ANALOGY AND "THE NATURE OF THINGS"; A CONTRIBUTION TO THE THEORY OF TYPES

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The type is a model constituting a standard for us.
A type is always stronger than an idea, let alone a concept.

Ernst Jünger

THE PRESENT ESSAY has been developed from a lecture which I delivered at the invitation of the Society of Legal Studies in Karlsruhe, Germany. Various unforeseeable circumstances have delayed completion of the manuscript for publication by about a year.† During this time, however,

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The present translation was prepared by Dr. Ilmar Tammelo, with the assistance of Mrs. Lyndall L. Tammelo, Mr. Anthony R. Blackshield, and Dr. Albert S. Foulkes. For both the original translation and the final revision, however, Dr. Tammelo must accept sole responsibility.

The translators wish to draw the reader's attention to some of the special difficulties which were encountered in this translation. Some of them result from the fact that in legal and philosophical matters German modes of expression—and even thinking—are often quite different from their English counterparts. Other difficulties arise from Professor Kaufmann's occasional rather personalized use of certain philosophical terms.

"*Sein und Sollen*": "*Sein*" in German philosophical terminology is an ambiguous word which may range from an extremely wide metaphysical sense to an extremely ordinary empirical sense: either ontological "Being," or simply that which "is" in an everyday way. "*Sollen*" is the infinitive form of the verb "shall" or "ought," but is also widely used as a substantive. The contrast between "*Sein und Sollen*" is equivalent to that between facts and values, and is usually translated in English as a contrast between "the Is" and "the Ought."

"*Sachverhalt*" and "*Lebenssachverhalt*": Both these terms are idiomatic in German philosophy and legal theory. The former is often translated simply as "circumstances" or "state of affairs"; we have usually used "fact-situation," hoping that this more accurately meets the demands of both literalness and English legal idiom. Correspondingly "*Lebenssachverhalt*" has been translated as "real-life fact-situation" or simply "fact-situation of life."

"*Tatbestand*": "*Taten*" are "acts" or "facts"; "*bestand*" indicates that these are somehow established. Again, in ordinary German idiom, the word means simply "circumstances" or "state of affairs," and also "the facts of the case." This last points to a special legal usage for which, however, there is no precise equivalent in English legal usage. In this usage the reference is to those fact-elements which are prescribed by a legal norm as constituting a type-situation whose occurrence in an actual case will bring the norm into play. In criminal law, for example, "*Tatbestand*" would mean something like "the constitutive elements in the offence." On the one hand, the reference is to what might be called the "generative notion of a legal rule"; on the other hand, the implication is that this notion is circumscribed and characterized by the legal rule itself. The latter implication is sometimes brought out explicitly by reference to "*gesetzlicher Tatbestand.*" In the present translation both this latter phrase and "*Tatbestand*" occurring *simpliciter* will be rendered as "legally-prescribed fact-elements," or some variation of this.

"*Gesetz und Recht*": These two words, like French "*loi*" and "*droit*" and Latin "*lex*" and "*ius*," both correspond to the single English word "law." The distinction is between "positive law" and the wider meaning implied in "the idea of law" or "the rule of law," with ethical and ideological connotations shading over into "justice." Where the words are used together by way of contrast, we have simply adopted the Latin version of this contrast, "*lex*" and "*ius*." "*Gesetz*" occurring independently has been translated by "positive (or "posited," or "enacted") law," or "a law," or "the law"; for "*Recht*" used independently we have said simply "law" (without an article).

For other necessary clarifications arising in the transition from German to English diom, see *infra* notes 5b and 39a.

the problems to which I have addressed myself have continued to occupy my mind. Naturally, therefore, several thoughts have been formulated differently and here and there new viewpoints have been added. The basic conception of the lecture and its order of thoughts have nevertheless remained unaltered.

The problem of the "nature of things" presents a range of aspects, of which two stand in the foreground : one of a more legal-ethical and legal-philosophical character and one of a more legal-theoretical and methodological character. Most works about the "nature of things" belong — at any rate as to their cardinal point — to the former field; this appears to be indeed a more fertile or productive field. Nevertheless the harvest it yields is of doubtful value as long as it is not clear what this juristic thought-formation called the "nature of things," is really capable of performing. The following pages attempt to make a contribution to the elucidation of this problem.

The legal-theoretical, methodological aspects of the "nature of things" has hitherto tended to be the Cinderella of the subject. So far as I am aware the first important inquiry in this area stems from Gunter Stratenwerth's *Das rechtstheoretische Problem der "Natur der Sache"* (1957). I have evaluated this book (partly erroneously) in my own work *Das Schuldprinzip* (1961). To be sure, Gustav Radbruch did important preparatory work in his essay "Klassenbegriffe und Ordnungsbegriffe im Rechtsdenken" (1938) 12 *Internationale Zeitschrift für Theorie des Rechts* 46 ff., which owing to the unfavourable circumstances of the time of its publication has nevertheless remained almost totally neglected up to the present day. Ilmar Tammelo with his essay "The Nature of Facts as a Juristic *Topos*" (1963) Beiheft No. 39 *Archiv für Rechts-und Sozialphilosophie* 236 and Julius Stone with his essay " 'The Nature of Things' on the Way to Positivism?" (1964) 50 *Archiv für Rechts-und Sozialphilosophie* 145, have probed more deeply this topic. But the decisive impulse for my own research came from a lecture (so far unpublished) delivered by Alessandro Baratta at the Institute for Legal and Social Philosophy at Saarbrücken in 1962 entitled "Juristische Analogie and Natur der Sache." With an intriguing terseness of reasoning, Baratta has pointed out the connection between analogy and the "nature of things" by virtue of their common "extensional" structure. On this track I am attempting a further advance, in which I diverge, of course, in several respects from Baratta's conception.

It is not my opinion that this short essay will give *the* answer to the problem of the "nature of things." But I am quite convinced that the theory of analogy and — as I would like to show — also the theory of types — can promote the discussion of the "nature of things" at least to some extent.

I

In Puchta's *Pandekten* we find the passage: "When the judge finds that external sources have failed him, he himself has to create the legal norm to be applied from the principles of the existing law. . .; proceeding from the nature of things he obtains it by way of juristic deduction and by way of analogy."[1] Puchta here quite explicitly assumes a functional relation between the "nature of things" and analogy; the nature of things serves him, as it were, as a means and a criterion for the analogical application of law—and this (likewise notably) by recourse to the "principles of the existing law." This connecting of the "nature of things" and analogy is conspicuous, for in modern legal theory and methodology these two forms of thinking are regarded and presented as completely separate and as completely independent of each other. Thus Larenz writes: "If there is a question of an 'overt' gap in the law, the gap is filled in most cases by way of 'analogy.' Resort to other (!) criteria is also possible, in particular to the 'nature of things'."[2] Here the "nature of things" and analogy are understood quite unmistakeably as different means of legal *ars inveniendi*, and this may be regarded at present as the prevailing conception.[3] Most writers[4] (though there are, to be sure, exceptions) have lost sight of Puchta's vision of the interplay between analogy as a procedure of law-finding and thinking from the "nature of things" (on which even in his own time he stood rather alone).

Only in a negative way, analogy and the "nature of things" are deemed to have something in common. This lies in their extraordinary character as *last resorts* to which recourse is to be made only when the "normal" methods of attaining concrete legal propositions, namely inter-

1. See Puchta, *Pandekten* 22 (1883) [quoted from Esser, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts* 102 (1956)].

2. See Larenz, *Methodenlehre der Rechtswissenschaft* 287 (1960). *Cf.* also Larenz, "*Wegweiser zu richterlicher Rechtsschöpfung*" in *Festschrift für A. Nikisch* 275 ff. (1958).

3. Many further references could be added. It may suffice to mention Engisch, who in his *Einführung in das juristische Denken* (3d ed. 1964) treats analogy (at 142 ff.) and the "nature of things" (at 190 ff.) as completely separate from each other.

4. Here special mention is to be made of Baratta, whose hitherto unpublished Saarbrücken lecture on "Juristische Analogie und Natur der Sache" (1962) has already been referred to in the Preface. See also Bullinger, *Die Mineralölfernleitungen* 71 ff., esp. 76 (1962) (with a reference to Triepel); Hassemer, "Der Gedanke der 'Natur der Sache, bei Thomas von Aquin," 49 *Archiv für Rechts-und Sozialphilosophie* 29 ff., esp. 40 ff. (1963); Schambeck, *Der Begriff der "Natur der Sache"* 88 (1964). *Cf.* also the quotation from Binding in Radbruch, "Die Natur der Sache als juristische Denkform" in *Festschrift zu Ehren von Rudolf Laun* 157 ff. (1948); hereinafter cited according to the separate printing in the *Wissenschaftliche Buchgesellschaft* (1960), where the passage here referred to appears at 37 ff.

pretation and subsumption, lead nowhere, because of gaps in the law. This reveals an aspiration to manage as far as possible without operations of thought which are logically suspect, as both the so-called analogy inference and the argument from the "nature of things" undoubtedly are. It is, indeed, commonly believed that these are not required except for filling gaps in the law,[5] and that in the "ideal case" of gaplessness of positive law, analogy and the "nature of things" are completely dispensable.

In this notion a good deal of the spirit of the old *legal positivism* still breathes. Bergbohm, in his classic statement of legal positivism, correctly recognized that from the positivist standpoint there ought not to be any such thing as the "nature of things" and analogy: and according to Palmströmian "logic" what ought not to be, obviously cannot be.[5a] "Still," Bergbohm sarcastically remarks, "metaphorical law is indulged in under the innocent name of analogy; still men want to force out of the nature of things a legal norm which isn't yet there; still a disorderly and rambling sense of equity seeks to paralyse positive law in the name

5. In sharp contrast to this, however, see Maihofer, who regards the "nature of things" as an "extra-legal source of law" which is at least of equal rank with posited law. See his "Die Natur der Sache," 44 *Archiv für Rechts-und Sozialphilosophie* 145 ff., esp. 172 (1958); *id.*, "Die Bindung des Richters and Gesetz und Recht," 8 *Annales Universitatis Saraviensis* (*Serie Rechts-und Wirtschaftswissenschaften*) 5 ff., esp. 25 f. (1960).

5a. *Translators' Footnote*: Palmström: the protagonist of a popular German poem, *The Impossible Fact*, by Christian Morgenstern. We here offer a free translation by A. R. Blackshield.

Palmström's getting on quite far
In years. While trying to cross the street,
He gets himself knocked off his feet
By a car.

"What next?" he says, in injured tones,
Picking up his aged bones
Resolved to live. "How *can* this be?
How could a motor-car hit me?

Ought I perhaps, in point of fact,
To blame the Motor Traffic Act,
Does it offer any reason
For cars to have an open season?

Surely, what would be unlawful
Would be to drive machines so awful,
Dealing death to living men.
Should the car have been there, then?"

Wrapped in steaming towels, he looks
Through piles and piles of statute books.
Soon the point is crystal clear:
Cars should not be driven here!

At once, the whole adventure seems
The merest figment of his dreams:
Because, as he can plainly see,
That which *ought* not, *cannot* be.

of equity." These cases are all instances of an "*unwillkürliche Art willkürlicher Rechtskonstruktion*,"[5b] for which there is no need. This is so because their "presupposition is that positive law has gaps." But this is nothing but "thoughtlessness," for "the presupposition is wrong : positive law has no lacunae at all" — where someone thinks he sees a gap in the law, the deficiency lies only "in the inquirer into laws, not in the law : his knowledge, must be complemented, not laws." "A law, even if it contains almost nothing about the matters to be regulated, is something which exists as a gapless whole : Who would dare to add to it without setting himself up as a source of the law ? It never needs any filling from outside itself; it is perpetually complete because its inner fertility and its logical power of expansion in its own area perpetually meet the entire need for legal judgments."[6]

Bergbohm's conception, however exaggerated it may appear to us today, is nevertheless only a logical consequence of the positivist dogma, according to which *lex* and *ius* are identical.[7] For the orthodox positivist, *ius* exists only in *lex* and nowhere else (hence the widespread notion that *ius* consists of articles or sections of *lex*); what is not regulated by *lex* is by the same token not regulated by *ius* either, falling therefore into the "space devoid of law."[8] And to find *ius* accordingly means nothing else but to apply *lex*, that is, to subsume under the concepts of *lex*. There is simply no room for a supplementing of *lex* by construction from analogy and the "nature of things." Indeed, strictly speaking there is not even room for an interpretation of *lex*. For when in conformity with the strict prohibition of law creation, one must think of the judge as subservient to *lex*, whose task (as Montesquieu put it) consists only in the production of an "exact copy of *lex*,"[9] then the concepts of *lex* must have a strictly univocal content about which there is nothing to "subtilize" ("*deuteln*"). Thus in the age of classical legal positivism express prohibitions of interpretation and commentation were set up. In a Bavarian ordinance of October 19, 1813, for example, all servants of the State and private scholars were forbidden to publish or cause to be published any commentary on the 1813 Criminal Code. This was quite in accordance with the intentions of Feuerbach, the creator of the Code in

5b. *Translators' Footnote* : Bergbohm's play on "*unwillkurlich*" *and* "*willkürlich*" is untranslatable in English. We might partially capture the flavour if we wrote "a systematic refusal to interpret the law systematically"; or "an unintentional kind of intentionally wilful legal construction"; or "a kind of irresolutely wilful (or systematically unsystematic, or mechanically capricious) legal construction"; or even "an automatically arbitrary kind of legal construction."

6. 1 Bergbohm, *Jurisprudenz und Rechtsphilosophie* 352 f., 372 f., 382, 384 ff. (1892). *Cf.* on this point also Darmstadter, "Die Analogie im Recht," 9 *Stadium Generale* 143 ff., esp. 148 (1956).

7. See on this matter Arthur Kaufmann, "*Gesetz und Recht*" in *Existenz und Ordnung, Festschrift für Erik Wolf* 357 ff. (1962).

8. *Cf.* Bergbohm, *op. cit. supra* note 6, at 375 ff. *passim.*

9. Montesquieu, *De l'Esprit des Lois*, bk. XI, ch. 6.

question, who had declared both official and private commentaries to be superfluous in view of the Code's clarity, dangerous as a cushion for judicial laziness, and, in short, a "real tomb of the new Code."[10]

Today these prohibitions of interpretation are characterized as "monuments of legislative *naiveté*,"[11] and this they surely are. But what, then, is the position in regard to the so-called *prohibition of analogy in criminal law*, which — according to prevailing juristic opinion — necessarily follows from the principle "*nullum crimen sine lege*"?[12] Is it not also a *naiveté* to assume that legal interpretation, even when it is extensive, can be admitted but that analogy must be prohibited? We need only to look at what is said in the relevant literature on the distinction between permitted interpretation and prohibited analogy to see that it is the admission of the complete unfeasibility of a practicable delimitation.[13] Nor is this merely a question of difficulties in a relatively narrow borderline area; the indistinguishability is rather of fundamental character. For when it is said that the interpretation is limited to the "possible meaning of the word," one is already right in the middle of analogy, because this "possible meaning of the word"[14] is neither univocal nor equivocal and hence can only be analogical. The remark of Engisch that the question can be one of "interpretation" only where it remains within the framework of a "clear and univocal meaning of the word,"[15] contains a *contradictio in adiecto*, because there cannot be in any sense a "univocal meaning of the word" or univocal "concepts of meaning." Only concepts which are devoid of material content (strictly speaking only concepts of numbers[16]) can be univocal; as soon as such a content is "interpreted into" them, they are no longer univocal but become analogical. Apart from that, clarification of a "clear and univocal meaning of the word" is not exactly what we mean by "interpretation." For interpretation (since "*inter-pretatio*" means literally an appraising mediation, a settling of the right mean) begins only where univocality stops short. Consequently it is always situated (because equivocality if

10. Quoted from Radbruch, *Paul Johann Anselm Feuerbach—Ein Juristenleben* 85 (2d ed. 1957).

11. See Engisch, *op. cit. supra* note 3, at 93.

12. On this recently Grünwald, "Bedeutung und Begründung des Satzes '*nulla poena sine lege*,'" 76 *Zeitschrift für die gesamte Strafrechtwissenschaft* 1 ff. (1964).

13. *Cf. e.g.* Schönke-Schröder, *Kommentar zum Strafgesetzbuch* § 2 notes 1 ff. (at 55 ff.), and esp. notes 45 and 46 (at 65 f.) (12th ed. 1965); Maurach, *Deutsches Strafrecht, Allgemeiner Teil* 84 ff. (2d ed. 1958); Baumann, *Strafrecht, Allgemeiner Teil* 133 ff. (3d ed. 1964).

14. In the same manner or similarly see *inter alia* Jescheck, "Methoden der Strafrechtswissenschaft," 12 *Studium Generale* 107 ff., 113 (1959); Engisch, *op. cit. supra* note 3, at 83 (with numerous further references); Baumann, "Die natürliche Wortbedeutung als Auslegungsgrenze im Strafrecht," *Monatsschrift für deutsches Recht* 394 ff. (1958).

15. See Engisch, *op. cit. supra* note 3, at 82. Engisch, however, places the words "clear and univocal" between quotation marks.

16. *Cf.* Engisch himself, *op. cit. supra* note 3, at 108.

excluded) in the area of the analogical (since only here there is a "mean" which is to be settled through "*interpretatio*"). Hermann Kantorowicz already recognized quite clearly that "extensive interpretation, too, has no other motive and vehicle than the similarity of cases," and that it is therefore "subject to the same criticism as analogy, the role of which we quite often allow it to play when analogy is forbidden to appear."[17] If we look closely, this is indeed the case. The prohibition of analogy is really nowhere taken seriously; a strict prohibition of analogy is tantamount to a prohibition of interpretation.[18] Historical experience shows such a prohibition to be completely futile.

In the matter of so-called "prohibition of analogy," therefore, the question can only be whether it is possible to draw a more or less reliable boundary ***within analogy*** by means of useable criteria. Only by posing the problem in this way can we properly approach genuine problems of the ***nullum crimen*** principle. He who firmly adheres to the notion that such a principle contains the requirement of a univocal (exact) determination of punishable conduct by means of rigorously "defined" concepts, which provide sharp boundaries (and which accordingly contain the prohibition of every analogy) must necessarily run on the rocks of realities. For where do we find in law—especially in criminal law—such a univocal determination? Literally, indeed, there is no single criminal offence whose contours are actually fixed by the law; the boundaries are open on all sides. This is common knowledge, and yet, in numerous instances, one refuses to draw the consequences.

At the same time, there is no lack of legal-theoretical investigations which have already contributed a great deal towards the clarification of this complex of problems. In more recent times, Sax and Heller in particular have addressed themselves thoroughly and with the necessary impartiality to the problem of analogy, and both have arrived at the conclusions that there can be no prohibition which could rule out every use of analogy in criminal law leading to new or increased

17. See Kantorowicz ("Gnaeus Flavius"), *Der Kampf um die Rechtswissenschaft* 23 (1906) [reprinted in Kantorowicz, *Rechtswissenschaft und Soziologie: Ausgewählte Schriften zur Wissenschaftslehre* 13 ff. (Th. Wurtenberger ed., 1962)]. For a critical attitude as to the so-called "prohibition of analogy" see also Exner, *Gerechtigkeit und Richteramt* 39 ff. (1922); Germann, "Zum sogenannten Analogieverbot nach schweizerischem Strafgesetzbuch," 61 *Schweizerische Zeitschrift für Strafrecht* 119 ff. (1946); Waiblinger, "Die Bedeutung des Grundsatzes 'Nullum crimen sine lege' für die Anwendung und Fortentwicklung des schweizerischen Strafrechts" in *Rechtsquellenprobleme im schweizerischen Recht: Festgabe der Rechts-und Wirtschaftswissenschaftlichen Fakultät der Universität Bern für den Schweizerischen Juristenverein* 215 ff. (1955). Further references, including these to foreign law, are in Schönke-Schröder, *op. et loc. cit. supra* note 13.

18. It is interesting to note that Welzel declares analogy to be admissible within the framework of the interpretation of posited law (!). See his *Das deutsche Strafrecht* 21 (3d ed. 1963). And *cf.* Mezger, *Strafrecht: Ein Lehrbuch* 83 (3d ed. 1949).

punishment.[19] Up to the present, this has nowhere been refuted. However, these investigations and their results have not been taken into account — but have been passed over more or less in silence. How is this to be explained?

One reason, and surely the most compelling reason, why we militate against our better judgment is obvious; the prohibition of analogy in German criminal law is a taboo. He who touches it must face the reproach that he is still possessed by the evil spirit of the "analogy *novella*" of 1935. The unholy years of the dictatorship still burden German scholarly discussion in such a manner that issues are often decisively determined not on objective grounds but by inhibitions and blockages. Richard Busch once rightly observed: "The ideological fanfares which accompanied the admission of analogy in German criminal law, and certain blunders and abuses in its application, unleashed criticism which was likewise coloured by the ideology of its political and ideological opponents."[20] Under these circumstances little attention was paid to those inquiries which were devoted to the objective aspects of the problem. This is not exactly a compliment for German legal scholarship. It is high time that we find our way out of this impasse.

The second, and deeper, reason for the belief that we must stick to the prohibition of analogy in criminal law has already been intimated: it is the logical suspicion of analogy which proceeds from positivism. It cannot be disputed that the so-called inference from analogy leads always to problematic propositions, and can therefore never furnish assured results. But what does this prove against the significance of analogical reasoning in law? We cannot appreciate the true weight of such reasoning simply because we are still blinded by the positivist dogma that law resides only in *lex*, and consequently overestimate considerably the rule which posited law plays in the process of legal cognition. This leads to the result that other factors participating in this process are either not seen at all or are so distorted that they adapt themselves to the accustomed image according to which law is derived exclusively from *lex*. The ideological background of this monopoly of posited law (absolutism of *lex*) is nothing else than the conception of the law-state (*Rechtsstaat*) coined in the last century, which is still alive for us today, though no longer impregnable. This law-state, is, by its very nature, a *lex*-state: that is, it is the state in which the function of guaranteeing justice, liberty, and security in society is attributed only to posited law, where the task of moulding the law is consistently entrusted only to the legislature and not to any other organs of the state, particularly not to single citizens of the

19. See Sax, *Das strafrechtliche "Analogieverbot": Eine methodologische Untersuchung über die Grenze der Auslegung im geltenden deutschen Strafrecht* esp. 35, 152 ff. (1953); *id.*, "Grundsätze der Strafrechtspflege" in Bettermann-Nipperday-Scheuner, 3(2) *Die Grundrechte: Handbuch der Theorie und Praxis der Grundrechte* 909 ff., esp. 992 ff. (1959); Heller, *Logik und Axiologie der analogen Rechtsanwendung* esp. 135 ff., 142 (1961).

20. See Busch, in *Juristenzeitung* 224 (1955).

state. The doctrine of the separation of powers in the *lex*-state is hence interpreted in a manner in which any law creating activity must be reserved only for the legislature; the judicial "power" must restrict itself to a mere applying of the law created by the legislature so that its power, in the words of Montesquieu, is only a "*pouvoir neutre*" and "*en quelque facon nulle.*" It necessarily follows that all extra-legal and supra-legal criteria and considerations, and especially any law-creating activity on the part of the judges, are regarded as endangering the law-state and violating the principle of the separation of powers. Hence arguments from analogy and from the "nature of things" are met precisely by the law-state school of thought with extreme distrust.

Now it would be quite erroneous to understand from the above that such distrust is completely unjustified, and that perhaps the principle "*nullum crimen, nulla poena sine lege*" should be completely thrown overboard. One cannot be emphatic enough in warning against a "law"-finding which completely discards any posited law (notably represented and demanded today by certain brands of existentialism and situtation-ethics[21]), against a law which would be only "*existentiell*" or determined by particular situations (a law which recognizes no generally binding norm but only that man is bound to the self-project of ever unique situations[22]). This would indeed be the end of the law-state. But on the other hand, this does not mean that law, and the law-state, and the Magna Carta of the liberty of the citizen are only to be sought in posited law. It is a calamity that we usually see only the alternative: either "legal positivism" or "ius-naturalism"; either decision according to "positive *lex*" or according to "supra-positive *ius*"; either "normativism" or "decisionism"; either "law-state" or "judge-state." But these alternative are wrong in many respects. This must be looked into somewhat more closely, though here necessarily briefly.[23]

II

To begin with, it is important to see clearly the fundamental fact that there is no such thing as a "supra-positive law"— just as, in other respects, we find no "supra-positive" reality in our world. One may designate as "supra-positive" pure essences, pure ideal contents, which

21. *Cf.* esp. Cohn, *Existenzialismus und Rechtswissenschaft* (1955).

22. For a more detailed statement see Arthur Kaufmann, article cited *supra* note 7, at 368 ff., esp, 372 f.; *id.*, *Recht und Sittlichkeit* 21 ff., 40 (1964); *id.*, "Zur rechtsphilosophischen Situation der Gegenwart," *Juristenzeitung* 137 ff., 144 (1963).

23. Here, too, I must refer to my own expositions elsewhere for supplementation of the text: "La Struttura Ontologica del Diritto," 39 *Rivista Internazionale di Filosofia del Diritto* 559 ff. (1962); "The Ontological Structure of Law," 8 *Natural Law Forum* 79 ff. (1963) (forthcoming in German: "Die ontologische Struktur des Rechts" in *Die ontologische Begründung des Rechts: Wege der Forschung*, vol. XXII, Wissenschaftliche Buchgesellschaft). And see *Das Schuldprinzip: Eine strafrechtlich-rechtsphilosophische Untersuchung* 41 ff., 90 ff. (1961); article cited *supra* note 7, esp. 381 ff.

nevertheless are not real as such but constitute only potentialities. The idea of law and the general principles of law are therefore supra-positive, but for want of concreteness and contentual determination they are not yet law in the full sense of reality. Accordingly, for these supra-positive ("supreme") principles the designation "natural law" (which is encountered mainly in neo-Thomism,[24] but also elsewhere[25]) is at the least misleading; for it creates the impression of two legal orders, positive law and natural law, existing side by side. But as a real-life fact situation there can always be only *one* law, and this is positive : it is concrete and historical.

But — and this is no less significant — this positive law which achieves its full concreteness and actuality — what we shall call its "material positivity" — only in the legal decision made here and now (not necessarily judicially), is not identical with the statutory norm (or the norm of "customary law" or of "judge-made law"). The latter is formulated in general terms and is therefore not material-concrete, but only formally (*i.e.*, conceptually) concretized (we speak therefore of "formal positivity" here). Naturally such a general norm is a "*norma*" in the original and precise sense of the word, to wit a standard, a guide; it is quite indispensable for the sake of equal treatment of what is equal and also for the sake of avoidance of arbitrariness in the legal decision; otherwise there would be no *legal* decision. A "free finding of law" in the sense of *norm-free* law-finding does not exist. Even if the norm is not given in a statute (or in customary law), the fact remains that one cannot make a decision without a norm; the question is only where the norm is to be found : in morals, in *mores*, in "prevalent cultural and ideological conceptions," in the sense of decency of all those who think in an equitable and just manner," or simply in the sense of justice and the conscience of the decision-maker himself. We cannot follow this up here. Suffice it to say that every legal decision presupposes a norm. This does not mean, however, that the norm contains a legal decision in readiness within itself, so that the latter need only be released or deduced from the former. The assumption that law-finding is such a purely deductive procedure is indeed quite widespread, but that does not make it any the more correct. The norm is always only a *measure* for many *possible* cases. Precisely for this reason it is never the *decision* of any *actual* case; it is *lex*, hence not actuality but possibility of law. In order for *lex* to become *ius*, additional building-stones are required.

What was said about the relation between *ius* and *lex* correspondingly holds good for the relation between *lex* and the idea of law. Whatever may be said from a relativistic standpoint[26] against the absoluteness of

24. Rommen, *Die ewige Wiederkehr des Naturrechts* (2d ed. 1947) is typical here.

25. See above all Coing, *Die obersten Grundsätze des Rechts : Ein Versuch zur Neubegründung des Naturrechts* (1947).

26. For a more detailed discussion of relativism and its "relative" justification see Arthur Kaufmann, "Gedanken zur Überwindung des rechtsphilosophischen Relativismus," 46 *Archiv für Rechts-und Sozialphilosophie* 553 ff. (1960).

any given contents of law, there is no doubt that in all legislation there are already presupposed certain "general legal principles" (Erik Wolf), "legal-ethical principles" (Larenz), "maxims of just action" (Wieacker) : that is, basic requirements of justice, morality, and *bonum commune* as ideas to be realized. Among the best known examples we might perhaps mention the principles of equality, of good faith, of *pacta sunt servanda*, of *mens rea*, of choosing the lesser evil, and of the "golden rule."[27] It is necessary, however, to guard against the notion that *lex*, let alone concrete legal decisions, can simply be deduced from these legal principles, which are mostly very abstract (though not, as is often claimed, completely devoid of content and meaning). Admittedly, the recent practice of German courts has occasionally succumbed to this notion, in that it has undertaken to derive legal consequences directly from the "general norms of the moral law" : for example, that sexual intercourse during engagement is an immoral act of which criminal law takes cognizance, or that to omit to render assistance in the case of suicide is a punishable offence.[28] Nonetheless, no such "subsumption-ethics" exists. Here, too, it is necessary in reality to have recourse to other sources. At the same time, the fact remains that we cannot do without general value-considerations.

Thus we distinguish in the process of the actualization of law three stages. The *first* stage is constituted by *abstract-general, supra-positive,* and *supra-historical* legal principles; the *second* stage is the *concretized-general, formal-positive lex,* which is not *supra-historical* but which is still valid for a more or less long *span of time* ("the duration of the Act") ; the *third* stage is the *concrete, material-positive, historical law.* Or, in short : the idea of law, the legal norm, the legal decision. However, this sequence is to be understood as a logical one only; ontologically, the relation is reversed, for the concrete law is closer to reality or more real than the idea of law.

For further understanding, there are two basic propositions, both of equal importance. The first asserts that in the process of the actualization of law each of the above stages is indispensable. This means,

27. See Erik Wolf, "Die Natur der Allgemeinen Rechtsgrundsätze" in *Deutsche Landesreferate zum VI. Internationalen Kongress für Rechtsvergleichung in Hamburg 1962, Rabels Zeitschrift für ausländisches und internationales Privatrecht* 136 ff. (1962); Larenz, *op. cit. supra* note 2, at 314 ff.; Wieacker, *Gesetz und Richterkunst : Zum Problem der aussergesetzlichen Rechtsordung* esp. 10 (1958); *id.*, "Gesetzesrecht und richterliche Kunstregel," *Juristenzeitung* 701 ff. (1957); *id.*, "Rechtsprechung und Sittengesetz," *Juristenzeitung* 337 ff. (1961); Fundamental discussions in this matter are Esser, *op. cit. supra* note 1, *passim* ; Del Vecchio, *Grundlagen und Grundfragen des Rechts : Rechtsphilosophische Abhandlungen* 164 ff. (1963).

28. See 6 *Entscheidungen des Bundesgerichtshofs in Strafsachen* 46, 147. *Cf.* further also 28 *Entscheidungen des Bundesgerichtshofs in Zivilsachen* 375; 6 *Entscheidungen des Bundesverfassunggerichts* 389. This judicial practice is very controversial. See on this matter especially Weischedel, *Recht und Ethik* (1956); Weinkauff, "Der Naturrechtsgedanke in der Rechtsprechung des Bundesgerichtshofs," *Neue Juristische Wochenschrift* 1688 ff. (1960) ; Wieacker, "Rechtsprechung und Sittengesetz," cited *supra* note 27; Arthur Kaufmann, *Recht und Sittlichkeit,* cited *supra* note 22, esp. at 143 ff.

therefore, that there can be no legal norm *without* the idea of law (without legal principles), no legal decision *without* a legal norm. The second proposition asserts that no stage is capable of being merely deduced from the stage which is (logically) immediately higher to it (more general, more abstract). Consequently, this means: no legal decision *merely* from the legal norm, no legal norm *merely* from the idea of law (merely from legal principles). In brief, both one-sided "decisionism" and one-sided "normativism" are to be rejected.[29]

By adopting the first proposition, we disavow those conceptions which maintain that it is possible to attain law without presupposed value standards. In thus stressing the presuppositional character of value-standards, we seek only to bring out that a value-character is not "given" in an empirical factual sense, and therefore cannot be merely distilled from any factuality. Of course, attempts to found law simply on facts are as old as human civilization itself. In some instances, law has been regarded as an emanation of power, as with the sophists, with Hobbes, and with modern dictatorships. In other instances, the will (of single persons, or of a majority) has been regarded as a law-creating agent—as for example in the voluntarism of the late scholastics or in the free-law doctrine.[30] In other instances, interests, expectations, habitual behaviour patterns, social roles, or other sociological facts are mentioned as exclusive causative factors of law, as in the older jurisprudence of interests, in empirical legal sociology, and in some recent doctrines of the "nature of things." For the magic formula of the "normative force of the factual" has always exercised a power of fascination; all the more so because it seems to give promise of help in making the leap from the Is to the Ought, from reality to value. But this "normative force of the factual" does not exist. In cases where genuine normative qualities are thought to be gained from a fact, it is never a question of a purely empirical fact but of a state of affairs which has already been placed into some relation with a value. This is to say, it is a question of a "moral" power, "reasonable" will, "valuable" interests.[31]

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29. *Cf.* on this point Carl Schmitt, *Über die drei Arten des rechtswissenschaftlichen Denkens* (1934), which is still worth reading today despite errors due to the tendencies at the time of its writing.

30. Kantorowicz, *op. cit. supra* note 17, at 34, is quite typical on this point: everything which ought to be is something which exists, for what ought to be is what is willed to be.—This argumentation enjoys even today a great popularity.

31. This is made quite explicit in Maihofer, "Die Natur der Sache" cited *supra* note 5, at 21 ff., and *id.*, *Naturrecht als Existenzrecht* 21 ff. (1963). *Cf.* generally also Arthur Kaufmann, *Recht und Sittlichkeit*, cited *supra* note 22, at 18 ff. and *id.*, "Freirechtsbewegung—lebendig oder tot?: Ein Beitrag zur Rechtstheorie und Methodenlehre," *Juristische Schulung* 1 ff., esp. 5 ff. (1965). That the Ought cannot be inferred from the Is (in the sense of the experiential actually subject to laws of natural science and mathematics) has again been recently shown by Klug, "Die Reine Rechtslehre von Hans Kelsen und die formallogische Rechtfertigung der Kritik an dem Pseudoschluss vom Sein auf das Sollen" in *Essays in Honor of Hans Kelsen* 154 ff. (1964). This does not mean, of course, that there cannot be any *ontological* relation between reality and value. Klug himself declares the talk of the "abrupt" separation between the Ought and the Is to be misleading. See *ibid.* 168.

By adopting the second proposition—which will be our main concern in what follows—we make an equally emphatic renunciation of all those unilaterally "normativistic" trends of thought which in contrast direct our attention to the axiotic viewpoint, that is, to the idea, the norm, the Ought, and which consider it possible to proceed directly from there to the real law. There have been quite a number of such attempts. Indeed, the "factual force of the normative" is an equally serviceable magic formula with which to throw a bridge from the idea to reality, from the Ought to the Is. In legal conceptualism (*Begriffsjurisprudenz*) this thought is manifested in its purest form. According to this doctrine, the concepts of posited law are not only factors of ordering but represent rather living configurations which are continually unfolding (Puchta's "genealogy of concepts"), which are even fertile, mate with each other, are productive of new concepts, and thereby bring about a constant growth of law out of itself (the natural-historical method of the early Ihering).[32] In philosophy and theology, there is a famous example of this way of thought: the "ontological proof of God," in which His necessary existence is inferred from the concept of God as "the most perfect Being." Precisely this "ontologism," the deduction of existence from essence, of actuality from possibility, of Being from being-conceived-of, constitutes the core of legal conceptualism: concepts not only express essences, but produce existence. It is generally considered today that we have essentially moved beyond legal conceptualism: that it is a thing of the past. Yet entire volumes could be filled with modern examples of legal conceptualistic argumentation—in judicial decisions, in councils' submissions, in opinions of legal experts, and in juristic literature. Even today, what passes as the most important characteristic of able lawyers is the art of legal-conceptual construction, that much-praised and much-chided juristic acumen, which is capable of coaxing legal decisions by logical procedures out of concepts in the positive norm which no one, not even the legislator, has suspected to be there. The thinking of most lawyers is primarily, if not exclusively, orientated to the norm.

And here, natural lawyers (in the traditional sense) once again concur with legal positivists. According to the rationalist-absolutist doctrine of natural law, positive legal norms are derivable in a strictly logical manner from the highest absolute legal principles; according to the normativist legal positivism,[33] legal decisions are derivable from positive legal norms in the same manner. This affinity of two such declared opponents as rationalist iusnaturalism and legal positivism

32. *Cf.* in greater detail the clear exposition in Larenz, *op. cit. supra* note 2, at 16 ff. *Cf.* also the above quoted saying of Bergbohm, in which he speaks of the "inner fertility" and of the "logical power of expansion" of law (understood as a posited norm which is conceptually fixed). See his *op. cit. supra* note 6, at 387.

33. Today most consistently represented by Kelsen in his *Reine Rechtslehre* (2d ed. 1960).

may be felt surprising. But it does have its deep reasons.[34] Common to both is above all the system idea of rationalistic philosophy, according to which it is possible to erect, in a purely rational manner, a closed system of perfectly adequate and exact cognition of reality. Thus the great "natural law" codifications towards the end of the eighteenth and the beginning of the nineteenth centuries (*Codex Maximilianeus Bavaricus Civilis, Preussisches Allgemeines Landrecht, Code Civil, Österreichisches Allgemeines Bürgerliches Gesetzbuch*) were all of them advanced with the claim to complete regulation of legal relations. And the legal positivism of the nineteenth century adopted the same attitude; it took over this rationalist and iusnaturalist inheritance without hesitation. Even Bergbohm, who saw his main task as root and branch "eradication" of the weed of natural law, emphasized over and over again the logical completeness and gaplessness of the legal order.[35]

Meanwhile, of course, this dogma of the gaplessness of positive law has long since been recognized as an error. It has by now become a commonplace that all laws have gaps. Nevertheless, the opinion prevails that—apart from a few exceptional cases — a law which contains gaps is capable of being completed, through itself, by interpretation, analogy, *argumentum e contrario*, teleological reduction, and similar patterns of argument. It is still maintained — by positivists as well as by iusnaturalists — that *ius*, at any rate in most cases, is identical with *lex*, and therefore the old doctrine is still quite prevalent that — at least in normal cases — *lex* is the only source of law from which concrete legal propositions shall be derived. The awkward article 20, § 3 of the Constitution of the Federal Republic of Germany, according to which the executive and the judiciary are bound to " lex *and* ius " (" Gesetz *und* Recht"), is overcome by an explanation which reveals the complete embarrassment of traditional legal theory. " *Recht* " (it is said) here means nothing but " every legal *norm* " (in the meaning of article 2 of the Introduction Act of the German Civil Code) in other words, exactly what has always been called "*Gesetz* in the material sense." The implication is that the prominence given to *Recht* side by side with *Gesetz* in the above mentioned article of the Constitution is completely superfluous.[36]

34. *Cf.* in greater detail Arthur Kaufmann "The Ontological Structure of Law," cited *supra* note 23. *Cf.* also the recent publications of Tsatsos, *Zur Problematik des Rechtspositivismus* (1964) and Stone, " 'The Nature of Things' on the Way to Positivism?" 50 *Archiv für Rechts-und Sozialphilosophie* 145 ff., esp. 164 f. (1964). In this context the collection of essays *Naturrecht oder Rechtspositivismus?* (W. Maihofer ed., 1962) is important.

35. See Bergbohm, *op. cit. supra* note 6, at 367 ff.

36. See (with references to literature) Arthur Kaufmann, *op. cit. supra* note 7, at 359 f.

But all these ideas are erroneous. Legal norms are *not* contained, complete and ready for use, in the general principles of law (the idea of law), nor legal decisions (the concrete law) complete and ready for use in legal norms. But once we say this we lose the only basis on which positive norms could be derived from the principles of the so-called natural law, or concrete legal judgments from positive norms, by way of logically stringent syllogisms. Such logical inferences become feasible only after other operations of thought have preceded them. Indeed, common conviction takes this fact into account insofar as we primarily see the legal method not as a formal-logical but as a "teleological" method. One must only submit that the structure of this "teleologic," which, if it is "logic" at all, can only be "transcendental logic,"[37] is still very obscure; and this is above all because up till now posited law has been too much looked upon as the exclusive source of the legal decision.

III

Our second proposition maintains that just as no legal norm can be derived solely from the idea of law, so also no legal decision can be derived solely from the legal norm. The idea of law and positive norms, being thus only the potentiality of law, whence then does its full reality result? To this there is only one answer: from concrete fact-relations of life which — in Dernburg's classic formulation — already carry in themselves (though more or less developed) their due proportion and order.[39] As posited law can be concretized only through consideration of the *possible* fact-relations of life which are to be regulated, so law (*ius*) can be realized only through consideration of the decisive *actual* fact-relations of life. The norm as a mode of the Ought can never produce actual law out of itself, something of ontic nature must be added. An actual law arises only where a norm and a concrete fact-relation of life, the Is and the Ought, enter into correspondence with each other. Or, in short:

Law is a correspondence of the Is and the Ought.[39a]

37. A pioneering work in this area is now Krings, *Transzendentale Logik* (1964).

38. In his inquiry into the "prohibition of analogy" in criminal law, which unfortunately has remained almost unnoticed (cited *supra* note 19), Sax has certainly contributed much towards clarification of this obscurity: he has already clearly recognized that the so-called teleological procedure of interpretation exhibits the structure of analogy (see esp. at 97 ff.).

39. See 1 Dernburg, *Pandekten* 87 (5th ed. 1896).

39a. *Translators' footnote*: The author has told the translators in a private letter that by the key word "*Entsprechung*" in this formula (which we have rendered as "correspondence") he purports to convey something dynamic, something which is of polar, dialectic character. There seems to be no single English word to convey the meaning intended, and perhaps even no single German word (including "*Entsprechung*" which he has chosen) would do this either, unless understood in view of the full context in which it occurs. So understood, perhaps the phrase "mutual adequation" would do justice to the thought of Kaufmann in English, and possibly neologisms such as "inter-respondence" or "co-respondence," provided however that these, too, are to be understood in view of the full context of the author's thought.

And law being a correspondence, the totality of law is thus no complex of statutory sections, no unity of norms, but a unity relations :[40] a relational unity. But "relational unity" and "correspondence" signify analogy. [41] Ἀνά-λογος means literally according to the *logos*; analogy is consequently — in the classically simple formulation of St. Thomas Aquinas —"concordance according to relation."[42] Analogy is neither identity nor difference, but it is both: "the belonging-together of identity and difference" (Heidegger[43]), "a medium between identity and contradiction" (Lakebrink[44]), "unity of correspondence between what is essentially different (Söhngen[45]), or, as Hegel has said, "the dialectical identity," "the unity of unity and disparity," "the identity of identity and non-identity."[46]

Such a unity of correspondence between what is essentially different — between the Ought and the Is, between a norm and a fact-relation of life—constitutes concrete, real law. Our conclusion that "Law is a correspondence of the Is and the Ought" signifies, therefore, that the Is and the Ought in law are connected neither by identity nor by difference but by analogy (correspondence); that the actuality of law itself is founded on an analogy and, accordingly, legal cognition is always analogical cognition. *Law is originally analogical.*

This thesis seems to contradict radically the contemporary conception of law and legal cognition, and will therefore certainly meet with great distrust. But, the thesis of the analogical character of law and legal cognition is neither new nor obsolete. Only we are today often not aware of the analogical and of analectics, so that they are not

40. In Radbruch we find this "relational character" of law already intimated when he conceives of law as "a value-related reality." See his *Rechtsphilosophie* 91 ff., 118 123, 221 f. *passim* (5th ed. 1956); *id.*, *Vorschule der Rechtsphilosophie* 33 f. (2d ed. 1959). On this point now also Kwun, *Entwicklung und Bedeutung der Lehre von der "Natur der Sache" in der Rechtsphilosophie bei Gustav Radbruch* (Saarbrücken Dissertation, 1963).

41. On this and the following point see Krings, "Wie ist Analogie möglich?" in 1 *Gott in Welt; Festgabe für Karl Rahner* 97 ff. (1964); *id.*, *op. cit. supra* note 37, at 294 ff.

42. See St. Thomas Aquinas, *Quaestiones Disputatae de Veritate*, qu. I, art. 11. See also *id.*, *Summa Theologica* I pars, Q. qe, art. 5.

43. See Heidegger, *Identität und Differenz* 10 (2d ed. 1957).

44. See Lakebrink, *Hegels dialektische Ontologie und die thomistische Analektik* 12 (1955).

45. Söhngen, "Analogia entis in Analogia fidei" in *Antwort: Karl Barth zum 70. Geburtstag* 266 (1956). Recently Söhngen, *Analogie und Metapher: Kleine Philosophie und Theologie der Sprache passim* (*cf. e.g.* 84) (1962).

46. See 1 Hegel, *Sämtliche Werke* (Glockner ed., 3d ed. 1951 onwards), at 31 ff. (esp. 124 ff.) on the so-called "*Differenzschrift*" 4 *id.* 508 ff., 525 ff. (*Wissenschaft der Logik*, 1st Part). See also 2 *id.* 594 ff. (*Phänomenologie des Geistes*) and 18 *id.* 360 (*Vorlesungen über die Geschichte der Philosophie*," 2d Part). On these matters see Lakebrink, *op. cit. supra* note 44, *passim* and Coreth, "Identität und Differenz" in 1 *Gott in Welt: Festgabe für Karl Rahner* 158 ff. (1964).

referred to by name. And only to this extent is there any real difference from ancient and mediaeval philosophy. In classical Western metaphysics, especially in Aristotle and St. Thomas Aquinas (but Plato, St. Augustine, Bonaventura, Cajetan, and Suarez should also be considered), analogy stood in the centre of thinking; it constituted the core of ontology and of the theory of knowledge. The classical *analogia-entis* doctrine[47] is mostly considered today only from the viewpoint of the problem of God—as a doctrine which, its opponents contend, seeks to apprehend God by means of analogy. But they thereby fail to recognize that though God as the last link represents the apex of the *analogia-entis* doctrine, its centre of gravity lies in the sphere of the finite. In this context the problem of the non-existence or existence of God affects only (!) the question of whether or not the analogicity of terrestrial being and human cognition is a fundamental defect.[48] But whether one believes in God or not, whether the world is ultimately considered to be sound or defective—does not change anything in the structure of terrestrial being and in the manner of our thinking, or cognition, and our speaking. One may regard analogicity as a defect and so strive to replace it with univocity and rationality, but again and again reality imposes insuperable limits on this aspiration.

If we look more closely, it proves that analogy is at home in all areas of human life, in practical as well as theoretical areas: in biology (homology), medicine (especially anatomy), art and the history of art, physics, technology, agriculture, planimetry, sociology, and the philosophy of history—not to speak of theology.[49] Only in law and in

47. See on this matter Przywara, *Analogia Entis* (1932/62) in two volumes; A. Brunner, *Erkenntnistheorie* 188 ff. (2d ed. 1948); Nink, *Ontologie* 92 ff. (1952); Söhngen, *Sein und Gegenstand* 96 ff., 122, 247 ff., 304 (1930); 2 H. Meyer, *Systematische Philosophie* 159 ff. (1958); Hengstenberg, *Autonomismus und Transzendenzphilosophie* 415 ff. (1950); M. Müller, *Sein und Geist* 49 ff. (1940); Edith Stein *Endliches und ewiges Sein* 311 ff. (1950); Heintel, *Hegel und die Analogia entis* (1958); Lakebrink, *op. cit. supra* note 44; Holzamer, "Analogia entis als Weg zum Sinnverständnis im Denken der Philosophia Perennis" in *Sinn und Sein* 125 ff. (Wisser ed., 1960); Söhngen, "Analogia entis in analogia fide," cited *supra* note 45, at 266 ff.; Kreck, "Analogia fidei oder analogia entis?" in *Antwort*, cited *supra* note 45, at 272 ff.; Söhngen, "Wesen und Akt in der scholastischen Lehre von der participatio und analogia entis," 8 *Studium Generale* 649 ff. (1955); Berg, "Die Analogielehre des heiligen Bonaventura" *ibid.* 662 ff.; Leist, "Analogia entis" *ibid.* 671; Flückiger, "Analogia entis und analogia fidei bei Karl Barth" *ibid.* 678 ff.; Siewerth, "Die Analogie des Seienden" in *Gott in Welt*, cited *supra* note 41, at 111 ff.

48. Krings, article cited *supra* note 41, at 110, is correct on this point.

49. Besides those already mentioned, see Sedlmayr, "Analogie, Kunstgeschichte und Kunst," 8 *Studium Generale* 697 ff. (1955); Wagner, "Analogie als Methode geschichtlichen Verstehens" *ibid.* 703 ff.; Bochenski, "Gedanken zur mathematisch-logischen Analyse der Analogie," 9 *Studium Generale* 121 ff. (1956); Juhos, "Über Analogieschlüsse" *ibid.* 126 ff.; Kratzer, "Das Bild in der Physik" *ibid.* 129 ff.; Wohlfahrt, "Analogie als Begriff und Methode der vergleichenden Anatomie" *ibid.* 136 ff. *Cf.* further Klug, *Juristische Logik* 119 ff. (2d ed. 1958); Fischl, *Logik* 115 (2d ed. 1952) McInerny, *The Logic of Analogy* (1961) is also most interesting.

legal theory does it seem (if prevailing opinion is to be heeded) to be degraded to the role of a "stopgap." It is true, that now and then even amongst legal scholars one finds a different conception of analogy. Thus Eugen Ehrlich says that it belongs "to the highest level of intellectual achievement"; and that analogical cognition is the product "of the highest flights of which the human intellect is capable," for analogy is "creative, not only in its psychological foundations, but also in its results...."[50] He who declares the theory of the analogy of Being and of cognition to be finished and done with, thereby testifies only to his own defective learning.

Let us try to summarize the *classical analogy doctrine* in a few sentences. According to this doctrine, "analogy of Being" means that single entities agree and differ in their mode of being at one and the same time by all participating in *one* Being (ontologically understood—which is not to say that this "Being" is God), but in a different manner. Or to put it another way: Being is a single unity, but it belongs to various entities not in the same manner, that is, in terrestrial things it is realized only analogically. Thus there exists a hierarchical order of Being, in which Being and its contents are realized in proportianally equal stages in the Universe. This ontological finding has a corresponding logical finding. We cognize the essence of an entity through comparison with some other entity, which (at least from the viewpoint of the comparison) is better known than the entity that is to be cognized. The analogy of Being is thereby presupposed: the concordance and diversity, the unity and multiformity of things. Without concordance, that is, with a complete heterogeneity and relationlessness of things, there are no possibilities of comparison, and hence of cognition. If the multiformity should fall apart into a final unconnected plurality (pluralism of Being), then every entity would stand in isolation, and there would be no connection of one with another, not even in mind or thought. Without diversity, however, everything would fall into one, and there could always be only a repetition of the same without any cognitive value. In this sense, all cognitions which widen our knowledge—Kant's "synthetic" judgments —are always analogical cognitions (so that Eugen Ehrlich is correct to speak here of "creative" cognition). The classical metaphysics thus regards genuine cognition of essences, cognition of things in themselves, as possible—not as univocal but only as analogical cognition.

Into this conception of Being and of cognition of Being a *rationalism* intrudes which, virtually, no longer recognizes analogy.[51] According to rationalism, Being is cognized "*more geometrico*," "*clare et distincte*" (Descartes), with mathematical exactitude. There is only univocal cognition, or none at all. Correspondingly, rationalism assumes that

50. See Eugen Ehrlich, *Die juristische Logik* 227 (1918).

51. See on this point Holzamer, "Analogia entis...," cited *supra* note 47.

there are only univocal (mathematical) concepts, under which one can logically subsume. Analogical concepts, of meaning, concepts of functions, concepts of order, type concepts, are not recognized by rationalism.

This kind of metaphysics and ontology (namely, that of rationalism, not the classical metaphysics and ontology) was destroyed by Kant.[52] At the same time, however, Kant upholds the rationalist concept of cognition for scientific use. His question, "How is metaphysics as a science possible?" (meaning, "How are synthetic propositions *a priori* possible?"), is for him the same as the questions, "How is pure mathematics possible?" and "How is pure natural science possible?" For him, too, scientific cognition can only be a univocal, mathematical cognition. Nevertheless, he restricts this concept of cognition to the "objects" which are brought forth by reason synthetically and *a priori*: that is, he restricts them to logical and mathematical objects. Of the objects of actual Being there is no univocal cognition of essence, no synthetic propositions *a priori*. Since Kant denies to the intellect the power of spiritual-intellectual perception (and thereby also the faculty of creative-active cognition, recognizing only the intellect's "spontaneousness of cognition") he must necessarily arrive at the conclusion that the essence of things, the things in themselves, are not open to universal scientific cognition. Thus he enters into decisive opposition to the rationalist metaphysics of Descartes, Leibniz, and Christian Wolff. In contrast, his critique of cognition does not affect the roots of classical metaphysics, which denies just as he does the possibility of a univocal, mathematically exact cognition of the essence of things. And though, as against this, Kant does not recognize an analogical cognition of essences as "scientific" knowledge (and therefore replaces analogical concepts by purely negative "limit-concepts" for the use of science[53]), this is a question of secondary importance, which basically affects only the concept of science. Kant does not call analogical apprehension of essences "cognition," but he never denies that it is possible. Indeed, he himself (though he has been styled "the wrecker of everything") speaks once in his *Lectures on the Philosophical Doctrine of Religion* of the "magnificent way of analogy."[54]

Only in the post-Kantian period have the doctrines of the analogy of Being and the analogy of cognition fallen completely into oblivion. In the *nominalism* which now emerges (or, more precisely, re-emerges)

52. See in greater detail Arthur Kaufmann, *Das Schuldprinzip*, cited *supra* note 23, at 56 ff. (with documentation).

53. *Cf.* Söhngen, *Sein und Gegenstand* cited *supra* note 47, at 96 ff.; de Vries, *Denken und Sein* 283 f. (1937).

54. Cited from Söhngen, "Wesen und Akt...," cited *supra* note 47, at 651. On the theme "Kant and analogy" see also Söhngen, *Analogie und Metapher* cited *supra* note 45, at 64 ff.; *id.*, *Sein und Gegenstand*, cited *supra* note 47, at 96 ff.; Specht, *Der Analogiebegriff bei Kant und Hegel* esp. 51 ff. (1952); Krings, article cited *supra* note 41, at 99.

only particular entities are recognized as having the character of actuality; the actuality of the general, of essence, of things in themseves, still always presupposed in Kant, is denied. Consequentially, there cannot be any cognition of essences either, neither univocal nor even analogical. For such cognition would presuppose that there is a correspondence between things, in which they agree with one another in a generalness. But, according to nominalism, for which only particular entities exist, things are unconnected and in complete separation and severance from each other.

In the *fictionalism* of *Vaihinger*, the conclusion is quite consistently drawn that no cognition whatever exists: all so-called cognitions are in fact fictions, that is arbitrary and consciously false ideas for the purpose of the apprehension of reality. They are ideas which are not "true"; nevertheless, they can possess a "performance value" if they prove to be purpose-conformable (*zweckmässig*), on pragmatic, economic, biological, or other grounds.[55] We are then dealing only with "crutches of thinking," which are discarded again when they have fulfilled their purpose.[56] Here, one would think, the classical analogy doctrine is finally buried. And yet it still lives on in this very fictionalism.[57] It would be indeed a wonder of wonders if an arbitrary, consciously wrong idea, in short a falsity, turned out to have even a purely pragmatic usefulness. A fiction can only be useful if it expresses at least a piece of truth, an analogical truth. Esser rightly says that fictions never import doing violence to reality but are rather "the unconscious expression of a need for equal assessment, which is called forth by a similarity of given states of affairs."[58] Fictions are, in the ultimate analysis, nothing else but analogies.

What has been said above can be well illustrated by the famous controversy about the nature and reality of the so-called juristic person.[59] Otto von Gierke's theory of the juristic person as a real corporate personality (*Verbandspersönlichkeit*), which like man is a substantial formation with human characteristics, represents rationalist ontologism. The fiction theory of von Savigny and Windscheid falls into the opposite extreme, regarding the juristic person as only a devised, excogitated formation, and accordingly attributing to it no reality at all. In fact, the juristic person is neither a person in the same sense and of the same structure of reality as man (the "natural person"), nor is it a mere fiction lacking any reality, but it is a real entity which—in comparison

55. Vaihinger, *Die Philosophie des Als Ob* (3d ed. 1918); *cf.* esp. 175 ff.

56. *Cf.* Petraschek, *System der Rechtsphilosophie* 291 (1932).

57. Vaihinger himself keeps referring to analogy; *cf. op. cit. supra* note 55, at 155 ff.; 249 f.; 312 ff.; 325 ff.; 631 ff.; 659 ff.; 672 ff.; 702 ff. *passim.*

58. See Esser, *Wert und Bedeutung der Rechtsfiktionen* 24 ff., 105 (1940); *cf.* also *id.*, *Einführung in die Grundbegriffe des Rechts und des Staates* 319 (1949).

59. Basic on this subject is Serick, *Rechtsform und Realität juristischer Personen* (1955).

with man—is to be characterized as a person in the analogical sense. The fiction theory is incapable of founding the essence of the juristic person by means of objective criteria. The theory of real corporate personality misleads us to legal conceptualist (*begriffsjuristische*) consequences, for example, to the consequence that the juristic person is, like the natural person, capable of performing legal acts (*handlungsfähig*), capable of committing delicts, and capable of having reputation (*ehrfähig*). But the conception of the juristic person as a person in the analogical sense can, on the one hand, explain its form of actuality and, on the other, also overcome the danger that apart from the similarity with the natural person the difference might be overlooked and their equivalation extended beyond legitimate limits.

This idea can also be further pursued in relation to other so-called *legal fictions*. In legal theory, legal fictions are usually characterized as concealed references by which it is prescribed that for case T_2 the legal consequence T_1 shall follow; the legislator has thus sought to avoid repetitions for a sake of economy of legal provisions.[60] But this is only the apparent reason for legal fictions. Their deeper reason lies in the similarity of the facts of the cases.[61] Hence the range of possible fictions is by no means unlimited.[62]

When a child *en ventre sa mere* is deemed to be already born for purposes of succession (§ 1923, s. 2, German Civil Code), this means that from the viewpoint of the normative purpose, the *ratio iuris*, it is considered as equal to those in fact already born. That a child born out of wedlock is deemed not to be a relative of its father (German Civil Code, § 1589, s. 2), means that from the viewpoint of relationships under family law—and only in this respect—the child is considered as equal to the non-relatives of the father. The same applies to fictions in criminal law. The aider and abettor who has promised his assistance before the commission of the act is not an accomplice (otherwise there would be no need for § 257, s. 3 of the German Criminal Code), but he is treated as such, because his action is essentially the *same* as the action of the accomplices. And when in the law of larceny, the value of a thing is regarded as a thing itself according to the objective value theory, the justification of this fiction lies in the fact that on the principle of § 242 of the German Criminal Code the punishment for deprivation of property is in such cases to be deemed equal to the objective value of the thing itself. The essence of the fictions consists thus in an analogy: in an equivalation of what is unequal from a viewpoint which proves to

60. See in greater detail Larenz, *op. cit. supra* note 2, at 166 ff.

61. Besides Esser (cited *supra* note 58) see also H. A. Fischer, "Fiktionen und Bilder in der Rechtswissenschaft," 117 *Archiv für die Civilistische Praxis* 143 ff. (1919); Ehrlich, *op. cit. supra* note 50, at 226 ff.; Petraschek, *op. cit. supra* note 56, at 290; Darmstaedter, article cited *supra* note 6, at 146.

62. *Cf.* Sax, "Über Rechtsbegriffe: Gedanken zur Grenze rechtlicher Begriffsbildung" in *Festschrift für Hermann Nottarp* 133 ff., esp., 147 f. n. 45 (1961).

be essential, or as we might also say, in a similarity according to the measure of a determined relation (relational sameness, relational unity).

Such an equivalation of what is unequal according to the measure of a viewpoint which proves essential, that is, analogy, occurs everywhere in law —it is impossible to enumerate all the instances. We add only a few more examples from the realm of criminal law, which at first sight have nothing to do with analogies. In certain circumstances, "semi"-omissions such as letting a child starve to death, though not mentioned in the law at all, will be punished like acts of commission, such as the killing of a man. This is analogy in its purest form,[63] which no sophistry can argue away. Similarly, analogy is at work in the so-called "alternative finding" ("*Wahlfeststellung*") which is deemed to be admissible when the evidence discloses offences (such as larceny and receiving of stolen goods), of which the accused has undoubtedly perpetrated one but it is not certain which, and these are said to be "morally or psychologically equivalent." Analogical character is further found in the so-called "*argumentum e contrario*" that mistake of fact can exclude *mens rea* for the purposes of punishability of useless attempts.[64] Further instances of analogies are where "evidentiary marks" (cork brands, painters' signs, tallies of beers kept by strokes on a felt coaster, holes punched by a time-clock) are treated as "documents" under the criminal law; where hydrochloric acid or dog set on a person with a "weapon" in the sense of §223a of the Criminal Code (as to grievous bodily harm); where the damaging of the "reputation" of a corporation is punished as libel in the same way as the injuring of the "honour" of a human being; and so on—the examples are legion. It is difficult to see why courts which, day by day and year by year with the approval of the literature, have declared such analogies to be legally correct, have refused when dealing with the famous problem of larceny of electricity —to treat electricity as a "thing" within the meaning of § 242 of the Criminal Code. It is still less clear why this, of all things, should be "a legal-political triumph."[65] Moreover, modern criminal *legislation*, too, works with the increasingly favoured "exemplifying method"—a

63. As correctly seen by H. Mayer, "Das Analogieverbot im gegenwärtigen deutschen Strafrecht," *Süddeutsche Juristenzeitung* 12 ff., 14 f. (1947), likewise *id.*, *Strafrecht, Allgemeiner Teil* 119 (1953). *Cf.* also 2 Gallas, *Niederschriften über die Sitzungen der Grossen Strafrechtskommision* 279 (1958).

64. Misunderstood by Spendel, "Der sogennante Umkehrschluss aus § 59 StGB nach der subjektiven Versuchstheorie," 69 *Zeitschrift für die gesamte Strafrechtswissenschaft* 441 ff. (1957). *Cf. contra* Sax, "Zum logischen und sachlichen Gehalt des sogen. 'Umkehrschlusses aus § 59 StGB' " *Juristenzeitung* 241 ff. (1964). See also H. J. Bruns, *Der untaugliche Täter im Strafrecht* 14 (1955).

65. As it is called by Baumann, *op. cit. supra* note 13, at 133 (he accepts other analogies without any hesitation). Welzel, *op. cit. supra* note 18, at 21, correctly observes that the judicial practice has here "proceeded in too narrow-minded and formal a manner." Also interesting is the note 46 on § 2 of the German Criminal Code i of Schönke-Schröder, *op. cit. supra* note 13, at 65, according to which the French Court of Cassation does treat electricity as a thing and accordingly punishes its illegal use as larceny.

combination of general clauses and casuistry, quite manifestly with the mediation of analogy. The legislator gives only a few examples of "particularly grave cases" of an offence, and confers on the judge the function of imposing similar penalties in similar cases—that is, analogous cases.

IV

We have seen that all analogy involves an equivalation of unequal cases from a viewpoint which proves to be essential, an equality according to a determined relation. This raises the problem of *equality*, the central problem of law in general. For the idea of law, justice, demands equal treatment of equal cases and different treatment of unequal cases. But what is equal, and what unequal?

In almost the whole of modern philosophy since the advent of rationalism, even in Kant, equality is understood as *formal* or *mathematical* equality, *i.e.*, virtually as identity. But there is no such equality in actuality. "Equality," Radbruch says, "is not a datum, things and men are as unequal 'as one egg to another'; equality is always an abstraction from a given inequality from a determined point of view."[67] Formal equality as an abstraction of thought can be expressed exactly only mathematically: a = a. Thus already St. Thomas Aquinas remarks that only numbers are quite equal to each other.[68] Only mathematical concepts are completely determined, univocal in the strict sense.—Likewise, complete diversity or contradiction is also an abstraction, which again can be exactly expressed only mathematically: a is not non-a. In actuality, there are no two completely different entities, because all entities are equal to each other, at least in that they exist—but by no means only in that. There is only a partial equality and a partial inequality: similarity and dissimilarity.[69] Equality and diversity in the formal sense are abstract and as such never actual poles, within which reality unfolds itself. They direct our interest now to a greater similarity of objects, now to a greater dissimilarity, so that we speak of equality and inequality. What is given immediately is not equality or diversity but analogy of entities; for, even before we become conscious of a principle of equivalation or of a principle of non-equivalation, things are apprehended in their similarity or dissimilarity.[70]

That the problem of equality flows into the problem of analogy was clearly demonstrated even by Aristotle's *Nicomachean Ethics*. The

66. On this point see Noll, "Zur Gesetzestechnik des Entwurfs eines Strafgesetzbuches," *Juristenzeitung* 297 ff., 300 f. (1963).

67. See Radbruch, *Rechtsphilosophie*, cited *supra* note 40, at 126. *Cf.* Engisch, *Logische Studien zur Gesetzesanwendung* 30 ff. (3d ed. 1963).

68. St. Thomas Aquinas, *Quaestiones...*,cited *supra* note 42, qu. I, art. 11.

69. *Cf.* also Heller, *op. cit. supra* note 19, at 3 ff.

70. *Cf.* Esser, *op. cit. supra* note 27, at 231. On the whole matter see also A. Brunner, *op. cit. supra* note 47, at 172 ff., 191 f.

just, he says, is not a formal equality, but an equality of relationships: it is something proportional, something corresponding, a mean—the mean, however, is an analogy (τὸ γὰρ ἀνάλογον μέσον),[71] This mean, this analogicity of Being, must be presupposed to enable us to achieves orderliness at all, in our knowing as in our relations. If everything were one and the same, if there were no differences, then it would be meaningless, even impossible to form different words and different norms. On the other hand, if there were no connecting links, no commonness in things at all, then we should need to have a special name for everything and a special norm for every human action (this is why Nietzsche says that every order is rooted in the "eternal return of the same"[72]). Order, including legal order, exists only on the basis of the analogy of Being, which is a mean between identity and contradiction between equality and diversity.[73]

Thus, *analogical concepts*, too are a mean: the mean between univocal (monosemic) and equivocal (polysemic) concepts (in a strictly logical sense, of course, only univocal concepts can be called "concepts" at all).[74] Univocal concepts express something that is identical. As we have already stressed, only concepts of numbers are univocal in the strict sense; the concept "male person 21 years of age" has a univocal content: a man who has completed the 21st year of his age but not yet the 22nd year. With equivocal "concepts" all such agreement disappears: the German word "*Strauss*" can mean an ostrich, a bunch of flowers, or a struggle. With analogical concepts, however, there is neither a complete univocality of content nor a pure equivocation; here it is rather the question of figurative, symbolic, metaphorical ways of expression:[75] the "depth" of the mind, the "sickness" of modern art, "smiling" meadows, "soft" music, "dry" wine. On the one hand, the analogical concept exhibits a firm "core"; otherwise nothing can be "conceived" by the aid of the concept. On the other hand it must be able to assume various meanings (which is why sometimes in this connection we also speak of "relative concepts");[76] otherwise this core

71. See 5 Aristotle, *Nicomachean Ethics* 1130a ff. *Cf.* Przywara, *op. cit. supra* note 47, at 75 f., 105 ff.; Söhngen, *Analogie und* Metapher...,cited *supra* note 45, at 63 f. *passim*; Krings, article cited *supra* note 41, at 97 f.; Ehrlich, *op. cit. supra* note 50, at 226.

72. See Löwith, *Nietzsches Philosophie von der ewigen Wiederkehr des Gleichen* (1956).

73. Quite in this sense Maihofer, *Vom Sinn menschlicher Ordnung* 64 (1956), who conceives of "order" as a "texture of correspondences." The same idea can be found already in St. Thomas Aquinas, *Summa Theologica I pars*, Q. 116, art. 2 and 3.

74. *Cf.* Bochenski, *Formale Logik* 205 ff. (1956); *id.*, article cited *supra* note 49, at 121.

75. See on this point Söhngen, *Analogie und Metapher...*,cited *supra* note 45, at 57 ff.; Gadamer, *Wahrheit und Methode* 71, 407 *passim* (1960); Fischl, *op. cit. supra* note 49, at 57 ff.; Wittgenstein, *Tractatus Logico-Philosophicus—Logisch-philosophische Abhandlung* 16 ff. (Suhrkamp ed., 1963). *Cf.* also Sax, *op. cit. supra* note 19, at 107 as well as his article cited *supra* note 62, at 143 ff.

76. *Cf*, Engisch, "Die Relativität der Rechtsbegriffe" in *Deutsche Landersreferate zum V. Internationalen Kongress für Rechtsvergleichung in Brüssel* 59 ff. (1958).

would have no capacity of binding together a variety of similar entities.[77]

One main significance of analogical concepts is that they make it possible to transfer the language of our observable world to the realm of psychic and intellectual life. Expressions taken from the material world are transferred to mental phenomena. We have simply no other possibility of expressing mental contents, *significata*. Since we have no purely intellectual perceptions—Kant is absolutely right on this—we have also no special concepts for intellectual phenomena. No concept can be separated from the perceptual element because the whole of our cognition commences with sense-perceptions. And precisely for this reason, matters transcending sense experience can be expressed only through analogical concepts, only by means of an analogy to a similar observable object. But because with an analogical concept the object from which the perceived (the "picture") has been derived, does not coincide with the thing meant, there is always the danger that the mode of being of the latter may be confused with that of the former: that—to repeat an example already used—by failing to recognize the analogical character of the concept "juristic person," we may assume that its mode of being is the same as that of the "natural person," and thus draw "conclusions" that it has the capacity of performing legal acts, being injured in its reputation, and of committing delicts.

In this context it is to be borne in mind that virtually all juristic concepts, even the so-called descriptive ones, are analogical concepts, because they never express a meaning which is merely perceptional but always (at least additionally) an intellectual, a specifically legal meaning. Thus Radbruch long ago pointed out that the concepts which the law adopts from perceptual experience are never preserved in their original perceptual meaning, but always undergo a "teleological transformation."[78] This means simply that the concepts by means of which evidentiary facts are structured for legal purposes have an analogical character: or as current terminology has it, they represent "meaning-components" of legal rules, "functional concepts" (except for the rare cases in which pure concepts of numbers are employed in legal rules). This shows the questionable nature of the German Supreme Court's argument that electricity being physically no thing was also no thing in the legal sense, that is, within the meaning of the criminal law against larceny.

As the *analogia entis* and the *analogia nominum* represent a mean, so the *anologia cognitionis*, analectics, is also a mean: the mean between

77. *Cf.* Krings, article cited *supra* note 41, at 102. The old distinction between *attribution* analogy ("sound" body—"sound" nutrition) and *proportionality* analogy (6 : 3=4 : 2); fishes' fins like birds' wings cannot be discussed here in greater detail. In the last analysis all analogy rests on proportionality, relativeness, correspondence.

78. See Radbruch, *Rechtsphilosophie* 219 f.; *id.*, *Vorschule* ... 10, both cited *supra* note 40.

logic and dialectics.[79] Therefore it is suspected by both. And yet both logic and dialectics involve a reference to analectics. Pure logic can work only with identity. Because, however, there is nothing really equal in our world, the terms of a relation must be *made equal* by an abstraction[80] before inferences of logic can be employed. This means that logic presupposes a process of analogy.[81] Dialectics, on the other hand, works with contradiction. But with pure contradiction, in the absence of any relation, dialectics cannot work either; it is possible only in cases of contrariety, *i.e.*, there must be present only a relative disparity. So that dialectics, too, cannot do without analogy. All our cognitions are rooted ultimately in analogies.[82]

The so-called *analogy inference* is no logical inference, however much effort has been made (by Drobisch, Wundt,[83] and above all recently Bochenski[84]) to construct a stringent analogy inference. Either these inferences do not involve really compelling conclusions, or they are stringent, in which case they are no longer analogy inferences. Given a cogent logical foundation, the so-called analogy inference becomes a pure syllogism.[85] Such a cogent logical foundation for a proposition is possible only when the similarity of the analogata is already known, *i.e.*, when it is already determined. Yet it is precisely this similarity which the analogy inference is first of all supposed to show! Hence Klug's attempt to arrive at a logical analogy inference by means of a "similarity range" must fail; for such a "similarity range" is variable according to the viewpoint adopted, and therefore cannot be determined exactly.[86]

The so-called analogy inference is usually called a "same-level inference," an inference from the particular to the particular — in contrast, on the one hand, to deduction (in which the particular is inferred from the general) and, on the other hand, to induction (which presents a conclusion from the particular to the general).[87] But it may be asked, how is it possible to infer from the particular to the particular? How may one infer that what is peculiar to a particular is also characteristic of another particular? How can one reason from agreement as to some characteristics, to agreement as to others?

79. *Cf.* Przywara, *op. cit. supra* note 47, at 65 ff.; Lakebrink, *op. cit. supra* note 44, at 412 ff. (summarizing) *passim.*

80. Krings, article cited *supra* note 41, at 104.

81. See Klug, *op. cit. supra* note 49, at 151 ff., who in this context does not speak, however, of analogy but of "teleologic."

82. *Cf.* A. Brunner, *op. cit. supra* note 47, at 188 ff.

83. *Cf.* Klug, *op. cit. supra* note 49, at 109 ff.

84. See Bochenski, *op. cit. supra* note 74, at 205 ff.; *id.*, article cited *supra* note 49, at 121 ff.; *id.*, *Logisch-philosophische Studien* 107 ff. (1959). *Contra* Juhos, article cited *supra* note 49, at 126 ff.

85. See Heller, *op. cit. supra* note 19, at 118 ff., 144.

86. See Klug, *op. cit. supra* note 49, at 123 ff. *Contra* Schreiber.

87. For further details see Klug, *op. cit. supra* note 49, at 101 ff. (with further references); Engisch, *op. cit. supra* note 3, at 142 ff.; Sax, article cited *supra* note 19, at 97 ff.; Heller, *op. cit. supra* note 19, at 10 ff., 52 ff.

Let us take a familiar example :

1. The earth is a planet illuminated and warmed by the sun, having seasons and times of the day, an atmosphere, and also organic life on its surface.

2. Mars is a planet illuminated and warmed by the sun, having seasons and times of the day, and also an atmosphere.

3. Mars has organic life on its surface.

How, then, is the conclusion reached that Mars has "likewise" organic life on its surface? Only by means of a further, tacitly presupposed *latent premise* : the presupposition of regularity of natural events. The road to the so-called analogy inference thus leads not at all from the particular to the particular, but through the general to the particular.[89] In this sense, even Aristotle described analogy inference as a mixed inductive-deductive inference.[90] The analogy is a hybrid form between the deductive and the inductive method. But since even the purely inductive inference is not compelling—in any case not the incomplete induciton, which alone is significant in practice[91]—the so-called analogy inference can lead all the more logically only to problematic propositions.[92] Nevertheless, analogy is in no way scientifically worthless on that account. If we were restricted in science to logically compelling conclusions, we would find it extremely difficult to progress. Creative new knowledge is hardly ever achieved in the form of a stringent logical inference, and it is precisely analogy which has such a creative cognitive value. This consists in the discovery of something previously unknown by way of a latent premise.[93]

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88. *Cf.* 1 Hessen, *Lehrbuch der Philosophie* 161 f. (2d ed. 1950) ; Sax, *op. cit. supra* note 19, esp. at 136 ff., also at 97 ff. ; A. Brunner, *op. cit. supra* note 47, at 298 ; Fischl, *op. cit. supra* note 49, at 111.

89. *Cf.* Larenz, *op. cit. supra* note 2, at 287 ff. ; Bartholomeyczik, *Die Kunst der Gesetzesauslegung* 79 ff. (1951) ; Schack, " 'Analogie' und 'Verwendung allgemeiner Rechtsgedanken' bei der Ausfüllung von Lücken in den Normen des Verwaltungsrechts," in *Festschrift zu Ehren von Rudolf Laun* 275 ff. (1948).

90. References to the sources in Klug, *op. cit. supra* note 49, at 114.

91. This is probably generally accepted. *Cf., e.g.,* 2 Sigwart, *Logik* 414 ff. (5d ed. 1924) ; A. Brunner, *op. cit. supra* note 47, at 289 ff., 295 ff. ; de Vries, *op. cit supra* note 53, at 240 ff. ; Hessen, *op. cit. supra* note 88, at 153 ff. ; Wittgenstein, *op. cit. supra* note 75, at 109 f.; Fischl, *op. cit. supra* note 49, at 109 ff. ; Schreiber, *op. cit. supra* note 86, at 71 ff.

92. *Cf.* also Heller, *op. cit. supra* note 19, at 10 ff. ; 51 ff. ; Sax, *op. cit. supra* note 19, at 132 ff. ; Schreiber, *op. cit. supra* note 86, at 47 ff. ; Engisch, *op. cit. supra* note 3, at 143 f. ; Hassemer, article cited *supra* note 4, at 41 ff. *Cf.* also Klug, *op. cit. supra* note 49, at 107, 115.—Sigwart, *op. cit. supra* note 91, characterizes analogy as a heuristic principle purporting to establish hypotheses.

93. This creative element of analogical cognition has been well brought out by one of the participants of the author's legal-theoretical seminar (summer semester 1963), namely Backman. He says that where an object coincides in *virtually* all characteristics with an object previously known, then it is no longer proper to speak of cognition but only of recognition—an acquaintance with it which possesses no specifically scientific value. He adduces the following example : (a) A zoologist who finds a may-bug needs no special intellectual effort to know the zoological characteristics of this beetle which are known to him although he has never seen this individual may-bug before. (b) If at zoologist, however, discovers a hitherto unknown creature which bears all the characteristics of an insect (body divided into three segments, six legs on thorax, jointed members, chitin cover), he has to discover for himself further properties of this creature (*e.g.,* respiration by trachea). Only in case (b) can we speak of genuine cognition; in case (x), however, there is nothing but recognition (acquaintance).

What has been said above can be directly applied to the current juristic uses of analogy inference. When § 226a of the German Criminal Code, as to the significance of consent in cases of bodily injury, is applied by analogy to cases of wrongful imprisonment, this presupposes that equality between bodily injury and deprivation of freedom, from the viewpoint of the questions of the victim's consent, has first been established. Here, too, the reasoning proceeds by means of a generality, by means of a latent premise: the identity of "*ratio legis*" or "*ratio iuris.*"[94] The rationality of the norm must coincide with the rationality of the object, there must be *an identity of the meaning-relation.* Gustav Radbruch has once characterized the sense of justice as "a mentality which is capable of changing over from the particular to the general, and from the general to the particular again."[95] But this means simply that the sense of justice is the ability to think in terms of analogies.

Accordingly, the inference a *similibus ad similia* is possible only on the presupposition of a latent premise, a general proposition. The inference itself, then, does not constitute the core but the final point of the analogical procedure. It cannot take effect before the analogata are made comparable, that is, when these are brought into a relation of similarity (this "*extensio*" is the core of analogy). For this a *tertium comparationis* is required. This *tertium* is what is really problematic in analogy. For the standpoint for comparison is not fixed and determinate. Though not completely arbitrary, it is changeable; at least in range of meanings and values, and the latent premise is a variable premise—instead of similarity it is always possible to establish dissimilarity also. Whether women is similar or dissimilar to man, the bear to the dog, the aeroplane to the ship, cannot logically be determined; it depends on the viewpoint from which they are compared. In place of the analogy conclusion, an *argumentum e contrario* is always also logically possible (though of course not teleologically so!).[96] What is decisive is the choice of the *tertium comparationis* by which the cases compared are considered.

V

It should now be obvious from the above that all legal cognition, all *law finding*, every so-called "subsumption" exhibits the structure of analogy. For "to subsume" means that a norm and a concrete situation of life are "brought into correspondence" with each other. But directly, by the use of a simple syllogism, this is not possible, because a norm and a state of affairs are not equal. The norm lies on the level of the Ought which is conceptually formulated; the state of affairs lies on the level

94. The usual distinction between "*analogia legis*" and "*analogia iuris*" plays no role in our context. It is in any event questionable.

95. See Radbruch, *Rechtsphilosophie*, cited *supra* note 40, at 203.

96. For a different, but in my opinion unconvincing view, see Klug, *op. cit. supra* note 49, at 134 ff. See on this point Heller, *op. cit. supra* note 19, at 132 ff.; Schreiber, *op. cit. supra* note 86, at 51 ff.

of empirical factuality. So that before a logical syllogism can be employed, these must first be *made equal*: that is, the fact-situation specified in the norm as conceptually formulated in the legally-prescribed "fact-elements," must be brought into a relation with the actual, concrete fact-situations of life, so that by means of a "teleological" procedure, their similarity is established. This, however, is analogy. The so-called "subsumption" is nothing but an "analogy inference within the framework of the prescribed fact-elements."[97] Admittedly, in simple ("unproblematic") cases the similarity between the fact-situation specified in the norm and a real-life fact-situation can be so conspicuous that anyone—or at least an experienced lawyer—will immediately grasp their equality. Nevertheless, even here, the law-finding is not a mere "application" of law. The determination that a fact-situation occurring in life corresponds to a fact-situation specified in a norm is always a "teleological" decision; for what governs is never the mere letter of the law, but always its "spirit." Esser says quite correctly: "Every 'application' of a law is already an interpretation, since even a decision that the tenor of a text is so unequivocal as to make interpretation superfluous ...rests upon an interpretation...law-finding is never merely the work of subsumption."[98]

Law-finding, then, is *a bringing-into-correspondence, an equivalation, an assimilation* of the norm and the real-life fact-situation. And this process is accomplished from two sides.

On the one side, the real-life fact-situation must be normatively qualified, brought into a relation to a norm, *made to fit the norm*; as Radbruch says, we must "cross over gropingly from the world of actuality to the world of values in order to find the idea that gives meaning to this empirical phenomenon."[99] Engisch speaks in this context of "putting" the concrete case to be judged on par with the cases clearly envisaged by the fact-elements prescribed in the legal rule";[100] and he calls this bringing to parity "the genuine subsumption."[101] The analogical character of "subsumption" is thus made quite clearly apparent. "Subsumption" is here understood not as a logical syllogism, but as the unfolding of a determined fact-situation of life from normative points of view. And precisely in this capacity to analyze real-life

97. *Cf.* Heller, *op. cit. supra* note 19, at 87; Androulakis, *Studien zur Problematik der unechten Unterlassungsdelikte* 173 (1963). Tammelo, "Sketch for a Symbolic Juristic Logic," 8 *Journal of Legal Education* 277 ff., esp. 298 (1955), is also very interesting.

98. See Esser, *op. cit. supra* note 1, at 253 f.; Larenz, article cited *supra* note 2, at 279. See generally also Arthur Kaufmann, article cited *supra* note 7, at 381 ff., and 388 ff.

99. See Radbruch, article cited *supra* note 4, at 33.

100. See Engisch, *op. cit. supra* note 67, at 26; *cf. id., op. cit. supra* note 3, at 56, also at 199, n. 47 ("subsumption and equivalation").

101. See Engisch, *op. cit. supra* note 67, at 19. "Subsumption" lies basically in the "minor premise" of the logical inference (as expressly stated in *id., op. cit. supra* note 3, at 50).

fact-situations from legal-normative viewpoints—and not primarily in mere knowledge of the law—lies the centre of gravity of legal talent.

But where are we to find the standpoint of comparison in this "bringing to parity," of which Engisch speaks, of real-life fact-situations and those specified in norms? Engisch answers: in interpretation. "Interpretation," he says, "furnishes not only the *material* of comparison for the subsumption, but also at the same time *points of relation* for the comparison."[102]

And this refers us to the other side of the process: the norm must be brought into connection with a fact-situation of life, it *must be made to fit the facts*. This is what is called "interpretation": ascertaining the legal meaning of the norm. Yet this meaning does not reside, as traditional methodology still assumes, only in legal rules, in abstract and therefore far-reaching empty legal concepts. We must rather, in order to ascertain this meaning, seize on something more concrete: on the relevant particular life-situation. The "meaning of a legal rule" can never be ascertained apart from the meaning, the "nature" of the real-life fact-situation which is to be judged.

Therefore, the "meaning of a legal rule" is not definitely established either. Though the text of the law remains the same, it changes—with fact-situations of life, and indeed with life itself. What can constitute a "weapon" within the meaning of the Criminal Code depends upon what is employed *hic et nunc* for killing or injuring men; consequently, something can be a "weapon" today which at the time of the enactment of the Criminal Code did not exist at all, and which the traditional "concept" of weapon does not cover. If a new corrosive chemical is characterized as a "weapon" within the meaning of § 223 a of the German Criminal Code (grievous bodily harm), then this cannot follow simply from the abstractly defined concept of "weapon," but far more from the meaning, the "nature," of the situation of life which is regulated by the law. Alternatively we can say that "weapon" is here understood not as an abstractly defined concept, but as a "meaning-full concept," as a "functional concept," in fact as an analogical concept, which includes something comparatively similar to what we understand by "weapon" in the proper sense. In just the same way "document" is taken as an analogical concept, when "evidentiary marks" which are not documents *stricto sensu* are included as such. Or when it is said that the reputation of a corporation can be injured like the honour of a human being, then at any rate this can be justified on the grounds that the concept of "honour" is being employed in an admittedly very extensive analogical sense. When, on the other hand, the Supreme Court of Germany (as already mentioned) did not regard electricity as a "thing"

102. See *op. cit.* 57 f.; *id., op. cit. supra* note 67, at 33. *Cf.* Heller, *op. cit. supra* note 19, at 141.

whose theft would be punishable as larceny, this was not convincing, because the concept of "thing" was not understood in the there relevant sense, not in the sense of the real-life situation to be regulated.

We have spoken of "two sides" of the methodological process of law-finding : on the one hand, the assimilation of a real-life fact-situation to a norm, on the other hand the assimilation of a norm to a fact-situation. However, this cannot be understood as if separate acts were involved, in a sequence of induction and deduction; it is rather a matter of both occurring at once. It is a "give-and-take" progressive *unfolding* of a fact-situation towards a norm and of a norm to a fact-situation; the "*extensio*" peculiar to analogy lies precisely in this "unfolding." What is called "analogy" in traditional jurisprudence is distinguished from "normal" law-finding, that is, from the so-called "teleological interpretation," only by the degree of the *extensio*, and not by the logical structure of the procedure. "Ordinary" subsumption, too, is an analogy. It would be possible to distinguish logically between subsumption and analogy only if there were a logical boundary between equality and similarity. But there is no such boundary, for material equality is always only a similarity, and formal equality does not occur in real life. It "exists" only in the realm of mathematical (logistic) figures and signs. This circumstance frustrates every "prohibition of analogy," even when it is emphatically foresworn because it cannot be objectively justified.

What has been said above sounds strange to the ears of lawyers only because the methodological procedure for the law-finding has been called by its true name—because we are uncovering its analogical character. Apart from this, we are not saying anything out of the ordinary. Thus, entirely in accord with the above presentation, Engisch (in agreement with Viehweg) speaks of a "constant interaction," a "wandering of glance to and fro" between the norm and the real-life fact-situation.[103] Larenz describes the relation between "norm" and "decision" as "dialectic" : "the decision is neither a simple 'application' of a norm, in which this remains unchanged; nor, on the other hand, is it a pure 'act of will'. It is a bringing to consciousness, a clarification, hence a greater determination and by the same token to some extent also a development or a further formation ('concretisation') of the immanent meaning present in a general norm .... The norm ...constantly requires a decision in order that it can be *somehow* effective as a norm (i.e., as a directive measure, a 'general' law) ; a 'decision', on the other hand, requires a norm or a principle, to which it can be oriented, for

103. See Engisch, *op. cit. supra* note 67, at 15 ; *ibid.* 27 ("Interaction between interpretation and subsumption") ; Viehweg, *Topik und Jurisprudenz* 60 f. (1953). *Cf.* further Coing, *Die juristischen Auslegungsmethoden und die Lehren der allgemeinen Hermeneutik* 22 f. (1959) (the procedure of legal thought is "not purely deductive" but "has a *tópos*-character") and Betti, "Zur Grundlegung einer allgemeinen Auslegungslehre" in 2 *Festschrift für Ernst Rabel* 119 f. (1954) ["adjustment (adequacy of meaning) of understanding," "tuning," "harmony"].

otherwise it could not *claim to have legal validity.*"[104] And finally we may refer to the testimony of Henkel, who in quite similar vein brings out "the two sides of the process of law formation": "(1) the understanding of those elements of ordering which are to be *extracted from 'things'* and their regularities or structures; (2) those aspects of norm-formation which make it possible for an ordering to be imposed on the aims, values, and purposes of law, that is, an ordering in view of the *requirements of the idea of law.*"[105] Throughout these passages, though in different words, it is made obvious that neither the "major premise" nor the "minor premise" of the so-called juristic inference can be ascertained in isolation; so that law-finding is never a logical syllogism only, but a groping reaching of hands from the realm of the Is to the realm of the Ought and from the realm of the Ought to the realm of the Is; a recognition of norms in fact-situations and of fact-situations in norms.

The fact that all law-finding involves analogical procedure, and so exhibits the structure of *extensio*, also explains the constantly astonishing phenomenon that "the law is wiser than the legislator," that there can be read from a law consequences that the legislator has not put into it at all. If the extraction of concrete juristic propositions is understood simply as "application of law," this phenomenon remains an unsolvable riddle. It is often thought, of course, that an explanation can be found in the so-called "objective theory of interpretation", oriented not to the will of the historical legislator but to the changing "meaning of the law." But how does the "meaning of the law" change when the text of the law remains the same? It is so only and solely because this "meaning of the law" does not lie solely in the law at all but also in the concrete fact-situations of life for which the law is laid down. Hence the "objective interpretation" of a law is not in fact a mere interpretation of law at all, but that complex "deductive-inductive" analogical process, the "wandering of attention here and there" between the law and the concrete fact-situation, which was discussed above. It is only an account of this analogicity, this "polarity" between fact-situations of life and those specified by norms, that the law lives and grows, having the ontological structure of historicity.[106]

As in law-finding, that is in the obtaining of legal judgments for actual cases, analogical character is also inherent in the method of legislation, *i.e.*, in the formation of statutory norms. The idea of law

104. See Larenz, *op. cit. supra* note 2, at 112; see also at 132, quoting Schönfeld, *Die logische Struktur der Rechtsordnung* 51 (1927): "A law and a judicial decision are relative to each other."

105. See Henkel, *Einführung in die Rechtsphilosophie* 297 (1964).

106. For the first attempt to found the historicity of law on such a "polarity" see Arthur Kaufmann, *Naturrecht und Geschichtlichkeit* (1957); *id.*, "Diritto Naturale e Storicitá," 10 *Jus, Rivista di Science Giuridiche* 178 ff. (1959); *id.*, *Das Schuldprinzip* 86 ff. and "Die ontologische Struktur des Rechts," both cited *supra* note 23. And see *ibid.* for further references.

(or general principles of law which flow from it) and the fact-situations of life to be regulated (as anticipated in the legislator's thought) are ***brought into*** correspondence with each other (or equivalated or assimilated to each other). The idea of law must, on the one hand, be opened to real-life fact-situations, it must be materialized, concretized, "positivized"; the fact-situations of life, on the other hand, must be idealized, normatively and conceptually structured, in short "construed." A group of fact-situations occurring in life, which have proved to be "equal" in terms of some viewpoint regarded as "essential" (for example, because of the congruence of dominant interests, or because the same rights and interests are endangered), are collected by the legislator into a conceptually formulated set of "fact-elements" for which he prescribes a legal consequence. But fact-situations which the legislator treats as equal in compliance with the principle of equality, are in fact never really equal: no larceny is ever committed exactly like any other larceny, no man conforms exactly to another in his actual contractual capacity or in his actual culpability, because all men differ in their knowledge, abilities, traits of character, and powers of intellect and will.[107] In real life there exist only similarity and dissimilarity, to higher or lower degrees. Insofar as the fact-elements formulated in legal norms are made artificially equal (a man of twenty is as "limited in contracting capacity" as a child of seven) or artificially unequal (a man one minute before attaining the age of full contractual capacity and one minute thereafter!), they are a result of abstractions. Their original source is the analogicity of being.

In the fashioning of norms of "***customary law***" the position is no different, except that here the work of the legislator is performed by the "silently working forces" of long-continuing usage, building real-life fact-situations into equality (that is, equalizing them from the viewpoint of a legal principle). As concerns the so-called "free finding of law by the judges," distinguished by the absence of any statutory or customary norm, the act of norm-creation cannot be simply leapt over even here. The judge must rather, as the famous article 1, section 2, of the Swiss Civil Code directs, begin by assuming the role of the legislator in such a situation: that is, he must elaborate a norm for himself ("judge-made law") in which he generalizes (or construes in consideration of a general legal principle) the singular real-life fact-situation which has to be decided, by comparing it with other (notionally constructed) fact-situations which are similar in form. Only then can he arrive at concrete legal decisions. "Free finding of law by the judges" without a general norm would be no finding of law but an arbitrary act—which is

107. For this reason conviction of the accused has also an analogical character, inasmuch as the judge *compares* the culprit with himself ("a vicarious judgment of conscience") or with the conduct of others in essentially similar circumstances (*i.e.*, of knowledge, ability, physical and mental condition, and situation). The proper ("personal") guilt of the accused cannot be ascertained by him. *Cf.* Arthur Kaufmann, *Das Schuldprinzip*, cited *supra* note 23, at 197 ff., 212 ff., 223 ff. *passim*.

not to deny that such an act can occasionally produce "juster" results than a methodically-derived legal decision.

VI

Law-making is an assimilation of the idea of law and of possible future fact-situtions of life; law-finding is an assimilation of legal norms and of actual fact-situations of life. Such an assimilation or equivalation, or bringing-into-correspondence of the Is and the Ought presupposes, however, that there is a *tertium quid,* in which the idea or norm and the fact-situation coincide; that there is a *mediator between the Ought and the Is.* We need something which represents both the particular and the general, fact and norm; we need a *universale in re,* an Ought in the Is.

This *tertium,* this mediator of the procedure of law-making as well as law-finding is the "meaning" in which the idea of law or the norms of posited law must be identical with the fact-situation so that these can be brought into correspondence with each other (identity of meaning-relations). This meaning is also called the "*nature of things.*" The "nature of things" is the *tópos* in which the Is and the Ought meet; it is the methodological fulcrum for the connection ("correspondence") of reality and value.[108] The inference from fact-situation to norm and from norm to fact-situation is therefore always an inference about the "nature of things." The "nature of things" is the cardinal point of the analogy inference; it is the foundation of the analogical procedure both of law-making and of law-finding. For it is the mean between conformity to facts and conformity to norms, and as such the real vehicle of the objective legal sense, which is what all legal cognition is about.

This is stated, though in different words, by basically all thinkers who have dealt with "the nature of things."

Thus for Radbruch the "nature of things" is the "meaning of a fact-situation of life" and "meaning" is "an Ought realised in an Is, a value which appears in reality." The "nature of things" is a "linkage of fact-ascertainment and value-judgment."[109]

For Maihofer the "nature of things" is a "bridge between the Is and the Ought," the "product of a postulate and a problem presented at the same time."[110]

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108. *Cf.* Tammelo, "The Nature of Facts as a Juristic *Tópos*" in *Australian Studies in Legal Philosophy* (Tammelo, Blackshield and Campbell eds. 1963), being Beiheft No. 39 *Archiv für Rechts-und Sozialphilosophie* 236 ff.; Kwun, *op. cit. supra* note 40, at 24; see also *ibid.* 18, 26, 38 f., 48.

109. See Radbruch, *op. cit. supra* note 4, at 31, 33. *Cf.* also at 21 his reference to Schiller, who describes the "nature of things" "almost like the personality of things."

110. See Maihofer, article cited *supra* note 5, at 152 f.; *id., op. cit. supra* note 31, at 20.

For Stratenwerth, the "nature of things," "material-logical structures," are "ontic data which from a certain viewpoint appear as essential"; we are dealing with an "indissoluble" "relation between a certain axiotic standpoint and the corresponding material structure."[111]

For Baratta the "nature of things" is a "fumbling over from the realm of the Is to the realm of the Ought," a "dialectical relatedness of the normative and the factual."[112]

For Fechner the "nature of things" is the "meaning-endowed content of a thing" it means "the real connections that are given in social relations *and* the meaning residing in them."[113]

For Schambeck the "nature of things" is the "essential foundation of a datum" and thus "equally an expression of factuality and of ideality." "It refers at the same time to a state of being set before us and to the meaningful content found in it."[114]

For Larenz the "nature of things" means "at the same time an ontological and a normative set of fact-elements, an Ought found in the meaning of an Is and already more or less realised in the Is." It is "a problem present in our postulates"—it "does not mean an individual fact-situation of life and its fortuitous thus-being," but "a recurrent situation," in short, the fact-situations of life "in their factuality and typicality."[115]

If we reduce all these *dicta* to a single common dominator, the "nature of things" appears as the manifestation of the general in the particular, a value-quality in the factual. On the one hand the idea of law is displayed in its "material determination,"[116] in its openness towards the material in which it is to be realized. So too is the norm of *lex* in its "ontic relatedness," in the legal fact-elements seen as a typicalized fact-situation of life. On the other hand, real-life fact-situations are presented in their "idea-determinedness"[117] and "value-relatedness";[118] in their ideality, their character as standards, models:

111. See Stratenwerth, *Das rechtstheoretische Problem der "Natur der Sache"* 17, 25 (1957).

112. See Baratta, lecture cited *supra* note 4; *cf.* also: *id.*, "Natura del Fatto e Diritto Naturale," 36 *Rivista Internazionale di Filosofia del Diritto* 177 ff. (1959) (forthcoming in German in *Die ontologische Begründung des Rechts*, 22 *Wege der Forschung*, Wissenschaftliche Buchgesellschaft; ed. by Arthur Kaufmann).

113. See Fechner, *Rechtsphilosophie* 147, 151 (2d ed. 1962).

114. See Schambeck, *op. cit. supra* note 4, at 143. See also *id.*, "Der Begriff der 'Natur der Sache'," 10 *Österreichische Zeitschrift für öffentliches Recht* 452 ff. (1960).

115. See Larenz, article cited *supra* note 2, at 288 and *id.*, *op. cit. supra* note 2, at 349.

116. See Radbruch, "Rechtsidee und Rechtsstoff," 17 *Archiv für Rechts-und Wirtschaftsphilosophie* 343 ff. (1923/24); *id.*, *Rechtsphilosophie*, cited *supra* note 40, at 98 f.; *id.*, *op. cit. supra* note 4, at 17.

117. *Cf.* Maihofer, article cited *supra* note 5, at 150.

118. *Cf.* the works of Radbruch works cited *supra* note 40.

in their typicality. Where we think from the standpoint of the "nature of things," we are always dealing at the same time with the fact-situation and a value; we experience an indissoluble "structural entanglement of the Is and the Ought," an analogicity and polarity of actuality. Engisch's question: "Where then does the ontic structure cease and the axiotic viewpoint start?[119] is fundamentally unanswerable, because in actuality there is no boundary between the two. Real-life fact-situations free of values and values detached from the ontic are pure figures of thought, not realities—otherwise we would "drown" in the ontic or the deontic. This indeed was the reason for the failure of the "classical" system of criminal law, which sought to distinguish between purely descriptive sets of "fact-elements" and purely normative "illegality." In reality, the sets of fact-elements prescribed by criminal law are "types" of wrongs: they are typifications of undesirable fact-situations of life.

In all this it has already become sufficiently clear that the "nature of things" refers to the *type*. Thinking in terms of the "nature of things" is typological thinking.[120] Thus one of the most pressing problems of contemporary legal philosopy—that of "the nature of things"[121]—flows into one of the most pressing problems of contemporary legal theory—that of "types."[122]

The type constitutes an intermediate level between the general and the particular; it is a comparative concrete, a *universale in re*. Thus the type is distinguished on the one hand from the abstract general concept, which is "defined" (delimited) by a limited number of isolating "characteristics" and therefore—according to Kant—at the opposite pole from immediate perception. In contrast to such concepts the type, in its greater proximity to actuality, immediate observability, and materiality,

119. See Engisch, "Zur 'Natur der Sache' im Strafrecht" in *Festschrift für Eberhardt Schmidt* 99 ff. (1961). See also on this cluster of problems Zampetti, "Methodologische Betrachtungen zum Verhältnis von Norm und Tatsache," 9 *Österreichische Zeitschrift für öffentliches Recht* 87 ff. (1958).

120. See as early as 1938 Radbruch, "Klassenbegriffe und Ordnungsbegriffe in Rechtsdenken," 12 *Internationale Zeitschrift für Theorie des Rechts* 46 ff., esp. 49 (1938); *id., op. cit. supra* note 4, at 30 ff. See also Maihofer, "Recht und Existenz" in *Vom Recht* 170 (1963); *id., op. cit. supra* note 31, at 23; Larenz, as cited *supra* note 115; Stratenwerth, *op. cit. supra* note 111, at 22.

121. For a detailed account of the history of problems of the "nature of things" see by Erik Wolf, *Das Problem der Naturrechtslehre—Versuch einer Orientierung* 107 ff. (3d ed. 1964).

122. On the problem of "types" in legal theory, in addition to Radbruch, article cited *supra* note 120; see H. J. Wolff, "Typen im Recht und in der Rechtswissenschaft," 5 *Studium Generale* 195 ff. (1952); Engisch, *Die Idee der Konkretisierung in Recht und Rechtswissenschaft unserer Zeit* 237 ff. (1953) (with many further bibliographical references); Larenz, *op. cit. supra* note 2, at 333 ff.; Henkel, *op. cit. supra* note 105, at 351 ff.—*Cf.* also Esser, *op. cit. supra* note 1, who speaks of "standards" as living, guiding images in legal relations (at 95 ff. *passim*). See further Philipps, *Zur Ontologie der sozialen Rolle* (1963), esp. 31 ff.—And on typological legal thinking in Chinese philosophy *cf.* Kwun, *op. cit. supra* note 40, at 49 ff.

is not definable but only "capable of explication." It has, indeed, a firm core, but no firm boundaries: so that one or another of the "traits" characterizing a type can be absent from a particular fact-situation without calling its typicality into question. The concept (here always to be understood as the abstract-general cencept, the "generic concept" or "class concept") is closed; the type is open. The concept knows only the sharp "either-or"; it separates; the relevant thinking is "thinking by separation." The type (the "ordering concept" or "functional concept") adjusts itself on the contrary to the "more-or-less" of the manifold actuality; it connects, makes connections of meaning apprehensible; in it the general is perceived "as a whole." It is, therefore, not possible to "subsume" under the type, as is done under the concept; it is rather possible only to "ordinate" a concrete fact-situation to it, or "to bring the facts into correspondence" with it, to a higher or lower degree.[123] With the type, therefore, we are no longer engaged in "exact" formal-logical thinking.

But on the other hand, the type is also distinguished from the individual, from the particular phenomenon. What is unique cannot be typical. The type appears, as Ernst Jünger says in his ingenious little book *Typus, Name, Gestalt*, "only within what is comparable"; it "presupposes the comparable and by the same token, the distinguishable."[124] It is scarcely possible to bring out the analogical character of the type more clearly.

If we transfer what has been said above to the level of law, then the type (meaning the normative type, not an "average type" or "frequency type," and also not the "ideal type" in the meaning of Max Weber) proves to be *the* mean between the idea of law and the fact-situations of life, around which ultimately all legal thought revolves: the mean between conformity to norms and conformity to the facts. The type is at once a standard for the transient phenomenon and a model of the idea. It receives its life from both, and is therefore on the one hand richer in content and more open to immediate perception than the idea and on the other hand more valid, more intellectual, and more enduring than the phenomenon.[125] It is true that the type is not rigid and unchangeable in its contours; but it is to a large extent removed from our powers of disposition. We cannot form types in an arbitrary manner. The type is the primordial entity (*Ur-Sache*), the "primeval phenomenon" (*Urphäänomen*) in Goethe's sense.

Thus the type is present in all legislation and law-formation. The task of the legislator is to describe types. In this, he may have a certain latitude; he can, *e.g.*, define murder as premeditated killing, but also

123. Thus before Engisch and Larenz already quite clearly Radbruch, article cited *supra* note 120, esp. 46 f.

124. See Ernst Jünger, *Typus, Name, Gestalt* 28, 82 (1963).

125. *Op. cit.* 92, 125 f.

as killing carried out stealthily or dishonestly or from base motives. But through all the variations some type of murder as a particularly grave form of intentional killing is indispensable. And when article 20, section 3 of the German Constitution directs that the courts are bound to "*lex* and *ius*" (*Gesetz und Recht*"), this simply means that the judicial decision must do justice both to the meaning of the statutory norm, and to the meaning of the real-life fact-situation, the "nature of things": that is, it must comprise the real-life fact-situations in the typicalized form intended by the statutory norm.

Success or failure in both law-making and law-finding depend upon a correct apprehension of types. Our contemporary uncertainty—at least among lawyers—does not spring primarily from the fact that laws are conceptually worse constructed than of old; rather, we are no longer quite sure of the types behind the concepts of *lex*.[126] We no longer know properly what "a prudent man of business" or "a just judge" or "a model family man" is. Had we had before us with intuitive certainty the model of a "conscientious medical man," then the problem of the medical duty of disclosure, or of sterilizing operations would not have become so intractable. We live in an age of transition, such periods are times of radical change, and therefore of uncertainty. For us traditional types and configurations have largely lost their persuasive force.

The task of the legislator, we have said, is to describe types. For this purpose, the abstract concepts used in the construction of laws are of great importance, for they give them form and guarantee legal certainty. But it is impossible to describe a type precisely; the description can always only approximate to the type; it is never captured in its ultimate depth. For the content of the type is always richer, more intellectually powerful, more meaningful, and more perceptible than that of the abstractly defined concept. And this again shows that *ius* can never be identical with *lex*, because it cannot be captured in its concrete fullness of content. For this reason there can be no closed "axiomatic" legal system, but only an open system of *tópoi*.[127]

A type can never be "defined" but only "described." Consequently legislation faces two extremes. On the one hand, it can avoid description of the type altogether, and only name it. This occurs, for example, in § 185 of the German Criminal Code, which directs simply that "slander" shall be punished in such and such a manner. Such a

126. Ernst Jünger, *op. cit.* 44 ff., speaks outright of a "decrepitude of types and characters," of an "atrophy of types" and of loss of authority resulting therefrom, which are to be observed everywhere today.

127. See above all Viehweg, *op. cit. supra* note 103, at 53 ff., esp. 58 ff., 62 ff. *Cf.* also Engisch, "Sinn und Tragweite juristischer Systematik," 10 *Studium Generale* 173 ff. (1957) (with a list of literature), Larenz, *op. cit. supra* note 2, at 133 ff.; Siebert, *Die Methode der Gesetzesauslegung* 13 (1958).

procedure leads to great elasticity in the application of laws, but at the expense of corresponding uncertainty in the law. Or, on the other hand, it can seek to describe the type as minutely as possible ("casuistically") —for example, the regulation of "grand larceny" in § 243 of the Code. This has the advantage of greater legal certainty, but it leads to hairsplitting and to impracticable results—the expenditure becomes greater, the returns smaller. The "exemplifying method" already mentioned above, which the projected Criminal Code of 1962 uses copiously (*inter alia*, incidentally, in its definition of "grand larceny" (§ 236)), takes a middle course between these extremes: the legislator describes the type only by examples, and at the same time refers the judge expressly to analogical finding of law.

Here again we see the old experience confirmed. The constant tension between material justice and legal certainty cannot be resolved; for legal certainty is indeed as such an attribute of justice, and that tension is hence a tension within justice itself.[128] For this reason there is similarly, for example, no patent solution for the dispute between the theory and judicial practice as to "type correction" of the sections relating to murder (§ 211 of the German Criminal Code).[129] The question "concept or type?" cannot be solved by sacrificing either of the two. For (if we may slightly change a famous saying of Kant) concepts without types are empty; types without concepts are blind. The legislative objective of complete conceptualization of types is unattainable, and it is therefore necessary again and again for concrete law-finding to have recourse to the types intended by the law and to its fundamental models. The essence of "teleological interpretation" is that it works not with the abstractly defined statutory concepts but with the types which stand behind them; it argues from the "nature of things." To return to the example of hydrochloric acid being regarded as a "weapon," this follows not from the *concept* of weapon but from the *type* of grievous bodily harm.[130]

We have already seen that concepts are analogical at their very source. The univocal, monosemic, strictly defined concept is reached only after an operation of thinking, an abstraction. If this concept is then to be "applied" to reality, concretized in a judgment, it must again lose its abstract character, and with this its univocality. In the concrete judgment the abstractly defined concept plays no part.[131] On this

128. *Cf.* Radbruch, *Vorschule...*,cited *supra* note 40, at 32 f.

129. See Maurach, *Deutsches Strafrecht, Besonderer Teil* 28 f. (4th ed. 1964).

130. The opinion of Larenz, *op. cit. supra* note 2, at 344, according to which the "types of delicts" under criminal law are conceptually so widely framed that they can hardly be understood as "types" is untenable. On the significance of typological thinking in criminal law (not to be mixed up with the suspect doctrine of the "normative type-concept of the criminal") see already Radbruch's 1938 article, cited *supra* note 120, at 49 ff.

131. Krings, article cited *supra* note 41, at 104 f., agrees with this view.

account, too, criminal-law doctrine teaches that the formation of *mens rea* does not involve a subsumption of the actual happening under the abstract legal concept, but rather requires "subsumption in a lay manner," a "parallel evaluation in the sphere of the layman," a "parallel judgment in the consciousness of the perpetrator," or what is suggested by all these formulae. But this simply means that if the perpetrator is to be treated as acting intentionally, he must have associated his action with the type of wrong meant by the law.

In the process of actualization of law we are concerned with a constant closing and opening again of legal concepts. It could almost be called a dialectics of "the jurisprudence of concepts" (*"Begriffsjurisprudenz"*) and "the jurisprudence of interests" (*"Interessenjurisprudenz"*), thereby acknowledging that both contain an element of truth. The legislator tries to capture the typicalized fact-situations of life as precisely as possible in concepts; but in order to do justice to the actualities of life the courts must then force open these concepts again because they prove to be too narrowly defined ("delimited"). Yet immediately the reverse process begins. Once more—for instance by legal commentators—a new, "corrected" definition of the relevant concepts is given, which in its turn, in view of the variety of life, can again be sufficient only for a shorter or a longer period. The process is never-ending.[132] A very good illustration is provided for this by the concept of "possession" (larceny as a breach of another's possession), which has been defined anew and corrected countless times since the present Criminal Code came into force, without any such definition ever being found which hits on exactly the type intended—possession as a person's sphere of peaceful enjoyment (*Friedenssphäre*).[133]

From this, it also becomes obvious now what the principle *"nullum crimen sine lege"* actually says. It cannot mean a strict prohibition of analogy, for such a prohibition would presuppose that the crime entailed in the legally-defined set of fact-elements can be conclusively defined by univocal concepts. But this is impossible.[134] The principle *"nullun crimen sine lege"* says rather that the type of the punishable act must be fixed in a formalized rule of criminal law, *i.e.*, it must be described more or less completely. Therefore analogy in criminal law finds its limits in the type of wrong which lies at the basis of the

132. *Cf.* Radbruch, article cited *supra* note 120, at 53; also Larenz, *op. cit. supra* note 2, at 335.

133. *Cf.* Figlestahler, *Untersuchungen zum Gewahrsamsbegriff im Strafrecht* esp. 49 ff. (Saarbrücken Dissertation, 1963).

134. To this extent *pace* Grünwald, article cited *supra* note 12, who speaks of a "strict observance" of the analogy prohibition (at 15). For an erroneous view see also Stree, *Deliktsfolgen und Grundgesetz* 78 ff. (1960). A correct view is taken, however, by Kielwein, "Grundgesetz und Strafrechtspflege" 8 *Annales Universitatis Saravienses, Serie Rechts-und Wirtschaftswissenschaften* 127 ff., esp. 133 f. (1960). See also *supra* notes 17, 18, and 19.

legally-defined set of fact-elements.[135] What lies beyond is the free finding of law. (It would therefore be inadmissible, for example, to punish female homosexuality *per analogiam* under § 175 of the Criminal Code, since clearly the penal provision there pertains only to the type of wrong associated with male homosexuality.) Those with misgivings over the contention that in criminal law analogy is permissible up to the limit of the type of wrong, may speak of "teleological interpretation" instead of analogy—this does not alter the facts. When Stree suggests that the opinion sometimes put forward, according to which strict prohibition of analogies aggravating punishment does not exist, has not been able to establish itself,[136] it must be answered that such a strict prohibition of analogies has never existed in criminal law—it exists exclusively in commentaries and textbooks.

So, too, the problem of *quasi-omission* crimes (*unechte Unterlassungsdelickte*) solves itself. That their punishment entails an analogy to the punishment of crimes of active commission cannot be subjected to serious doubt. In § 13 of the Draft Criminal Code of 1962, this analogy is expressed quite distinctly:

> He who omits to avert a result which falls within the set of fact-elements in a rule of criminal law shall be punished as a wrongdoer or as an accomplice if he has a legal duty to ensure that such result shall not eventuate, and if in the circumstances his conduct is equivalent to actualisation of the legal fact-elements by a positive act.

The latter part of this provision—which simply expresses what has long been the prevailing practice—concerns the so-called "equalisation problem": in order to be punishable, an omission must *correspond* in wrongfulness to the relevant delict of commission. In other words, it must be analogical. This analogy does not infringe the principle "*nullum crimen sine lege*," insofar as the act of omission can (as our preceding reflections suggest) be associated with the type of wrong envisioned by the relevant legal prescription of fact-elements. If a mother intentionally lets her child starve, then this corresponds to the type of wrong of intentional killing, and will therefore be "correspondingly punished." So, the *tertium comparationis* for the equality of evaluation referred to in § 13 of the Draft Criminal Code, is a type of wrong. When on the other hand Grünwald and Armin Kaufmann assume that the crime is conclusively defined conceptually in the statutory fact-elements, and thus see no possibility of equivalating crimes of semi-omission with those of commission (and consequently require

135. Thus a correct view is taken by Sax, "Grundsätze...," cited *supra* note 19. *Cf.* also *id.*,..."Analogieverbot"..., cited *supra* note 19, at 148 ff.

136. See Stree, *op. cit. supra* note 134, at 78, note 258.

specific statutory prescription of fact-elements for crimes of omission),[137] this is a belated flowering of the legal positivist jurisprudence of concepts in its purest form.

VII

These pages should have made clear that juristic thinking is by its nature an analogical thinking, a thinking from the "nature of things," a typological thinking. But *is* there analogy at all, is there such a concept as the "nature of things," or such a thing as a type? And is it possible to speak here of cognitions, or are we merely in the area of subjective opinion? These two questions touch the foundations of Being and cognition in general and can never be shaken off.

Thus we are brought in the end to none other than the old but constantly re-emerging controversy about universals, to the question about the relation between the universal and the particular, and also (closely connected with this) to the question about the relation between the Is and the Ought.[138]

Nominalism denies the existence of the universal. It "exists" only "*post rem*" as a concept formed by the thinking intellect, as an idea conceived of, or quite simply as a name. In consequence there is also no similarity, no typicality, no "nature of things"; these are nothing but products of the human intellect. In this sense Baratta says: "*la* natura *del fatto risiede nell' atto,*" the ***nature*** of things lies in the act; the ***nature*** of things is nothing but "the activity of the subject," which qualifies the fact normatively, by giving it again and again a new meaning.[139] According to this view, the meaning is not given but is interpreted into the fact; the normative is subjective. If this is the case, there cannot be any genuine legal cognition; what is called "legal cognition" is only a product of the "cognizer" himself. From the strictly nominalistic viewpoint there cannot be any cognition at all: the individual thing, thought of as absolute and without a universal residing in it, is "ineffable."[140]

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137. See Grünwald, "Zur gesetzlichen Regelung der unechten Unterlassungsdelikte," 70 *Zeitschrift für die gesamte Strafrechtswissenschaft* 412 ff. (1958); Armin Kaufmann, *Die Dogmatik der Unterlassungsdelikte* esp. 280 ff. (1959), *id.*, "Methodische Probleme der Gleichstellung des Unterlassens mit der Begehung," *Juristische Schulung* 173 ff. (1961). In contrast, a correct view is adopted by Androulakis, *op. cit. supra* note 97, at 172 ff., also at 245 ff. See also Henkel, "Das Methodenproblem bei den unechten Unterlassungsdelikten," 44 *Monatschrift für Kriminologie und Strafrechtsreform* 178 ff. (1961); Arthur Kaufmann and Hassemer in *Juristische Schulung* 151 ff. (1964).

138. See in greater detail, also dealing with the "nature of things" problem, Arthur Kaufmann, *Recht und Sittlichkeit*, cited *supra* note 22, at 34 ff.

139. See Baratta, "Natura del Fatto...," cited *supra* note 112, at 202, 222. *Cf.* also Ballweg, *Zu einer Lehre von der Natur der Sache* ff., (1960) 68. who calls the Ought, "utopical."

140. The view taken by Krings, article cited *supra* note 41, at 107, is therefore correct.

Opposed to nominalism is ultra-realism ("concept-realism"), according to which the universal, the essence, is substantially and really present even "*ante rem.*" But this is contradicted by our experience. In our world there is only the individual, the particular. The universal as such is not encountered: in any event it could be "*ante rem*" only in a transcendent world. So that there cannot, either, be any immediate, adequate, univocal cognition of universals, of essences, of things in themselves, of values.

An evident solution of the problem is offered by the middle position, which may be designated as moderate realism, or equally as moderate idealism. The universal is present neither already "*ante rem*" nor only "*post rem,*" but it is "*in re,*" as the essence carried in the real individual and actualized in different entities in an analogical manner. Even so the Is and the Ought stand in an analogical relation to each other. Only by proceeding from this idea, on the basis of ontological analogicity, can we really overcome mere generic thinking ("generic metaphysics"). Nominalism cannot do so; for it dismisses the universal from the individual so that it is isolated and (albeit involuntarily) hypostatized.

If we take this thesis, this hypothesis, as fundamental, then the similarity of things does not appear as something that is merely attributed to them by the subjective observer; rather the things carry the marks of similarity primarily in themselves. This corresponds to our experience, according to which nothing exists completely in isolation for itself. The mutual referredness of entities is an ontological fact, not a mere process of thinking. Of course, similarity *as such* does not exist; it has no palpable reality as also there is no type *per se* and not "nature of things" *as such.* The "nature of things" does not so to speak occur in nature. But for all that it is not unreal. It has a relational character: it is the relation existing in actuality between the Is and the Ought, between a real-life fact-situation and a normative quality.[141] Does not the recurrently posed question as to whether the "nature of things" is only the *ultima ratio* of interpretation, and of the filling of gaps,[142] or a genuine source of law here turn out to be wrongly posed?[143] The "nature of things" is neither a mere means for complementation of laws nor a source of law like legislation, but a kind of "catalyst" which is necessary in every act of law-making and of law-finding, in order that the idea of

141. On the relational character of the "nature of things" see above all Stratenwerth, *op. cit. supra* note 111, at 24 ff. *Cf.* further, Wieacker, *op. cit. supra* note 27, at 14; Weischedel, *op. cit. supra* note 27, at 6 ff.; Rinck, "Gleicheitssatz, Willkürverbot und Natur der Sache," *Juristenzeitung* 521 ff., 523 (1963). See also Radbruch, *op. cit. supra* note 4, at 13. This aspect has been hinted at by Bobbio, "Über den Begriff der 'Natur der Sache'," 44 *Archiv für Rechts-und Sozialphilosophie* 320 f. (1958).

142. See Radbruch, *op. cit. supra* note 4, at 15. See also over forty years ago Gutzwiller, "Zur Lehre von der Natur der Sache" in *Festgabe der Juristischen Fakulät der Universität Freiburg (Schweiz) zur 59. Jahresversammlung des Schweizerischen Juristenvereins* 282 ff., esp. 297 ff. (1924); see also Esser, *op. cit. supra* note 1, at 103.

143. See Maihofer, article cited *supra* note 5, at 172. *Cf.* Bobbio, article cited *supra* note 141, at 314 ff.; Henkel, *op. cit. supra* note 105, at 392; Larenz, article cited *supra* note 2, at 351. *Cf.* Ernst Jünger, *op. cit. supra* note 124, at 79, 126, 128.

law (or the posited norm) may be brought into connection ("correspondence") with the fact-situations of life, and the Is into connection with the Ought.

If the universal is actualized analogically in individual entities, and value in single fact-situations of life, then argumentation from the "nature of things" involves not merely positing by the cognizing subject, but a real cognition. This is not by any means to deny that an "intuitive" (and therefore a creative) factor plays a role here; but it is not a *mere* intuition.[144] Of course, conclusions drawn from the "nature of things," from analogy inferences, never yield mathematical certainty, but always only probabilities. Yet to whom does this say anything new? Exact legal cognition, exact calculability of law has never existed, and never will exist.[145] This must always remain a utopia. Probability is the large area in which we, as men, move in actual fact. If we wanted to wait always for certainties, our life would stand still.

Thinking from the "nature of things," analogical, typological thinking, is not (formal-) logical thinking. But it is not unlogical, unrigorous, confused thinking either; it does not involve us in circularities.[146] It is pre-logical thinking. From the viewpoint of logic, the conclusion from the "nature of things," the analogy inference, is a pre-judgment (*Vor-urteil*). Yet without pre-judgments there are no logical judgments.[147] All logical thinking is preceded by a thinking concerned with essences.[148]

For thinking from the "nature of things" the saying of Heidegger is apt:

In this area there can be no proofs but many signposts to wisdom.[149]

Translated by *Ilmar Tammelo, Lyndall L. Tammelo, Anthony R. Blackshield,* and *Albert S. Foulkes.*

144. See Radbruch, *op. cit. supra* note 4, at 14. See also *ibid.* 34 f. (*cf. contra id., op. cit. supra* note 40, at 99). See further Larenz, *op. cit. supra* note 2, at 351. *Cf.* Jünger, *op. cit. supra* note 2, at 351. *Cf.* Jünger, *op. cit. supra* note 124, at 79, 126, 128.

145. A correct view is taken by Sax, article cited *supra* note 19, at 997 f.; Larenz, article cited *supra* note 2, at 275. See also Engisch, *Wahrheit und Richtigkeit im juristischen Denken* (1963); Söhngen, *op. cit. supra* note 45, at 117 f.

146. See Topitsch, "Sachgehalte und Normsetzungen," 44 *Archiv für Rechts-und Sozialphilosophie* 189 ff., esp. 194 ff. (1959).

147. See on this point above all Gadamer, *op. cit. supra* note 75, at 261 ff

148. Radbruch once said: "The overestimation on the logical element in legal method distinguishes accidental lawyers from born lawyers." See his *Der Handlungsbegriff in seiner Bedeutung für das Strafrechts-system* 18 (1904).

149. See Heidegger, *op. cit. supra* note 43, at 10.