CRITERIA OF JUSTICE*

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I

The discovery of criteria of justice [1] and their development can be regarded as the principal aim of recent West-German legal philosophy, whose outlines and basic ideas since the turn of the century the present essay proposes to trace. In contrast to a legal-theoretical or legal-methodological treatment, which in the same period, at any rate in Germany, views the problem of the criteria of the rightness of law employed in judicial decision-making from the position of enacted law (*Gesetz, lex*) and thus always presupposes the existence of a legal enactment (*ein Gesetz*, a law), [2] the criteria of justice in legal-philosophical treatment are fundamentally independent of

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Translators' Note: We would like to point out that in English there is no exact terminological correspondent to the distinction which in various continental languages and in Latin can be made, for example, by the words "*Recht*" and "*Gesetz*," "*droit*" and "*loi*," and by "*ius*" and "*lex*." We have tried to convey this distinction, which is one of central importance in the present article, by the words "law" and "enacted law" (and by referring to any particular instance of the latter by the expression "a law"). We would also like to mention that only with considerable hesitation we decided to translate "*Positivismus*" with "positivism." What in German legal philosophy is called "*Positivismus*" or "*Rechtspositivismus*" is not quite the same what in Anglo-Saxon jurisprudence is called "positivism" or "legal positivism." In contrast to the German usage of the correspondents of these words, they do not convey the idea that there is an ultimate duty to obey enacted law. Thus, the jurisprudents, following the tradition of Bentham and Austin, while affirming that a norm enacted in a correct legal procedure, whatever the content of this norm may be, is legally valid, do not affirm that there can be no overriding considerations for an individual or a community to repudiate and to disobey it. The norm in question can be invalid, for example, from the moral point of view, and the person or persons concerned may answer the question as to what they ultimately ought to do on the grounds of moral considerations. Positivism in the sense of German legal philosophy could here be called perhaps "legalistic positivism" or "positivist legalism." It may be viewed as a degenerate form of iusnaturalism, namely one of Hobbesian brand. This extreme form of positivism or degenerated natural-law thought does not seem to have any exponent, at least among distinguished Anglo-Saxon legal scholars. Since Professor Kaufmann and Dr. Hassemer employ the concept in question while discussing recent German legal philosophy, we think that the words "positivism" and "legal positivism" are legitimate in this context.

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[1] "Criteria of Justice" ("Kriterien der Gerechtigket") is the title of a legal-philosophical inquiry by Martin Kriele published in 1963.

[2] *Cf.* Kaufmann & Hassemer, *Enacted Law and Judicial Decision in German Jurisprudential Thought*, 19 U. TORONTO L.J. 461, at 461-62 (1969).

the existence and contents of a law. Legal-philosophical inquiry penetrates behind the facade of enacted law and thereby calls this law into question. For a legal theory, the criteria of rightness are principles of proper interpretation and application of enacted law; for legal philosophy, the criteria of rightness are the principles of right law. That enacted law is binding cannot be presupposed by legal philosophy, for this law does not alone judge but can also itself be judged; the criteria of justice are standards not only for the judicial decision but also for enacted law.

The statement that a legal-philosophical approach is not exhausted in the reflection of the relationship between enacted law and judicial decision but calls the former itself into question cannot mean that legal-philosophical problems are posed independently of enacted law or that this law is nothing more for legal philosophy than a contingent fact of legal history or legal experience. The function which enacted law (*Lex*) has within law (*ius*) is, on the contrary, an ubiquitous problem, central in recent German legal philosophy. In contradistinction to legal theory and methodology, this function is not exhausted by the derivation of a judicial decision from a law (presumed to be right or "just" beyond all question). The function of enacted law for a legal philosophy is more fundamental. For it, enacted law is not only a repository of technical rules of decision but is a possible vehicle of criteria of justice. A legal philosophy is not concerned with the procedure of derivation of judgments from enacted law but with the rightness of enacted law itself.

These remarks on the distinction between legal-philosophical and legal-theoretical approaches in relation to enacted law can serve as a preliminary delimitation of legal-philosophical inquiry; they sketch the point of view from which the writers will here present recent German legal-philosophical developments and distinguish these developments from legal-theoretical approaches. The distinction between legal theory and legal philosophy is by no means universally established; the problem of this distinction is itself a legal-philosophical quandary. It is not to be discussed here but only mentioned.

The topic selected for the present article, the function of enacted law within law, is fruitful yet inadequate for bringing out the radical character of the legal-philosophical inquiry. It is fruitful because it shows distinctly the two legal-philosophical points of view which are still much debated in West Germany today: natural-law thought and legal positivism. [3]

For an abstract rationalistic natural-law doctrine, the positivization of law in a legal enactment is only an accidental condition of right law. For

[3] A collection of recent legal-philosophical works was published under the title NATURRECHT ODER RECHTSPOSITIVISMUS? (NATURAL LAW OR LEGAL POSITIVISM?), edited by W. Maihofer, in 1962, *Cf.* also the collection of essays, DIE ONTOLOGISCHE BEGRÜNDUNG DES RECHTS (THE ONTOLOGICAL FOUNDATIONS OF LAW), edited by A. Kaufmann, published in 1965. Both volumes provide a representative survey of recent German legal-philosophical literature either by way of reproductions or of bibliographical data.

such a doctrine, there are supreme immutable principles valid always and everywhere, regardless of whether or not they are laid down in a law. Here legal enactment has no function to perform in law. Right and valid law does also exist outside enacted law. Legal positivism—insofar as it is conceivable as a matter of legal philosophy or insofar as it is to be thus conceived—denies the existence of legal principles outside enacted law. For legal positivism, this law is the sole source of all law; enacted law has a total function within law—it is identical with law.

Although recent legal-philosophical treatments have endeavoured to overcome legal positivism or the abstract natural-law doctrines, the problem area circumscribed by the function of enacted law within law is nevertheless not yet abandoned. To offer a preliminary and summary characterization, these recent developments aim at doing away with the barren dualism between iusnaturalism and legal positivism. They seek to elaborate the relationship between law and legal enactment, as it were, immanently, that is, to discover concrete and specific characteristics of a "just law" or a "positive right law." These efforts, too, relate to the function of enacted law within law; they lie, figuratively speaking, between iusnaturalism and legal positivism but not outside the plane which extends between these two poles.

It should be pointed out that the topic of the function of enacted law within law is not capable of covering all directions of legal-philosophical thought relevant here. This is above all so because a topic has been chosen which provides contentual information and is not a mere formal point of reference. In contrast to a legal-theoretical or legal-methodological treatment, the chosen topic can offer only an immanent point of view in the exposition of legal-philosophical doctrines, one which cannot stand outside the scope of the science considered in relation to it. For legal philosophy is a part of philosophy and not of legal science.[4] It has, therefore, not a determined object of cognition which can be delimited from outside. Its object of cognition is one which can be determined only immanently, that is philosophically, to wit legal-philosophically. Thus, every viewpoint of a legal-philosophical statement—and hence every contentual delimitation of this viewpoint—is that which can be examined in relation to it.

Furthermore, the topic of exposition here chosen proceeds from another assumption which eliminates the radical questioning of legal philosophy from consideration. This assumption is that there ought to be legal enactments.[5] It excludes the doctrines which deny the existence of any enacted law system altogether. Such doctrines appear in particular in certain Marxist and existentialist conceptions. They do not seem to have been propounded within legal philosophy; however. there are attempts to do so and there are philoso-

[4] For a detailed statement of this view see A. Kaufmann, *Zur rechtsphilosophischen Situation der Gegenwart*, [1963] JURISTENZEITUNG 137-48, at 138.

[5] "A law" is not to be understood here, of course, in the sense of a codification system. The function in question can be performed by every norm (understood as a rule for deciding an indefinite number of cases), irrespective of whether it is written or unwritten.

phical basic theories from which the corresponding legal-philosophical systems could be developed.

In formulating his doctrine of the withering away of the state, Friedrich Engels said: "The intervention of the State power becomes superfluous in one area after the other and goes to sleep. In place of the government over persons the administration of things and the management of production relationships appear. The State is not 'abolished'; it withers away." [6] In a classless society, a legal order as is now assumed to exist is no longer conceivable. The laws no longer determine the behaviour of the individual; he chooses freely his form of life and, in making his choice, he produces "law." [7]

Such a "choice" of law, a release of man from a pre-existing legal order, is made also by Jean-Paul Sartre. He proceeds from the tenet that there is no essence which precedes existence and which prescribes for it its order: "*L'existence précède l'essence.*" [8] For man, this means: "*L'homme est seulement non seulement tel qu'il se conçoit, mais tel qu'il se veut, et comme il se conçoit après l'existence.*" [9] These statements suggest that it is impossible to conceive a moral or a legal order which exists outside the individual human being and thereby prescribes the form of existence to him by way of a general norm whatever its origin may be (*e.g.*, custom, reason, or state enactment). Man himself chooses himself; he himself is freedom: "*Aucune morale générale ne peut vous indiquer ce qu'il y a à faire.*" [10]

Viewed from a legal-philosophical point of view, these philosophical systems could be said to be positivistic insofar as they consider the obligatory nature of any norm to be totally contained in this norm. This, however, does not do justice to the whole radical character of these systems. They differ from genuine positivist doctrines fundamentally in that they do not recognize a positive law as a rule for deciding future cases at all. Above

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[6] F. ENGELS, HERR EUGEN DÜHRINGS UMWÄLZUNG DER WISSENSCHAFT 348 (11th ed. 1958).

[7] Cf. also a survey of a Marxist legal and political philosophy in, H. WELZEL, NATURRECHT UND MATERIALE GERECHTGKEIT 191-201 (4th ed. 1962).

[8] J.-P. SARTRE, L'EXISTENTIALISME EST UN HUMANISME 17, 21 (1959).

[9] *Id.* at 22. *Cf.* also: "L'homme n'est rien d'autre que ce qu'il fait. Tel est le premier principe de l'existentialisme."

[10] *Id.* at 47.

> Quand nous disons que l'homme se choisit, nous entendions que chacun d'entre nous se choisit, mais par là nous voulons dire aussi qu'en se choississant il chosit tous les hommes. En effet, il n'est pas un des nos actes qui, en créant l'homme que nous voulons être, ne crée en même temps une image de l'homme tel que nous estimons, qu'il doit être. Choisir d'être ceci ou cela, c'est affirmer en même temps la valeur de ce que nous choisissons, car nous ne pouvons jamais choisir le mal, ce que nous choisissons, c'est toujours le bien, et rien ne peut être bon pour nous sans l'être pour tous.

Id. at 25-26.

Cf. H. WELZEL, *supra* note 7, at 209-19, who, in his chapter on existentialism in legal philosophy, deals mainly with Martin Heidegger. *Cf.* also A. KAUFMANN, DAS SCHULDPRINZIP: EINE STRAFRECHTLICH-RECHTSPHILOSOPHISCHE UNTERSUCHUNG (1961).

all for Sartre, man is not bound by such a rule. He does not live under a directive. Therefore, even the question as to whether there can be a legal *order* or norms providing contentual information for the regulation of human conduct is inadmissible.

If for such an extremist version of Marxist or existentialist legal philosophy it should turn out that there are rules for a human convivium—for example, because the members of a classless society exhibit a certain behaviour precisely because of their freedom from the state and law or because men create their morals (in Sartre's sense) in a specific coinciding manner—then such rules of convivium are not pre-existent; they are not established before their realization in a human act. At any rate, after they are realized, it can be ascertained that they have been valid for this act here and now; for the next act, it cannot be presumed in principle that they will be valid again. There is no criterion of justice outside the human act; the act cannot be measured by reference to anything else but itself.

If there should be such a thing as law, there must be enacted law, however it may be conceived, which would lay down the criteria for right conduct before any given instance of this conduct. If such a "law" is to be discovered, then it will prove to be only a subsequently stipulated rule which establishes that men (accidentally perhaps?) have made use of their freedom in a certain manner and which provides a prognosis about future human conduct, a prognosis concerning the probability of their behaving again in this or another way. However, irrespective of how they behave, they realize law in every case. Such a subsequently discovered rule can be styled a norm only in a statistical but not in a normative sense. Therefore, it does not satisfy the concept of enacted law here employed. A law has no function in these systems.

II

Before proceeding to examine the two legal-philosophical trends of thought which provide diametrically opposite foundations for the criteria of justice, and hence view the function of enacted law within law in an utterly different manner, it should be noted that neither doctrine is propounded today in the pure form in which they are presented here. It is questionable whether all their assumptions have ever been clearly formulated. In this context, it is significant that after the great philosophical systems of German idealism the recent systems of legal philosophy do not form integral parts of comprehensive philosophical systems, although like their predecessors they rest on the foundations of general philosophy.

Those legal philosophers who have been the most influential in the last decades have propounded relatively independent systems. These do incorporate philosophical insights, but as systems of legal-philosophy they are closed. With a few exceptions—for example, Ernst Bloch, [11]—they have

[11] *Cf.* E. Bloch's principal work in legal philosophy: NATURRECHT UND MENSCHLICHE WÜRDE (1961).

come from lawyers and not from philosophers. This circumstance must be reckoned with in the present essay by taking into account that the statements which various authors have made about legal philosophy are not immanent statements of a philosophical system, and, therefore, they must not be interpreted by reference to such a system. Further, it should be noted that the direction of inquiry of recent German legal philosophy has been determined primarily by an interest in legal problems and has often been also actuated by it. It follows herefrom that a radical solution of legal problems is more alien for such a legal philosophy than for a philosophical doctrine whose starting point of inquiry is not law and which, therefore, can arrive at the denial of a legal order more easily.

All these legal-philosophical doctrines and statements move within a range of problems which has been staked by positivism and iusnaturalism. The exposition of these polar opposites has, therefore, an illustrative purpose. Both strive for an order through law, both seek criteria of justice, both are ultimately of the opinion that they have found a final answer to the question as to what is or is not just and right in a concrete case.

"Even the most despicable legal order has an obligative value," says Hans Ulrich Evers, [12] closely emulating the founders of positivist legal philosophy with these words, among whom Karl Bergbohm should be especially mentioned. At the end of the nineteenth century, Bergbohm demanded that "even the most abject law, insofar as it is created in a formally correct manner" must be recognized as binding. [13] Here, the limitation of scope of legal philosophy within the framework of positivity or legality of law finds its expression. Positivism—with its historical antecedents in sophism, nominalism, voluntarism and subjectivism [14]—elevates the positivity of law, its factual validity and its formal regular enactment to the rank of a criterion of justice and thereby abandons the ground from which positive law could still be subjected to contentual correction and criticism. Criteria of justice are no longer considered to exist outside of legal enactments. The will of the legislator lays down these criteria; legislative power and justice coincide.

In a particularly clear manner, this basic attitude has been expressed by Hans Kelsen in his system of a "Pure Theory of Law." The concrete positive legal order is strictly separated from all extraneous normative elements, consequently also from those of ethics. This system of enacted law has binding force, not because it would represent a fair adjustment of interests of citizens or would actualize in any other manner criteria of justice, but rather because it is formally justified by a supreme unprovable norm—the "basic norm," which is contentually not apprehensible and whose sole function is to prevent the regressus ad infinitum from occurring, into which a strictly positivistic system would enter if the binding force of a norm would

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[12] H. U. EVERS, DER RICHTER UND DAS SITTLICHE GESETZ 141 (1956).

[13] 1 K BERGBOHM, JURISPRUDENZ UND RECHTSPHILOSOPHIE 144 (1892).

[14] *Cf.* especially H. WELZEL, *supra* note 7, at 12-18, 66-89, 162-82, 183-235; A. KAUFMANN, *supra* note 10, at 44, 73.

result in any given instance from a higher validating norm in the same system. In this case there must be an ultimate norm, which may be called "the basic norm" and which is intrinsically binding. It cannot draw its validity from outside the system, because this would remove the purity of the doctrine; nor can it be justified by recourse to a still higher norm of the same system, because this would mean that the system is infinite. [15]

Whilst legal positivism regards the criteria of justice as residing in positive law and does not allow for scientific argumentation about justice outside enacted law, its polar opponent, the rationalistic natural-law thought, as it flourished in the seventeenth and eighteenth centuries and continues to exist in various guises today, falls into the opposite extreme. "Antiquity justifies slavery, the mediaeval ages the dominance of the Church over the State, the modern ages the sovereignty of the State. Hobbes justifies absolute monarchy, Locke and Montesquieu constitutional monarchy, Rousseau democracy. In so doing, all rely on natural law, which is thereby proved to be unreliable. Oddly enough, every proponent of natural law seems to have a different idea not only of its concrete content but even of its essence, making it thereby impossible to speak of a unitary trend of thought among the proponents of natural law."

Contemporary examples in addition to those offered by Wilhelm Sauer can easily be provided. [16] Thus the Supreme Criminal Court of the Federal Republic of Germany has repeatedly held that concrete norms cannot be derived from a supreme moral law which is not positivized; for example, it is not possible to derive from such a moral law that extramarital intercourse or suicide is a criminal offence or otherwise illegal. [17]

After the experiences during the Hitler regime, when laws of flagrantly

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[15] It should be noted that Kelsen does not want his theory to be regarded as a kind of legal philosophy but as a "general theory of law." He fully recognizes that law is not to be separated from extra-legal evaluations, but relegates such evaluation, *i.e.*, various "ideals of justice," to legal philosophy, which in his opinion is a part of legal politics. For a more detailed consideration of this point of Kelsen's legal theory, see Kaufmann & Hassemer, *supra* note 2, at 469-73.

The answer to the question as to whether legal philosophy can be separated so completely from a general theory of the legal order or whether the norms of a law are valid merely because enacted law can come into existence only in a formally correct procedure and not also because it contains just (*i.e.*, materially right) legal norms is at least to be sketched in the present inquiry.

[16] W. SAUER, SYSTEM DER RECHTS- UND SOZIALPHILOSOPHIE 434 (2d ed. 1949). *Cf.* his exposition of iusnaturalist theories in general, *id.* at 414-36.

[17] *Cf.* in particular the decisions of the Criminal-Law Senate of the Supreme Federal Court of Germany (*Bundesgerichtshof*): 6 B.G.H. St. 46, 147; 17 B.G.H. St. 230. *See especially* 6 B.G.H. St. 52: "The norms of morals, however are intrinsically valid; their (strongly) binding character rests on a pre-existing order of values which is to be accepted and on deontic principles governing human convivium. They are valid independently of whether or not those whom they address with a claim that they be observed actually observe and recognise them. Their content cannot change because the conceptions of what is valid change." *See also id.* at 153: "Because any suicide—with the possible exception of extreme cases—is strongly disapproved by morals, because no one can dispose of his own life in a sovereign manner. . . ." For a more detailed consideration of this matter, see A. Kaufmann, *supra* note 4, at 143.

criminal character were enacted, there began a period of post-war Germany which can be called "Renaissance of Natural Law." Above all, the courts, but also the literature of criminal law, were confronted with the problem whether the fact that, for example, the notorious *Führer*-commands were issued in a regular law-making procedure constituted an irrebuttable presumption that they satisfied the criteria of justice or whether the legality of these commands was annulled by a flagrant offence against laws of humanity and the dignity of man. This problem arose in all convictions for war crimes, with particular urgency in the trials of the so-called informers (*Denunzianten*). Here the question is to be answered whether a denunciation for criticism of the regime or for listening in to foreign broadcasts could be an offence against supra-legal or extra-legal principles of law, even though these acts were in violation of laws valid at that time. This question leads directly to the core of the controversy between iusnaturalism and legal positivism. The courts have always held that these laws were materially wrong and were, therefore, null and void despite their formal validity. [18]

To some extent under the impact of historical events, this imported a rejection of the very gist of legal positivism. The strict fidelity of the judge to enacted law, demanded until then by leading legal philosophers, was abandoned. A material criterion, a criterion of justice, was introduced, requiring the judge to examine the validity of any law under legally relevant moral principles. This abandonment of the emphasis on legal security and the turn towards a conception which brought justice to bear on legal decision-making manifested itself in a particularly distinct manner in Gustav Radbruch, one of the foremost and influential exponents of modern legal philosophy. Still in 1932 and relying heavily on Kelsen's elimination of the value-considerations pertinent to justice from a scientific theory of law and on his relegation of these considerations to legal politics, Radbruch advocated a relativistic conception of law by saying that the choice between the values of justice represented by individualism, collectivism, and transpersonalism was scientifically unfeasible. He declared that legal philosophy must leave the choice between the ultimate presuppositions of systematically developed legal conceptions to individuals. [19] Therefore, according to Radbruch, the decision

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[18] For a more detailed information about this matter, see A. KAUFMANN, DAS UNRECHTSBEWUSSTSEIN IN DER SCHULDLEHRE DES STRAFRECHTS. ZUGLEICH EIN LEITFADEN DURCH DIE MODERNE SCHULDLEHRE 214, 223, (1949). *Cf.* A. Kaufmann, *Gedanken zur Überwindung des rechtsphilosophischen Relativismus*, 46 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 553-69 (1960).

[19] G. RADBRUCH, RECHTSPHILOSOPHIE 102 (6th ed. E. Wolf, 1963). The affinity to Kelsen's thought becomes manifest when Radbruch's reasoning leading to this conception is considered. See *id.* at 100: "Deontic principles can be founded on and proved only by other deontic principles. This is precisely why the ultimate deontic propositions are unprovable, axiomatic, and not amenable to be cognized but only to be professed. Hence, where opposing contentions about ultimate propositions or opposing conceptions of values and outlooks of life confront each other in a dispute, it is not possible to decide for one or another in a scientifically univocal manner."

That such a decision is impossible is not disputed in legal philosophy today. Nevertheless, the question arises as to whether the impossibility of a scientifically uni-

concerning the legal values which had entered into a law was an affair of politics: "Whosoever has the power to enforce law proves thereby that he has the vocation to make law." [20]

For the judge this meant his extradition to the Might of enacted law, which he could not escape by invoking the unjustness of a given law: "We despise the minister who preaches against his conviction but we admire the judge who does not allow his fidelity to law to be affected by his recalcitrant sentiment of justice"; [21] for the dogma has its value not only as an expression of faith, but also as an embodiment of justice. The value of this law also lies in that it guarantees legal certainty, and primarily in this quality it is manipulated by the judge. A just man is worth more than a merely law-abiding man faithful to enacted law. We do not speak of "law-abiding judges" but only of "just judges," for a law-abiding judge is already a just judge due to the fact that he abides by enacted law. [22] Law (*ius*) and enacted law (*lex*), justice and legal certainty, converge for Radbruch in the judge. When the judge obeys enacted law he actualizes the criteria of justice—he is a just judge.

It was shown afterwards that this cardinal principle of legal-philosophical relativism and positivism constituted an item of academic wisdom which failed miserably in the attempts to understand and to shape legal reality and which denied to law its noblest task—to prevail over Might and Violence. As long as the laws provide for a more or less reasonable adjustment of social interests and a sufficient protection of human dignity, legal philosophy can

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vocal decision imports also the incognoscibility of these deontic principles. Radbruch's conception of cognition here, in contrast to his later works, is still determined by the ideal of science prevailing in the nineteenth century. *Cf.* on this point Kaufmann & Hassemer, *supra* note 2, at 476-77. By assigning "univocal" cognition only to legal philosophy and everything else to a political doctrine of opinion, Radbruch deprived legal philosophy of its first and foremost task: the ascertainment of the "ultimate deontic principles" on which law is founded. Just as for Kelsen, legal philosophical inquiry remains ultimately for him, too, a formal machination: "Legal philosophy provides the way to propound exhaustively the conceivable ultimate presuppositions and thereby all points of departure for legal evaluation in their opposition and in their affinity within the framework of a 'topics' of possible world out-looks. This 'topics' includes not *the* system of legal philosophy but rather a complete systematics of its possible system." *Id.* at 101. If legal philosophy is conceived in this way, it is not concerned with law; it is concerned only with a possible (and indeed not with contentually correct) thought about law.

[20] *Id.* 179. "The connection between Might and Right . . . the normativity of the factual, receives also a philosophical foundation now. . . . Law is not valid *because* it is capable of being enforced efficiently but it is valid *when* it is capable of being enforced efficiently, because only then it is capable of providing for legal certainty." *Id.* at 180.

[21] To this statement, Werner Maihofer has contraposed the following formula: "We despise the judge who decides against his conviction and we admire him when in his fidelity to law he does not permit himself to be led astray by unjust or immoral law." *Die Bindung des Richters an Gesetz und Recht (Art. 20, Abs. III GG)*, 8 ANNALES UNIVERSITATIS SARAVIENSIS, SERIE RECHTS- UND WIRTSCHAFTSWISSENSCHAFTEN 5-32, at 32 (1960). This formula imports the assertion of iusnaturalist thought as against the absolute fidelity to enacted law advocated by legal positivism.

[22] G. RADBRUCH, *supra* note 19, at 182.

practically and theoretically afford to regard the criteria of justice as lying exclusively in enacted law. As soon as laws became an instrument of naked power and of oppression of men, legal philosophy took a different view. Positivism had foregone every possibility to qualify laws as unjust, because it had abandoned the idea that the ground of criteria of justice lies outside enacted law. This experience was the signal for a legal-philosophical reorientation, one which eventuated also in Gustav Radbruch, to whom unjust laws of the Nazi regime brought direct suffering when he lost his teaching position as a result of the National Socialist seizure of power in 1933.

In 1946, Radbruch wrote: "Positivism with its credo that 'a law is a law' actually rendered the German legal profession defenseless against laws of arbitrary and criminal content. It believes that the validity of a law is established by the fact that this law is in a position to be enforced. But Might can perhaps be a foundation for a Must but not for an Ought and validity." [23] By these words, Radbruch abandoned the view that there was an identity of Might and Right in a law. Enacted law had no validity simply because it was enacted law; it was necessary to resort to other criteria in order to establish this validity.

Hence the possibility, even a jural necessity, to refuse obedience to enacted law under certain circumstances. Radbruch expresses this thought very cautiously. Now, even in the dawn of the renovation of law carrying a iusnaturalist imprint, he—in contrast to many contemporaries—still sees enacted law to have an indispensable function within law; he does not abandon legal certainty in favour of an idea of justice: "It should be possible to resolve the conflict between justice and legal certainty thus—positive law secured by enactment and political power (*i.e.*, enacted law) prevails even when it is contentually unjust and fails to conform to legal purposes, except when the conflict between positive law and justice attains such an intolerable measure that this law as 'wrong law' must give way to justice." [24]

In this estrangement from positivism, Radbruch does not fall back into an uncritical natural-law doctrine, [25] which contains a fallacy similar to that of legal positivism: whereas the latter neglects justice in law in favour of facticity or positivity, uncritical iusnaturalism does not appreciate the significance of the positivity of law and its necessary relationship to social states of affairs. From general transepochal principles which do not require any

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[23] *Gesetzliches Unrecht and übergesetzliches Recht, reproduced in* G. RADBRUCH, *supra* note 19, at 352 (Apendix) (first published in [1946] SÜDDEUTSCHE JURISTEN-ZEITUNG).

[24] *Id.* at 353.

[25] Radbruch does not renounce legal certainty in favour of the newly discovered justice. For him, both legal values are necessary. He takes cognizance of the fact that legal certainty is a function of justice: "That law be certain and that it be not interpreted in one way here or today and in another way elsewhere or tomorrow is also a demand of justice. Where an antagonism arises between legal certainty and justice, *viz.*, between a law which is contentually challengeable but positive and a law which is just not cast into the appropriate legal form, there is in fact a conflict of justice with itself, a conflict between apparent justice and actual justice." *Id.*

enactment, it draws conclusions about concrete problems of law in an abstract-deductive procedure. The actual social circumstances which are affected by such decisions and the legal consciousness of those who are subjected to them do not enter into the decision and have no influence on it. Such a legal doctrine proves to be untenable in its actual application. Appraisals which are altogether conditioned by the given time and situation enter even into a iusnaturalist legal doctrine, simply because a concrete legal decision cannot be deductively derived from general principles such as "Do good," "Avoid evil," or "Accord to everyone his due." For this purpose, those iusnaturalist fundamental tenets are too general. The problem of iusnaturalist doctrine consists rather in the circumstance that the necessary and unavoidable relationship of law to reality is subjected to a reflection and that law is only allegedly independent of time.

Precisely because of the refusal to recognize the relative and time-dependent factors of law and legal decision and to reflect on them, iusnaturalist doctrines obstruct the road to the elimination of these factors in legal decisions. Therefore, they are exposed to the danger of overrating the binding force of natural-law tenets. Positivism seems to rely "only" on positive law, which could have contained equally well provisions different from its actual contents; in fact, decisions made in reliance on positivist conception are nevertheless influenced by extra-legal factors which are not so "contingent" as is enacted law. Whereas positivism underrates the bearing of its principles, the natural-law doctrine is threatened by the opposite danger: it attributes to *its* principles (conceived as rules derived from eternally valid ought-propositions in a seemingly deductive manner) necessary and supratemporal rightness, without considering that such legal decisions are mostly reflections of here-and-now existing legal consciousness which is historically mutable. This appears distinctly from the illustrations mentioned above. [26]

III

Legal positivism and the natural-law doctrine have proved to be the two poles between which the area of legal-philosophical research expands. However, it has become apparent that their findings cannot constitute an adequate description of the reality of law and provide a foundation for the conception of this reality. Both trends of thought absolutize a part of legal reality (either the justice-content or the positivity of law) and demean the other part.

A real innovation of legal philosophy was, therefore, to be expected only from an approach which took seriously the reality of legal experience—one which did not deduce the essence of law from a traditional image of the

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[26] On the iusnaturalist approach, *cf.* also A. Kaufmann, *Gesetz und Recht, in* FESTSCHRIFT FÜR ERIK WOLF: EXISTENZ UND ORDNUNG 357, at 362-63 (1962); W. SAUER, *supra* note 16, at 434; H. WELZEL, *supra* note 7, at 236.

world or from a traditional concept of science but rather directed its attention to the manifestation of law in social life and to the mode of its realization. Such a preoccupation with the "facts of law," which process has not reached its end even today, led to insights until then not known or long forgotten promising a mediation between the extreme standpoints of positivism and ius-naturalism.

When one speaks of surpassing the natural-law doctrine, this does not mean (at least in recent legal philosophy) that natural law is simply disavowed. It is rather to be understood that the concept of natural law in this period has become ambiguous and glaringly deceptive. Until the beginning of the twentieth century, it was quite clear that "natural law" signified the sum total of always and everywhere existing right, supreme deontic laws and their application in concrete situations.[27] This conception of natural law has changed, above all as a result of Rudolf Stammler's influence.[28] Stammler denied the immutability and abstractness of natural law, not natural law itself; he talked of "natural law with a changing content" and, with other legal philosophers of his time,[29] he thereby opened the road to the conception of a mutable, historical natural law, which nevertheless retained the character of "right law." This new conception could be styled the doctrine of "concrete natural law."

The above mentioned reorientation of legal philosophy rested on two fundamental insights. On the one hand, it was recognized that the supra-temporally valid precepts of abstract natural law could not provide any concrete decisions in particular cases. One possibility is that they are considered to be detached from every historical reality-import being formulated anew in the light of the understanding of any given situation. In that case,

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[27] In the legal philosophy of antiquity and of the middle ages, especially with their influential exponents, Aristotle and Thomas Aquinas, the concept of natural law had still a different content. Here, it meant also that which is "right by reason of nature" (*physei dikaion, lex naturalis*). On this point, *cf.* especially H. WELZEL, *supra* note 7, at 28-37, 57-66. The core of the problems of the later abstract natural-law doctrine—the immutability and absoluteness of the supreme deontic principles—was elaborated here in a different manner. The old doctrines of natural law had not advocated an abstract law but deontic principles which referred to the mutable nature of man as well as to the temporal and specific conditions of the concrete situation of the judges and the legislators. For a more detailed examination of this matter see A. Kaufmann, *supra* note 26, at 380-83; W. Hassemer, *Der Gedanke der "Natur der Sache" bei Thomas von Aquin*, 49 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 29-43 (1963). This natural-law philosophy was lost subsequently and was obfuscated by other theories. Only in the twentieth century were these original conceptions revived through reflection upon concrete conditions of legal experience.

[28] Rudolf Stammler's principal works are: LEHRBUCH DER RECHTSPHILOSOPHIE (2d ed. 1923); THEORIE DER RECHTSWISSENSCHAFT (2d ed. 1923); WIRTSCHAFT UND RECHT NACH DER MATERIALISTISCHEN GESCHICHTSAUFFASSUNG (5th ed. 1924); RECHTS- UND STAATSTHEORIEN DER NEUZEIT. LEITSÄTZE ZUR VORLESUNGEN (2d ed. 1925); DIE LEHRE VON DEM RICHTIGEN RECHTE (2d ed. 1926); RECHTSPHILOSOPHISCHE GRUNDFRAGEN. VIER VORTRÄGE (1928).

[29] On the three great legal-philosophical and legal-theoretical directions of thought among Stammler's followers (Neokantians, Neohegelians, and phenomenologists), *cf.* Kaufmann & Hassemer, *supra* note 2, at 476-83.

it is impossible to derive a concrete decision from them *per subsumptionem*, because they do not supply any contentual information for a decision. Thus, the precept "Avoid evil" does not contain even a preliminary idea of what "evil" means; it is nothing but an empty formula. Every content can be read into this formula because it does not contain a criterion for determining what is to be avoided; therefore, it is worthless for a science concerned with concrete decisions. On the other hand, if the supreme principles of natural law are not formulated in complete abstraction from every historical understanding, and this is to be presumed because they are expressed not in formal language but in natural language, which always evokes a certain understanding in the addresser and the addressee, then they cannot be called abstract and supratemporal. For what one understands by "evil" in the utterance "Avoid evil" differs depending on the person who has this understanding and where and when he has it. Welzel's *Naturrecht und materiale Gerechtigkeit* has the great merit of applying these insights to the history of legal philosophy and of showing their tenability in the history of ethical problems.

The second insight on which recent West-German legal philosophy essentially rests is the reality-import of law. This means that law cannot exist dissociated from the social situation which it is supposed to govern. Law involves a concrete adjustment of social interests; it involves implementation of concrete evaluations of the society for which it obtains. Hence, it requires positivitization so that it can not exist merely in the heads of lawyers but be embodied in laws and judicial decisions of any given society.

This brings a tension into the concept of law. On the one hand, it cannot exist outside its real embodiment in law (*leges*) and judicial decisions (as is assumed by the natural-law doctrine); on the other hand, these positivitization do not represent the whole law (as is taught by positivism). Accordingly whilst laws and legal decisions are recognized as necessary for the realization of law, they are nevertheless not the only possible repositories of law (*ius*). They are exposed to a critique from outside. To take up an illustration offered above, the post-war trials of war criminals could not found judicial decisions simply on natural law derived from eternally valid precepts and brought to bear on the relevant concrete situation. Nor were they committed to conclude that the fact that the *Führer*-commands were enacted in the form of laws meant actualization of law in the guise of unjust laws.

This shows that the rejection of the positions of legal positivism and rationalistic iusnaturalism does not make the decisions of the legislator and the judge easier, but on the contrary more difficult. Such a rejection discards the nostrum of decision-making contained in both doctrines: the tenor of the law or supra-legal precepts—*tertium non datur*. It is easier to show that the positivist and the iusnaturalist approaches do not lead to an accurate description of the reality of law than to show how this description is properly to be effected.

Various attempts have also been made to show where the criteria of justice binding upon the judge and even upon the legislator could be dis-

covered. These attempts are of actual importance and should not be viewed from a purely historizing perspective. It is, therefore, apposite to outline the main trends of the relevant thought and the modes of their justification. In so doing, the task is to point out problem areas rather than to differentiate the exponents of these problems.

The recent attempts in West-Germany to unearth criteria of justice are conspicuously similar in regard to central problems. They have a common starting point in the history of ideas, and, determined by these ideas, they also share a common aim. Although their philosophical and jurisprudential foundations originate from an earlier period, they exhibit dictinctly the experiences of the lamentable course of German legal reality during the Hitler regime and immediately thereafter. It was henceforth no longer possible to return to positivism. But the road to iusnaturalism, seemingly practicable after the reign of injustice, was closed through the recognition that deductions from supra-temporal precepts were not scientifically founded. It was therefore imperative to develop a new natural-law thought, which did not subject itself slavishly to enacted law and which, on the other hand, did not lend itself to such a facile derivation of criteria of justice as was practised by earlier legal philosophers.

An escape from the barren alternative of positivism and abstract iusnaturalism was possible only when the basic dogma, which explicitly or implicitly underlay both doctrines was overcome: the dogma of the *a priori* separation of the Is and the Ought. Gustav Radbruch formulated it as follows: "Nothing is ever to be regarded as right only because it is or because it was or because it foreseeably will be." [30] This dogma constituted the philosophical basis of legal positivism, which derived from it the complete autarchy of the legal system (*viz.* its separation from all extra-legal factors such as morals, public policy, social circumstances, the legal consciousness of the persons affected by law, and so on) and the hierarchical structure of the legal order as Kelsen said: "A norm which constitutes the ground of validity of another norm is figuratively described as the higher norm in relation to a lower norm." [31] It is to be noted that this dogma of the separation of the Is and the Ought has never been formulated so poignantly by the rationalist natural-law doctrine; nonetheless, it constituted a foundation of the iusnaturalist theory, too: as in a positivist system, the legal order is here constructed independently of historical concrete factors. Neither the possible

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[30] *Cf.* the quotation in the beginning of note 19 *supra*. The founder of the so-called "methodological dualism" is Hans Kelsen, the most consistent German exponent of legal positivism. See his REINE RECHTSLEHRE 5 (2d ed. 1960): "The difference between the Is and the Ought cannot be explained in a greater detail. It is given to our consciousness immediately. No one can deny that the utterance 'Something is' (that is, the utterance by which an ontic state of affairs is described) is essentially different from the utterance 'Something ought to be' (by which a norm is signified). Likewise he cannot deny that from the statement that something is it is not possible to conclude the statement that something ought to be and *vice versa*." For a more detailed consideration of this matter, see Kaufmann & Hassemer, *supra* note 2, at 469-73, 476-83.

[31] H. KELSEN, *supra* note 30, at 196.

content of the supra-legal deontic principles nor the procedure by which decisions are deduced from them is in any way influenced by historical circumstances. Historical facts exercise no determining influence upon natural law.

Recent philosophy effected, or prepared ground for, a renunciation of this thought at an early stage. The corresponding developments in legal philosophy only started with a certain "shift of phases." In the early period of German existential philosophy (above all with Martin Heidegger) and in its precedent phenomenology of Edmund Husserl and the neokantianism of Wilhelm Windelband, Heinrich Rickert, and Emil Lask, there was a call for the turn "to the things themselves" (as Husserl put it). This call was followed in West-German legal philosophy, leading to supersedence of the traditional dualism of the Is and the Ought and thereby a new "concrete" concept of natural law. These new doctrines rest on the idea that the Is and the Ought are always somehow interconnected, that the given facts are value-endowed, that norms or values are constituted in relation to facts, and that deontic thought-formations can exist only in a concrete individual or social domain, not in a "space devoid of facts."

Whilst this provides the basic thought of recent legal philosophy, it still remains to be shown in what way this relation between facts and norms, between the social world and the values is conceived. The recent doctrines relating to this matter exhibit a distinct diversity. They have a significant connection with recent philosophy. We shall outline their characteristic features in the sequel.

The recent Protestant jurisprudence offers a so-called "institutional legal theory" [32] which conceives of the "institutions" (the state, the church, political authority, ownership, marriage, and so on) as intermediating agents between social facts and deontic determinations. These institutions are conceived not merely as fact, but as "God's foundations"; they are conceived invariably to represent values. Thus, they are regarded as entities pre-existent for law —not, of course, in the sense that they constitute something which law must simply adopt. However, for a legal order, they are nevertheless not unbinding as the social facts are for a conception which separates the Is and the Ought.

Following primarily Nicolai Hartmann, and also Edmund Husserl, a phenomenological legal theory takes cognizance of "ontological structures"

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[32] *Cf.* above all R. SMEND, VERFASSUNG UND VERFASSUNGSRECHT (1928); RECHT UND INSTITUTION (H. A. Dombois ed. 1956); R.-P. CALLIESS, EIGENTUM ALS INSTITUTION. EINE UNTERSUCHUNG ZUR THEOLOGISCH-ANTHROPOLOGISCHEN BEGRÜNDUNG DES RECHTS (1962). On the institutionalist theory of law and on the theories of the nature of things, ontological structures, and on the phenomenological and the existentialist theories of law, *cf.* the bibliography supplied by Winfried Hassemer in DIE ONTOLOGISCHE BEGRÜNDUNG DES RECHTS at 664-742, (A. Kaufmann ed. 1965).

(*sachlogische Strukturen*) in the world and hence also in law.[33] For this theory, law when making its choice of what to prohibit or what to permit is always bound to "ontic states of affairs," for instance, to the "physical needs of men, their sex difference, their 'sociality', i.e. their need to rely and their dependence on other men."[34] The question of how law ought to react to such natural facts is obviously not answered by these facts. However, it is already certain that such structures constitute a condition of law; their very existence requires, for instance, that there be some legal regulation. Welzel goes beyond these pre-existing circumstances (*e.g.*, the alleged *a priori* legal provision according to which nothing ought to be demanded which a person is physically unable to perform) contending that such ontological structures are present also in human conduct as the object of every legal regulation. This conduct is for him "something more than a mere causal process of nature differing from this process by a purposive steering, that is, by its teleological character."[35] For the theory of ontological structures, the projects of meaning for human law are immanently delimited by the corresponding ontological structures. By this, the "gulf" between facts and values is "bridged."

Along similar lines, a legal-philosophical theory proceeding from existential philosophy tries to identify value-endowed, legally relevant ontic structures[36] in the "cultural states of affairs."[37] The central concept here is "as-Being" based on the consideration that man is never simply "he himself"; he is always an entity which has a significant relation to other men. This relation is, on the one hand, not value-free; it is determined by typical interests and expectations which every man has in his situation as regards other men. On the other hand, this relation is characterized by the fact that the individual does not play simply the role of "a human being in general" but the role of a "determinate some one" confronted at any given time with determinate, socially preformed interests and expectations. Man always appears in a social role: *as* a physician or *as* a patient, *as* a father or *as* a

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[33] See above all H. WELZEL, NATURALISMUS UND WERTPHILOSOPHIE IM STRAFRECHT. UNTERSUCHUNGEN ÜBER DIE IDEOLOGISCHEN GRUNDLAGEN DER STRAFRECHTSWISSENSCHAFT (1935); H. WELZEL, *supra* note 7; H. WELZEL, WAHRHEIT UND GRENZE DES NATURRECHTS (1963); G. STRATENWERTH, DAS RECHTSTHEORETISCHE PROBLEM DER "NATUR DER SACHE" (1963).

[34] H. WELZEL, *supra* note 7, at 244-45.

[35] *Id.* at 244 and similarly in numerous other publications. This structural determination of human conduct has provided an access to the ontological structures also in West-German criminal-law dogmatics: the teleological doctrine of act.

[36] See especially W. MAIHOFER, RECHT UND SEIN. PROLEGOMENA ZU EINER RECHTSONTOLOGIE (1954); W. MAIHOFER, VOM SINN MENSCHLICHER ORDNUNG (1956); Maihofer, *Die Natur der Sache*, 44 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 145-74 (1958), *reprinted in* DIE ONTOLOGISCHE BEGRÜNDUNG DES RECHTS at 52-86 (A. Kaufmann ed. 1965); Maihofer, *Konkrete Existenz. Versuch über die philosophische Anthropologie Ludwig Feuerbachs, in* FESTSCHRIFT FÜR ERIK WOLF: EXISTENZ UND ORDNUNG at 246-81 1962); W. MAIHOFER, NATURRECHT ALS EXISTENZRECHT (1963); W. MAIHOFER, RECHTSSTAAT UND MENSCHLICHE WÜRDE (1968); L. PHILIPPS, ZUR ONTOLOGIE DER SOZIALEN ROLLE (1963).

[37] See Kaufmann & Hassemer, *supra* note 3, at 476-83.

mother, *as* a purchaser or *as* a vendor. Enacted law in this theory is "nothing else but an attempt at a proposed solution of the materially right and humanly just judgment of a concrete legal state of affairs; it is 'binding' if it proves to be adequate to the things here and now." The factual structures of human life in which man finds himself are a "concrete standard of material justice";[38] they are a criterion of justice.

Finally, the theory of the nature of things must also be mentioned among the attempts to apprehend the values or the deontic thought-formations in their reference to reality and to view reality as always importing values. The concept of the nature of things operates here as a receptacle for divers efforts to overcome the dualism of the Is and Ought. Thus Günter Stratenwerth views the nature of things from the point of view of a phenomenological, ontological legal theory, whereas for Werner Maihofer it is based on existentialist legal philosophy; for Gustav Radbruch (who actually kindled the legal-philosophical discussion on the nature of things) it is a *tópos*, a thought-form for the apprehension of the originary mutual reference of fact and value;[39] for Herbert Schambeck[40] the nature of things is a bridge which leads by way of an "objective ontological insight" to a supra-legal order of Being, to an "ontological order of essence."[41]

However differently the alternates "abstract natural-law thought" and "legal positivism" are viewed by recent West-German legal philosophy, and however differently the nature of things is conceived, all these theories have in common the point that law is no longer regarded as a catalogue of immutable norms and is no longer identified with enacted law: Be it in institutions, in *a priori* ontological structures, or in given social roles—for a legal regulation there are always pre-formed actualizations of values. These influence and bind every legal decision: that of the legislator or that of the judge.[42]

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[38] Maihofer, *Die Natur der Sache, supra* note 36, at 172.

[39] The first study by Radbruch on the nature of things appeared in Italian: *La natura della cosa come forma giuridica depinsiero*, 21 RIVISTA INTERNAZIONALE DI FILOSOFIA DEL DIRITTO 145 (1941). In German, it was first published under the title: *Die Natur der Sache als juristische Denkform*, in FESTSCHRIFT FÜR RUDOLF LAUN ZUM 65. GEBURTSTAG 157 (1948), and as an independent new edition in 1960. On Radbruch's theory of the nature of things, *cf.* Kaufmann & Hassemer, *supra* note 3, at 476-83.

[40] *Cf.* especially, H. Schambeck, *Der Begriff der "Natur des Sache,"* 10 ÖSTERREICHISCHE ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 452 (1959/60); H. SCHAMBECK, DER BEGRIFF DER "NATUR DER SACHE". EIN BEITRAG ZUR RECHTSPHILOSOPHISCHEN GRUNDLAGENFORSCHUNG (1964).

[41] On this topic see also A. Baratta, *Natura del fatto e diritto naturale*, 36 RIVISTA INTERNAZIONALE DI FILOSOFIA DEL DIRITTO 177 (1959); A. Baratta, *Gedanken zu einer dialektischen Lehre von der Natur der Sache, in*, GEDÄCHTNISSCHRIFT FÜR GUSTAV RADRBUCH 173 (A. Kaufmann ed. 1968); O. BALLWEG, ZU EINER LEHRE VON DER NATUR DER SACHE (2d ed. 1963); N. A. POULANTZAS, LE CONCEPT DE NATURE DES CHOSES DANS LA PHILOSOPHIE ET LA SOCIOLOGIE CONTEMPORAINES DU DROIT. ESSAI SUR LA RELATION DU FAIT ET DE LA VALEUR (1964) in two volumes; A. KAUFMANN, ANALOGIE UND "NATUR DER SACHE". ZUGLEICH EIN BEITRAG ZUR LEHRE VOM TYPUS (1965).

[42] For a more detailed examination see A. KAUFMANN, NATURRECHT UND GESCHICHTLICHKEIT (1957); A. Kaufmann, *The Ontological Structure of Law*, 8 NATURAL LAW FORUM 79 (1963); RECHT UND SITTLICHKEIT (1964).

Hereby, not only a contentual delimitation of possible legal decisions is given but also a platform from which a critique of legal decisions is possible. If abstract natural law could endow, as Wilhelm Sauer has shown, almost every evaluation with the dignity of necessary and immutable rightness, legal positivism could retreat to a formally valid creation of law. Today, such an almost unquestioned conviction of rightness of a legal decision is no longer possible. The most recent legal-philosophical inquiries have shown that every legal decision is an aporetic judgment. Its rightness cannot be determined by recourse to a univocal standard but must be ascertained in a contentual altercation with the facts of the social world, with the legal consciousness of citizens, and with here and now prevailing concrete conditions of legislation and judicial decision.

This conception has also led to a contemporary revision of West-German legal philosophy and methodology. [43] Law is no longer understood as an arsenal of instruments for decisions to which the legislators or the judges need only to go and help themselves, but rather as an end which they seek to achieve and yet cannot quite achieve because law is living, dynamic, and historical. No aspiration of law, no matter what its point of departure, ever reaches its goal; it always means "being on the way."

All this does not answer the question of the criteria of justice posed by the most recent German legal philosophy. However, it shows that the question is posed in such a manner that new horizons are opened for legal science.

[43] *Cf.* Kaufmann & Hassemer, *supra* note 2, at 483-86.