that this systemic metaphysics of overlapping, dialectic concepts (in our case the international legal system), exists on an evolutionary *scale of forms* where the tension between ideas and institutions changes the balances within the various inherent dialectics of that system as it evolves, and, in this way, changes the normative character of its practical existence.

In the same way that the scientific assumption of classification is replaced with the assumption that concepts overlap, the discovery of new ideas or theories is no longer the primary task of the philosopher. This objective is replaced by the quest to understand the continuing refinement of any system of concepts, where the inherent ideas preexist and are well know. Within philosophical method it is assumed that we already know the etymology of our subject. However, since all known concepts and empirical phenomena are derived from a set of essential dialectically-related metaphysical presuppositions, their internal dialectic balance of component ideas is constantly in flux and it is the pattern of this change that is the most crucial thing about them. When once the ideas of freedom and slavery coexisted, they are now antonyms. Consequently, the job of each generation of applied philosophers is to note how an existing logic of concepts has refined itself in response to the demands of the evolution of the dialectic context in which it exists. In effect, the philosophic task in the deciphering of paradigms for the analysis of law and policy is to decipher the continuity or discontinuity of the dialectic interaction of ideas within a core metaphysics, given the changing superstructure of practice.

The combined ideas of a metaphysics of absolute and relative presuppositions combined with a dialectic scale of forms characterizes any specific practical manifestation of policy or law as both permanent and changing at the same time. Specifically, it is *permanent* in that the same essential metaphysical components make up the idea of, for example, sovereignty, but *changing* in that the evolution of reason and agency render different dialectic weighting of these components, each creating a different empirical manifestation of sovereign authority in practice. A philosophical logic of concepts is therefore permanent because its inherent or essential components are constant and simultaneously changing, while their dialectic balance shifts over time on its scale of forms to produce distinct empirical 'snapshots' of the positive law. In the relationship between policy and law, philosophical method predicts that every empirical *logic of investigation* for a policy contains an inherent philosophical *logic of overlapping and dialectic concepts* which simultaneously creates reality and is created by it. Deciphering the pattern of dialectic change in core principles, as these map onto practice, gives the analyst a deeper and more dynamically comprehensive understanding of that legal practice. But given the empirical complexity of sources and strata that constitutes international legal practice, how can one begin to decipher and evaluate the underlying logic of concepts that represents practical reason in international law?



Here a return to a focus on Enlightenment philosophical arguments provides an answer. PPLD suggests that the key to simplifying the dialectical complexity of the world is to depend upon pre-existing philosophical systems which have worked out alternative arguments for the structure of this metaphysics in the form of distinct ideas of practical reason, human agency and their interaction. These philosophical arguments have already worked through the complicated maze of overlapping concepts to create competing systematic arguments for the relationship and evolution of practical reason, human agency and the law. Based on the distinction between the philosopher and their philosophical argument, already discussed, it is not what a philosopher argues about international law in particular that is most relevant, but what their overarching philosophical argument about reason and agency can say about the evolution of transnational law.

What does any one logic of concepts tell us about human reason and agency, the origin of law and its status both within and between states? Does this story map onto experience, practice and how international law has evolved empirically? If so, we gain insight into the philosophical substructure of the law beneath the changing positive reality of legal matters. By letting these argument do the majority of the work in deciphering alternative accounts of how specific conceptual substructures create, and are created by, specific legal superstructures, it is only their translation into policy paradigms that remains for them to become operational tools for the analyst. But before we examine the parameters of paradigm construction, the subject of evolving interrelationships between conceptual substructures and legal superstructures suggests a third distinction prompted by PPLD.

#### **THEORETICAL MONISM V. PHILOSOPHICAL PLURALISM**

Collingwood's methodology of metaphysics and scales of forms, combined with the utilization of various philosophical arguments, taken together, within the context of PPLD, suggest a further distinction between *Theoretical Monism* and *Philosophical Pluralism*. A characteristic of modern legal theory is its predisposition to assume that while the practice of law may have an evolutionary character, its theoretical substructure is best explained by a single static normative argument. There is an assumption that while change in practice must be anticipated theoretically, that this surface change does not create essential change in the dynamics of practical reason, agency, or the process-norms and principles involved.

In the first chapter we will look at evidence for my contention that a single logic of concepts is not adequate to properly take account of the changing balance between moral concepts on the scale of forms that is the evolution of the international legal system. We will examine both the traditional effort from Vitoria to Vattel to use natural law as a foundation for *jus gentium*, and the contemporary effort to take account of both *jus dispositivum* and *jus cogens* in Ratner's theory of international justice, and Whetherall's international social contract. First, however, I shall make the case, based on the dialectic assumptions at the core of PPLD, for a generic distinction between theoretical monism and philosophical pluralism.

Collingwood's philosophical method assumes that socio-legal matters exist on a dialectic scale of forms, where overlapping foundational norms both affect and are affected by changes in legal practice. PPLD implies that international law is an interdependent dialectic architecture of surface<sup>5</sup>essence. This means, primarily, that the international legal system is expected to be an open dynamic system where both the reality of legal practice and the metaphysical imperatives of reason and agency are in a constant interaction either maintaining the status-quo or producing change. These dialectic links between the constituent conceptual components further means that none of these 'parts', nor their assumed character, can be isolated from the rest of the system of logical-metaphysical interrelations for epistemological purposes. While one may judge that, for example, sovereignty is a higher dialectic priority for the legal system than human rights, at a specific time or place, one must consider both concepts as existing and in tension with one-another at all times. Most important here, however, is the entailment that while these empirical and metaphysical components of law are in persistent dialectic tension, each moment or stage of the law's evolution may require its own foundational philosophical argument to represent the normative priorities of that stage's unique dialectic balance of constituent components. Only then is the integrity of both the individual stages of change and the overall scale of forms for the international legal system adequately being taken into account.

The essence of sovereignty, as argued in the first book of this series, requires a philosophical logic of concepts at its origin that is based in a characterization of reason and agency focused on the order of the international system as guaranteed by sovereign authority and *jus dispositivum*. That book argued that this phase of the international legal system is best illuminated by the PPLD of David Hume's philosophical argument. Here, without international *jus cogens* principles, political and civil rights are being considered within the context of this same sovereign authority. However, with the rise of public order principle as *jus cogens*, particularly after the second World War, sovereignty has been increasingly challenged by the international recognition of critical principles. This change cannot be analyzed from within Hume's PPLD, as its almost exclusive focus on the ethics of social convention does not lay a foundation that can adequately support or analyze critical principle that is inherently disruptive of conventional process. Instead, what is required is a logic of concepts emphasizing critical principle that justifies authority beyond the state in the name of right and the integrity of the person. In this book I argue that Hegel's PPLD best fits these requirements.

Recognizing that the international legal system has both a changing superstructure of practice as well as a dynamic substructure of philosophical argument, PPLD creates a policy design space characterized by multiple logics of philosophical concepts as these both create and are created by the evolution of practical reason as expressed in an ever more refined understanding of human-moral agency. These circumstances make it impossible for one 'theory' or single argument about the moral foundations of international law to be adequate to the understanding of a dynamic international legal system. While the greater legal system has a metaphysics and scale of forms that conceptualize how change occurs through the juxtaposition of moral arguments comprehensively, over time, each moment or stage of this development requires a distinct philosophical-policy-legal paradigm to

adequately reflect the specific balance of those dialectic components that define reason and agency during each phase of an evolving international legal system.

PPLD makes this *philosophical pluralism* necessary because the components of the dialectics involved shift and change balance vis-à-vis one-another over time and context. Specifically, for the greater international legal system, the core dialectic of *process*↔*principle*, as set out in the first book of this project, suggests that it may exhibit at least three different characterizations of metaphysical essence, or practical reason in agency. These three ‘moments’ in the evolution of the international legal system require paradigms for (1) the initial balance in favor of process; (2) the rise of critical principle to challenge process and (3) the balance in favor of critical principle. These phases reflect this projects focus on the philosophies of Hume, Hegel and Kant as providing paradigms to explain (1) the *origin* of the international legal system; (2) its *persistence* confronting the dilemmas of the contemporary era, and (3) its future imperatives toward *fruition* as a fully codified institutional structure. In effect, PPLD logically and morally requires that the complexity of the practical legal system be reflected in the complexity of the changing essence of its philosophical substructure, that is, with distinct philosophical-policy paradigms to provide an adequate foundation for each stage in the development of legal practice. This sequence also provides a substructure for Collingwood’s argument that practical reason has three distinct phases: order, right and duty.<sup>12</sup>

**Figure 1 About Here**  
**[Scale of Forms For ILS]**

Fundamentally, PPLD implies that the greater legal system, at its essence, has a permanent core dialectic and unchanging core presuppositions represented by the SPPs corresponding to the rules of recognition, adjudication and change deciphered through Hume’s origin paradigm. In addition, however, we also expect that the realities of the changing superstructure of practice will create distinct configurations and trends in the positive law over time given the changing substructural balance between the Systematic Policy Precepts (SPPs) that generate these rules. Driven by the core *process*↔*principle* dialectic and how its rebalancing causes shifting relations between the SPPs, distinct phases on the scale of forms are realized, and each of these requires a distinct philosophical-policy paradigm to illuminate the moral refinement of the system as it changes. It is the dynamics of the moments of change in the stages that create the greater scale of forms that is the whole history of the international legal system.

Overall, change is captured in the more localized stages or phases of the international legal system as it evolves on its greater scale of forms. Rather than the positivist premise that one conceptual substructure is adequate to describe the changing reality of the international legal system, PPLD provides more. By allowing one to take the dialectic dynamics of the law seriously, PPLD replaces theoretical monism with philosophical pluralism in three ways. First, it provides the analyst with a window before and after any specific positive legal context through establishing a pattern of evolution in stages. Second,

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<sup>12</sup> Preface to first book...Collingwood political writings

it also allows each identified stage of legal change its own logical-conceptual integrity by providing the investigator with a unique and compatible philosophical foundation that is able to more fully accommodate that stage's priorities. Lastly, those studying the international legal system are provided with a more accurate model of its pattern of dialectic balance where multiple philosophical arguments can be utilized to describe and analyze the ebb and flow of its evolution. It is also the case that different definitions of concepts (e.g. sovereignty) within different snapshots of the positive law in the superstructure of the system can be connected to others through their common SPPs or essential components in the substructure, although being separated chronologically as distinct positive law.

Within the specific context of this book, to more adequately take account of this complexity, PPLD indicates that the call for pluralism requires two distinct normative-philosophical PPLD paradigms in order to adequately describe the context of the international legal system as a design space. Specifically two paradigms are necessary to provide legitimate foundations for both the origin of the space in *jus dispositivum* and its reliance on sovereign authority, as well as for the rise of public order *jus cogens* principles and their justification of authority beyond the state.

To more fully understand this essential dialectic of authority, we will proceed, in the next chapter, to more completely consider the contrast between theoretical monism and philosophical pluralism as it is specifically applied to the international legal system. First we shall use the lens of PPLD to describe this legal system as containing four levels of dialectical specification resulting in the contrast between the sovereign authority of *jus dispositivum* and the rise of *jus cogens* with its need for authority beyond the state.

Necessitated by the dialectic structure of the international legal system, which is assumed with the application of Philosophical Method to it as a legal design space, theoretical monism will be exposed as providing a less than adequate explanation of this new dynamic complexity. Specifically, both natural law theories of *jus gentium* and modern theories of justice and international social contract will be found wanting due to their inability to take account of the need for plural normative structures to reflect the integrity of different dialectic balances or 'moments' in the evolution of the scale of forms for this legal design space.

Specifically, a transition must be made between Hume's and Hegel's PPLD. Hume's paradigm is adequate only to an understanding of the origin of the international legal system, but not to its persistence over time or its fruition<sup>13</sup>, which require that Hume's paradigm cede its conceptualization of authority to other paradigms representing the rise and possible dominance of process by critical principle. Consequently, in this second volume of, PHILOSOPHICAL METHOD, POLICY DESIGN AND THE INTERNATIONAL LEGAL SYSTEM, I move from the origin of the international legal system as illuminated by Hume's PPLD to the legal system's persistence in the face of dilemmas created by the increasing tension between sovereign authority and critical right-in-law requiring the rise of authority beyond the state.

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<sup>13</sup> The 'fruition' paradigm will be Immanuel Kant's

This change will be argued to be better described through G.W.F. Hegel's paradigm. Only through a consideration of the interaction of both of these paradigms can one adequately account for the rise of public order critical principles as *jus cogens* in contemporary legal practice that create a dialectic opposition between preexisting conventional reliance on sovereign authority and right-based considerations that increasingly require the exercise of international law as authority beyond the state.<sup>14</sup>

Therefore, the PPLD protocol for deciphering a paradigm and a step-by-step review of Hume's PPLD will be examined in the upcoming section<sup>15</sup> as the justificatory foundation for sovereign authority and the legitimacy of *jus dispositivum*. This reassessment will provide the point of departure for the argument in the rest of this book, that is, take us to Hegel and the full argument for his PPLD as a basis for an understanding of the rise of critical, public order, *jus cogens* principles within the design space and the justification and legitimacy of authority beyond the state within the international legal system.

### **PPLD: PARADIGMS FOR LEGAL DESIGN**

Once the philosopher's logic of concepts is identified it needs to be specifically focused on the domain of law and policy through the creation of a *policy paradigm*. The paradigm interprets the specifics of the philosophical argument through a filter of those generic dialectics, categories and principles that pertain to human socio-political agency as it makes policy and law. Thus a comprehensive and complex philosophical argument is simplified for utilization as an alternative framework for application to specific issues of policy and legal practice. The policy paradigms reflect distinct ideas of practical reason as set out within a specific systematic philosophical argument, but only as it specifically addresses the parameters of legal analysis. In the process of matching the philosophical premises of the paradigm, that is, how it defines the policy space and the character of the humans within it, to the facts of a specific legal subject under examination, the paradigm's utility to any particular policy or legal study can be determined.

By rendering paradigms, PPLD makes philosophy about more than universals. It demonstrates how those universals specifically define and illuminate particular ideas and facts related to the contextual practice of law and policy. To make independently derived and distinct philosophical arguments about human practical reason useful, PPLD complements the universalities of philosophical method with the particulars of a defined policy paradigm for application to the law. In this way, the metaphysical and philosophical components of the philosopher's arguments are more adequately related to the practical dimensions of the law or policy being scrutinized.

Through the use of a dialectic conceptual framework, PPLD makes the philosophical system a *philosophical-policy paradigm* applied within a *legal design space*. It is a legal design space because the logic of the philosophical system is being applied to both

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<sup>14</sup> (Gillroy 2018)

<sup>15</sup> Updated to account for refinement of the PPLD protocol since the publication of *An Evolutionary Paradigm For International Law* in 2013.

understand the policy process as it exists, and design alternatives for change through the selection of alternative paradigms. PPLD neither favors the status-quo or change but facilitates the deeper examination of both. By deciphering a paradigm from a logic of concepts that maps onto and therefore provides a foundation for the status-quo, it also exposes those assumptions within the substructure of the status-quo argument that are illogical or need refinement. PPLD assumes that any snapshot of the status-quo is a 'moment' that illustrates how the rebalancing of essential dialectics has changed the evolution of the law on its scale of forms. That is, how our assumptions about reason, agency and the state have changed given the refinement of human experience over stages of the law's development.

By deciphering what needs to change to compensate for the refinement of conceptual logics over time, one is simultaneously isolating the requirements of a more adequate alternative paradigm to act as a philosophical substructure for that change. This illuminates the empirical reality in terms of the dialectic activity of its metaphysical presuppositions (i.e. absolute and relative) so that the analysis of policy and law become a matter of utilizing the underlying imperatives of distinct philosophical-policy paradigms to create or recreate the legal design space given the dynamic demands of reason-in-agency. Here, the philosophical idiosyncrasies of the law are no longer just assumed or ignored but explained by an understanding of the dynamic ideas that have created, and are simultaneously created by, the evolving facts of legal practice and institutions.

PPLD begins with the assumptions of Collingwood's Philosophical Method, elaborated above. By applying them to restructure pre-existing systematic philosophical arguments about humanity in society, it produces a variety of distinct sets of deductive premises from different whole systematic philosophical arguments. While these are not created within the context of any particular legal or policy issue, they can be tested, or mapped against, any and all empirical practice. From this perspective, each philosophical argument is assessed through philosophical method to render a policy-legal paradigm that provides its own metaphysical 'truth' about reason in human agency that can then be comparatively tested against other arguments for accuracy against both prior practice and the future demands of change.

Specifically, by deciphering paradigms from existing philosophical systems, one can utilize a variety of comprehensive arguments about the human condition prior to, and independently of, approaching any particular policy-legal question. That the philosophical synthesis precedes the policy analysis is critical to avoid the positivist pitfall of allowing the empirical dimension of the 'problem' to be determinative. Only by first understanding the logic of concepts within a specific philosophical argument, can this argument be applied as a whole systematic perspective on human reason and agency. In order to maintain the integrity of the philosophy thus utilized, its essential argument as to fundamental human categories and concepts must be understood first, and only then, be tested for utility against the existing historical patterns of practice. This allows the philosophical imperatives to drive the policy. It provides the opportunity not just to know 'what' but 'why' and 'how'. The analyst can move from policy and law as a bias for the status-quo to a full

consideration of alternative possibilities, given the inherent imperatives of various other logics of concepts generated by distinct paradigms.

By starting into Hart's jungle with a more accurate map of its essence, at the floor, one no longer assumes that the jungle's canopy explains what exists below. Understanding humanity at a more essential level, through the cross-section of pre-existing philosophical arguments with distinct sets of premises about the human condition, I maintain that analysts can be armed with a better picture of essence, source, scope and, therefore, the proper configuration of a legal or policy matter. In this way, we may have access to a clearer picture of the various arguments for the human predispositions behind specific matters of legal and policy choice, enhancing modern decision making with comprehensive arguments about human nature and its evolution. Traditional or empirical logics of investigation for a policy or legal question are now supplemented with an underlying choice of philosophical logics of concepts, that provide an explanation of why what 'is' exists, how it came to be and when and where it creates both advantages and disadvantages in terms of change.

Further, perhaps the most unique advantage of using PPLD in the analysis of law and policy is its ability to decipher specific paradigms to illuminate distinct phases of legal evolution, that is, to provide a changing philosophical substructure to support a superstructure of changing legal practice. As discussed above, the paradigms deciphered through PPLD support a philosophical pluralist approach to the study of law and policy.

Consequently, in this second volume I move from the origin of the international legal system to its persistence and the current dilemmas this creates, and from Hume's PPLD of what Collinwood might call 'practical reason as utility' to that of G.W.F. Hegel or 'practical reason as right'.<sup>16</sup> The transition is necessary given the rise of public order *jus cogens* principles in contemporary legal practice that create a dialectic opposition between preexisting conventional reliance on sovereign authority and right-based considerations that require the exercise of international law as authority beyond the state.<sup>17</sup>

This tension cannot be fully accommodated by Hume's logic of concepts with its exclusive focus on Justice-As-Sovereignty. But before moving ahead to Hegel's PPLD, we shall undertake a step-by-step review of the combined components of PPLD as a technique. We will employ the philosophical system of David Hume, argued in the first book of this series to offer an illuminating *origin* paradigm for the genesis of the modern international legal system. Since the first book's publication in 2013, the PPLD protocol has evolved into its present form here enunciated. While the essence of Hume's paradigm and the implications of its application to the law have not changed, the new configuration of PPLD refines its presentation and accessibility. Describing the refined PPLD process by bringing Hume's PPLD up to date also acts as a guide to the rest of this book, where the methodology is to be employed in the argument for the use of Hegel's PPLD as a *persistence* paradigm for transnational law.

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<sup>16</sup> The 'fruition' story will be Immanuel Kant's

<sup>17</sup> (Gillroy 2018)

## HUME'S PPLD REFINED

To examine a philosophical system through the lens of philosophical method, deducing the policy-legal paradigm from that groundwork, I have created a framework of categories and dialectics. We shall use this framework (Figure 2) to both refine and update PPLD as well as Hume's specific argument about the genesis of the international legal system as first outlined in the first book in this series.<sup>18</sup>

### Figure 2 About Here [Hume's PPLD]

David Hume's philosophical logic of concepts was chosen to illuminate the genesis of human social cooperation in social convention that provides a foundation for the evolution of sanctions, including law, that rise to secure a stable social order.<sup>19</sup> Because it is an origin paradigm beginning with unconscious human interaction, establishing stability by compensating for the growth and complexity of society through law, I contended that it provides us with a systematic metaphysical map capable of illuminating the evolution of international law from its normative and practical origin.

Generating Hume's PPLD begins by examining his systematic and whole philosophical argument through the categories of Collingwood's philosophical method. First, we decipher the metaphysical structure of Hume's argument. As previously explained, Collingwood posits that this structure contains an *Absolute Presupposition* and a series of *Relative Presuppositions*. To locate the absolute presupposition, or most fundamental logical premise of the argument, one must identify that precept that drives, or provides the ultimate imperative for, the philosophical argument as a whole. The relative presuppositions are then those concepts, or precepts, that are instrumental in the actualization of the end of the absolute presupposition. These relative presuppositions can be those concepts that positively make the absolute presupposition real in the world or those that negatively present obstacles to its realization, that must be overcome.

For Hume's PPLD, the absolute presupposition, upon which the rest of the logic of concepts is built, is the *human passion for a stable social order*.<sup>20</sup> Fundamentally, the point of departure for the law is the affect of context or circumstance on the individual, and the requirements for collective action needed to establish a stable, certain, and ordered existence that encourages the public good.<sup>21</sup> This passion, however, is retarded by the "circumstances of justice" that act as the relative presuppositions of his argument.

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<sup>18</sup> See Gillroy, John Martin. 2013. *An Evolutionary Paradigm For International Law: Philosophical Method, David Hume & The Essence Of Sovereignty*. Palgrave-Macmillan. This new Figure replaces Figure 1.2 on page 45.

<sup>19</sup> (Gillroy 2012, 59-63; 2008, 429-479)

<sup>20</sup> (T: 472, 480, 485-486, 497, 526, 543)

<sup>21</sup> (Buckle 1991; Gillroy 2013, Ch.1)



Because the need for society is defined as a product of the passions, argued to be the dominant force opposed to reason in the dialectic of human nature, Hume describes the individual in terms of the association of ideas in the human mind that produces a particular category of sentiment: fellow-feeling or sympathy.<sup>22</sup> Sympathy provides a fundamental basis for a morality of passions; the development or encouragement of sympathy with others grants moral value to human action. However, the evolution of this sympathetic predisposition is countered in the human mind by the existence of a powerful opposite force from which the individual must be able to remove herself to create and maintain social organization: self-interest. This tension defines the person within a dialectic struggle for their practical reason that finds its synthesis in Hume's concept of "limited generosity".<sup>23</sup> This limited generosity, combined with empirical *scarcity* and general *power-equality* define Hume's circumstances of justice.<sup>24</sup>

Continuing with philosophical method, this metaphysical structure is then placed within the context of the evolving *Scale of Forms* characteristic of the philosophical argument under scrutiny. A scale of forms is rendered when the dialectic balances between the relative presuppositions of an argument cause corresponding changes in the surface practice of the law.

For Hume's PPLD, no single, independent or *apriori* criterion for justice as an expression of practical reason exists. Justice is a *process-norm*, a level of sanctions beyond individual approbation of moral behavior, the imperative of which promotes the collective utility of social processes. Justice is the result of social pressure as the complexity of human interaction forces a more formal and universal norm to establish, or reestablish, an enlightened sense of public well-being linked to social order. Justice is both allocative and distributive, a means and an end, as well as a source, locus, and scope for society. Simultaneously, it is considered to be both a normative and empirical concept, established in a mutual respect for the stability of one-another's property.<sup>25</sup> Hume's *scale of forms* is therefore contained within the stages by which convention is created and supported in the face of the circumstances of justice as society expands. Justice is focused upon that level of sanction necessary to maintain stability in the face of an ever larger and more complex social system. Beginning with the *approbation* of others, moving on to *justice* in the form of a social convention or process-norm that establishes a standard for stable social equilibrium, and finally creating *governance* within a political society based upon the previous process-norm of justice further sanctioned by formal law produced by social contract-by-convention.

The currency of this evolutionary scale of forms, later to play the role of the *Operating Principle* of Hume's PPLD, is in the formation and persistence of *social convention*

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<sup>22</sup> (T: 470, 472, 478, 484)

<sup>23</sup> (T: 487-489)

<sup>24</sup> (T: Ibid.)

<sup>25</sup> (T: 491)

as social justice.<sup>26</sup> Conventions are not customs,<sup>27</sup> but those unconsciously learned rules which set the parameters of action in terms of the requirements of justice, thereby stabilizing social agency. The further growth and universal spread of convention is dependent upon coordination at an equilibrium where a process-norm that provide a moral focus for just order adds moral obligation to action through the 'artificial' maxims of justice. Here the dialectical interdependence between the empirical and the normative becomes critical to the establishment and persistence of society.

Duty, promise, and transference by consent become possible only with the establishment of the social convention of justice as a process-norm.<sup>28</sup> On route, morality, through a sympathy for the general interest, lends approbation and obligation to anything that supports society and denies it to that which tends to social disintegration. Morality is a necessary foundation and reinforcement of one's *sense of justice* and provides an added sanction for social stability on Hume's scale of forms, beyond that provided by the protection of one's 'honor.'<sup>29</sup> With justice, individual sympathy becomes reinforced by a concrete sense of the public interest that articulates the utility of society and further realigns self-interest to collective ends.<sup>30</sup>

Hume's contention that society can and does establish itself with the process-norm of justice alone, and without formal institutional governance, is based on the premise that society remains homogeneous, small, and simple.<sup>31</sup> Justice as social convention is necessary in the formation of society to stabilize property and ascribe moral virtue to its stability as a public interest. But, like the preceding moral approbation that sanctioned social order, justice alone is not always sufficient to assure a stable and evolving society. This creates another level of sanctions on Hume's scale of forms: governance through codified law.

What Hume calls "political society" finds its genesis in the formal reconfirmation of personal utility in the collective interest represented in convention.<sup>32</sup> As justice empowers limited generosity by compensating for the tendencies of self-interest to undermine society, the role of the state is to add institutional structure and sanction to established social conventions. Consequently, social convention, originating in moral approbation with justice to insure performance, gains the formal social sanction of government and codified law to support it. Now, larger social groups are more permanently able to coordinate themselves in the face of the dynamic evolution of human nature. Government, with its conscious contract-by-convention rendering a formal legal structure, is not based on a distinct or

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<sup>26</sup> (T: 496-498)

<sup>27</sup> Unlike the standard positivist assumptions about custom adopted by H. L. A. Hart (1961), social convention is efficacious, endowed with an internal moral quality and generates the essential tension between process and principle that engages the validity of the law and its moral authority in a dialectic between, respectively, procedural and substantive rules. See Gillroy (2013, 73-82).

<sup>28</sup> (T: 516)

<sup>29</sup> (T: 501)

<sup>30</sup> In the *Treatise* utility begins with self-interest but finds its essence only in the collective good (T: 472). In the *Enquiries* Hume begins with the case for the utility of social convention and ends with its relationship to self-love (E: 174).

<sup>31</sup> (T: 499)

<sup>32</sup> (T: 538)

stronger obligation than justice requires, but as the final level of sanctions on Hume's scale of forms, governance combined with justice has a cumulative and more powerful effect on maintaining individual cooperation. Each level overlaps and builds on the other, with the social stability of larger and more complex communities as the common objective.<sup>33</sup>

Moving through the double-headed arrow indicating mutual affect (Figure 1), Hume's paradigm is deciphered by making the philosopher's metaphysics real in the dialectic structure of his paradigm's *fundamental assumptions* about the *individual*, how we act *collectively* and what is the proper *role of the state*. These three assumptions are considered fundamental to any analysis of policy or law, that is, they represent the characterization of the person for whom policy is being made, the ramifications of collective action in transforming individual choices into joint social choices, and the role of the state assumed to be proper in the process of codifying policy into law. These assumptions, in turn, render an operating imperative or standard for policy and law that represents the absolute presupposition of the philosopher's metaphysics in legal analysis.

PPLD suggests that for the policy/legal context, this dialectic structure begins with the tension between *process*  $\leftrightarrow$  *principle*.<sup>34</sup> The core dialectic arises from the most essential tension of all, that between law based in the ideal of cooperation or the *process* of social order as an end in itself, opposed to law based in the ideal of transcendent *critical principle*, related to the status of the person as an imperative of reason regardless of context. Beginning with this core dialectic of *process*  $\leftrightarrow$  *principle*, PPLD specifically assigns sub-dialectics representing the core tension in each fundamental assumption so that these can be more easily deciphered.

First, the *Process*  $\leftrightarrow$  *Principle* dialectic, applied to the fundamental assumption of the policy-legal argument in terms of the character of the individual, is represented by the sub-dialectic of *Passion*  $\leftrightarrow$  *Reason*. Assuming that human agency contains both components of character, the dialectic balance between them will define the person assumed to be the subject of policy and law. The next fundamental assumption defines the collective action problem assumed by the philosophical argument and focuses on the sub-dialectic of *Utility*  $\leftrightarrow$  *Right* as the basis upon which the requirements of policy or legal cooperation should be judged. Here, to establish and maintain public coordination, one asks how the transition from individual choice to collective outcomes balances the influence of the collective utility of social stability (*Process*) against individual right (*Critical Principle*).

Lastly, building on the assumptions about the individual and the collective action problem, the role of state within the particular philosophical argument must be deciphered. The sub-dialectic of *Active State*  $\leftrightarrow$  *Passive State* is pertinent here. An *Active State* is charged not only with the protection of a private sphere, but the regulation of process in the name of principle; an active state supports not just the negative freedom of the person, but the empowerment of their positive freedom or agency in the world. Meanwhile, the *Passive State* exists only to provide the legal background conditions of civil life, where only that

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<sup>33</sup> (T: 543)

<sup>34</sup> (Gillroy 2013, Chapter 1)

negative freedom (i.e. freedom from interference) necessary to social cooperation is protected. Any further policy initiative is limited to mimicking the requirements of said process when they cannot be produced without public law.

The next dimension of the policy-paradigm framework renders an *Operating Imperative for the Policy-Maker* from the fundamental assumptions. This operating imperative represents the complex metaphysics of the argument in the applied context of policy and legal practice. The transformation of the fundamental assumptions into the operating imperative gives the policy-maker an integrated standard of practice by which to analyze the specific cases, or problems to be examined. It builds a bridge between the theoretical structure of the philosophical system and its practical application, making the metaphysics and scale of forms within the philosopher's argument more accessible to public decision making.

Hume's fundamental assumptions, building on his metaphysical presuppositions and scale of forms, balances the dialectic structure of *process* vs *principle* in the following way. The individual is defined in terms of *passion over reason*. The absolute presupposition of the human passion for a stable social order places that sympathy necessary to social cooperation in tension with individual self-interest as the biggest threat to stability, making reason but passion's "slave".<sup>35</sup> The collective action problem emphasizes public *utility* over individual *right*, as social convention, evolving over its three levels of sanctions, uses approbation, justice and then government to overcome the "circumstances of justice". Finally, the role of the state within Hume's PPLD, is primarily *passive*, limiting governance to rendering codified law primarily from, and in the protection of, evolving social convention.

These fundamental assumptions then inform an operating imperative of *Justice-As-Convention*, or in the case of international law, *Justice-As-Sovereignty*.<sup>36</sup> The overlapping dynamics of social evolution, to compensate for the circumstances of justice and the dynamic complexity of human social interaction, settle upon a process-norm that stabilizes property internationally. Neutral between specific manifestations or principles of sovereign property, it creates an international predisposition to jointly honor the territorial power of the state in internal matters: matters that carry over to define international law, primarily, in terms of the will of the sovereign state.

The process of cooperation resulting in the sovereign state is both the *means* to justice and the *ends* of justice itself. For Hume's philosophical-policy, justice is order, or the stable coordination of human interaction, where one's sympathy to fundamental social interests requires an additional level of sanction to persist. Justice is also that pattern of allocation and distribution that solves the collective action problem and assures a stable social order. In effect, as the passion for social order evolves and overlaps with the dynamics of the empirical world, the sanctions of government enforce Justice-As-

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<sup>35</sup> (T:415)

<sup>36</sup> (Gillroy 2008, Part IV; 2013, Ch.2)

Sovereignty as a means for legally incorporating new social facts over time, while protecting international coordination.<sup>37</sup>

The last three elements in the matrix framework (Figure 1) concern the full operationalization of the operating principle. Sequentially, they are the *Material Imperatives of the Policy Maker*, the *Shorthand Legal Method* to be employed to specific applications of the philosophical argument to policy and legal matters, and the deciphering of the *Legal Design Context Model* suggested by the application of the philosophical logic of concepts to the specifics of the case under consideration.

The *Material Imperatives* are those tangible collective, public or private goods, the allocation and distribution of which will make the operational imperative real in peoples' lives. These may, depending on the philosophical argument being implemented, include such things as property, education, wealth, opportunity for work or other goods and services to which the policy-maker has access. The *Shorthand Legal Method* is the primary attribute of the legal system that the operating imperative emphasizes for its full implementation. This shorthand might be a particular process or method, like cost-benefit is for the market paradigm, or it might be a specific rule of recognition, adjudication or change that best relates the operating imperative to the practice under scrutiny. Lastly, the *Context Model* is the specific arrangement of components of the institutional structure necessary in the application under consideration as these are characterized, defined and arranged by the philosophical logic of concepts applied to a specific policy or legal context.

Within Hume's PPLD, the *Material Imperatives of the Policy-Maker* are defined in terms of laws that stabilize the ownership and transfer of property, one's education or socialization to the conventions of practice, as well as assent to a definition of personal dignity externally defined by those conventions. Here, what Hume calls the artifice of politicians correlates their self-interest with the collective interest in a society stabilized by social convention, fully implementing that stability in the persistence of convention through law.

Within the context of the international legal system, the *Shorthand Method* and *Context Model* is constructed by the dialectic interaction of the Systematic Policy Precepts (SPP) deduced from the requirements of the legal system for rules of recognition, adjudication and change. Specifically, as outlined in Chapters 2-5 of the previous book in this series, a local rule of recognition in the SPP of effective control of territory, a universal rule of recognition in the SPP of peaceful cooperation, a rule of adjudication represented by the SPP of progressive codification and, finally, the rule of change as made manifest in the SPP of non-intervention.

As seen through the logic of Hume's PPLD, the dialectic interactions of these legal rules affect the balance in favor of the local rule of recognition: the SPP of effective control of territory. Consequently, by defining the essence of Justice-As-Sovereignty for Hume's PPLD, it becomes the *Shorthand Policy-Legal Method* for the paradigm. Holding primary

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<sup>37</sup> (T:567-9)

weight it also dialectically arranges the other SPPs in the way characterized in Chapter 5, of the previous book (See Figure 6.1 on page 261). This figure is the context model that represents the origin of the modern international legal system from the standpoint of Hume's PPLD.<sup>38</sup>

But Hume's concentration on process and the evolution of voluntary law does not tell the entire story of the international legal system. It is inadequate to a comprehensive understanding of the process↔principle dialectic within the context of our analysis. Understanding the international legal system through PPLD, these dialectic components will provide counter-pressure on one another. So, while the origin of the modern international legal system suggests an argument for practical reason that emphasizes the *utility* of process over principle to create and empower a system of voluntary law, the governance structure so created will not be able to arbitrate matters concurrent with the opposite components of the dialectics involved (in this case *right*). Within the secured and stable equilibrium of this system of law, it is not just social convention that has a legal-institutional standing. The tendency of individual right to be sacrificed to the advantage of social convention may be assumed to inspire a policy concern for the restoration of the latter through the codification of what has become known as Public Order Principles, what I call critical principles. This requires a distinct philosophical foundation that supports a rebalancing not only of the dialectic between *process↔principle*, but all of its sub-dialectics.

Specifically, to understand the forces at work in rebalancing process↔principle requires a philosophical argument based on reason rather than passion. It must emphasize right over social utility and give an imperative to the active state to transcend a dependence on social convention in order to make the freedom of the person real in the world through law that emphasizes authority beyond the state.

Hegel fills this bill.

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<sup>38</sup> (Gillroy 2013, p. 261)

**FIGURE 1**  
**SCALE OF FORMS FOR THE INTERNATIONAL LEGAL SYSTEM**  
**AND CORRESPONDING CHANGES IN THE DIALECTIC BALANCE OF THE SPPs**  
**CONSTITUTING THE ESSENCE OF SOVEREIGNTY**

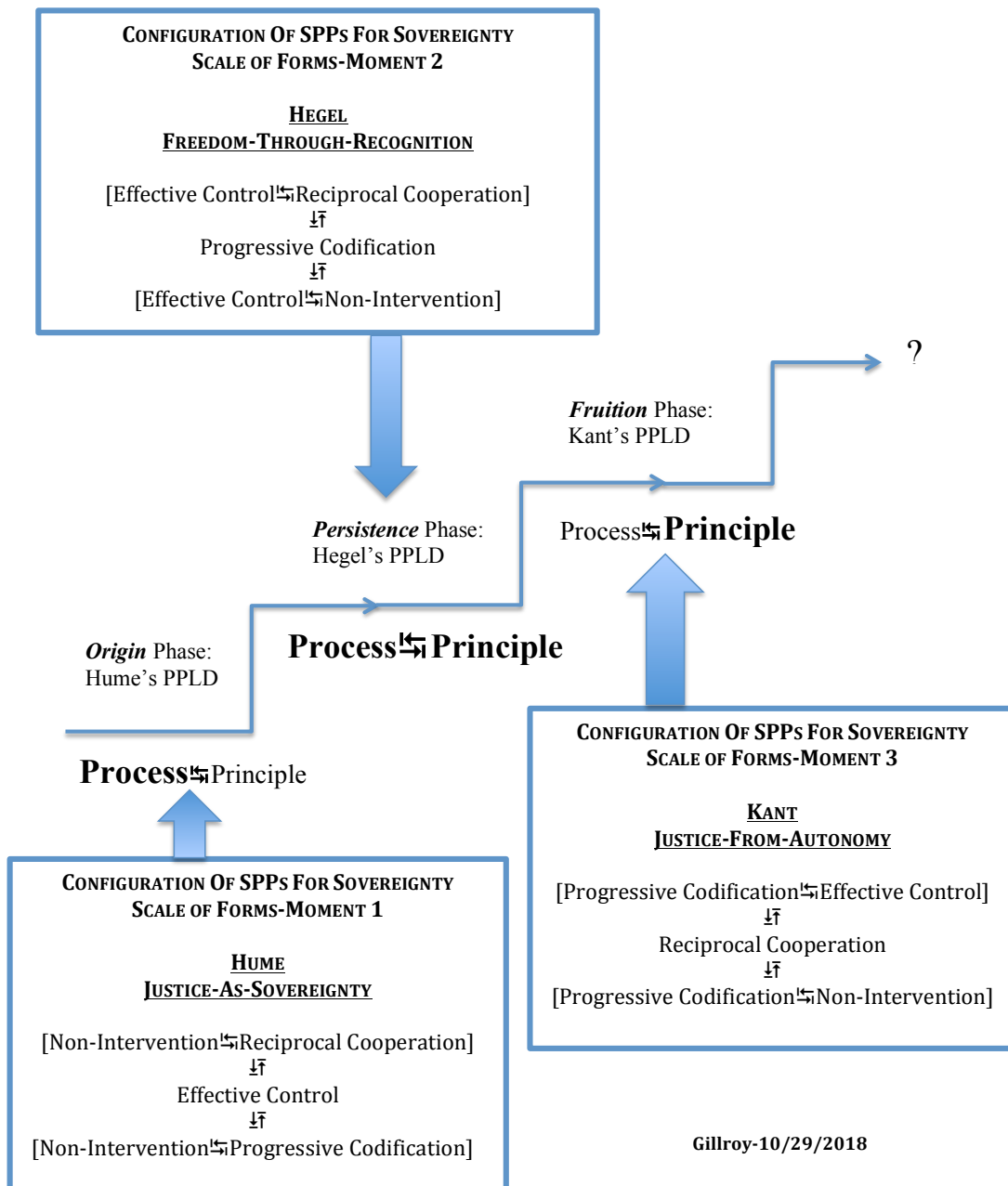


FIGURE 2

**PHILOSOPHICAL METHOD APPLIED TO A PHILOSOPHICAL ARGUMENT  
RENDERING HUME'S PHILOSOPHICAL-POLICY & LEGAL DESIGN PARADIGM**

