ARSP
Archiv für Rechts- und Sozialphilosophie
Archives for Philosophy of Law and Social Philosophy
Archives de Philosophie du Droit et de Philosophie Sociale
Archivo de Filosofía Jurídica y Social

ARSP Band 97 • Heft 2 • 2011

Dietmar von der Pfordten, Göttingen

What is Law? Aims and Means

ABSTRACT: The article aims to understand the phenomenon of law/the concept of law from a philosophical perspective. First, it is argued that law is a sort of human action. Therefore, the phenomenon of law can only be understood by analyzing the two main elements of human actions: aims and means. The aim of law is the mediation between possible contrary, conflicting concerns. The four parts of this aim are analyzed. But also morals and other social norms have a similar aim. So law has to be distinguished from morals and these other social norms by its specific means. The specific means of law are its categorical character, its externality, its formality and – if law and religion are separated like in many modern societies – its immanence.

I. The Perspective of Legal Philosophy on the Law

As with any other phenomenon, law can be subject to different perspectives of inquiry. From a doctrinal perspective, law can be understood as a normative basis for lawmaking and adjudication. From a historical perspective, law can be viewed in its time-dependent changing dimension and as a part of human history in general. From a sociological perspective, law can be looked upon as an actual social fact or institution in relation to other social facts or institutions, like politics or the economy.[1] From a naturalistic perspective, law can be observed as neuronal states, the bodily movements of humans, sound waves, and so on. Finally, from a very limited, internal and descriptive perspective, law can perhaps be described (in its most abstract and general features and beyond particular legal systems) as the object of a descriptive "General Theory of Law" ("Allgemeine Rechtslehre"), of a "Pure Theory of Law" ("Reine Rechtslehre") or – in a specific and narrow understanding – "Jurisprudence".[2]

What, then, is a philosophical perspective on the law? This obviously depends on our understanding of philosophy in general. Therefore, one must ask: What distinguishes philosophy from other scientific and academic inquiries like legal dogmatics, history, sociology, natural science, or a General Theory of Law?

1 For a sociological and juridical perspective on law, cf. e.g., Ralf Dreier, Der Begriff des Rechts, in: Recht-Staat-Vernunft, Frankfurt a. M. 1991, 95-116.

2 Hans Kelsen, Reine Rechtslehre, 2nd edn., Wien 1960, 1; John Austin, The Province of Jurisprudence Determined, 1995, 11, 18, 288. See for another understanding of 'jurisprudence' as a second-order inquiry into the study of law: Alf Ross, On Law and Justice, London 1959, 25-26. For an understanding in the sense of the question "What is law?": Brian Bix, Jurisprudence, 4th edn., London 2006, 9.

Every search for knowledge requires at least three elements: (1) an object,[3] (2) an aim, (3) and some means to attain this aim: a method. For example, biology has as its object living beings, as its aim a description and explanation of these living beings, and as its method empirical research, experiment, induction, the establishment of hypotheses, the formulation of theories, and the like. What, then, can be considered as the object, aim, and method of philosophy?

Within the confines of the present paper, this question can be treated only briefly. Three insights are crucial. (1) Philosophy does not have a particular type of thing or fact as its general object like physics (energy and matter), biology (living beings), sociology (society), and linguistics (language). (2) Accordingly, since the particular types of things or facts are assigned to the singular sciences and humanities, the formal object of philosophy must be something else. (3) At the same time, philosophy (as a type of inquiry) cannot dispense with any sort of object, nor limit itself only to one aim and/or one method.[4] In general, human agency can be understood in terms of its aims and means. However, the particular kind of activity that is represented by the search for knowledge is, by conceptual necessity, a search for knowledge of something. It is always relational or, more precisely, intentionally directed towards a particular object. Similar to the objects of mathematics, this object need not be a real thing or real fact in space and time, and, of course, it may turn out to be non-existent – similar to the ether that late nineteenth century physics found out to be non-existent. The insight that an object of inquiry does not exist as a thing or fact is an important piece of knowledge about this object of inquiry.

The object of philosophy is far more obscure and more difficult to grasp than the particular types of things or facts which are the objects of the singular sciences and humanities. And one can – some philosophers do – even question its existence. But the identification of an object of philosophical investigation is necessary.
What can this object of philosophical inquiry be? If the singular things and facts are occupied as objects of inquiry by the various sciences and humanities, the only object of inquiry left for philosophy seems to be this: it can only be the connection of all singular things and facts – otherwise put: the world as a whole, understood not in the sense of simply summing up the knowledge of the singular sciences but in some abstract, non-empirical sense.

Philosophical inquiries try to understand particular objects like law, language, knowledge, or the human being, as part of this connection of all singular things and objects; or, from a complementary perspective, they try to understand these connections between single things and facts.[5] This means that the single objects are not dealt with in

3 „Object" is understood here in a wide, epistemological sense. It comprises not only things and facts but also abstract and constructed objects like numbers in mathematics.

4 Some authors suggest that philosophy can be defined by reference to a method alone. Cf., e.g., Jay Rosenberg, Philosophieren, 2nd edn., Frankfurt a. M. 1989, 17; Alf Ross, On Law and Justice, 25: "It [Philosophy] is no theory at all, but a method. This method is logical analysis. Philosophy is the logic of science, and its subject the language of science." The quote shows that it is impossible not to take into account an object of philosophy as well. Contradicting himself, Ross begins with the claim that philosophy is only a method, but then goes on to propose that the object of philosophy is the language of science.

5 See Plato, Laches 199d4-e5, Politeia 504d7-505a4; Arthur Schopenhauer, Die Welt als Wille und Vorstellung, Sämtliche Werke, vols. 1 and 2, Darmstadt 1961; Ludwig Wittgenstein, Tractatus logico-philosophicus, Werkausgabe, vol. 1, 10th edn., Frankfurt a. M. 1995, 11: „1. Die Welt ist alles, was der Fall ist"; Rudolf Carnap, Der logische Aufbau der Welt, Hamburg 1998.

isolation, as, for example, in a General Theory of Law or in a Pure Theory of Law; nor are they considered in relation to other single objects, as when, for example, single objects such as law, politics, or economy are investigated only in relation to society in the social sciences.[6]

The philosophical perspective does not necessarily refer to an ideal or transcendent reality, for it is very questionable whether such a reality exists.[7] The assumption of such an ultimate reality is just one specific philosophical position, for example, Plato's theory of ideas, or Aristotle's theory of the Prime Mover as the ultimate cause of all motion.[8] It cannot be a conceptually necessary condition of philosophy. Rather, the object of philosophy is to be understood as the connection of every singular entity or fact with all other singular entities or facts. It is a sort of frame for our understanding of the world.

The aim of philosophy depends on its object. If the object of philosophy is the world as a whole (the connection of everything with everything), its aim can only be an encompassing view of this connection of everything with everything. A particular view would not take as its object the world as a whole; rather, it would look to particular facts or things in isolation (or in relation to other particular facts or things). "Encompassing" should not, in this respect, be understood as a sort of addition. Even though any particular knowledge may be relevant for philosophy, the mere addition of all knowledge of all singular sciences cannot be its aim. Philosophy is no encyclopedia. Rather, it aims at a comprehensive and abstract view of the world, a frame of all singular knowledge. However, as pointed out above, this abstract, philosophical perspective on particular objects such as law is only one possible perspective among other, equally legitimate perspectives.

If the object of philosophy is the connection of everything with everything and the aim is an encompassing view of this totality of connections, then there seems to be no reason to restrict the means to attain this aim. The method of philosophy, then, comprises all possible methods of all other singular inquiries. There can be no narrowing down to mere deduction (as in mathematics and logic), or to empirical inquiry (as in the natural and social sciences), or to description (as in a Pure Theory of Law) – every method can be used to reach the aim of an encompassing view.

What are the consequences of this task of general philosophy for the philosophy of law?[9] Philosophy of Law has to inquire into law, not for the specific purposes of adjudication (as a doctrinal perspective would have it) nor as changing historical institution (as investigated by history of law) nor in its specific relation to society (as investigated by sociology) nor as a natural or normative but isolated fact but first and foremost in its possible and actual connection with all other objects. It aims at an encompassing perspective on law, and to that end it may make use of all kinds of methods.

But is such an external, all-encompassing philosophical perspective on law possible at all? Law is not a purely physical object. It is an intentional (hence meaningful and interpretative) practice.[10] Moreover, this practice, in a certain sense and to a certain

6 See the writings by Niklas Luhmann: Das Recht der Gesellschaft, Frankfurt a. M. 1993; Die Politik der Gesellschaft, Frankfurt a. M. 2000; Die Wissenschaft der Gesellschaft, Frankfurt a. M. 1990.

7 For this understanding of philosophy as a search for an ultimate reality and its critique: John Passmore, Article „Philosophy" in: The Encyclopedia of Philosophy, ed. Paul Edwards, New York/London 1967, vol. 6, 217.

8 Plato, Phaidon, Menon, Politeia, passim; Aristoteles, Metaphysik 1071b3

9 For a first formulation of the task of a philosophy of law: Dietmar von der Pfordten, Was ist und Wozu Rechtsphilosophie?, Juristenzeitung 59 (2004), 157-166.

10 Ronald Dworkin, Law's Empire, Cambridge 1986, 46

degree, is self-referential. It commonly involves self-interpretations or higher-order interpretations on the part of the practitioners of law themselves: Jurists, legislators, administrators of law, and the like refer to, reflect upon and interpret law while applying it. One might conclude that these self-interpretations by professional practitioners of law provide the only relevant source for understanding the concept and phenomenon that is law.

As a meaningful intentional practice, law cannot be understood without reference to the intentions pursued by law. Certainly, the self-interpretations of judges, legislators and other professional jurists can offer valuable clues to an adequate understanding of these intentions. However, it is important to note that these self-interpretations, important as they may be, do not exclude an external, philosophical perspective on law. Such a philosophical perspective is not excluded for at least five reasons.

First, self-interpretations by practitioners of law do not offer the only possible source for an adequate understanding of the respective intentions pursued by law. There are further sources as well: for instance, past or future utterances or actions within which the intentions in question are embedded. Second, self-interpretations may diverge among different experts or different legal systems. Third, self-interpretations may be erroneous or incomplete. For instance, a judge may intend to pronounce his judgment but fail to notice that the specific procedure does not allow this. In that regard, his self-interpretation of his performance as renderer of judgment is mistaken. Fourth, self-interpretations themselves can be made the object of inquiry. Fifth, like other social facts, law concerns all members of a community, not only the experts; this holds in particular for the law of a political community. Hence, there is no reason why the understanding of law should be considered as a kind of esoteric knowledge, reserved for the experts. The arcana imperii are illegitimate and have justly been abolished by democratic societies. It is not only a matter of fact that self-interpretations can be subjected to investigation and interpretation by a third party. Such examinations are also permissive from an ethical point of view, as long as they do not violate the privacy of the person whose self-interpretation is in question. Jurists and other practitioners of law may be experts on specific juridical concepts and phenomena such as, say, mortgage or administrative act; but they have no particular competence with regard to a general and all-encompassing understanding of the phenomenon of law as a whole.

How can we further characterize the philosophical perspective on law?

The first answer to this question is negative: We cannot any longer assume an essence or substance of law. These pretensions of metaphysics have fallen into doubt for good epistemological reasons, which were formulated by Kant and many other eminent philosophers.[11] We cannot identify things as such. But we can search for the most stable, and, therefore, relatively necessary properties of a phenomenon into which we wish to inquire. So we can look for the most stable and necessary properties of the phenomenon 'law' which, because of their necessity, and, therefore, pervasiveness, are decisive for all relations to all other facts or things in the world. Thus, we can try to identify how law is connected to all other things according to our understanding of law itself.

In order to reveal the most stable features of the phenomenon of law, a promising way seems to be to inquire into the necessary conditions of the concept of law – relying on the assumption that thus far no singular instance of the phenomenon of law has been found to lack the features that correspond to those necessary features of the concept

11 Immanuel Kant, Kritik der reinen Vernunft, 2nd edn., Kants gesammelte Schriften. Edited by the Royal Prussian Akademie of Science, vol. 3, 57

of law. This assumption supports the further assumption that no instance of law that lacks these features can be found – admittedly an assumption which we can make but not prove. Put somewhat differently: The philosophy of law can try to understand the place of the concept of law in our conceptual scheme. This place is not a priori in nature. But we can assume that, in relation to our conceptual scheme as it is, it is a sufficiently fixed one, so that we can speak of "necessity" – not in an absolute sense, but (at least) in a relative sense, relative to our conceptual scheme.

The nature of concepts is controversially discussed: ideal entities (Idealismus, Platonismus), real properties of singular entities (Frege, Carnap), mental representations (Descartes, Locke, Hume, Kant, Bolzano, Fodor, Prinz) or units of language (strict nominalism, Hobbes, Wittgenstein, Quine).[12] For a comprehensive view, which is the aim of philosophy, the third, mental interpretation seems to be the most fruitful because mental representations have an intermediate position between the represented properties and language, and refer to both. So they seem to be the ideal means to reach a comprehensive view of objects and their interrelations.

Besides this ontological question, there is the question of how to analyze concepts. The traditional method of definition "per genus proximum et differentiam specificam" is problematic, for it assumes ontological units like "genera" and "differentiae".[13] But it can be reduced and transferred into a search for a multitude of necessary conditions of the concept of law which correspond – so we can perhaps assume – to necessary qualities of the phenomenon of law. A proponent of strict nominalism, Wittgenstein suggested that concepts are structured by "family resemblances" among different features which do not share any common condition.[14] This option cannot be excluded, but it has a serious disadvantage. It precludes the possibility of distinguishing concepts in terms of their distinctive features. Hence, we would do well to consider this option as the least favourable solution.

Wittgenstein himself, in a famous example, characterizes games as "processes," that is, he alludes to a necessary condition of the concept of games.[15] Hence, according to a weaker interpretation, Wittgenstein only denies the possibility of analyzing concepts in terms of necessary and jointly sufficient conditions but concedes the possibility of necessary conditions.[16] If even the possibility of necessary features of concepts were excluded, one concept could not be clearly distinguished from another, and, due to

12 Properties: Gottlob Frege, Die Grundlagen der Arithmetik, Stuttgart 1987, 15; Rudolf Carnap, Logical Foundations of Probability, 2nd edn., Chicago 1962, 7. Mental representations: John Locke, An Essay Concerning Human Understanding, New Work 1959, Introd., 32; book II, 1, 1, 121; Immanuel Kant, Kritik der reinen Vernunft 2nd edn., Akademieausgabe vol. 3, 85; Bernard Bolzano, Wissenschaftslehre, § 73, Gesamtausgabe I, II/2, Stuttgart-Bad Cannstatt 1987, 137: Vorstellungen, die keine Anschauungen sind oder enthalten; Jerry Fodor, Concepts. Where Cognitive Science Went Wrong, Oxford 1998; Jesse J. Prinz, Furnishing the Mind. Concepts and their Perceptual Basis, Cambridge 2002, 1, 3, passim. Units of Language: Ludwig Wittgenstein, Philosophische Untersuchungen, §§ 96, 383; Williard v. Orman Quine, Word and Object, Cambridge 1960, 3, 12, 161, 270. See for a comprehensive historical study: Morris Weitz. A History of the Major Philosophical Tradition, London 1988. On Hobbes' strict nominalism, see Dietmar von der Pfordten, Thomas Hobbes' Sprachphilosophie und ihre philosophiehistorische Bedeutung, in: Logos N. F. 7 (2001), 386-402.

13 Aristoteles, Metaphysik 1037b29f

14 Ludwig Wittgenstein, Philosophische Untersuchungen, Frankfurt a. M. 1977, § 67

15 Ludwig Wittgenstein, Philosophische Untersuchungen, Frankfurt a. M. 1977, § 66: „Betrachte z. B. einmal die Vorgänge, die wir ‚Spiele' nennen. Ich meine Brettspiele, Kartenspiele, Ballspiele, Kampfspiele, usw. Was ist diesen gemeinsam? – ..."

16 See for this interpretation: Hjalmar Wennerberg, The Concept of Family Resemblance, in: Theoria 33 (1967), 107-132, 110; Eike v. Savigny, Wittgensteins "Philosophische Untersuchungen". Ein Kommentar für Leser, vol. 1, Frankfurt a. M.1988, § 66, sec. 3.

this, concepts could not fulfill their function as a means for gaining knowledge about the world. If, by contrast, one accepts the possibility of necessary conditions of concepts, one also has to accept the possibility that a concept has more than one necessary condition. In such a case, the necessary conditions can be brought together. So if one finds several necessary conditions for a concept like law, their combination can, at the least, be considered as progress towards necessary and sufficient conditions, though one cannot prove this, and, therefore, one cannot prove the identity or at least equivalence of the definiendum with the definiens. (It could only be assumed with regard to purely stipulative definitions as provided, for instance, in mathematics or logic.[17]) There can only be a process of approximation of the definiens to the definiendum by adding as many necessary conditions as possible, helping to distinguish the phenomenon in question from other phenomena.

The fact that law is a social, rather than natural, phenomenon does not preclude such a procedure, for, with regard to social phenomena, we can also distinguish between those features that are relatively necessary and those that are relatively contingent. What, then, can be assumed to be the necessary conditions of the concept of law, conditions which can be understood as necessary features of the phenomenon of law, and which, in connection, might perhaps lead to a necessary and sufficient condition which can serve as a definition in a reduced and relative (but not absolute) understanding?

II. The Phenomenon of Law

Conceptually, law can be understood as divine, natural, or human law. In the following, the focus will be on human law. Human law is less a natural than a social fact. However, this characterization is not particularly illuminating. For there are a lot of very different social facts: politics, economy, religion, morals, power, media, the general public, demographic development, and so on. How can law be distinguished from these other social facts? A first crucial step in doing this is to realize that law is necessarily a kind of human action in the widest sense (including its consequences, whether these are in fact intended or can at least be expected).[18] Law is human action in two respects: as a general phenomenon, and in all its singular manifestations. When a judge decides, he always performs a human action. When a public official issues an administrative act, he performs a human action. When a parliament votes for a statute, it performs a collective human action.

The qualification of law as a human action makes possible the next step: If law, by conceptual necessity, is a form of human action, it can only be understood if one takes into consideration the necessary qualities of human actions. What are the necessary qualities of human actions? Human actions are comprised of at least two necessary elements:[19] an aim or an intention, and some means (broadly conceived) to realize this aim. This holds for all actions, though the means may be very reduced. The means

17 This was already stated by Immanuel Kant, Kritik der reinen Vernunft, vol. 3, 477.

18 Gustav Radbruch, Rechtsphilosophie, ed. Ralf Dreier and Stanley Paulson, 2nd edn., Heidelberg 2003: „Recht ist Menschenwerk."

19 For the necessity of an aim in every action see e.g. Aristoteles, Nicomachean Ethics 1094a1; John Searle, Intentionality. An Essay in the Philosophy of Mind, Cambridge 1983, 107. Not all actions have the same aim, but specific types of actions like law can be specified by one uniform, albeit for obvious reasons quite abstract aim.

can also be the performance of the action itself, for example, when someone walks with the sole aim of walking, or if someone looks with the sole aim of looking.

Here is an example for the necessity of aims as an element of any action: If someone raises his hand, it can be a salutation, an agreement to a contract, a physical exercise, a request for permission to speak, or any of many other types of actions. It is only possible to distinguish these actions (which, in their outward performance, can be identical) by identifying different aims or intentions, for example, by asking the actor, or by considering the situation surrounding the performance of the action: On the street, it is often a salutation, in an auction, the agreement on a price, in a gym, a physical exercise, and, in a conference, a request for permission to speak. On the other hand, a salutation can be performed in different ways: by raising one's hand, by shaking hands, by saying "Good morning", or by simply smiling in someone's direction. Even as it concerns language, Grice has shown that we necessarily have to consider the aim of an utterance in order to understand it.[20]

Before a proposal concerning how to understand the specific aims and means of law is set forth, one possible objection to this proposal of understanding law as human action with aims and means shall be addressed. It is often said that law should be understood as an institution, an organization or a system.[21] This approach requires comment.

First: Admittedly, in so far as "system" refers to multiple elements and relations, it also applies to law. But in this general, abstract sense, wind and clouds, too, might be characterized as systems. Otherwise put, the notion of a system fails to capture one crucial aspect of law, namely, that it is a form of human action. To be sure, there may be more specific, sociological notions of "system" which contribute to our sociological understanding of law as part of society. But they cannot offer an all-encompassing, philosophical perspective on law.

Second: "Human action" is a quite natural concept. It is also a concept of daily life. Everybody understands what a human action is, for example, in distinction to a mere reflex or a mere happening. The concepts of institution or system, in contrast, are theoretical, in particular sociological concepts. It seems to be very unsatisfying to try to clarify a difficult but factual concept like law by means of such vague, artificial, and theoretic concepts as 'institution' or 'system'.

Third: Sociological concepts like institution, organization or system are very often – but not always – understood as describing social phenomena that are not the result of intended human actions. So by understanding law as a system or as an institution, the crucial aspect (namely, that law's having an aim is a necessary condition) is – at least on one possible understanding of these concepts – defined away without notice. From a sociological viewpoint, the specific aim of law might not be relevant. Such a sociological view of law perhaps reduces its interest to the causal outcomes and/or the social functions of law. And for a "pure", or jurisprudential, view of law, the specific aim might not be relevant either. Such a "pure" or jurisprudential view of law perhaps reduces its interest to the means of law, that is, to rules or norms. But for a philosophical perspective on law, such reductionism is not appropriate.

From the fact that law as a kind of human action necessarily has aims, it does not follow that all singular instances of law pursue the same or at least a similar, specific

20 Paul Grice, Meaning, In: Studies in the Ways of Words, ed. Paul Grice, Cambridge 1989, 219

21 For institutions: Karl N. Llewellyn, Jurisprudence. Realism in Theory and Practice, Chicago 1962, 233-242. For systems: Niklas Luhmann, Das Recht der Gesellschaft, Frankfurt a. M. 1993, Günter Teubner, Law as an Autopoietic System, Oxford 1993.

aim, such that some common specific aim can be considered as a necessary condition of the concept of law.[22] How could this further step be justified? A possible answer is this: Concepts are useful only if they are distinguishable. If one wants to distinguish the concept of a specific type of human action (such as law) from the concept of human action in general, a specific aim is necessary. It is not possible to rely on the means alone, for similar means can be used – at least in all cases we know – for different aims, and, therefore, for different types of action. Rules and norms, for instance, are employed as means not only in the context of law but also in, for example, moral, religious, and political contexts.

The assumption that one specific necessary aim underlies all single instances of law-making does not imply that it is a common aim pursued by all law-makers, comparable to the common aim of business companies or religious communities. The individual law-makers pursue the same specific aim, but they do not do this altogether, for they lack both the knowledge and the willingness required for such a joint pursuit. The assumption of a single specific aim underlying all single instances of law-making does not exclude the possibility that individual law-makers pursue additional non-specific, subjective aims by law-making. For instance, a deputy may also wish to satisfy the interests of his voters, a judge may be loath to disappoint the expectations of the audience, and so forth.

For some human actions, including their outcomes, a specific aim is not only necessary, but also sufficient to distinguish it from other actions or outcomes. For example, the production of a chair is defined by the purpose of producing an artefact that one (and only one) person can sit on. The shape or material of the chair makes no difference: The chair might have three, four or five legs. It can be made of wood, iron, stone, straw, plastic or whatever. And the necessary means of producing something applies to all artefacts.

Does law, as a form of human action, also have such a necessary and sufficient aim? According to the thesis proposed in the present paper, the specific aim of law is a necessary ingredient of its definition, but not sufficient to distinguish it from other social facts with similar aims, like morals. Thus, it is also necessary to understand law's specific means in order to distinguish it from other human actions with a similar aim. This is what makes the definition of law so difficult and controversial – a difficulty which Kant was already treating with irony, when he wrote: 'The lawyers are still searching for their definition to their concept of law.'[23]

So a first answer to the question "What is Law?" would be this: As far as human law is concerned, law is human agency in the widest sense. If this holds, it can only be understood in terms of its specific aim and its specific means. If one tried to reduce the understanding of law either to aims or to means, this would not lead to an encompassing, philosophical view of law but at best to the revelation of some partial aspects of law.

Those assuming something like a divine law probably presume that God pursues a particular aim by appeal to this divine law and uses some particular means. It seems, then that for an adequate understanding of the idea of divine law, too, the idea of aims and means is crucial. Something analogous seems to hold for the assumption of natural law, construed in teleological terms. If this holds to be true, it supports the claim that

22 One might consider whether the possibility of such an identical or at least similar aim underlying all law is excluded by a strict nominalism. However, it seems to me that this is not necessarily the case, given that human aims and abstract terms are (at least in principle) possible.

23 Immanuel Kant, Kritik der reinen Vernunft, vol. 3, p. 479. Translation DvdPf.

aims and means are indispensable elements for an adequate understanding of the concept of law.

III. Aims and Means in Understanding Law

In the history of legal philosophy, views of the significance of law's aims or means have changed dramatically. In order to achieve an appropriate understanding of law, it is useful to look at this dramatic change first.

From the beginning of philosophy in ancient times up to the late Middle Ages, great emphasis was laid on quite specific and demanding aims in order to distinguish law from other phenomena. For Plato and Aristotle, the aim of law and politics was the good, explained as justice, and, especially for Aristotle, eudaimonia and the common good.[24] The means played no great role. Cicero, too, stressed justice as the aim of the law.[25] Thomas Aquinas then defined law as: an ordinance of reason for the common good, made by him who has care of the community and promulgated.[26] The aim, therefore, is the common good. However, Aquinas still mentions justice, especially in respect of the positive law.[27]

In the seventeenth century, this emphasis on the specific aim of law vanished. The good, justice, eudaimonia and common welfare were no longer considered to be the main aim of law and politics. The means became more and more important. Thomas Hobbes proposed a reduced but still quite specific aim of law and politics: self-preservation.[28] Furthermore, he stated that law in general consists of commands,[29] which were later interpreted by Austin as orders accompanied by sanctions for lack of compliance.[30] Locke assumed the preservation of property – understood in a wide sense to include life, liberty and ownership in material goods – as the main aim of law and politics.[31] The utilitarians still assumed a specific aim but in a reduced form: maximizing happiness, understood as a collective effort to promote the individual and contingent states of pleasure and pain.[32] Kant defined law with respect to a liberal and very limited aim: Law comprehends the whole of the conditions under which the voluntary actions of any one person can be harmonized with the voluntary action of every other person, according to a universal law of freedom.[33] For Hegel, too, the aim of law is freedom.[34]

24 Plato, Politeia 327a1, 433a; Aristotle, Nicomachean Ethics I 1, 1094a; V 1, 1129a; Politics 1328a36
25 Cicero, De Legibus, I, 29
26 Thomas Aquinas, Summa Theologiae, II-I, qu. 90. Following the course of the Queastio, these four elements are developed. The final definition is at the end in the answer to article 4.
27 Thomas Aquinas, Summa Theologiae, II-II, qu. 57ff.
28 Thomas Hobbes, Leviathan, Cambridge 1991, chap. 17, 1
29 Thomas Hobbes, Leviathan, chap. 26, 1
30 John Austin, The Province of Jurisprudence Determined, Cambridge 1995, 12, 21-37
31 John Locke, Second Treatise on Government, Cambridge 1991, §§ 3, 6, 7, 123, 124
32 Jeremy Bentham, The Principles of Morals and Legislation, Buffalo 1988, chap. 1, I, 1
33 Immanuel Kant, Metaphysik der Sitten, Metaphyische Anfangsgründe der Rechtslehre, § B
34 Georg Wilhelm Friedrich Hegel, Grundlinien der Philosophie des Rechts oder Naturrecht und Staatswissenschaft im Grundrisse, Frankfurt a. M. 1970, works 7, § 40, 98: ‚Das Recht ist zuerst das unmittelbare Dasein, welches sich die Freiheit auf unmittelbare Weise gibt.', § 4, 46: ‚Der Boden des Rechts ist überhaupt das Geistige und seine nähere Stelle und Ausgangspunkt der Wille, welcher frei ist, so daß die Freiheit seine Substanz und Bestimmung ausmacht und das Rechtssystem das Reich der verwirklichten Freiheit, die Welt des Geistes aus ihm selbst hervorgebracht, als eine zweite Natur, ist.'

In the nineteenth and twentieth century, the scepticism concerning necessary aims, value relativism, and a general positivism in the philosophy of science lead to a nearly total dismissal of specific aims of the law and an almost exclusive reference to the means as the fundamental aspect of law. In England, John Austin characterized law as "sanctioned commands" ("sanktionierte Befehle").[35] In Germany, Rudolf v. Jhering defined law in a purely formal way, namely, as the valid coercive norms of the state.[36] For him, norms and coercion are the crucial means of law. However, Jhering also proposes an aim of law, if only a relative and rather unspecific one: securing the fundamental conditions for the existence of a society.[37]

Hans Kelsen identified no specific aim of the law. In his theory, law is distinguished from other social facts only by its specific means: by forming a hierarchical and dynamic system of coercive norms which confer validity on other, inferior norms with a basic norm as the last necessary assumption and unifying ground of validity.[38] Law is differentiated from other social orders like morals only by its specific means: by the necessary use of coercion to guarantee obedience, and by its quality of being a dynamic system, that is, by the fact that the hierarchy of validity is based not upon correspondence in content but upon formal authorization.[39]

H. L. A. Hart, too, finds the distinguishing feature of modern, developed law, "the heart of a legal system", only in means, namely, in a system of primary and secondary rules.[40] He identifies three forms of secondary rules: rules of change, rules of adjudication and a rule of recognition. The rule of recognition is in particular the necessary means to identify the other rules of law.[41] An aim of law is mentioned by him only en passant, and it is only a very unspecific aim, which holds for many other social facts. Hart says: 'I think it quite vain to seek any more specific purpose which law as such serves beyond providing guides to human conduct and standards of criticisms of such conduct.'[42]

Joseph Raz, in his definition of law, omits the two-level requirement and adds "authority" as the decisive feature.[43] But "authority" is still another means – like norms, sanctions, and second-order rules. No one accepts authority as a final aim of law.

Among the Anglo-Saxon theorists of law of the twentieth century, it is Ronald Dworkin who has laid the greatest stress on the aims of law; for this reason, he is particularly important in the present context. To be sure, his famous distinction between rules and principles is, basically, a distinction in terms of means: ultimately, it is only a distinction between two types of rules: "all-or-nothing" rules on the one hand, and rules that are susceptible to deliberation on the other.[44] With principles, moral aims enter into the law. But Dworkin never identified, at this early stage of his work, a singular external and specific aim as a necessary condition of all instantiations of law. Later, he stresses the

35 John Austin, The Province of Jurisprudence Determined, 12, 21-37

36 Rudolf v. Jhering, Der Zweck im Recht (1877), 3rd edn., Leipzig 1893, vol. 1, 320: ‚Recht ist der Inbegriff der in einem Staate geltenden Zwangsnormen.'

37 Ibd., 443. On 446, Jhering stresses the relativity of aims. On 511, both conditions are put together.

38 Hans Kelsen, Reine Rechtslehre, 3, 196

39 Hans Kelsen, Reine Rechtslehre, 34

40 H. L. A. Hart, The Concept of Law, 98

41 H. L. A. Hart, The Concept of Law, 79

42 H. L. A. Hart, The Concept of Law, 249

43 Joseph Raz, Legal Positivism and the Sources of Law, in: Raz, The Authority of Law. Essays on Law and Morality, Oxford 1979, 43: 'Put in a nutshell, it [law] is a system of guidance and adjudication claiming supreme authority within a certain society and therefore, where efficacious, also enjoying such effective authority.'

44 Ronald Dworkin, Taking Rights Seriously, London 1977

ethical significance of equal concern or equality, but characterizes this value only as the ultimate aim of politics or just government.[45] In his main work Law's Empire, he introduces, besides justice and fairness, a third specific virtue or conviction of law makers: integrity.[46] He does not, however, propose that this virtue or conviction of law-makers is a necessary aim of law and hence a necessary condition of the concept of law. It is only an "ideal" which ought to be accepted by political communities and law-makers like judges and legislators.[47] Apart from that, the assumption that integrity is not only an ethical ideal of good or just law but instead a conceptually necessary condition of law, would be too strong. It is hardly the case that, as a matter of fact, all cultures and all communities pursue this aim of integrity in creating law.

One of the few philosophers of law in the twentieth century who identified a specific and decisive aim of law (and, because of this, deserves of careful attention) was Gustav Radbruch.[48] In a return to pre-modern roots, Radbruch proposed justice as the necessary aim or "idea" of law.[49] For him, justice (in a wider sense) encompasses three sub-aims:[50] justice as formal equality, expediency (Zweckmäßigkeit), and the certainty of law (Rechtssicherheit). The problem with this explication of justice, in my view, is that legal certainty is quite concrete (being only a sub-aim or a means), while expediency is very abstract and unspecific. In fact, it merely refers to the necessary condition that we have found not only in law, but in every human action: attaining an aim. Also justice in the sense of formal equality – the first sub-aim of justice in a comprehensive sense – and maybe even justice in the general sense could be such an aim. So what we need is to identify a more specific aim. Radbruch's attempt to characterize justice in the general sense in terms of those three qualifications remains, in my view, quite unsatisfying. The reason for this is that his account combines quite different elements of the means-end-correlation without clarifying how they relate to that correlation.

What is the outcome of this history of attempts to identify a specific aim of law or to reduce it? I think we have to look for an aim of law which satisfies two requirements: it must not be too abstract, for otherwise it would be worthless as a necessary aim of law in comparison with other human actions, that is, it would lack any distinguishing function. Hart's proposal that law "governs human conduct" may be true, but it is much too abstract to serve as a specific aim of law. Human conduct is governed by all kinds of things: for example, age, streets, friendship, and the weather. At the same time, the aim in question must not be too specific if it is to hold for all kinds of law, that is, if it is to serve as a necessary condition of the concept of law. For that reason, the good, justice, or equality, understood in a substantial way, could not be the aim of law. For, on the one hand, the good, justice, and equality have been, and still are, understood in very different ways. On the other hand, we assume that bad or unjust law is still law.

45 Ronald Dworkin, Sovereign Virtue. The Theory and Practice of Equality, Cambridge 2000, p. 1

46 Ronald Dworkin, Law's Empire, Cambridge 1986, pp. 166-167, 176

47 Ronald Dworkin, Law's Empire, pp. 189, 214-215, 218

48 His disciple Arthur Kaufmann follows him in the assumption of this aim. See Arthur Kaufmann, Rechtsphilosophie, 2nd edn., Munich 1997, chap. 9, 135. Hermann Kantorowicz, a friend of Radbruch, first gave a definition with an aim and then a definition lacking any aim: Hermann Kantorowicz, The Definition of Law, Cambridge 1958, 12: „Law is a body of rules aiming at the prevention or the orderly settlement of conflicts.", 21: „A body of rules prescribing external conduct and considered justiciable."

49 Gustav Radbruch, Rechtsphilosophie, 34

50 Gustav Radbruch, Rechtsphilosophie, 54, 73

We need, however, some aim. Law cannot be understood by its means alone, for all proposed features of the means can also be features of non-legal systems. Consider this example: Madame X was the leading figure in nineteenth-century bourgeois Paris. The rules of her salon were the rules of higher society at that time. Thus, we have a two-layer rule system with a rule of recognition: The rules which are applied by Madame X were the rules valid for the upper class in Paris at that time. This resembles a system of primary and secondary rules, which H. L. A. Hart deems to be specific to modern law. But we would not accept Madame X's system of rules as law. The example shows that the intersection of primary and secondary rules is not sufficient for law. But is it at least necessary? We can imagine a very primitive society in which some members, without fixed obligations, sometimes ask other members (who are not determined in advance) to mediate in conflicts. In other cases, the members solve their conflicts by a sort of formal agreement. I think we would consider these primitive social facts as law. But a secondary rule of recognition determining which of these phenomena is law and which is not cannot be identified. So the distinction between primary and secondary rules is not even a necessary condition for the concept of law. Hart might perhaps reply that the system of Madame X is not a political or state-run system.[51] But the norms of churches, private clubs, or those governing the assignment of Web domains are also considered as law without being political or state-run. And the law of nations is political but not national. Thus, Hart describes a very pervasive but merely contingent feature of modern developed legal systems. He has given us an understanding of law that – in his own words – might also be the understanding of a "descriptive sociology."[52] It is an understanding which is very valuable as a sociological description of a modern, highly-developed legal system, but it does not render superfluous a philosophical perspective on law.

What could we plausibly consider as a necessary aim of law? If the answer is also to hold for divine law and natural law, it faces a characteristic difficulty: We cannot know the alleged 'ultimate aims' of God or nature. However, in so far as even divine and natural law – if they exist – are to be considered to be law for humans, we may perhaps presume that their respective aims and means are sufficiently similar to the aims and means of human law.

IV. The Necessary Aim of Law: Mediation between Possible Contrary Concerns

My proposal is this: Law has as its conceptually necessary aim (and, thus, necessary feature of its concept) the mediation between possibly contrary, conflicting concerns.

For instance, statutes mediate between various general concerns of people, judges' holdings mediate between interests in particular conflicts, administrative acts mediate between the specific wishes of individual citizens and/or the interests of the general public.

So we have four elements of the necessary aim of law: (1) at least two concerns or interests, (2) which are contrary, (3) the possibility that these concerns may conflict, and (4) a form of mediation. These elements need careful explanation:

51 H. L. A. Hart, The Concept of Law, 239-240
52 H. L. A. Hart, The Concept of Law, 6

(1) Concerns/Interests: Concerns or interests (for present purposes, these concepts are used synonymously) are not reducible to an economic or egoistic will. An important concern or interest, for example, is that one's children be able to attend a good school. The concept "concern" is derived from more concrete properties. I think four properties have to be taken into consideration: strivings, needs, wishes and the aims of individuals who can be thought to be bearers of interests. These four properties form a sort of continuum between purely bodily and purely mental properties. Functions of our bodies like the immune system are purely bodily. Needs such as the need for food, drink, warmth, and shelter are bodily but can be wilfully controlled. Wishes often have bodily origins but are primarily mental and can be suppressed, like the wish to read a book. Aims are purely mental, like the aim to set up a valuable theory of law. For lack of a real body, collective and theoretical entities like juridical persons cannot develop strivings, needs, or wishes. Only aims, set forth by the real persons who function as their representatives, can be attributed to them.

Concerns are both subjective and objective. There is another continuum in reference to this issue: We have to consider first the concrete factual will of an individual. If this is impossible, then we have to look at his or her abstract factual will. The next step would be a past factual will, for example, of a person without conscience in respect of rescue measures and medical treatment. If no such past factual record exists, we will have to look, in a fourth step, at the hypothetical personalized will of this person, and, in a final step, at the hypothetical will of a person like this.

In order for the mediation of concerns to be legally relevant, the concerns in question must be sufficiently weighty. This is presumably one of the reasons why – in spite of their obvious mediating function – we do not generally consider rules of games as law. In a way, games are self-sufficient, that is, they have no necessary external aims. Their respective internal aims only refer to the game in question itself. Hence, also the corresponding aims and desires of the participants only pertain to the game; they fail to gain the inherent weightiness of those concerns that are susceptible to legal mediation. If someone takes a game too seriously, he misses its peculiar character as a game. For this reason, the referee in a game does not engage in adjudication – even if his mediating function resembles that of the judge. By contrast, arbitration outside games can generate law perfectly well.

(2) Contrariness: The concerns must in some way be contrary. If they are perfectly parallel, there is no need for law to solve the conflict between them. Again, the contrariness need not be actual. Its possibility suffices, whether it is the possible contrariness between the concerns of living persons or between the concerns of living persons and that of future generations.

(3) Possibility of Conflict: Even if two concerns are contrary to each other, a conflict between them – or, more precisely: about them – may be impossible. In that case, there is neither a possibility nor a reason for mediation. Consider the following example: A farmer wants rain, the tourist sunshine. For as long as local weather cannot be influenced, there can be no conflict between their contrary concerns. Mediation by law is neither possible nor necessary.

(4) Mediation: There must be a weighing or considered decision between these possible contrary concerns. That does not mean that law must be good or just in a perfectionist sense. The necessary condition is only that the entities which are of concern have to be taken into consideration in some way. If persons are murdered or their being murdered

is ordered – that is, they are killed without a criminal inquiry or fair trial –, this cannot be law because it does not mediate between actual or possible contrary concerns at all.

In this sense, killings in war are not law, though, of course, they may be allowed from the point of view of international law or ethics, for instance, as a means of self-defence. Similarly, for conceptual reasons the total disfranchisement of certain social groups cannot be law. Whether, for example, ancient slavery qualifies as law depends upon whether the concerns of the slaves were taken into account, even if only to a minimal degree.

The conditions of law proposed here are relatively abstract and weak. Law does not have the fulfillment of all or even the main demands of morality or ethics as its necessary aim. But it does have a conceptually necessary aim without which it is impossible to identify a social fact as law. We may call this aim "justice" in some weak sense. This is to be taken, however, not as a normative, ethical standard but as a conceptually necessary ingredient of the concept of law.

How can we identify the reality of this aim? That is, how can we know whether a given action does in fact aim at the mediation of conflicting concerns? This is a pragmatic question. We can and should rely at least on apparent intentions of the agent, his actual performance of actions, the pragmatic embeddedness of his actions, and the acceptance by other members of the society within which the action takes place.

Also seemingly descriptive norms of law may mediate between conflicting concerns. For example, before a state's capital or national colours are fixed by law, there may be considerable disagreement and competition among citizens and cities about the matter.

The proposed necessary aim of law is less demanding than the requirements of the famous Radbruch-Formula.[53] Unlike the Radbruch-Formula, the present proposal does not deny the validity of a legal norm even if the norm seems to be unjust to an intolerable (unerträglich) degree (first part), nor does it deny its very nature as law if justice is not even intended by the law-maker (second part). Although the stronger demands of the Radbruch-Formula cannot be considered as necessary conditions of the concept of law in a theoretical perspective, from an ethical perspective, they ought to be incorporated as law in the customary or positive law of every legal system. For reasons of ethics, law has to strive for much more than what conceptual analysis identifies as its conceptually necessary conditions. We have to strive for good and just law. But we have to distinguish carefully this material, ethical demand from the conceptual question "What is law?".

53 Gustav Radbruch, Gesetzliches Unrecht und übergesetzliches Recht, in: Gustav Radbruch, Rechtsphilosophie, ed. Stanley L. Paulson and Ralf Dreier, 216: „Der Konflikt zwischen der Gerechtigkeit und der Rechtssicherheit dürfte dahin zu lösen sein, daß das positive, durch Satzung und Macht gesicherte Recht auch dann den Vorrang hat, wenn es inhaltlich ungerecht und unzweckmäßig ist, es sei denn, daß der Widerspruch des positiven Gesetzes zur Gerechtigkeit ein so unerträgliches Maß erreicht, daß das Gesetz als ‚unrichtiges Recht' der Gerechtigkeit zu weichen hat. Es ist unmöglich, eine schärfere Linie zu ziehen zwischen den Fällen des gesetzlichen Unrechts und den trotz unrichtigen Inhalts dennoch geltenden Gesetzen; eine andere Grenzziehung aber kann mit aller Schärfe vorgenommen werden: wo Gerechtigkeit nicht einmal erstrebt, wo die Gleichheit, die den Kern der Gerechtigkeit ausmacht, bei der Setzung positiven Rechts bewußt verleugnet wurde, da ist das Gesetz nicht etwa nur ‚unrichtiges Recht', vielmehr entbehrt es überhaupt der Rechtsnatur."

V. The Necessary Means of Human Law: Categorical Character, Externality, Formality, Immanence

By reference to this aim of mediation between possible contrary concerns, we can distinguish law from many social facts. But some social facts have the same or at least a similar aim. This holds in particular for morals, politics, religion, and non-moral conventions. Law can be distinguished from these social facts which have the same or a similar aim only by reference to its necessary means.

Not all means of law fulfill this function. Law uses means that other social acts inevitably use as well in order to mediate between possible conflicting concerns – for the simple reason that the mediation presupposes their use. This holds most notably for such basic means as language and thought. It is virtually impossible to mediate between conflicting concerns without making use of language and thought. Law makes use of thinking and language in various forms: description, evaluation, prescription.[54] Norms in particular are a necessary means of law since the mediation of conflicting concerns is impossible without obligating the parties to certain acts. Law is necessarily normative.

Normativity is not peculiar of law. Morals, politics, religion, and non-moral conventions necessarily make use of norms as well in order to realize their respective mediating aims. Thus, we still lack an answer to the question of which necessary means are specific for law. By comparison with other social facts, the following distinctive means of law can be identified:

(1) Conventions (such as table manners): Law comprises not only voluntary norms but also at least some categorical obligations, that is, obligations which do not have the concrete agreement of those obligated as a necessary condition (which does not mean that all norms of the law are categorical). So it is – like morals – distinguished from pure conventions by its partially categorical character.[55] Their categorical character distinguishes judgments also from mere mediation.

(2) Morals: Law has, in all its various manifestations, only external sources and means (judging, agreeing, issuing, ordering, voting) but no purely internal source, such as human conscience, which is one necessary source of morals.[56] So the distinctive feature of law, in comparison with morals, is its externality in all singular instantiations.

(3) Politics: Law, in all its manifestations, is marked by a certain formality in its making, promulgation, or application which simple political acts, for example, a decision in foreign politics, even in the form of a rule like the Monroe Doctrine or the Breschnew Doctrine, do not have.[57] So the distinctive feature of law in comparison to politics is its formality in all its singular instantiations. This formality lends support to legal certainty. In its final realization, the requirement of formality also holds for common law that has to find its form in parliamentary, judicial, or administrative proceedings.

54 Dietmar von der Pfordten, Deskription, Evaluation, Präskription, Berlin 1993

55 Note that categorical character has to be distinguished carefully from coercion.

56 This was already stated by Immanuel Kant, Metaphysics of Morals, Metaphysical Foundations of the Theory of Law, Introduction.

57 See for a comprehensive study of the formality of law: Robert Summers, Form and Function in a Legal System, Cambridge 2006. Summer's concept of formality is in many respects wider than would be necessary in order to distinguish law from politics.

(4) Religion: Even as 'divine' or 'natural' law, law refers to immanent states of affairs within human life and agency. By contrast, religion, as the practice of a faith, also refers to a transcendental goal – the goal, say, of beatitude, reincarnation, or eternal peace of the soul. Accordingly, the distinctive feature of law in comparison to religion is its immanence in all its singular instantiations. This holds at least under the condition that law and religion are separated in reality and are not more or less interwoven, as in Jewish or Islamic law.

VI. Against a Reductionism of Means

Modern legal theory not only reduces the concept of law to certain means (and is to that extent instrumentalistic); it is reductionist also with respect to the means. They are reduced, for instance, to norms (Kelsen), rules (Hart), or rules and principles (Dworkin). This reductionism of means can be termed "normativism". Also, this second reductionism lacks a reasoned foundation. And it is connected to the first reductionism which aspires to a general conception of law in terms of means alone. If one assumes that there is a specific aim of law, there seems to be no need to reduce the means of law to one type, notably norms, rules or principles. We can assume that any and every appropriate means might be used by law in order to reach its aims, not only norms, rules or principles.

There are in particular two further kinds of means: (1) concepts, and (2) institutions.

(1) Law is made up of concepts like ownership, possession, human dignity, life, liberty, contract, administrative act, tort, negligence, and so on. These concepts are tools for understanding the world. They are means of distinguishing different phenomena so that different obligations can be imposed. The concepts of law cannot be reduced simply to parts of norms. This raises the difficult question of what is primary: concepts or norms/rules/principles.[58] Several representatives of modern legal theory have explicitly or implicitly assumed that concepts are determined by the norms which they are parts of. But this picture is too simplistic. Law takes many natural and social concepts – such as soil, air, art, science, family, and the like – into its system without totally defining or even being able to define these concepts for its internal systematic purposes.

(2) A multitude of rules or norms is combined to form institutions like the institution of marriage or the institution of private property. These institutions serve more specific functional purposes that transcend the general aim of law, for instance, the purpose of supporting the social institution of marriage.

VII. Law and Developed Law

Does this definition of law in terms of an aim and means help us to understand the phenomenon of law better? Obviously it does. One can distinguish the following three sorts of primitive law, which already fulfill the proposed requirement of a specific aim and specific means: formal agreement, formal obligation by the community, and mediation by judges. All three of these primitive forms of law have the aim of mediating between

58 See Alf Ross, Tu-tu, Harvard Law Review 70 (1956-57), 812

possible contrary concerns.[59] Moreover, we may assume that all of them show the features of categorical character, externality, formality and immanence in their means; for example, a formal agreement mediates between the contrary concerns of the parties who have set up the agreement. It includes, at least partly, categorical obligations. It is purely external. It has some form. And it is immanent – it is, at any rate, if law and religion are separate.

These three primitive forms of law, which still can be seen in the law of nations and the law of primitive societies, are then enriched and rendered complex in several steps in order to become modern law. It will be shown that these enriching steps also yield a more comprehensive picture of modern law, although this contingent process of enrichment is subject no longer to a philosophy of law but to a history and sociology of law instead.

1) formal agreement	formal obligation by a community	decisions by judges
2) law of customs	formal ordinances by a community	law of precedents
3)	statute law of a community	
4)	constitutional law of a community	

Already in the first and second stage of this development, the legal norms require the existence of a community in some weak and general sense: a community of contractors, a community of parties and their judge or any other community that obligates and of which the obligated person is a member. In stages three and four, all more primitive forms of law become dependent on the more advanced forms, which then claim priority. At these stages, statute law and constitutional law legitimize and govern contracts, collective obligations, and judicial mediation.

VIII. Law and Morality/Ethics

What is the outcome of this definition of law for the highly disputed relationship between law and morality/ethics? Or, to be more specific: Are law and morality conceptually (and, therefore, necessarily) linked, or are they only contingently linked, either externally via a causal connection or internally via an incorporation decision?[60]

The most decisive step in answering this question is to distinguish between morality (positive morality, morals) and ethics (critical morality, moral philosophy). Morals or morality are necessarily social facts which can be recognized empirically. We can describe the moral norms and the moral behaviour of certain people in specific societies, for example their truthfulness, their benevolence or their sexual habits. The moral norms guide our general actions immediately and primarily. Ethics is not necessarily a social fact but a possible mental product, an ideal with a claim to universality. Ethics does not guide our general actions immediately and primarily but justifies and criticizes such primary norms as morals, law, religion, conventions, and the like.

The relationship between law and morals is the relationship between two social facts. This relationship is causal and incorporative (and, therefore, contingent). There

59 For the formal obligation of the community this is at least true in respect of those obliged because the one who is obliged can refuse to obey. He is not forced. But it is not always true in respect to third parties.

60 See Robert Alexy, Begriff und Geltung des Rechts, Freiburg 1992, 15

is a necessary link only in so far as both social facts have the same basic and abstract aim of mediating between possible conflicting concerns. Therefore, acts of law-making have to follow the same basic and abstract aim as do acts of morality. And for prudential reasons, law is well advised in its realizations to take morals into account. But beyond this, there is no conceptually necessary requirement for creating law as a fact in order to consider more concrete aspects of morality.

This requirement can only be a normative ethical requirement, which demands of law that it shape its aim and means in a certain way in order to be good and/or just law. This leads to the second part of the question, the relationship between law and ethics. The specific aim of ethics is to criticize and justify normative facts like law. Therefore, law and ethics are conceptually linked. But this link is only decisive in qualifying the law as good and/or just. So unjust law – in a sense of 'unjust' that means more than the necessary condition of mediation between possible contrary concerns – is still law. Only ethics calls for its improvement.

The problem of whether one ought to obey this unjust law is a second, independent (moral, as well as ethical) question. De facto, different moral systems may answer this question differently. In ethics it is answered like this: If the injustice of law transgresses a certain threshold of gravity, disobedience is allowed or even required. This disobedience varies with the gravity of the injustice at issue. It ranges from the simple failure to comply to civil disobedience to resistance with force and even to the assassination of tyrants.[61]

IX. Conclusion

The philosophical perspective which leads us to the most abstract and comprehensive concept of law is only one perspective among others. Therefore, there is no presumption in favour of taking this perspective on law. On the other hand, the philosophical perspective is not replaceable by any other perspective, for example, a doctrinal, historical, sociological, natural, or jurisprudential understanding of law. All these attempts to reductionism are by definition doomed to fail, for they are able to understand law only as an isolated or related phenomenon but not as part of the world as a whole, as connected with everything else.

Does this philosophical understanding of law have any worth? There are at least three answers to this question. First: Every understanding of the world has some worth in itself because it is better to understand the world than not to do so. Second: The demarcation from other social phenomena is important for pragmatic reasons. It is, for example, important to know that, conceptually, the total exclusion and deprivation of rights of some parts of the population cannot be law at all. Third: We can understand what good or just law is only if we know exactly what the aim of law is. If the aim of law is the mediation between possible contrary concerns/interests, and if the necessary means of law are thought, language, normativity, a categorical character, externality, formality, and – if law and religion are separated – immanence, then good or just law is good or just mediation between these possible contrary concerns/interests, and the good and just application of these means. This means that good and just law presupposes insights into the concept of law, that is, into its necessary aim and its necessary means.

Author's address: Prof. Dr. Dr. Dietmar von der Pfordten, Platz der Göttinger Sieben 6, 37073 Göttingen, Germany; dpfordt@gwdg.de

61 Dietmar von der Pfordten, Rechtsethik, München 2001, p. X