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THE ONTOLOGICAL STRUCTURE OF LAW*

Arthur Kaufmann

SOME LIGHT may be shed on one of the perennial questions of jurisprudence by considering it in the light of an analogy furnished by metaphysics. The question is, What are the general constituent elements of law? The analogy is the answer given to the even broader question, What are the constituent elements of being?

To those who have no taste for metaphysics, or believe it to be a discipline consisting in the otiose shuffling of words, this appeal to its tools must appear a compounding of confusion. Yet now, as always, there is everywhere, except possibly in England, a substantial body of philosophers who take seriously, as Western philosophers from Plato to Heidegger have taken seriously, the great attempt to reason about the structure of reality. To them my present attempt to apply the Thomistic analysis of being to law may seem warranted.

I. THE TWO COMPONENTS OF LAW

ONE FACT is determinable in the history of legal thought. There has been constant oscillation between what are commonly called "natural law" and "legal positivism."

To be sure, neither of these positions has always been pushed to its extreme consequences. The history of Anglo-American legal thinking, for obvious reasons, testifies to a more peaceful course than the continental tradition. The movement back and forth between legal positivism and natural law in the most recent development of law in Germany has, in contrast, been especially measurable. Naturally, this is no accident. Extreme

* This article has been translated from the German by the Staff of the FORUM. With the approval of the author, the translation has compressed parts of the original and has, in the interests of clarity to readers of English, occasionally sacrificed a literal translation to an effort to express the author's basic ideas. The American lawyer may all too often share the view that H. L. A. Hart attributes to the English lawyer: "If he believes at all that there are points where law and metaphysics meet, these are felt to be on the periphery of his concerns, if not in an outer darkness." Hart, *Philosophy of Law and Jurisprudence in Britain, 1945-1952*, 2 AMERICAN JOURNAL OF COMPARATIVE LAW 355, 357 (1953). For a good example of the rather quizzical way in which an American professor of law is apt to view metaphysics, see Hessel E. Yntema, *Jurisprudence and Metaphysics — A Triangular Correspondence*, 59 YALE LAW JOURNAL 273 (1950). This kind of doubt, faintheartedness, or outright rejection of metaphysics is, of course, an attitude vigorously deplored by the author of this article.

positivism during the time of the Nazi dictatorship had the slogans, "A command is a command" and "Law is law," and brought about, in areas, a complete perversion of law. After the Second World War its approach was replaced by the much discussed renaissance of natural law thinking. This movement, however, has now often gone beyond its goal too far in the other direction. Some courts, appealing to an alleged natural law, have pushed aside valid laws which blocked their way to a desired decision; they have, for example, imposed punishments which were not at all envisaged by the law. There is, therefore, an explicit and perceptible disenchantment; even a reaction to neopositivism. These events have demonstrated before our eyes in Germany something at all times demonstrated by history, although never so plainly, and of general validity: both a one-sided natural law approach and a one-sided positivistic approach do not correspond to the ontological structure of law; each in its absoluteness is jurisprudentially untenable and cannot alone endure. It is quite remarkable that as some have spoken of "the eternal return of natural law," so have others spoken of "the eternal return of legal positivism."¹ This persistent fluctuation between natural law and positivism makes plain better than any theoretical arguments that each interpretation emphasizes one aspect and only one aspect, that neither may be treated as sufficient without injury to reality.

Reflection confirms the testimony of the history of thought. Neither legal positivism nor natural law seems tolerable. The view that we "must recognize as binding even the basest statute, so long as it has been enacted with formal correctness"² can no longer be considered after the experience of the Fascist and Communist dictatorships. The history of the recent past has given us a kind of "metaphysical experience" with almost the exactness of an experiment in the natural sciences. It has shown that for the validity of law there must be more than legality.

Yet we are on an equally wrong track if we oppose to legal positivism a "suprapositive natural law." One is then exposed to the warranted objection that there cannot be two equally valid orders of law and that one is necessarily superfluous.³ A suprapositive law possesses no reality as law.

It is evident that both views, that of legal positivism and that of idealistic natural law, say something true about law, but that insofar as they do not correspond to its ontological structure, each takes one side of the law for

1. See HEINRICH ROMMEN, *THE ETERNAL RETURN OF NATURAL LAW* (1947) and D. Lang-Hinrichsen, *Zur Ewigen Wiederkehr des Rechtspositivismus*, in *FESTSCHRIFT FÜR E. MEZGER* 1ff. (1954).

2. K. BERGBÖHM, 1 *JURISPRUDENZ UND RECHTSPHILOSOPHIE* 144 (1892).

3. See, for example, HANS Kelsen, *DIE PHILOSOPHISCHEN GRUNDLAGEN DER NATUR-RECHTSLEHRE UND DES RECHTSPOSITIVISMUS* 27 ff. (1928).

the whole. Gustav Radbruch has said, "It is no less part of the concept of just law to be legal than it is the task of positive law to be just."⁴ The doubleness of the essence of law and the existence of law, of natural lawfulness (*Naturrechtlichkeit*) and legality (*Positivität*), creates the ontological structure of law. The one-sided monistic conception of law must, then, give way to a dualistic one, or, more exactly, to a polar conception of law. The relation of natural lawfulness and legality of law must be understood neither as a relation of identity, with one being necessarily contained in the other, nor in the opposite way as if they were two alternatives, but the relation must be understood as a relation of polarity, as a relation of contraries completing and supporting each other.⁵

The polarity of natural lawfulness and legality expresses the relation of the validity of law to its effectiveness.⁶ We have here the key to an understanding of both main themes of legal philosophy: justice and certainty; law and power. Basically, they center on one and the same question, the question of the ontological structure of law. The monistic theories of law fasten on only one aspect of legal reality: positivism, on the existential; idealistic natural law, on the essential. The former sees only the certainty, the effectiveness, the factual power of the norm; the latter sees law only from the angle of justice, substantive content and material validity. Positivism regards the validity of the norm to be the result of its effectiveness; idealistic natural law regards validity as the criterion of the effectiveness. The problems con-

4. GUSTAV RADBRUCH, *RECHTSPHILOSOPHIE* 169 (1956).

5. On the philosophical concept of polarity which explains the association of contraries and relative opposites, see HANS MEYER, 2 *SYSTEMATISCHE PHILOSOPHIE* 34 (1958). These polarities can be compared as soul and body or as man and wife. Compare F. A. von der Heydte, *Von Wesen des Naturrechts*, 40 *ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE* 220 (1952). Cf. the remarks of Iredell Jenkins, *The Matchmaker or Toward a Synthesis of Legal Idealism and Positivism*, 12 *JOURNAL OF LEGAL EDUCATION* 1, 30 (1959):

Yet, positivism and idealism perpetually renew this quarrel, when it appears on the point of extinction in concrete cooperation, because each persists in challenging the other with a ridiculous and abstract either/or. Positivism says, in effect: "Either establish that you can reach absolute and categorical knowledge of values, or leave them alone until you can." Idealism says, in effect: "Either establish that you can operate the legal system entirely without recourse to values, or leave it alone until you can." It needs no argument to make manifest the utter impossibility of these undertakings. But that has not prevented the idealists and positivists from attempting them. And it is precisely this dedication to lost causes that is responsible for the mood of despair and antagonism that pervades so much modern legal philosophy. Goaded by the positivist challenge, idealism has concerned itself much too exclusively with proclaiming the existence of absolute values and the dependence of law upon exact knowledge of them. Similarly, positivism has concerned itself too exclusively with asserting the autonomy of the legal order and with seeking to make it internally self-sufficient. To the extent that effort is diverted to these tasks of Sisyphus, legal theory becomes sterile and esoteric, and legal practice reflects these ills and suffers correspondingly.

6. On the relations between ontology and logic, see W. Goldschmidt, 3 *ÖSTERREICHISCHE ZEITSCHRIFT FÜR OFFENTLICHES RECHT* 186, 201 (New series, 1950).

cerning "law and power," "justice and certainty," are finally insoluble for both views; each has suppressed one member of the relation in favor of the other. The supple relation of polarity is not generally seen, or if it is seen, it is pushed off as an antinomy belonging to the apparently unanswerable questions of law.⁷ We recognize, then, that the reality of law becomes clear in the association of the essential element with the existential element, of natural lawfulness with positivity, so that justice and certainty, validity and effectiveness, lawfulness and power, legitimacy and legality, are neither identifiable nor antagonistic, but are related as polar forces and so stand in a fruitful exchange with one another. A one-sided emphasis on justice fails to correspond to the ontological structure just as much as the assertion that power is what distinguishes the legal character of a norm. Justice as a suprapositive principle of law effectively exists only in positive law, and positive law is valid only through its participation in justice. The neglect of positivity endangers the *certainty* of law; the neglect of justice endangers the certainty of *law*. Each conditions the other and needs the other.

Through this ontological foundation a new and deeper sense may be given to the concept of positivity. This sense is distinct from that of the prevailing opinion which limits itself to a positivistic assertion that legality is the property of a norm "which is set out by a subject."⁸ Legality is now identified with the presence, the corporeity, the being of law. The positivity of law means such a measure of actualization and concretization of its essence that something is justiciable, that we can grasp it, handle it, use it. There are legal norms which are positive, but not legislated — for example, customary law which owes its positivity not to an act setting the norm but to common and continuous usage. On the other hand, there are legal norms which are so abstract and indefinite in their limits that they cannot be considered positive in an ontological sense — above all, the so-called public policy arguments as, for example, the command to consider "good morals."

Such invocations of public policy testify forcefully that the accepted concept of legality is jurisprudentially unusable. For an essential function of legality, it is agreed, consists in its guarantee of certainty of law. But no one would seriously assert that "public policy," although it is a legal norm, is a certain norm. The certainty of law is, rather, guaranteed through public policy being made concrete in judicial decisions and in the study of law.

The reality of law has, thus, a bipolar structure. The bipolarity means

7. Compare RADBRUCH, *op. cit. supra* note 4, at 174 ff.; esp. 181 ff., where he treats the antinomy involved in the problem of validity as insoluble. But see also RADBRUCH, *VOR-SCHULE DER RECHTSPHILOSOPHIE* 35 ff. (1959).

8. For example, René Marcic, *Die bedingte Natur des positiven Rechts*, 15 *JURISTENZEITUNG* 198f., 200 (1960).

that its essence and existence are not identical. This determination is set out both against legal positivism and against idealistic or rationalistic natural law thought.

II. THE TWO COMPONENTS OF BEING

THE STRUCTURE of law I have just outlined amounts to a transposition to the structure of legal being of the familiar metaphysics of Thomas Aquinas. In his terms, essence is that through which a definition may be given of a thing; it is the sign which a definite thing possesses in a potential state. Existence is the realization or actualization of this possibility.⁹

By these two, essence and existence, the structure of real things is given. Ideal concepts possess no proper, independent existence, but only an existence which is merely conceivable or imaginable, as, for example, the literary form of Faust.¹⁰ Real things, on the other hand, have an independent existence and do not exist merely in being conceived. This independent existence comes from essence taking form in some corporeal shape which receives it (Thomas Aquinas puts it, "*Quidditas est recepta in materia*"¹¹). The essence first becomes present in a body. There are no pure essences in our world; they would lose themselves in shapelessness. Even spiritual substances can have effect only if they assume real shape; they need something to make them things such as tangible sacraments and institutions.

In our world the distinction of essence and existence is the foundation for the change, development, and decay which we observe in all things. If existence were a component of the essence of beings, they would always exist. But this is the case only with absolute being, with God, "whose essence is his existence."¹² God is *ens a se*, the *ens realissimum*, the *actus purus*, and He therefore exists necessarily and eternally.¹³ Earthly things have no absolute being; they are contingent and terminable. Their essences do not necessarily possess existence. They were not always in existence, and what does not exist today may exist tomorrow. Their essences can be conceived of as pure poten-

9. All substances, says Thomas Aquinas, are composed "by that which they are" and "what they are," *quo est* and *quod est*. DE ENTE ET ESSENTIA ch. 5. See A. BRUNNER, DER STUFENBAU DER WELT 463 ff. (1950); Hedwig Conrad-Martius, *Realontologie*, in 6 JAHRBUCH FÜR PHILOSOPHIE UND PHÄNOMENOLOGISCHE FORSCHUNG 159 ff. (1923); NICOLAI HARTMANN, GRUNDLEGUNG DER ONTOLOGIE 88 ff., 110 ff., 128 ff. (3rd ed. 1948); JOHANNES HESSEN, 3 LEHRBUCH DER PHILOSOPHIE 37 ff., 56 ff. (1950); H. KRINGS, FRAGEN UND AUFGABEN DER ONTOLOGIE 17 ff., 45 ff., 72 ff., 120 ff. (1954); H. MEYER, *op. cit. supra* note 5, at 100 ff.; C. NINK, ONTOLOGIE 11 ff. (1952); EDITH STEIN, ENDLICHES UND EWIGES SEIN 31, 117 ff. (1950). For a view based on the existentialist ontology of Heidegger see also MAX MÜLLER, EXISTENZPHILOSOPHIE IM GEISTIGEN LEBEN DER GEGENWART 14 ff., 83 ff. (2nd ed. 1958).

10. Compare Conrad-Martius, *op. cit. supra* note 9, at 161 ff.

11. THOMAS AQUINAS, DE ENTE ET ESSENTIA ch. 6.

12. *Idem*.

13. Conrad-Martius, *op. cit. supra* note 9, at 167, 181; KRINGS, *op. cit. supra* note 9, at 75.

tiality. The nonexistence of a thing is not equivalent to the impossibility of its being.

The distinction of existence and essence which my traditional analysis supposes is usually described in technical jargon as a distinction made by reason with a basis in reality. In short, the distinction is asserted to be neither purely logical, nor purely perceptible in real being. It is reached by the consideration that if essence and existence can be separated in thought — and we can surely conceive of essences apart from their existence — then they must be distinct in reality.¹⁴

The basic metaphysical distinction between essence and existence parallels, it will be remarked, the distinction already made between legality and justice in law. That this should be the case follows from my premises according to which law belongs to what the phenomenologists call “a regional ontology.” Being is analogous. What it is analyzable into in general, may be found in any particular area of being.

Werner Maihofer has conceived the question of an ontology of law in a different fashion. Although he recognizes that he is dealing with a regional ontology, he believes that he can take the fundamental ontological question of Heidegger, “Why is there being and not nothing?”¹⁵ and use it as a basis for the corresponding question “Why is there law, rather than no law?”¹⁶ But he thus misses the proper theme of the ontology of law. The question why there is generally any kind of entity is entirely distinct from the other question why there is precisely this or that determined entity. The first question has as its object, being in general, as being is the ground of each entity.¹⁷ The second question does not lead to the “being” of determined entities, for their immediate causes can be found in other entities. This is in fact the case with law. There is, to be sure, law only because there are

14. This kind of distinction is traditionally described as a *distinctio rationis cum fundamento in re*. See J. HESSEN, *op. cit. supra* note 9, at 41. See also H. MEYER, *op. cit. supra* note 9, at 102 ff.; A. BRUNNER, *op. cit. supra* note 9, at 161 ff.; P. L. ZAMPETTI, 2 PROBLEMA DELLA GIUSTIZIA NEL PROTESTANTESIMO TEDESCO CONTEMPORANEO 108 ff. (1962); ALLERS, ERLÄUTERUNGEN ZU THOMAS VON AQUIN, DE ENTE ET ESSENTIA 80, 104, 107, 133 (3rd ed., 1956).

15. HEIDEGGER, EINFÜHRUNG IN DIE METAPHYSIK 1, 21, 153 (1953); WAS IST METAPHYSIK? 21, 23, 42 (7th ed., 1955). According to Heidegger there is an ontological difference only where there is a distinction between being as such (*esse*) and an entity (*ens*). In classical metaphysics, where concentration is directed to the difference between essence and existence, the focus is on “the entity as such and the determination proper to it.” (ARISTOTLE, METAPHYSICS 1003^a). Heidegger accuses this kind of philosophy with “forgetfulness of being” and calls it “essence philosophy.” It is true that the fundamental question of ontology concerns being and not entity. However, reality is such that we are not able to know being as it stands independent of all entities. We may question it, but we cannot make it the object of knowledge, for it is the last thing to be questioned and so cannot be further defined.

16. W. MAIHOFFER, RECHT UND SEIN: PROLEGOMENA ZU EINER RECHTS-ONTOLOGIE 38, 39 (1954).

17. Cf. HEIDEGGER, VOM WESEN DES GRUNDES 18 (3rd ed., 1949).

entities in general, but first and properly there is law because there are men and because man as a social being needs law. This is, indeed, the express conclusion of Maihofer's investigation: "the ground and object of all law is . . . the property of social being needing to complete its being in existence with others."¹⁸ Because of the inner analogy (the analogy of being) between man and law something more may be said on the social nature of law; to this extent there is an ontology of law.

If, with Heidegger, one recognizes an ontological difference only between being and entity, nothing but a fundamental ontology is possible.¹⁹ Regional ontologies are possible only as philosophies of essence, as the phenomenological school of Edmund Husserl has rightly seen.²⁰ This means regional ontologies are possible only on the foundation of the ontological distinction between essence and existence. The question of a regional ontology can never be whether or why an entity is, but only what it is.²¹ To this extent Maihofer must be rejected. However, his approach to law through the use of the analogy of being has justification. The character of law as being can in fact be extensively understood only by comparison with the mode of being of man. It is his way of putting the question that is erroneous. Why is there law at all? To ask this question seems to ask of law the properties of man. It seems to set up an anthropology of law. But, as Maihofer himself says, the real task of an ontology of law is an examination of the "structure of being of the law."²²

What is fundamental, then, for the ontology of law is the difference between essence and existence. The implications of this difference I shall now develop.

III. CHANGE AND THE CONSTITUENTS OF BEING

THE ONTOLOGICAL DISTINCTION between the essence and the existence of law, between legality (*Positivität*) and justice (*Naturrechtlichkeit*), opens a way to understand the meaning of the "historical nature of law," one of

18. MAIHOFFER, *op. cit. supra* note 16, at 125. Cf. also pp. 30 ff., 73 ff., 83 ff. See also his *VOM SINN MENSCHLICHER ORDNUNG* 41 ff., 70 ff. (1956). In these places Maihofer asserts against the one-sidedness of existentialism that the social being is as original as the individual self-being. This is the particular merit of his work. In German, Maihofer reads as follows: "Grund und Ziel allen Rechts ist . . . die Eigentlichkeit des Alsseins, in der sich das Selbstsein in seinem Dasein mit Andern zu vollbringen hat."

19. Heidegger says expressly, "The first philosophical step in the undertaking of the problem of being starts with . . . an entity as an entity and not with a question of an entity's origin in other entities." *SEIN UND ZEIT* 6 (7th ed., 1953).

20. The basic work is EDMUND HUSSERL, *IDEEN ZU EINER REINEN PHÄNOMENOLOGIE UND PHÄNOMENOLOGISCHEN PHILOSOPHIE*, esp. bk. 1, pp. 309 ff. (2nd ed., 1922).

21. Cf. R. REININGER, 2 *METAPHYSIK DER WIRKLICHKEIT* 4 (2nd ed., 1948).

22. MAIHOFFER, *RECHT UND SEIN* 66 (1954), referring to MAX MÜLLER, *SEIN UND GEIST: SYSTEMATISCHE UNTERSUCHUNGEN ÜBER GRUNDPROBLEME UND AUFBAU MITTELALTERLICHER ONTOLOGIE* 36 (1940).

the most pressing problems of modern jurisprudence. That the law, including natural law, is conditioned by time and by situation, that it is not static, but dynamic, that it possesses a structure determined by time in history — that is both our way to new roads and a rediscovery of the classic paths.²³ Yet particular investigations of these questions, focusing on the ontological problems, are rather sparse.²⁴ At the same time, general philosophy in the last decade has intensively focused on the problem of history.²⁵ In this article I cannot comment on these developments at length. But it is remarkable that the more recent philosophical investigations of the phenomena of time and of history have been scarcely used by jurisprudence.

In speaking of the historicity of law, I do not mean the empirical history of concepts and their historical realization. Our problem lies not in the history of law, but in the ontology of law. It is the "problem of the unique and nonoptional historical task."²⁶ This problem is not concerned with how law really exists in history. What is important is how it has a history, how it is determined in its nature by the mode of history. It is a matter of the ontological history of law itself.

In *Natural Law and History* I tried to show that this problem could not be resolved either through a historicist's conception of law or through an absolutist conception.²⁷ Historicism resolves the entire character of law into the empirical facts of history and recognizes nothing constant, nothing timeless in the law. It entangles itself in the contradictions of an unlimited rela-

23. See my suggestions in *DAS SCHULDPRINZIP* 86 ff. (1961).

24. In chronological sequence there have been the following: E. OPOCHER, *Diritto e tempo*, 9 ACTES DU XIÈME CONGRÈS INTERNATIONAL DE PHILOSOPHIE 85 ff. (1953); GERHART HUS-SERL, *RECHT UND ZEIT* 7 ff. (1955); G. DEL VECCHIO, *Mutabilità ed eternità del diritto*, *JUS RIVISTA DI SCIENZE GIURIDICHE* 1 ff. (1954); ARTHUR KAUFMANN, *NATURRECHT UND GESCHICHTLICHKEIT* (1957); Kaufmann, *Diritto naturale e storicità*, *JUS RIVISTA DI SCIENZE GIURIDICHE* 178 ff. (1959); G. DEL VECCHIO, *Wandelbarkeit und Unvergänglichkeit des Rechts*, 14 *UNIVERSITAS* 1175 ff. (1959); J. J. M. VAN DER VEN, *GRUNDRECHTE UND GESCHICHTLICHKEIT* (1960). See also L. STRAUSS, *NATURAL RIGHT AND HISTORY* (1953); G. DULCKEIT, *PHILOSOPHIE DER RECHTSGESCHICHTE* (1950); K. ENGISCH, *VOM WELTBILD DES JURISTEN* 67 ff. (1950); A. VILLANI, *HEIDEGGER E IL "PROBLEMA" DEL DIRITTO* (1958). One essay linking ontology and law in an American legal journal is Ilmar Tammelo, *On the Space and Limits of Legal Experience*, 11 *JOURNAL OF LEGAL EDUCATION* 171 (1958) — chiefly on the ontology of Louis Lavelle.

25. HEIDEGGER, *SEIN UND ZEIT* 372 ff.; JASPERS, *PHILOSOPHIE* (3rd ed., 1956), Vol. II, pp. 118 ff.; Vol. III, pp. 18 ff., 24 ff.; N. HARTMANN, *DAS PROBLEM DES GEISTIGEN SEINS* (2nd ed., 1949), Part 3, Sec. 2, pp. 456. A. BRUNNER, *GESCHICHTLICHKEIT* (1961); HEDWIG CONRAD-MARTIUS, *DIE ZEIT* (1954). H. BARTH, *DAS SEIN IN DER ZEIT* (1933); O. F. BOLLNOW, *EXISTENZPHILOSOPHIE* 104 ff., 112 ff. (4th ed., 1955); G. JACOBY, *ALLGEMEINE ONTOLOGIE DER WIRKLICHKEIT*, 523 ff. (1955); K. LÖWITH, *HEIDEGGER — DENKER IN DURFTIGER ZEIT* 43 ff. (1953); H. MEYER, *op. cit. supra* note 5, at 77 ff.; M. MÜLLER, *EXISTENZPHILOSOPHIE IM GEISTIGEN LEBEN DER GEGENWART* 28 ff., 32 ff. (2nd ed., 1958); W. WIELAND, *F. SCHELLINGS LEHRE VON DER ZEIT* (1956).

26. M. MÜLLER, *op. cit. supra* note 25, at 34. Cf. also VAN DER VEN, *op. cit. supra* note 24, at 12.

27. ARTHUR KAUFMANN, *NATURRECHT UND GESCHICHTLICHKEIT* 14 ff., 21 ff. (1957); *Diritto naturale e storicità*, *loc. cit. supra* note 24, at 184 ff., 189 ff.

tivism. Precisely because of its panhistorical approach, it loses a grasp on history and becomes itself a form of absolutism.²⁸ On the other hand, absolutism treats a legal order as valid for all time and breaks down in the face of the facts of the history of law. It then retreats to a few, small first principles, idly leaving the content of law to relativism. It is a paradoxical but fundamental principle that every point of view, carried to its extreme, turns into its opposite. An exaggerated absolutism culminates finally in its polar opposite, relativism, and thereby contradicts itself.

The historical character of the law must be given a place between relativism and absolutism. It cannot mean either a timeless natural law, which is ever and never valid, nor a timeless legal positivism, in which laws are arbitrary and unconnected events in the stream of time. It is necessary to replace these contraries and to make "a synthesis between absoluteness and relateness, existing law and law in process, constant elements and developing elements, eternity and history."²⁹ This synthesis can be founded only on the basic structure of law, in the polarity between natural law and positive law, in the ontological difference between essence and existence.

Thus law, to whose essence existence does not necessarily belong, is contingent and terminable. If there were an absolute law, it would have to have existed in complete justice from the beginning and forever. We know by experience that this is not the case. The content of justice in a law may be realized in greater or lesser degrees, and it is even possible that it may not be realized. Indeed, it is possible, as we have experienced, that as a positive norm, a statute will be set out which is unjust, which is nonlaw. Because of the ontological differences between the essence and existence of law, there may be at any time a perverting of law, and the perverted content may take positive form. This perversion of law is a constant danger and is always present, not only in a tyranny. There can be no doubt then that law — just law, natural law — does not possess an absolute existence in our world.

With all earthly things, including law, there are a beginning and a past, which occur objectively in time. But this is not what is meant by ontological historicity in the significant sense of the structure of being. This latter kind of historicity may be comprehended only by men, for it is only within the scope of men.

28. ZAMPETTI, *op. cit. supra* note 14, at 115 rightly calls historicism "absolutization of the relative."

29. M. MÜLLER, *op. cit. supra* note 25, at 34. H. Ryffel also attempts to find a "way between relativism and absolutism." *Der Wertpluralismus unserer Zeit als philosophisches Problem*, 42 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 305 ff., 507 ff. (1956). See also A. ARNDT, RECHTSDENKEN IN UNSERER ZEIT: POSITIVISMUS UND NATURRECHT 21 (1955).

There are, of course, many beings such as plants and animals, whose essence and existence are distinct and whose beings are therefore contingent. But animal creatures are not themselves aware of this condition, and their existence is not determined by this knowledge. They always exist in the completeness of their essence without their being able or obliged to alter it. They do not need to develop their essence, and, therefore, they cannot fail to complete it. An animal acts through necessity in which he finds himself bound and is thereby safe. He knows no risk, no decision, no error. It is quite different with men. Unlike the animals, man is not locked up in his own essence, limited to a shuttered environment of peepholes. Due to his spiritual consciousness he may grasp the whole of reality, including himself. As Scheler and Gehlen have formulated it, man is "environment-free" and "open to the world." He is not only in the world, but he has the world.³⁰ He possesses the faculty of "putting everything at a distance from himself and himself at a distance from everything; even putting himself apart from himself, of objectivising everything including himself."³¹ In thinking he may separate the essence of things from their existence; he may spiritually oppose all beings to each other and so grasp his own being. In the capability to transcend himself, to reach being, "outside and beyond" any particular being, and beyond himself as a particular being, lie the roots of the spirituality and freedom of man.³²

As a result of this openness to the world and its accompanying freedom, the difference between essence and existence is realized by man in a way quite different from its realization in subhuman things. Man may always reflect upon his own potentiality. He can always look upon himself as a free person giving orders to himself. He is his own master. This does not mean, as Sartre thinks, that existence precedes essence, so that man in complete freedom can arbitrarily determine the object of his life. Rather, as metaphysics, especially scholastic metaphysics teaches, the conclusion to be drawn is precisely the opposite: essence is given as the object to be achieved by existence.³³ Man is not absolutely free. He cannot say, "Whatever I do,

30. M. SCHELER, *DIE STELLUNG DES MENSCHEN IM KOSMOS* 37 ff. (1949); A. GEHLEN, *DER MENSCH: SEINE NATUR UND SEINE STELLUNG IN DER WELT* 33 ff., 42 ff., 208 ff., 366 ff. (6th ed., 1958).

31. M. Müller, *Freiheit*, in *STAATSLLEXIKON — RECHT WIRTSCHAFT GESELLSCHAFT* 530 (6th ed., 1959).

32. *Ibid.*, where Müller speaks of a "transcendental liberty."

33. Cf. M. MÜLLER, *op. cit. supra* note 25, at 60. He demonstrates that in Thomas Aquinas there is not only a primacy of essence over existence, but yet the *esse* stands ahead of the *essentia*, because the latter is limitation, compulsion and reception for the *esse*. At the same time, essence in its acceptance is the foundation and bearer of existence. Thus there is a pure correlation.

I always fulfill my essence."³⁴ The development of man's essence does not occur by the power of a natural necessity; nor is it in his arbitrary determination. But it is the consequence of a spiritual act, of a freedom directed to meaning and value.

This freedom is man's permanent and never completed task, and, because he is free, he is able to fail in his task. The ability and the task to determine himself for himself give birth in him to the possibility of erring, of misunderstanding his own essence. Man may take risks; so has he responsibility to make himself and his work what they may be made. Freedom of decision is not only privilege, but burden.

From this viewpoint we may understand the time-imprinted character and historicity of man as a form of the structure of his being. Unlike unspiritual natures, man is not simply present; he does not develop himself like plants and animals, who stand objectively in time. Man has to become in order to be. He has the task to develop himself in time and out of time, to become his possibilities. Man has a consciousness of time and history, and so a way of transcending his existential present by means of the past and the future. He can plan, wait, fear, hope, and remember. History is the dimension in which he must come to his essence. As Welzel says, "History is the real development and the shaping of a meaningful order of life in which man seeks to bring his existence into a meaningful and enduring order."³⁵ In taking up the past, with its inheritance and its guilt, and in planning ahead to the future, man has to achieve what is just for the present, justice here and now.³⁶ Placed as a being who sees into time and history, he must work out his tasks by means of an effective collaboration with time and history. He must today sacrifice yesterdays for the sake of the future. He must always begin afresh. His work is never finished. He is always en route. He is always *homo viator*. Man is a vital spiritual being, says Scheler; he is "not a being at rest, not a given, but a potential in process; he is eternally to be undertaken; a goal ever to become."³⁷ For a human being the difference

34. Sartre, speaking explicitly of man, has said "Existence precedes essence." *L'EXISTENTIALISME EST UN HUMANISME* 17, 21 (1959). "Man is merely as he conceives himself to be." "He is as he wills himself to be, as he conceives himself to be according to his existence." "Man is not other than what he makes himself. This is the first principle of existentialism." There is "no other lawgiver than himself." Man has no freedom, but "man is freedom." *Id.* at 22, 93, 36.

35. H. Welzel, *Persönlichkeit und Schuld*, 60 *ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTS-WISSENSCHAFT* 428 ff., 454 (1941).

36. On the connection between justice now and existential concept of time see HEIDEGGER, *SEIN UND ZEIT*, sec. 2, chs. 2 and 3. Fifteen hundred years before him, Augustine had emphasized the factor of time in human existence. See *CONFESSIONS*, Book XI.

37. SCHELER, *op. cit. supra* note 30, at 27. See also GEHLEN, *op. cit. supra* note 30, at 36: "Man is determined by having to 'work himself out' and finding as 'his own work' his existence as a task." In the same sense, that man has the task of developing himself, see also Welzel, *op. cit. supra* note 35, at 433, 446, 450, 454.

between existence and essence is not simply an existing fact, but a living tension out of which he is called to draw the conception of himself and to bring himself into just correspondence with himself and his environment.

In history so understood, in the constant grasping for being and the development of essence, lies the route of human personality. A person is a spiritual individuality which is ordered from within to a completion of itself. At the same time a person is a social individuality. Man, who is directed by nature to the greatest possible development of his essence, cannot reach this goal as an isolated being. He must associate himself with others to reach the fullness of his being. It is the spiritual nature of man himself which refers him to other men. His social character is not something added to the person from without; it is founded in his historical personality, in his spiritual capability of completing himself and his spiritual need of completing himself. This is the meaning of solidarity, in contrast to either individualism or collectivism.

Man's mode of being is reflected in the mode of being of things which depend on man, which exist only because man exists: language, art, science, law. They share in the nature of man's essence. Thus law is historical in its meaning as man is. It is not a pure fact like an unspiritual thing having no internal reference to history. Law is in its very being determined by history. It has the "time-structure of historicity."³⁸ This is not to be understood merely as an assertion of the historical character of legal knowledge. The historicity of law means rather that its essence is bound to realize itself here and now. It means the concrete and particular character of the timeless content of justice in time and history. The essence and the existence of law are to be brought again and again into correspondence,³⁹ so that law may at the same time reach its true character and develop itself, that there may be here and now developed law which is just for this time.

The difference between being and existence, between natural law and positive law, is a living polarity in the process of being actuated, a continuing and uncompleted being in the way of development. Natural law is based on this process. It is derived not from a static, but from a completely dynamic nature. It must constantly develop to something new in order to become itself. There is never a law which is finished, but always a law which is becoming.⁴⁰

38. GERHART HUSSERL, *op. cit. supra* note 24, at 20, 22.

39. On this view of "correspondence" as the essence of order, compare for another view MAIHOFFER, *VOM SINN MENSCHLICHER ORDNUNG* 64 ff. (1956).

40. Similarly E. FECHNER, *RECHTSPHILOSOPHIE* 185, 261 (2nd ed., 1956). See also J. MESSNER, *DAS NATURRECHT* 318 ff. (3rd ed., 1958), and Von der Heydte, *op. cit. supra* note 5, at 224. Compare also VAN DER VEN, *op. cit. supra* note 24, at 28: "Fundamental

Such a human historical character as law possesses would be without meaning if there were not at the same time a transcendental goal beyond all history. This insight has been unerringly expressed by the first existentialist philosopher of the Christian West, St. Augustine. There would be no time if it were not given by Him "Who in the sublimity of an ever present eternity is above all past and all future."⁴¹ For us our *cor inquietum* testifies to this, as thirst proves the existence of water. As Kierkegaard has expressed it, the despair of man in the presence of the end of his being, of death, is a direct proof of the "eternal in man." "If there was nothing eternal in man, he could not despair."⁴²

In modern existential philosophy this absolute background of time and history is no longer grasped clearly; indeed, it is expressly rejected.⁴³ Nor can it be denied that our incomplete human power of knowledge is not in a position to get hold on the absolute with certitude and completeness. The absolute is never given to us in unbroken purity. If we think we grasp it, it is no longer entirely the absolute. Del Vecchio says, "To know the absolute is to assert a contradiction in terms, for the absolute, as soon as it is known, becomes relative."⁴⁴ Yet this epistemological relativity is no proof that the absolute does not exist.⁴⁵ On the contrary, without the absolute, a relativity of knowledge would not be possible, and we could never be conscious of relativity. As movement exists only in relation towards the unmoved, so relativity exists only in relation to what is not relative; what is time and history exists only on the horizon of the supratemporal and superhistorical. Of course we cannot grasp and hold the absolute. Yet to make absolute the historical involves a pure contradiction; the time-character of all historical being has meaning only against a background of what is timeless and has a content above time.⁴⁶ The historical nature of law similarly cannot be made absolute without thereby denying the being and function of law. The situation ethics of existentialism

laws cannot be thought about or created, any more than positive law except by a constant confrontation with the concrete realities of man and society. Indeed, being itself always emerges in a new way in each historical situation." Cf. Lon Fuller, "I believe that law is not a datum, but an achievement that needs ever to be renewed. . ." Fuller, *American Legal Philosophy at Mid-Century*, 6 JOURNAL OF LEGAL EDUCATION 456, 467 (1954).

41. ST. AUGUSTINE, *CONFESSIONS*, XI, ch. 13.

42. KIERKEGAARD, *GESAMMELTE WERKE* (Gottsched-Schrempf ed., 1910), Vol. VIII: *DIE KRANKHEIT ZUM TODE* 17.

43. This is particularly true of Heidegger. On this, see my *DAS SCHULDPRINZIP* 105 ff. (1961).

44. Del Vecchio, *Göttliche und menschliche Gerechtigkeit*, 11 UNIVERSITAS 1054 (1956).

45. See my *Gedanken zur Überwindung des rechtsphilosophischen Relativismus*, 46 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 553 ff. (1960).

46. N. HARTMANN, *DAS PROBLEM DES GEISTIGEN SEINS* 464 ff. See also F. J. v. RINTELEN, *PHILOSOPHIE DER ENDLICHKEIT IM SPIEGEL DER GEGENWART* 401 ff. (1951).

is self-contradictory when it brings the concrete, historical situation into law itself and consequently dispenses with any norm for a just decision.⁴⁷ How could a decision on the justice of a concrete case be possible without assuming a general norm, a measure of the right and just? If law takes its entire reality and completion out of the concrete nature of things, its measure and foundation can exist only in general norms, ideas which are absolute and above time. At the same time general norms from which the law takes its foundation and measure are not identical with law itself. This observation leads to a distinction, a distinction between rules of law (in German: *Gesetz*, here translated to include not only statutes but judge-made rules) and justice (*Recht*).

That a distinction between *Gesetz* and *Recht* exists would be generally denied by the positivists, and even most modern natural law thinkers would recognize it only in an exceptional case. But rules of law and justice are not the same. They are not merely occasionally distinct, but essentially so.⁴⁸ They are related to each other as potency and act, possibility and reality. Rules are not the full reality of justice. They are only one necessary step on the way to justice becoming real. A rule is a general norm for a variety of possible cases. Justice, on the other hand, decides actual situations here and now.⁴⁹

The rules of law are a norm, a line, a measure for just actions.⁵⁰ In its nature such law is general. It takes general likenesses from individual instances; it schematizes; and, while it abstracts from the concrete, it achieves general validity. Because of this abstractness it possesses permanence. It is not touched by the mutability of the concrete; in its essence it is necessarily unhistorical, suprahistorical. Moreover, the rules of law require an act to be set forth. "*Lex a legendo vocata est, quia scripta est,*" as Thomas Aquinas has said.⁵¹ He speaks in this connection of the act of legislation as "*ponere.*" The law has the property that it is set forth by a subject: "*Illud dicitur esse positivum quod ex voluntate . . . procedit.*"⁵² Rules of law are rooted in the

47. So G. COHN, *EXISTENZIALISMUS UND RECHTSWISSENSCHAFT* 155 ff. (1955). To the contrary, H. Kelsen, *Existenzialismus in der Rechtswissenschaft*, 43 *ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE* 161 ff. (1957). Cf. Alexander Pekelis: "Concrete cases cannot be decided by general propositions — nor without them." *LAW AND SOCIAL ACTION: SELECTED ESSAYS* 20 (1950).

48. Cf. my *Gesetz und Recht*, in *EXISTENZ UND ORDNUNG: FESTSCHRIFT FÜR ERIK WOLF* 357 (1962).

49. A. F. UTZ, *KOMMENTAR ZUM 18. BAND DER DEUTSCHEN THOMAS-AUSGABE* 401 ff. (1953), and M. E. SCHMITT, *RECHT UND VERNUNFT* (1955). Cf. my *Recht als Mass der Macht*, 163 *STIMMEN DER ZEIT* 22 ff. (1958/59).

50. Cf. THOMAS AQUINAS, *SUMMA THEOLOGICA* I-II, 90, 1.

51. *Id.* at I-II, 90, 4.

52. *Id.* at II-II, 57, 2.

authority of a lawgiver. They do not stem from being, but from the expression of a will giving a norm.

It is otherwise with justice. Justice is rooted in the natural order of things. It does not arise from the will of some authority, but it is originally a reflection of being.⁵³ That justice is given with being is the oldest thought of the West which we possess. This is the statement of Anaximander that all which is is a being in order.⁵⁴ Who thinks of being thinks also of justice. There is an original connection between cosmos and justice. Justice is the order of beings, in their concrete fullness, and it is, therefore, entirely concrete.⁵⁵ Justice is not a sum of norms, not an abstract scheme for legal transactions. It is rather the just transaction itself, the right decision in a concrete situation.⁵⁶ There is a further implication from this: Justice in the concrete, the decision for one form of order among many in a concrete situation, participates in the contingency and mutability of all concrete things. Justice, then, is in its essence historical.

It is not otherwise with natural law. Justice and natural law are, indeed, the same. Thus natural law, insofar as it is truly just, is filled with being, is concrete, is historical. There is no absolute and unchangeable natural law. The view of many thinkers on natural law, especially those neo-Thomists still bogged down in idealism, regards natural law as consisting in a few overriding, abstract, and generally valid and unchanging principles of justice and morality.⁵⁷ These are not natural laws, but natural principles.⁵⁸ The expositors of natural law should finally recognize this distinction between principles and justice. The fundamental principles of law are not themselves

53. See M. E. SCHMITT, *op. cit. supra* note 49, at 19 f., 33, 37; R. MARCIG, *VOM GESETZESSTAAT ZUM RICHTERSTAAT*, 123, 135, 160, 162 (1957); ERIK WOLF, *DAS PROBLEM DER NATURRECHTSLEHRE* 156; cf. p. 66 (2nd ed., 1959).

54. Erik Wolf, *Der Ursprung des abendländischen Rechtsgedankens bei Anaximander und Heraklit*, in SYMPOSION, *JAHRBUCH FÜR PHILOSOPHIE* 35 ff. (1949).

55. See Utz, *op. cit. supra* note 49, at 402, 433 ff.; M. E. SCHMITT, *op. cit. supra* note 49, at 8, 20, 34 f., 57, 76; Maihofer, *Die Natur der Sache*, 44 *ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE*, 145 ff., 173 f. (1958); MARCIG, *op. cit. supra* note 53, at 125; ERIK WOLF, *op. cit. supra* note 53, at 148.

56. St. Thomas suggests that originally, at least, justice stood for "the just thing itself." *SUMMA THEOLOGICA* II-II, 57, 1.

57. On this conceptual limitation of natural law, of which the work of H. COING, *DIE OBERSTEN GRUNDSATZE DES RECHTS* (1947) and *GRUNDZÜGE DER RECHTSPHILOSOPHIE* (1950), is typical, see SCHMITT, *op. cit. supra* note 49, at 39 ff. Contrast Fuller, *op. cit. supra* note 40, at 473: "So far as I can see it is only an ethics founded on the natural law theory that stands to profit from advances in the scientific knowledge of human nature. It is, furthermore, an ethics that not only permits but demands freedom in the search for a true understanding of man. In this sense it stands at the opposite pole from any theory that attempts to lay down in advance an eternal, unchanging 'code of nature.'"

58. So SCHMITT, *op. cit. supra* note 49, at 37, 47 ff., 52. See also my *NATURRECHT UND GESCHICHTLICHKEIT* 11 ff. (*Diritto naturale e storicità* 182 ff.); *DAS SCHULDPRINZIP* 113 ff.

natural law, although they are the foundations for natural law, the foundation of justice.

All justice assumes rules of law. There cannot be any legal decision without a norm, without a measure of the just. Ontologically, justice has primacy; logically, the rules of law are first. This does not mean that positive law is the original form of law. It means, rather, that the rules of law of the state depend on certain fundamental decisions as to values, which the lawgiver does not himself make, but which are given to him. It is, of course, a problem to give a foundation for these fundamental norms or principles of law, to determine how far and in what degree they possess absolute validity. A certain epistemological relativity must be conceded here. But this does not affect our problem. It is not to be denied that in each case the decisions of the lawgiver of a state are related to determined principles of justice, morality, and the common good, for he cannot give his commands and prohibitions by chance. Even such an ethically colorless direction as the command "Drive on the right" is in the last analysis based on the fifth commandment of the Decalogue.

The state's positive law is already a gradual actualization and concretizing of the fundamental principles, already a step on the way to concrete justice. To give law positive form is not simply an act of deduction. Rather it may be done only by a confrontation, achieved in the thought of the lawgiver, with possible concrete situations in which the law will be valid. The way of producing positive law is thus deductive and inductive at the same time. It is an association of abstract fundamental norms with the concrete nature of things. This concretizing and differentiation can go very far at times, but never further than the commandment to treat equal cases equally. The law must always be considered as governing a number of cases; it always possesses a certain degree of generality. It is not valid to push the differentiation in an endless casuistry until individual cases are considered purely as individual cases, because then the normative nature of law, its function as measure and rule of just behavior, is destroyed.⁵⁹ Positive law is neither purely abstract nor purely concrete. It is neither entirely suprahistorical nor entirely historical, but it is valid for a more or less longer period of time, for a legal period. Law is the hardened shape of justice, justice in a frozen form, justice in a certain state of becoming.

59. Cf. H. HENKEL, *RECHT UND INDIVIDUALITÄT* 18 (1958). A fundamental book on this problem is K. ENGISCH, *DIE IDEE DER KONKRETISIERUNG IN RECHT UND RECHTSWISSENSCHAFT UNSERER ZEIT* (1953).

The development of justice is completed in three stages. The first is the fundamental norm or natural principles. The second is the positive law. The third is the decision in a concrete situation.⁶⁰ It is in the concrete decision that law finally attains its complete being, that it comes to be entirely real. Each decision of law is, then, "a piece in the actual building of the law," a piece of reality.⁶¹

Justice is not contained in a complete form in any particular act of rule making, so that it may be simply read off from the rule. Yet this fact must not mean that a rule of law is but a recommendation to the judge who could push a statute aside according to his own will. There can be no thought of this. The judge is under all circumstances tied to law. But the law is in no case the only source for concrete judicial decisions. These are always and essentially derived from the nature of things. As Marcic has put it in an Aristotelian way, they are derived from the "middle of the concrete situation."⁶² The method of concrete legal decisions is like that of positive legislation: it is deductive and inductive at the same time. A legal decision is not exceptionally, but generally, a creative task, and never a pure application of law in the sense of a subsumption of facts under a logical syllogism. To determine the law is not simply to bring an abstract order of law into existence. It is rather to find the just order in each and every historical situation.⁶³ It

60. Proceeding from different assumptions, Kelsen also works out a similar process of developing the legal order from fundamental norms down to the concrete decision. See Kelsen, *REINE RECHTSLEHRE* 228 ff., esp. 242 ff., 255 ff. (2nd ed., 1960). Similarly Thomas Aquinas held that the doing of justice was completed only with the judgment of the judge. Cf. *SUMMA THEOLOGICA* II-II, 60, 1. On this see Utz, *op. cit. supra* note 49, at 465 ff.

61. F. WIEACKER, *GESETZ UND RICHTERKUNST* 7 (1958).

62. MARCIC, *op. cit. supra* note 53, at 312.

63. Cf. G. STRATENWERTH, *VERANTWORTUNG UND GEHORSAM. ZUR STRAFRECHTLICHEN WERTUNG HOHEITLICH GEBOTENEN VERHALTENS* 104 (1958). A quite similar outlook seems to characterize the dominant views in the American law schools as indicated in the recent remarks of Dean Eugene V. Rostow of the Yale Law School, *American Legal Realism and the Sense of the Profession*, 34 *ROCKY MOUNTAIN LAW REVIEW* 123, 134 (1962):

During the past twenty years or so, the stress in the American literature about law has been on this part of the equation — the quest for standards and values in the process of guiding the evolution of "the law that is" into the law we think it ought to become. The formulation and acceptance of ends, these writers know, helps to fix the line of growth of the law. Of those who have contributed this panel to the body of our thought about law, I might mention particularly Felix Cohen, F. S. C. Northrop, Messrs. Laswell and McDougal, Henry Hart, Friedrich Kessler, Jerome Hall, Lon Fuller and Edmond Cahn. Their work has helped to correct and offset the relative neglect of the problem of values which characterized the more positivistic outlook of the earlier legal realists.

. . . [T]he lawyer, judge, legislator or law teacher . . . sees every social conflict, every case, no matter how small, as an inseparable part of a larger whole. For him, each settlement, each decision, each opinion derives its validity and its legitimacy from his conscientious effort to make certain that it represents not only law, but good law. The lawyer, the legislator, the judge and the law professor have different functions, different degrees of discretion, different zones of choice. But they confront the same standard of

is first in the legal decision that law becomes justice. The court is the place where law is realized in its fullness. But the court is not the only place where what is just is to be determined. What is said of the just in court is analogously valid for all instances where concrete legal decisions are involved, in the functions, for example, of the administration of a state or in the functions of lawyers. All these actions together work for the building of the law and its development. They are participants in the task of making the law just.

duty and responsibility. The modern lawyer can find no workable boundary between law and policy, for he acknowledges law to be policy expressed in certain forms. His motto is Brandeis' remark, "No question is ever settled until it is settled right." For him the sense of the profession, the sense which justifies it, and makes it worthy of his dreams, is precisely that it is and must be the appointed agency of our society's sense of justice.