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The Nature of Legal Philosophy*

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Abstract. Philosophy is general and systematic reflection about what there is, what ought to be done or is good, and how knowledge about both is possible. Legal philosophy raises these questions with respect to the law. In so doing, legal philosophy is engaged in reasoning about the nature of law. The arguments addressed to the question of the nature of law revolve around three problems. The first problem addresses the question: In what kinds of entities does the law consist, and how are these entities connected such that they form the overarching entity we call "law"? The answer is that law consists of norms as meaning contents which form a normative system. The second problem addresses the question of how norms as meaning contents are connected with the real world. This connection can be grasped by means of the concepts of authoritative issuance and social efficacy. The latter includes the concept of coercion or force. The third problem addresses the correctness or legitimacy of law, and, by this, the relationship between law and morality. To ask about the nature of law is to ask about necessary relations between the concepts of normative meaning, authoritative issuance as well as social efficacy, and correctness of content.

The question of the nature of legal philosophy connects two problems. The first concerns the general nature of philosophy, the second, the special character of that part of philosophy we call "legal philosophy."

I. The Nature of Philosophy

There are so many schools, methods, styles, subjects, and ideals of philosophy that it is difficult to explain its nature. A general explanation of the nature of philosophy would presuppose that all or at least most of the very different conceptions of philosophy which have appeared in the history of the field have something in common that can be conceived of as the focal meaning or the concept of philosophy.

Perhaps the most general feature of the concept of philosophy seems to be reflexivity. Philosophy is reflective because it is reasoning about reasoning. Philosophy is reasoning about reasoning, for its subject, the human

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practice of conceiving, on the one hand, of the world, oneself, and other minds, and, on the other, of human action, is essentially determined by reasons.

Having a conception of the world, oneself, and other minds is to have a conception about what there is. Action, on the other hand, presupposes a conception about what ought to be done or is good. Reasoning about the general question of what there is defines metaphysics *qua* ontology; reasoning about the question of what ought to be done or is good defines ethics. Human practice is not only based—for the most part implicitly—on answers to both questions, it also includes—again, for the most part implicitly—numerous answers to a third question: The question of how to justify our beliefs on what there is and on what ought to be done or is good. This question defines epistemology. Philosophy attempts to make explicit the ontological, ethical, and epistemological assumptions implicit in human practice.

Explicit reflexivity is necessary but not sufficient to explain the nature of philosophy. A teacher who abhors students' chewing gum during his lecture may become reflective by asking himself what the reasons for his attitude are, but this is not enough for him to become a philosopher. Reflexivity must be associated with two other properties if it is to be seen as capturing something genuinely philosophical in nature. The reflection must be reflection about general or fundamental questions, and this reflection must be of a systematic kind. The shortest, most abstract, but nevertheless truly comprehensive definition of philosophy might therefore run as follows: Philosophy is general and systematic reflection about what there is, what ought to be done or is good, and how knowledge about both is possible.

This explanation by no means claims to exhaust its subject. Its brevity excludes this, and it may be that even a far more elaborated explanation will never be able to exhaust the nature of philosophy, for behind or between all the concepts one can use to explain its nature there may lie something which cannot be grasped conceptually, despite the fact that philosophy is a conceptual activity. Our explanation, therefore, can only attempt to provide a starting point for an answer to the question about the nature of legal philosophy. One may assume that this question has—as with legal philosophy itself—a certain autonomy, so that we need, indeed, an understanding of the general nature of philosophy only as a first step and not as a final and complete basis on which our understanding of the nature of legal philosophy rests, like a house on its foundations.

My definition of philosophy as general and systematic reflection about what there is, what ought to be done or is good, and how knowledge about both is possible, leads, notwithstanding its extremely abstract and highly tentative character, to three corollaries important for our purposes. First, reflection necessarily has a critical dimension. To reflect on what there is, what ought to be done and is good, and what we can know, is to ask for and to argue about what objectively exists, what is true or right, and what is

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justified. If one defines normativity as the ability to distinguish what is correct from what is incorrect, these questions are normative questions. Philosophy as a necessarily reflective enterprise therefore necessarily has a normative dimension. The general and systematic character of philosophical reflection leads, second, to an analytic, and third, to a synthetic or holistic dimension of philosophy. The analytic dimension is defined by the attempt to identify and to make explicit the fundamental structures of the natural and social world in which we live and the fundamental concepts and principles by means of which we can grasp both worlds. Without this analytic bite, philosophy could be neither general nor systematic in a substantial sense.

In legal philosophy, the analytic dimension concerns concepts like those of norm, "ought," person, action, sanction, and institution. The synthetic dimension is defined by the attempt to unite all of this into a coherent whole. A deeply founded and coherent picture of what there is, what ought to be done and is good, and what we can know, is the regulative idea of philosophy or, in simpler terms, its ultimate aim. This implies that philosophy is necessarily holistic. Our definition of philosophy should therefore be complemented by the following, which is implied by the definition: Philosophy is normative (or critical), analytic, and holistic (or synthetic). The three concepts of the definition (reflective, general, and systematic), and the three concepts of the corollary (normative, analytic, and holistic), are descriptions of the same things from different perspectives.

II. Pre-understanding and Arguments

Legal philosophy, as philosophy, is reflection of a general and systematic kind, and it has, exactly like philosophy in general, a normative, an analytic, and a holistic dimension. Its *differentia specifica* consists in its subject: the law. Legal philosophy is not generally directed to the questions of what there is, what ought to be done or is good, and what can be known, but to these questions with respect to the law. Raising these questions with respect to the law is to ask for the nature of law. This seems to lead naturally to the definition of legal philosophy as reasoning about the nature of law.

This, however, seems to cause a problem. It is a circularity problem, which rests on the fact that, on the one hand, legal philosophy cannot be defined without using the concept of law, whereas, on the other, it has the task *qua* reasoning about the nature of law of explaining what law is. How can legal philosophy begin to explore what law is, when it is impossible to say what legal philosophy is without knowing what law is? This circularity, however, is not vicious but virtuous in character. It is nothing other than a version of the hermeneutic circle, and it is to be resolved like all variants of this circle: by starting with the pre-understanding suggested by the established practice and elaborating it through critical and systematic reflection.

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The pre-understanding of law is not only the pre-understanding of an entity which is highly complex in itself. To this first complexity is added—as a second complexity—that the pre-understanding as such is capable of extreme variations. The scale extends from Holmes's "bad man" (Holmes 1897, 459), which defines a rather detached external point of view, to Dworkin's judge Hercules (Dworkin 1977, 105), which represents a rather idealistic internal one. Legal philosophy as an enterprise, which, at the same time, is systematic as well as critical, cannot start from just one pre-understanding. It has to consider all of them and, what is more, has to analyze the relation of all of them to all features of law.

The requirement to consider all pre-understandings which are to be found in law and legal philosophy on the one side, and all features of law on the other side, suggests the idea of something like a catalogue of all approaches and all features. But how does one compose such a list? Simply to pick up and collect each approach and each feature which appears in history or today before our eyes would, as Kant says, "not be a *rational system* but merely an aggregate haphazardly collected" (Kant 1996b, 493; trans. altered).[1] One needs no argument in order to say that this would be incompatible with the systematic and critical character of philosophy. Philosophical reflection demands a system. It is, however, much easier to say that a mere aggregate, or, as Kant sometimes puts it, a "rhapsody" (Kant 1996a, 755) is not enough, than to say how an adequate conceptual system or framework can be constructed. The best answer seems to be: not by an abstract theory of legal philosophy, but by systematic analysis of the arguments put forward in the discussion about the nature of law. No other procedure seems to fit better the general character of legal philosophy *qua* reasoning about the nature of law.

III. Three Problems

The arguments about the nature of law revolve around three problems. The first problem addresses the question: In what kind of entities does the law consist, and how are these entities connected such that they form the overarching entity we call "law"? This problem concerns the concept of a norm and a normative system. The second and the third problem are addressed to the validity of law. The second concerns its real or factual dimension. This is the area of legal positivism. Two centres are to be distinguished here. The first is determined by the concept of authoritative issuance, the second by that of social efficacy. The third problem of the nature of legal philosophy concerns the correctness or legitimacy of law. Here, the main question is the

[1] See Kant 1907, 357: "kein *Vernunftsystem*, sondern bloß (ein) aufgerafftes Aggregat sein würde."

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relationship between law and morality. To take up this question is to take up the ideal or critical dimension of law. It is this triad of problems that, taken together, defines the nucleus of the problem of the nature of law.

This tripartition claims to be complete, neutral, and systematic. It is complete when it can absorb all arguments that can be put forward for and against a thesis about the nature of law. The only proof possible for this consists in corroborating our triadic model with respect to as many critical instances as possible. The model is neutral when it adds no preferences to the weights of the arguments it absorbs. The proof is the same as in the case of completeness. It is, finally, systematic when it leads to a coherent picture of the nature of law. In this case, the proof cannot consist of anything else than an elaboration of a coherent account.

The last point can be generalized. Only by elaborating the best theory connecting answers to all three questions about the nature of law can the nature of legal philosophy become as clear as possible. It is, however, not only not the case that one can develop such a perfect theory here, but also the case that one may well be sceptical about whether such an ideal of perfection can ever be achieved. Fortunately, it is not necessary to know all, in order to know enough. In order to obtain as much as is necessary for our purposes it suffices to use the triadic model as a framework for the discussion of paradigmatic problems.

IV. Four Theses

The consideration of paradigmatic problems vis-à-vis our triadic model shall confirm four theses. This confirmation, again, implies a corroboration of the model. The first thesis says that legal philosophy is not confined to certain special problems connected with law; all problems of philosophy may arise in legal philosophy. In this respect legal philosophy substantially includes the problems of philosophy in general. One can call this the "general nature thesis." The second thesis maintains that there are specific problems of legal philosophy. They are due to the specific character of law, which results from the fact that law is necessarily authoritative or institutional as well as critical or ideal. This is the "specific character thesis." The third thesis says that there is a special relation between legal philosophy and other provinces of practical philosophy, especially those of moral and political philosophy. One can call this the "special relation thesis." A fourth thesis overarches the first three theses. That is, it does not simply join them as a fourth thesis, but expresses an idea behind them. It is the idea that legal philosophy can be successful only if it comes up to the level not only of one or two of these theses but to that of all three. This is the "comprehensive ideal" of legal philosophy.

While the triadic model of the problems of legal philosophy claims to be neutral, the four theses do not. They involve decisions with respect to the

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solution of these problems. This becomes clear when one contrasts the comprehensive ideal with something like a "restrictive maxim." A radical version of such a restrictive maxim maintains, first, that legal philosophy should never get involved in any genuinely philosophical problem, second, that legal philosophy should concentrate its efforts on the institutional or authoritative character of law, and, third, that legal philosophy should delegate critical normative questions to moral and political philosophy, which for their part should be kept, so to speak, beyond reach. The restrictive maxim mirrors a picture of legal philosophy that is fundamentally different from the picture of the field corresponding to the comprehensive ideal. Legal philosophy turns into a juridical theory of law, which is separated from general philosophy as well as from moral and political philosophy.

The choice between the comprehensive ideal and the restrictive maxim is a fundamental choice. The character of legal philosophy is determined by it much more radically than by the choice between legal positivism and non-positivism. The choice between positivism and non-positivism is a choice inside the realm of legal philosophy. The choice between the comprehensive ideal and the restrictive maxim amounts to a choice between philosophy and non-philosophy. This is the background against which our paradigmatic problems have to be considered.

V. Entities and Concepts

The answers given by Kelsen and Olivecrona in the 1930s to the classical question of what entities the law consists in present our first example. Kelsen defines "law as norm" (Kelsen 1992, 13), and norms as "meaning" (Kelsen 1992, 11, 14), and the "unique sense" of this meaning as "ought," and "ought" as a "category" (Kelsen 1992, 24). This is the language in which abstract entities are described. Kelsen insists that norms—and thus, law—can be reduced neither to physical events nor to psychical processes. They belong not to natural reality but to an "ideal reality" (Kelsen 1992, 15). Such an ideal reality, which exists in addition to the physical and the psychical world, would be a "third realm" in the sense of Frege (1967, 29). The opposite position is to be found in Karl Olivecrona, who, with an eye to Kelsen, maintains that "[t]he rules of law are a natural cause—among others—of the actions of the judges in cases of litigation as well as of the behaviour in general of people in relation to each other" (Olivecrona 1939, 16). This question—as an ontological question—is not only a question of general philosophical interest, it is also a question which must be answered in order to determine the nature of law, and it is, therefore, a genuine question of legal philosophy.

An adherent of the restrictive maxim might object that the question of the ontological status of norms is, for lawyers, as unimportant as the question of the real or only imagined existence of a mountain in Africa, identified and

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surveyed by two geographers, is for these two geographers (Carnap 1928, 35–6). The reply to this objection is that the realism problem has a different significance for geographers than the meaning problem has for lawyers. The answer to the question as to whether norms are meaning contents or natural causes determines the answer to a further question, namely, whether norms can be conceived as elements of an inferential system and, thereby, as starting points of arguments, or whether they are only elements in a causal network. In the first case, legal reasoning oriented towards correctness is possible, in the second, it would be an illusion. This shows how the self-understanding of legal reasoning and, by means of it, the self-understanding of law depends on ontological presuppositions. There are, naturally, several ways for reconstructing these presuppositions. But the mere fact that there exists the necessity of reconstructing them is enough to confirm the thesis that legal philosophy cannot do without arguments that are genuinely philosophical in character.

In any case, the concept of a norm or the "ought" is a candidate for the most abstract concept of legal philosophy. If one goes one step down from this level of abstraction, the inferential impact of the fundamental concepts of law becomes far more obvious. The distinction between rules and principles is a highly abstract question of the general theory of norms. It has, at the same time, far-reaching consequences for the theory of legal reasoning. If law contains both, then legal reasoning inevitably combines subsumption with balancing (Alexy 2003b, 433ff.). Legal reasoning is thereby essentially determined by structures that are structures of general practical reasoning. This is an important reason for not conceiving of legal reasoning as a province in its own right, separate and distinct from other provinces of reason.

All this shows that fundamental philosophical questions must be answered in order to grasp the nature of law. Reflection about the nature of law cannot succeed when separated from general philosophy.

VI. Necessary Properties

Asking for the nature of something is more than asking for interesting and important properties. Questions about the nature of law are questions about its necessary properties. The concept of necessity leads one to the heart of philosophy. The same is true with its relatives, the concepts of analyticity and the apriori. Without these concepts it is impossible to understand the meaning of questions of the type "What is the nature of φ?" Without understanding the structure of questions of this kind, one cannot understand the main question of legal philosophy: "What is the nature of law?"; and to fail to understand this question is to fail to know what legal philosophy is.

The possibility of defining the concept of nature as it appears in sentences of the form "What is the nature of φ?," namely, by means of the concept of

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necessity, allows for the substitution of the question "What is the nature of law?" by the question "What are the necessary properties of law?" This question leads, by means of the concept of necessity (and its relatives, analyticity, and the apriori), to the specific character of law. The question of what is necessary turns, when connected with the question of what is specific, into the question of what is essential. This is the area of the specific character thesis.

Two properties are essential for law: coercion or force on the one hand, and correctness or rightness on the other. The first concerns a central element of the social efficacy of law, the second expresses its ideal or critical dimension. It is the central question of legal philosophy to ask how these two concepts are related to the concept of law and, through it, to each other. All—or at least nearly all—questions of legal philosophy depend on the answer to this question.

It is highly contested whether coercion and correctness are necessarily connected with law. This dispute is attended by a meta-dispute about the question of what kind of argument can be given for and against the necessity of such connections. It is impossible to elaborate this here (Alexy 2003a, 3–16). I will therefore confine myself to some features which seem to be instructive for our question concerning the nature of legal philosophy.

Coercion is the easier case. It seems to be quite natural to argue that a system of rules or norms which in no case authorizes the use of coercion or sanction—not even in case of self-defence—is not a legal system, and this is the case owing to conceptual reasons based on the use of language. Who would apply the expression "law" to such a system of rules? Conceptual reasons of this kind, however, have little power of their own. Concepts based on the actual use of language are in need of modification once they prove not to be, as Kant says—mentioning, *inter alia*, the concepts of gold, water, and law—"adequate to the object" (Kant 1996a, 680).[2] Including coercion in the concept of law is adequate to its object, the law, because it mirrors a practical necessity necessarily connected with law. Coercion is necessary if law is to be a social practice that fulfils its basic formal functions as defined by the values of legal certainty and efficiency as well as possible. This practical necessity, which seems to correspond to a certain degree to Hart's "natural necessity" (Hart 1994, 199), is mirrored in a conceptual necessity implicit in the use of language. This shows that language, which we use to refer to social facts, is inspired by the hermeneutic principle that each human practice is to be conceived of as an attempt to carry out its functions as well as possible. Unravelling this connection between conceptual and practical necessity makes clear in what sense coercion belongs as a necessary property to the nature of law.

[2] See Kant 1904, 478: "dem Gegenstande adäquat."

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The second central property of law is its claim to correctness. This claim stands in genuine opposition to coercion or force, and it is an essential mark of law that it comprises such a difference.

The necessity of coercion, it has been shown, is based on a practical necessity defined by a means-end relation. In this respect, it has a teleological character. The necessity of the claim to correctness is a necessity resulting from the structure of legal acts and legal reasoning. It has a deontological character. To make explicit this deontological structure implicit in law is one of the most important tasks of legal philosophy.

All methods of making the implicit explicit can be applied here. One of them is the construction of performative contradictions (Alexy 2002, 35–9). An example of this is a fictitious first article of a constitution which reads as follows: "*X* is a sovereign, federal, and unjust republic." It is difficult to deny that this article is somehow absurd. The idea underlying the method of performative contradiction is to explain this absurdity as resulting from a contradiction between what is implicitly claimed in acting to frame a constitution—namely, that it is just—and what is explicitly declared—namely, that it is unjust. If this explanation is sound, and if the claim to justice, which is a special case of the broader claim to correctness,[3] is necessarily raised, then a necessary connection between law and justice is made explicit.

It is not difficult to recognize how this argument might be challenged. One simply has to deny that law necessarily raises a claim to correctness. Once this claim disappears, any contradiction between the explicit and the implicit vanishes. The declaration of injustice contained in our first article may then be interpreted as an expression of a claim to power.

This is not the place to discuss the question of whether it is possible for a system of norms to substitute the claim to correctness by a claim to power and nevertheless remain a legal system (Alexy 1998, 213–14). This is a question of legal philosophy, not a question about its nature. Here it suffices to say that the discussion about necessary deontological structures implicit in the law belongs to the very nature of legal philosophy.

VII. Law and Morality

If the thesis that law necessarily raises a claim to correctness should prove to be wrong, it would be difficult to contest the positivist's thesis of the separability of law and morality. The opposite, however, is the case if the thesis about the claim to correctness is true. The thesis would then provide a solid basis for the argument that morality is necessarily included in the law.

[3] Justice is a special case of correctness, if justice can be defined as correctness of distribution and compensation; see Alexy 1997, 105.

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The inclusion of morality in the law helps to solve problems, but it also creates problems that one might well be able to circumvent if one followed the positivist's separation thesis. The problems which the inclusion of morality can help to solve are, first, the problem of basic evaluations underlying and justifying the law, second, the problem of realizing the claim to correctness in the creation and the application of law, and third, the problem of the limits of law.

One aspect of the problem of basic evaluations has already appeared when the relation between law and coercion has been classified as a practical necessity. The concept of a practical necessity is ambiguous. A weak interpretation only refers to a means-end relation, where one treats the choice of the ends merely as a matter of fact or only as hypothetical. This is the import of Hart's concept of "natural necessity" if one understands the ends only as "some very obvious generalizations [. . .] concerning human nature and the world in which men live" (Hart 1994, 192–3). The picture begins to change, however, if the general ends of law like legal certainty and the protection of basic rights are considered as requirements of practical reason, and it changes completely if these requirements are considered as necessary elements of the law. Such a strong interpretation of the concept of practical necessity would provide an evaluative or normative basis of the law.

The second problem which the inclusion of morality promises to solve is the realization of the claim to correctness within the institutional framework of the law. An example is legal reasoning in hard cases. Once morality is conceived of as included by the law, moral reasons can and must participate in the justification of legal decisions when authoritative reasons run out. The theory of legal reasoning attempts to grasp this by conceiving of legal reasoning as a special case of general practical reasoning.

The third problem, which seems best solved by means of the inclusion of morality in the law, is that of the limits of law. If extreme injustice is not to be considered as law—at least from the point of view of a participant in the legal system—how should this be justified without recourse to moral reasons (Alexy 2002, 40–62)?

All of this, however, represents only the one side. The other side is, as already mentioned, that the inclusion of morality in the law creates serious problems. One of the main reasons for the authoritative and institutionalized structure of law is the general uncertainty of moral reasoning. Moral disputes tend to be endless. Often in social life a consensus cannot be achieved by discourse. For reasons of practical necessity an authoritative decision must, then, be substituted. This would, however, only be an argument for conceiving of moral reasoning as not belonging to law were it not possible to incorporate moral reasoning into legal reasoning without destroying the necessary authoritative elements of the latter. It is a main task of legal philosophy to consider whether or not this is possible.

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A second problem is far more serious. It is the problem of whether moral knowledge or moral justification is possible at all. If the meta-ethical theses of subjectivism, relativism, non-cognitivism, or emotivism should prove to be true, the claim to correctness would have to be interpreted in terms of something like an "error theory," as Mackie (1977, 35) has suggested. This shows that law by incorporating morality *via* the claim to correctness finds itself encumbered with the epistemological problems of moral knowledge and justification. This is not a small burden.

At the beginning of our deliberations we distinguished three main questions of philosophy: the ontological question of what there is, the ethical or practical question of what ought to be done or is good, and the epistemological question of what we can know. Our way through the fields of legal philosophy has shown that legal philosophy confronts all three kinds of questions. This already seems to be more than can be achieved by one person. But there is more. The reflective and systematic nature of legal philosophy demands that all these questions be connected in a coherent theory, which, for its part, must be as close to law as possible in order to guarantee that what it makes explicit really is the nature of law. In this way, our reflections about the nature of legal philosophy end with the exposition of an ideal.

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