Leopoldo García Ruiz

On the Concept of Law and Its Place in the Legal-Philosophical Research*

I. Approaching the question

Legal scientists do not need to resort to philosophical argumentation in order to describe the meaning and features of a particular contract, a given statute or judicial decision, or a constitution (or a whole legal system, for that matter). However, when it comes to say *what* is law itself, when it comes to find out the reason *why* law is present in our lives, things change a little bit. For whatever "law" means is neither a legal nor a scientific question, but a philosophical one. In fact, the main task of legal philosophy is precisely that of dealing with a global understanding of legal phenomena, and ultimately of adopting a concept of law[1]. Some other legal-philosophical questions can be more or less dispensed with. This one is not.

But, alas, the concept of law is an elusive, controversial one. And legal-philosophical conceptions in the past, however thoughtful and well-constructed, often have turned out to be too predetermined, too one-sided to be true[2]. In the words of Lon Fuller:

> "On the one hand, there are competent scholars who seem to deny the very existence of problems of institutional design. Their program seems to be a maximum exploration of governmental power – without any inquiry to its moral sources – for whatever ends seem worthy at a given time. On the other hand there are those who (...) resist the suggestion that the solution of these problems requires anything like an economic calculation or an application of the principle of marginal utility. From this entrenched position they are likely to regard those who disagree with them, not merely as being mistaken, but as being unprincipled an immoral."[3]

Indeed, some may have identified "law" with "just law" in the past, thus downplaying the formal aspects of it. Others have postulated law as a set of commands coming from a sovereign, or a set of precepts more or less logically interconnected, but skipping any reference to pretensions of justice historically present in the mind of every lawmaker. Still, others have seen law as a mere fact, leaving behind any consideration about its enforcement; etc.

* The origins of this paper trace back to a series of interchanges with fellow members of my former Department of Legal Philosophy at Navarre, followed by a couple of researching periods at Harvard Law School (spring of 1998, and year 2000–01). Its closer inspiration comes from a rethinking of several topics already present in my book *Derecho, intereses y civilización* (2002). In both cases my intellectual debt with Pedro Serna, now Jurisprudence Professor at the University of A Coruña, is the most apparent. I also want to thank here the "Fundación Séneca – Centro de Coordinación de la Investigación" and the Provost's Office at the UCAM in Murcia (Spain), whose financial support has been instrumental in order to complete this study.

1 *Ultimately*, but not *only*: there is of course a vast number of areas in legal philosophy, apart from this one. However, it is also true that, sooner or later, a legal thinker will necessarily adopt (or adhere to) some conception about law's nature. In this respect, Alexy has recently reminded that the main task of legal philosophy is precisely the "reasoning about the nature of law". See Alexy (2003), 64.

2 As Serna points out, these conceptions should often be regarded as false not so much for what they affirm, but rather for what they omit. See Serna (2002), 325.

3 Fuller (1978), 181.

It is true that legal theories have progressively become much more sophisticated in this respect. And so it would very be interesting to test how contemporary theories, in their aim to avoid this one-sidedness, have managed to keep a balance between their own inner consistency and their respective intellectual heritage[4]. As the reader will understand, I cannot give an in-depth appraisal of those conceptions here, and it would be pretentious (not to say stupid) on my part to dismiss them in a few words. Needless to say, I don't have myself any ready-made solution for the lasting controversy about the nature of law, either. But once I have plunged into this thorny topic, I will try and sketch my own views on the subject. Or to be more precise, my views on how (and at which stage of the legal-philosophical discourse) should the concept of law be acquired.

To my mind, perhaps the most sensible way to avoid falling into partial, unreal concepts of law may consist in starting not by establishing an *a priori* definition of law, but by giving a description (the fullest possible one) and a subsequent explanation (however limited may be) of law as we experience it in our everyday lives[5]. In other words: to describe and to explain *law as a social practice*[6]. Only then we will be able to confront deeper legal-philosophical issues.

This effort to incorporate right from the start certain data of our daily experience into our research comes availed by the multiplicity of uses that words like "law", "legal", "right"... (and their correlatives) receive in common language. Such a plurality of expressions should prevent us from trying to comprise the meaning of law into a single verbal expression[7]. Perhaps it would be wiser for us legal philosophers to see law in a broader perspective, as a complex human creation developing in time; a multifaceted entity that cannot properly be understood outside the context of social life and of culture.

To be sure, law is a "cultural reality" (and this is not so much a *definition* as an *statement* about law – one among many possible others). And "cultural realities" (that is, man-made objects, institutions, procedures, activities, etc.) when analyzed *in vacuo*, always lead to abstract, lifeless, ultimately false conclusions. By contrast, it is when we consider those entities within the horizon defined by the whole universe of human creations that we begin to grasp them fully. That is why, eventually, all the conducts, uses, and linguistic expressions which make up the realm of law are best perceptible when taken as a whole (that is, when we recognize that they are relative *to each other*). It is then that we realize how they are more or less consciously designed

4 A powerful study of this kind is Orrego, *H.L.A. Hart. Abogado del positivismo jurídico* (1997), where both Hart's work and his ambiguous relation to the positivist tradition before him are explored. A "soft" legal positivism has recently tried to refine Hart's position in many ways, specially as to the relation between law and morality (e.g., W. Waluchow, 1994). However, this re-rebirthing of positivism is not free from some old and new inconsistencies (cf. the debate between Villa and Serna in *Persona y Derecho* (2000), 33–97 and 99–146). For a balanced critique of natural-law theories that hastily identify "law" and "just law", thus disregarding the historical and institutional side of legal phenomena, see Serna (1997), at 306–313.

5 In this I am following Sergio Cotta's advice in his work *Il diritto nell'esistenza* (Cotta, 1987, at 21). My aim in so doing is to depart from those theories that settle a definition of their object of study at the beginning of their own discourse, thus narrowing their field of exploration in such a way that they become unable to verify if they have left something important out of the picture – for, most probably, that verification could only take place by falling into sheer contradiction with their own initial premises.

6 I borrow the expression from Francesco Viola's book *Il diritto comme prattica sociale* (1990).

7 In this regard, it is important to recognize that the concept of "law" should *not* be regarded as a judicative one. For this question, cf. Serna (2002), 326.

to fulfill some goals, and that those goals are linked to some needs and aspirations which pertain to human existence considered as such[8].

Three steps, then: description, explanation, and enquiry into the meaning of those previous activities in the context of human existence. Now, if we follow that path, it goes without saying that the concept of law cannot be found at the beginning, but only at the end of the legal-philosophical discourse[9].

II. The description and explanation of law as a social practice

But what does it mean to "broaden the field of experience" in our description of the legal phenomena? Above all, it means to keep ourselves away from equating "the law" to "a set of laws"[10]. Although this looks like a commonplace today, the fact is that contemporary legal philosophy seems reluctant to put up with the utmost consequences of this differentiation. Modernity still looms large on us, in many ways. And legal modernity introduced the ideal of law, not just as an order, but as a formal, wholly "rational" system, in the style of theoretical sciences. In this respect, both 19th century legalism and conceptualism were instrumental in spreading a strongly formalistic approach to law, in civil-law as well as in common-law countries[11]. The anti-formalist revolt that came along in the first part of the 20th century both in law and social sciences is also too well-known to be retold here[12]. Leaving aside any other consideration about the merits and flaws of those legal thinkers, my main interest here lies in the unashamed finalistic shift they gave to their reflections about law[13]. They called for a return to experience as a source of verification for legal science, and a closer attention to the purposes and consequences of law in its social milieu.

Certainly, a thorough legal-scientific analysis of precepts, institutions and concepts is both necessary and fruitful. But a theoretical approach about law can always go further. Legal philosophers are compelled to wonder *why* the elements that constitute the universe of law here and know are precisely what they are. Even if we must pay a very close attention to actually given *legal systems* (that is, to the different forms of law that govern political societies, and specially to those of our own time), at a certain point our focus will have to shift from the current set of precepts to the social

8 Cf. *ibid.*, 328; Cotta (1987), 22–23.

9 Cf. Serna (1997), 279–280.

10 Philologically speaking, this distinction becomes evident in languages like German, French, Spanish, etc.

11 A deeper study of this topic in García Ruiz (2003), 391–394. Another consequence of the modern legal mentality would be to consider legislation and precedent respectively as the main source of law in civil-law and common-law systems. In the long run, this has brought about a widespread perception of law as something conceptually dissociated from material patterns of justice. Cf. here Serna (2002), 330 *in fine*.

12 The classic story of this movement is White, *Social Thought in America. The Revolt Against Formalism* (1961). From then onwards, the mainstream among legal historians holds that jurisprudence has had a "pendulum-like" quality as to what the place of form and logic in the processes of lawmaking and adjudication should be. More recently, N. Duxbury has made a open stand against this view (see Duxbury, 1995, chaps. 1–2). Of course, both positions have gone through middle terms and reinterpretations along the years. There is an schematic but very balanced account of the whole "formalism vs. instrumentalism" explanation of American jurisprudence in López Hernández (2001), 267–299.

13 For a summarial approach to this revolt and its leading figures on both sides of the Atlantic (Jhering, Heck, Gény, Holmes, Cardozo, etc.) cf. García Ruiz (2002), 18–25, and the quotes therein. See also Larenz (2001), 57–90; Belleau (1997), 379–424; and Schwartz (1989), *passim*.

order and the *human relations and processes* shaped (or generated by) those precepts, and then to the *actual human goals and ideals* affect and are affected by them. *And then* we should go *back to the precepts* again, for at that stage of our research we will necessarily see those precepts under a different light[14].

In this line, one of the most comprehensive conceptions of law I know of was given in his day by Roscoe Pound (1870–1964), the Harvard law professor and leading proponent of "sociological jurisprudence". Even though I don't share some of the premises and conclusions present in his theory[15], I deem his characterization of law to be surprisingly balanced and worth of revaluation.

Pound classifies the answers historically given to the question about the nature of law in three main groups[16]: law as an *order*; law as a body of authoritative *grounds to determination* of controversies; and law as a *process*. To Pound's mind, *all three meanings*, far from excluding one another, *are complementary*, for none of them would be capable of describing fully the complex social task that law carries out in society.

A) Law as order

First of all, the term "law" would make reference to the legal order, that is, "the regime of adjusting relations and ordering conduct by the systematic and orderly application of the force of a politically organized society"[17]. "Law" in this sense stems from (and is maintained by) the judicial, administrative and legislative action. Therefore, it must not be considered only as a state or condition but as a dynamic reality as well[18]. In Pound's view, both the body of guides to determination and the processes by which those guides are applied help out to create and to maintain an specifically legal order within which a society is able to adjust individual conducts inasmuch as they affect the economic or social order, and in general, the activity of the rest of the members of that particular society[19]. This regime, he adds, involves trusting men with wide powers to direct and eventually judge their fellow men's conduct in everyday relations[20].

14 This poses the question of the hermeneutic circle present in philosophical discourses, which will be dealt with in the third part of this article.

15 Pound conceives law as an specialized phase of social control, whose proper task would be the protection of human interests, and, ultimately, the fostering of civilization. See García Ruiz (2002), 102–115, and chaps. III–IV, *passim*. His insistence on social control as the unifying factor of the three senses of law seems specially unfortunate to me, if only because does not give an specific note of law as distinct from other normative orders which control human conduct, protect human interests, and foster civilization as well. However, I do think that Pound's threefold characterization can still be very useful even if one starts from a different set of premises (as it is the case here). The sociological point of view, it goes without saying, is not the only possible way to hold together the different elements that make up the social practice we call "law". As for the rest of Pound's theory, I refer the reader to my critical assessment in *ibid.*, 115–119, and chap. V, *passim*.

16 Cf. Pound (1959), II, 3–96.

17 Pound (1959), II, 104–105, and Id. (1997), 40. Pound explains these three meanings in what he considers to be its logical order. Chronologically speaking, first men would have experienced law as a process of administering justice; and only then as a set of abiding guides for conduct or an specific order within society. Cf. Id. (1967), 153.

18 Cf. *ibid.*, 156.

19 Cf. Pound (1959), II, at 5.

20 Cf. Id (1932), 1–2. Unsurprisingly, both the normative and the coercive qualities present in every legal order can be easily detected here, for they are to be counted on in any description and explanation of the legal order.

B) Law as a body of authoritative grounds to determination of controversies

In a second sense, Pound identifies "law" with what he calls "a body of authoritative materials or of grounds" to determination and resolution of controversies[21]. This set of patterns which obtain in a given politically organized society guide the activity of judges and other legal officials while they conduct the judicial and administrative processes (third sense). It is thus that they maintain the legal order within that society (first sense).

Far from being a mere aggregate of laws, "law" in this sense would be an articulated, organic conception, made up by three elements: a set of precepts, developed and applied by an authoritative technique in the light of some received ideals.

The precept element

Pound includes under the label of "precepts" four heterogeneous types of legal materials: rules, principles, legal conceptions and standards[22]. They conform a catalogue which enable us to see how normative systems and legal science are more intertwined than is commonly supposed (in civil-law countries, at least).

Legal rules, the earliest type of law and the work of power, provide a definite detailed consequence for a definite detailed state or situation. When experience shows the impossibility of setting a precise rule for every situation of fact, *legal principles* appear. Usually shaped by teachers or lawyers, these authoritative starting points for reasoning enable jurists and legal officials to organize the experience acquired in their study, interpretation and application of rules. In later stages, two elements make their appearance, usually embedded either in principles or in the text of rules which establish them as authoritative[23]. *Legal standards* (like "due care", "fair conduct", etc.), are measures of conduct prescribed by law from which people depart at the peril of finding themselves liable, or their actions invalid. They are to be applied according to the circumstances of each case. Finally, *legal conceptions*, usually developed by scholars, are generalized categories (e.g. 'trust', 'sale', 'bailment'...) into which particular situations of fact are put, whereupon certain rules, principles and standards become applicable[24].

The technical element

As legal systems mature, they start to develop a certain set of traditions or mental habits as to how interpret and apply the precepts. Once this technique element settles in, Pound says, it become no less authoritative and no less part of the law than the precepts themselves, for it abides every member of the legal profession in that particular time and place. The constant presence of this element throughout history

21 Cf. Id. (1997), 40.

22 Pound sketched this classification for the first time in *An Introduction to the Philosophy of Law* (1922), and refined it throughout his life. His definitive statement on this matter, in Id. (1959), II, 124–128.

23 "Clearly, the prescription to comply with a given standard is in itself a legal rule, whereas a standard is a model of conduct practiced in social life" (Pattaro 1994, 181). Unsurprisingly, Pound always speaks of *rules* and *principles* as legal precepts, on one hand, and of *legal precepts defining* (or establishing) standards and conceptions, on the other. This very way of referring to the latter two categories show that their normativity must be regarded as indirect, in contrast to that of rules and principles. It was Pedro Serna who draw my attention to this distinction (see Serna 1993, 35–36).

24 Cf. Pound (1997), 41 ff.; (1994), 43 ff.; (1959), II, 124 ff.

would imply, among other things, that a mechanical handling of precepts by legal officials is nothing but an illusion[25]. Indeed, he adds, it this "art of the lawyer's craft" that serves to distinguish from each other the two great traditions of law in the modern, Western world: civil law and common law[26].

The ideal element

As a final component of law in its second sense, Pound speaks of a set of authoritative, historically given ideals which act as the background for the other two elements referred above. Not that *every* mental picture of the end of a precept must be considered as a *legal* ideal, and therefore a part of the law. But as it happens, some basic images of what precepts and technique should be *do* play a controlling part in legislative, adjudicative, and administrative processes. When that is the case, Pound says, and *inasmuch as they do play that part*, those ideals are as authoritative as the precepts and the technique effectively governed by them[27].

Sometimes the interaction of precepts and technique looks all-sufficient to solve a case, so the role of the legal ideals at stake passes more or less unnoticed. But this element becomes both apparent and crucial when new cases arise in which is necessary to choose from among equally authoritative starting points for legal reasoning.

To acknowledge the role played by ideals must not be seen as a hindrance to certainty. On the contrary, that open recognition should be of great help in order to build up a true, realistic certainty on legal matters, whereas ignoring them would only lead to maintain an illusory confidence. Therefore, Pound says, theories that exclude those dimensions from the juridical realm are just self-deceiving: in the end, their determination to offer a "scientific" explanation about law is an ideal plan as well, and only serves to harm people's trust in legal institutions[28].

C) Law as process

To Pound's mind, there is a third main sense that can be applied to the term "law", namely, the activity, process, set of procedures, etc. (both judicial and administrative) that maintains the legal order (1st sense) in society[29]. It is through the legal process

25 For his early critique of the late 19th-century model of formalistic legal adjudication, cf. Pound (1908), 605–623.

26 See this explanation, i.e., Id. (1997), 42–43. Pound speaks there of the analogical mode of reasoning attached to the civil law tradition of handling precepts, in contrast to the technique of looking to judicial precedents, so cherished in common-law countries.

27 Cf. Id. (1958), 2–6 & ff.; (1959), II, 116 ff. These ideals will often be traditionally received; i.e., ideals transmitted through the legal profession as to what the social order or the purpose of some precept or policy are, etc. Other times, they may be convictions that, after being assumed in the course of legal or jurisprudential research, end up determining the action of the courts or the legislatures. Needless to say, legal scholars, lawyers, social groups, etc. may lobby to see some values infused into legal practice. But they should not be considered as *legal* ideals *until* they are effectively adopted. On the other hand, it is a fact that these ideals may and do change in time and in space. In fact, the Harvard professor suggests that those ideals are sometimes key to explain transitions from one age of legal history to another (something which is apparent throughout *Interpretations of Legal History* –Pound, 1967). Cf. also Id. (1923), 661.

28 Cf. Id., (1958), 15 ff.; (1923), 654–656, 660–661, 814. At bottom – just like some natural-law schools of the Modern Age –, legal theorists like Bentham, Austin or Kelsen would have schemed an *ideal* plan to explain law and its adjudication. The logically interconnected body of rules they speak about is not a pure fact at all; it is an ideal: an image (their own image) of law as it *should be*. Cf. Id. (1958), at 15.

29 Cf. Id. (1959), II, 123–124; (1944), 51–52.

that precepts are shaped and effectively applied, techniques improve, and ideals are molded (2nd sense).

This sense of the term "law" – traceable back to the ancient Roman tradition – was strongly emphasized in the writings of Holmes and Cardozo. Pound basically shared their viewpoint, but warned about the risk of focusing too much on this sense of law the way American legal realists did afterwards, because he saw it wholly and necessarily compatible with the other two[30].

Beyond Pound's succinct statements about this third meaning of law as process, one can see how decisive may it become in order to stress the dynamic dimension of legal phenomena. To be sure, law is not a normative, institutional order *only* (and certainly is not a static one). Nor is it a heavenly-sent body of precepts, techniques, and ideals, to be mechanically applied whenever the occasion arrives. *Law is itself an activity as well*, a whole set of procedures without which the above-referred order and materials would never come to existence, nor develop in time. Both law as order and as a set of guides are the fruit of human actions and decisions that we have ended up calling "adjudication", "legislation", "administration", "contract", "mediation", etc., as Lon Fuller used to explain[31].

D) An appraisal of Pound's conception of law

To my view, a conception like Pound's opens the door to a rich, realistic description and explanation of legal phenomena as they actually take place, so that the two first steps of legal-philosophical research as proposed above may effectively be taken by legal theorists[32]. Obviously, Pound's formulation is far from being perfect[33]. But even so it is still a fresh, quite comprehensive approach to law, which has proved to be seminal for others[34]. On top of that, I think it is strikingly fitting for contemporary legal science and philosophy.

30 Cf. *ibid.*, 52. American legal realists focused only in this third sense of law, putting the other two aside. Somehow, they saw themselves as the true heirs of Oliver W. Holmes (and his – lately quoted *ad nauseam* – aphorism on law as "the prophecies of what the courts will do, and nothing more pretentious"), in their recognizing of legal status to whatever legal officials decide and, more generally, to any official control that actually takes place in an organized political society (In the words of Llewellyn (1991, 3): "What these officials do about disputes is… the law itself"). Obviously, these rough statements cannot do justice to a multifarious group of judges, professors and social scientists who never saw themselves as a proper school of thought, but only as scholars with a common (empiricist and/or psychologist) approach to the study of legal phenomena. Otherwise, there is an abundant bibliography on this movement and its lasting impact in American legal culture. A good selection of sources (and a guide to the rest of them) is Fisher-Horwitz-Reed (1993), *passim*. On the ambiguous, strained relationship between Pound and the Realist generation, see Hull (1997); García Ruiz (2002), 37–43, 57–67, 271–290; and Sánchez Díaz, (2002), chapter I, 1.2.

31 There are masterly studies by Fuller on these various legal processes that were posthumously collected in Fuller (1981), 86 ff. A description of law as "activity" in Ollero (1996), 474.

32 Pound indeed followed this advice: a good deal of his writings are devoted to describe and explain a whole gamut of legal institutions and processes. Further details in *A Bibliography of the Writings of Roscoe Pound*, two volumes edited by F.C. Setaro (1942) and G. Strait (1960), and published by Harvard University Press.

33 For instance, some may rightly regard his consideration of legal technique and ideals as *parts* of law as an exaggerated one. True, those elements fulfill an indispensable mission in bringing law to life. But if legal techniques are authoritative it is probably because there are some rules or principles (explicit or not) that prescribe their use. As for ideals, they can also be redirected to the precept element in many ways (we find them expressed in rules, principles, standards, and legal conceptions; in legislation as well as in adjudication, etc.).

34 Similarly, Alexy has proposed in our days a study of the legal system after a model that takes into account not only rules and principles, but also the procedural dimension of law. Such a model would

Firstly, such a characterization urges legal theorists (to use another Pound's phrase) to confront "the law in action" to "the law in the books"[35]. This dynamic perspective is a powerful means to overcome the reduction of law to a body of rules, for it leads to admit the actual presence of values and ideals in the development of legal institutions and precepts[36]. It should also help us to understand law in a non-essentialist way[37]. Rather, law may be seen as a set of actions that produce certain visible consequences in society; in short, as a social, human practice. This angle enable us to notice how legal precepts are actually in a permanent state of change – and not only because or promulgation and derogation. The precise meaning of that "set of authoritative materials" that Pound speaks about is being constantly re-determined and updated with each act of interpretation and adjudication[38].

Secondly, it is apparent that lawmakers operate with a series of goals or values of ethical and political nature, together with a variety of technical and factual data of diverse origin[39]. Besides, every legal order needs some measure of non-forced, spontaneous support from those who are abide by it, and therefore, always purports to be valuable. The content and structure of legal systems, and the activity of legal officials are conditioned in a variety of ways by this fact. The conclusion is that both a coherent description and explanation of law require to take values into account[40]. Such acknowledgement has become urgent now that constitutional rules and principles have acquired a clearly normative status, and the highest possible one, thus bringing about a considerable transformation in our legal systems. So much so that the respect for the principles and values infused in those Constitutions is considered today as the touchstone to judge the appropriateness of political and legal activities[41].

III. From analysis to comprehension: a note on legal hermeneutics and the study of law in context

Characterizations like Pound's may render a fairly accurate picture of what law is about in a given historical milieu. But such a concept will still remain within the limits of a functional perspective. A philosophically-oriented approach is always able to go

allow practical reason to play the highest possible role in our reflections about law, and so it would be preferable to any other. Cf. Alexy (1997), 161, 172–174.

35 Cf. Pound (1910), 12–36.

36 I.e., the case of the infusion of morality into law through the use of legal standards in a sober – and masterly – exercise of analysis by Pattaro (1994, 177–185).

37 To be sure, law may be seen indeed as an artifact, in the sense of a *cultural creation*, but not as "a thing" (i.e. a rock) or "a hand-made product" (a chair, for instance). To put it in Aristotelian terms, law belongs to the realm of *poiesis*, and not of *praxis*.

38 Some draw important consequences of this, namely, that legal positivity should be seen more as a *result* of a process than as a starting point; and a *provisional* one, at that. Cf. Ollero (1996), 474–494; Zaccaria (1989), 344–347; and Serna (2002), 315.

39 Pound himself understood that an ideal dimension affects not only the "law in its second sense" but the entire legal order – cf. Pound (1958), 3; and García Ruiz (2002), 91, ch. IV *passim*. Such a conviction could be regarded as matter-of-fact today, but it was not so only a few decades ago.

40 Value references are also needed (and more so) to find out how legal officials are to behave in the fulfilling of their task. However, this question does not pertain to an inquiry on the concept of law, but to a theory of justice instead.

41 Controls of constitutionality currently established in our legal systems sometimes entail a judgment, not only on the formal aspects of precepts, but on their content as well, inasmuch as they may contradict the literality of a constitutional clause, or violate the core content of a fundamental right. Cf. in this respect V. Villa (2002), 65–68; and Serna (2002), 132–135.

beyond, to try and discern not only what law consists of, but what can it be its meaning in our lives. Note that, once again, the question here should not be directly "*What* is law?", but rather "*Why* (is there) law?"

Description and explanation have lead us to this point. They constitute an indispensable, "previous" work, but they are not the final word in the exploration of the juridical realm. Even if functional analysis of law is necessary, it just cannot substitute for philosophical understanding. If that were so, the question "*how* is law?" would be the last possible one in legal philosophy. But that cannot be the case when the object of our inquiry is an artifact, a human creation. Human creations remain incomprehensible until we know about their reason of being, that is, the intended purpose(s) they were designed for[42]. Therefore, it is not only legitimate, but necessary to ask ourselves about the *what for* and the *why* of legal matters. And that implies a study of law in the context of social life, and eventually in the context of human existence as such[43]. We will notice then that legal texts and concepts, legal processes and institutions are human devices, more or less consciously destined to perform some task(s), and to serve some goal(s). And, willy-nilly, those goals will themselves be directed to obtain or to maintain some goods deemed to be relevant for human existence.

Now let us pause to consider something we have taken for granted until this point. Expressions like "previous work", "steps", "descriptive" or "explanatory moment", and so forth, have been repeatedly mentioned here. But all in all, there are powerful reasons to put those words in inverted commas. On one hand, it has been said that mere analysis is not enough: we need a global comprehension in order to grasp what the law is aimed at. But on the other hand, it has also been said that the way to gain access to that understanding is the description of legal phenomena. All of which seems to demand that the object whose functions we are going to study is previously delimited. Is not that a contradiction? Well, there is a paradox here, to be sure, but not a contradiction. As contemporary hermeneutics has showed, some peculiar circularity is attached to any philosophical argumentation, and to human understanding in general[44]. This should not be a disqualification. In order to grasp this fully, it is enough to consider that, methodologically speaking, the rough, general image of law we presuppose is the prejudice from which all human understanding must start. That image (which, *strictu sensu*, is not a concept) can, and most probably will go through several alterations during the process of inquiry, and therefore its validity will only be temporary. To our present purpose, all this means that description, analysis, and

42 Cf. Orrego (1997), 141–162, specially at 142.

43 Cf. Cotta (1987), 13–28, specially at 21–23; Ballesteros (1992), 90–102; D'Agostino (1996), 5–8.

44 Arthur Kaufmann has powerfully showed how the core of virtually *all* legal-philosophical theories fall into some sort of circularity. Instead of embracing a barren nihilism, Kaufmann concludes that there must be sound reasons to suppose that "a circular reasoning is not simply – not in every circumstance, at least – a by-product that a careful way of thinking could avoid. Rather, [circularity] somehow belongs to the very nature of our thought". Men would be able to avoid this circularity in their argumentations if they could use terms that were explicit and absolutely defined. But that in turn implies that the terms used for these definitions are of the same nature; and, secondly, that nobody may put forward guesswork or conjectures whose truthfulness has not been proven. This entails that the proof of veracity has to lean only on arguments that show themselves previously as being true. For the German theorist, it is obvious that this method would lead to an unending appealing to highest grounds or *petitio principii*.– and so it proves itself to be unfeasible. Cfr. Kaufmann (1993), 23 and *passim*. Alexy too mentions this hermeneutical circularity present in legal-philosophical argumentation, and sees it as something not only unavoidable, but even beneficial when practiced under close scrutiny: that sort of "circularity (...) is not vicious but virtuous in character"(Alexy, 2003, 65–66).

existential inquiry about law will feedback each other time and again (just as legal order, materials and processes do)... And even if circularity is unavoidable here, we can still maintain those steps in inverted commas, if only for the sake of logical argumentation. We cannot have a complete control of our previous background when we tackle the nature of law, but we can tell our prejudices from our judgments while this process is taking place, and so give them a purposive direction. After all, that is more important than permanently trying to trace back to the roots of our understanding (something that is always doomed to failure). In sum, we can still say without contradict ourselves that, strictly speaking, *the concept of law should be the most ripe fruit of legal philosophy, and not its first result.*

There is of course much more to say about the nature of law than these schematic considerations of mine. In fact, I have just tried to plot a route to be followed, and then had to stop at the threshold of its first anthropological implications. Hopefully, there shall be further occasions, and many other people who will put to that work. In this sense, legal philosophy cannot be a one-man task. We must have confidence in our ability to clarify legal problems together: truth (truth about law included) is neither simplistic, nor eclectic, but symphonic.

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Leopoldo García Ruiz, Associate Professor of Legal Theory, Universidad Católica San Antonio (UCAM), Av. de los Jerónimos s/n, 30107 Guadalupe (Murcia)