For an Illusion-Free Phenomenology of Law and Ethics

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If there is one domain that is crying out for the elucidative intent and the watchword of 'back to the things themselves' of Husserlian phenomenology, it is indeed law and more broadly ethics. 'Jurists are still looking for a definition of their concept of law', observed Kant in his *Critique of Pure Reason* in 1781.[1] Things have not come very far since then. Theorists still feel that 'pursuing a definition of law is a hopeless undertaking'[2] so much so that some of them, like Michel Troper or Denys de Béchillon, no longer hesitate to proclaim that such a definition could only be purely 'stipulative' (meaning arbitrary).

True, one would have good ground to doubt at the outset that phenomenology is really able to provide the helpful insight required. Attempts by Husserl himself and by his disciples to apply phenomenology to unveil the fundamentals of law and ethics have so far proved a resounding failure, discrediting the phenomenological label in legal spheres. 'One cannot say, from a scientific standpoint, it has been written, that phenomenology has helped to shed light on matters, it is rather the contrary that has been the case.'[3] 'Phenomenology is a throwback to the period before criticism… the upshot of it is a renewal of the old ontology; it leads to long out-dated metaphysics.'[4]

I would like to show here, however, that this failure does not call into question the objectives and the principle of the phenomenological method, but that it can be ascribed to the metaphysical aberrations of phenomenologists, beginning with Husserl himself. Taking up analyses I have developed in my recent book *Cheminements philosophiques dans le monde du droit et des règles en général*,[5] I shall then outline the prospects for a phenomenology of law and ethics that does not go astray in this manner.

I – ENDEAVOURS MARRED BY METAPHYSICAL ABERRATIONS

A.

It was Husserl who opened the floodgates – the Pandora's Box – to the metaphysical outpourings that consisted in ascribing transcendent objective reality to the products of our own minds. To restore an uncontrived and authentic contact with things, as is common knowledge, he imagined a method of successive 'reductions' or purifications of the awareness we have of things, so as to eliminate any impurities that might work their way into our vision and any distortions that might deteriorate it. The first step is to turn our attention resolutely away from ideas and theories about things, to free ourselves from the hold of what we are ready to think and say about them, and to try to concentrate solely on the things themselves, or more specifically on the being of things as it presents itself to our consciousness, by

[1] '*Noch suchen die Juristen eine Definition zu ihrem Begriffe von Recht*'.
[2] M. Virally, *La pensée juridique* (Paris, LGDJ, 1960) p. 1.
[3] J. Sedlacek, 'L'œuvre de François Gény et la science du droit pure', in *Recueil d'études en l'honneur de François Gény*, tome 1 (Paris, Sirey, 1935) p. 279.
[4] J. Haesaert, *Théorie générale du droit* (Brussels, Bruylant, 1948) p. 276.
[5] Paris, Armand Colin, 2012.

bracketing – *epoché* – all the factual and historical elements concerning it. But the crucial step in the phenomenological method (apart from 'transcendental reduction' reserved to the thing consciousness itself and which need not concern us here) is 'eidetic reduction', which consists in eliminating their contingent elements, their 'factitiousness' from the things present to our consciousness so as to uncover their fundamental structure, their essence or *eidos*. For Husserl, if one looks at – if one has before one's consciousness – some thing, one is able to observe in it, beyond certain elements that come across as variable, contingent and purely individual, a certain type structure corresponding to the specific and irreducible identity of the thing in the sense that, when this structure is no longer before my consciousness, when I make it vary either really – by modifying the actual thing observed – or merely in my imagination, it is another type of thing that I feel I have before my eyes.

> If one sets any object in its form or category, and if one continuously keeps its identity in evidence throughout variations in modes of consciousness, one notices that these modes, however fluctuating they may be and however unfathomable their ultimate features, are not however haphazardly or arbitrarily variable. They always remain tied to a type structure, which is invariably the same and cannot be broken, so long as it is to be a matter of consciousness of this or that determined entity, and so long as it should be possible to maintain the conspicuousness of its identity throughout the variations in modes of consciousness.[6]

It is this type structure of things, this essence or *eidos*, that the phenomenological method invites us to apprehend and to contemplate in all its purity through this operation of eidetic reduction. The means Husserl conceived of for doing this was the process of variation and especially imaginary variation, which makes it possible to decant the essence from the various elements that things display of themselves to the consciousness: the *eidos* of the thing observed will be made up of all the elements remaining unchanged through all the variations to which I subject the thing in my imagination, that is, the elements without whose presence I am no longer conscious of the same type of thing.

For the father of phenomenology, the essence or eidetic structure of things is thus an observational given: it can be found by straightforward observation of the world, just looking – looking carefully – at the things it gives us to see; their *eidos* supposedly results solely from a visual experience (*Wesenschau*). It is precisely on this point that Husserl seems to me to have fallen victim to a widespread objectivist illusion, although he masterfully decried and combatted it elsewhere (the themes of 'transcendental idealism' and 'constitutive' nature of consciousness occulted in common experience) – namely the tendency to hypostatise creations of the mind, to confer on them some independent, 'natural', objective reality outside of ourselves. The type structure of things is not exactly the product of observation but is first the product of a rational construction of the mind on the basis of the data of observation. Starting from a work of rationalisation of our observational data – from a work of analysing and ordering, comparing, cross-cutting, establishing ratios – and for the purpose of locating itself among 'the furniture of the world' (both the outside and the inside world), our minds come up with classifications or typologies, they manufacture a logical toolkit of classes and concepts (this term literally meaning 'holding together'), of labelled classes and concepts into which they place the things of the world and which are defined according to the point of view taken of those things, depending on the data selected as classifying criteria or 'classificatory reason': one puts into a class all the things and only the things displaying certain common characteristics, from which point of view they stand apart from all other things. The classes or concepts so constructed by our minds are not pictures or representations of things in the world

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[6] *Méditations cartésiennes*, French trans. G. Pfeiffer and E. Levinas, (Paris, Armand Colin, 1931, p. 44. Our translation.

as they actually appear to our eyes; they are schematisations, tools forged by our *logos* for our own practical needs, which enable us to identify things, to recognise them, tell them apart and speak of them. As physicist Fritjof Capra strikingly put it, 'the concepts we use to describe nature … are not features of reality, as we tend to believe, but creations of the mind; parts of the map, not of the territory'.[7]

The type structure of things Husserl speaks of is nothing other than the set of features through which we schematise things, which things present in that they are classified, labelled and contemplated through the classes or concepts into which they are arranged. This can readily be seen in the fragment cited above, 'If one sets any object in its form or category'. The type structure is not something supposedly arising naturally and spontaneously from the crude given of our contemplating the world, but something that is in relation with a classification or pre-established conceptualisation of things, something the world gives us to see through a 'mesh' or 'grid' we ourselves have prefabricated; it is our underlying organising criteria that impress in our eyes an essential or 'factitious' character on the givens of the things observed. Or to put it otherwise, essence is not as Husserl claimed an objective reality before our consciousness – a 'categorial' object endowed with the same objectivity as individual objects themselves[8] – but the content of a concept, what defines a class or category used to arrange individual objects, in some sense the spectrum or range of common features this class or category projects onto individual objects. Here I subscribe entirely to the illuminating analyses developed in another context by another great philosopher, Ludwig Wittgenstein, and captured in his formula 'it is not the property of an object that is ever "essential", but rather the mark of a concept'.[9] It is by a pure optical illusion that this sort of photo-fit picture applied to the things of the real world seems to us to meld, to be present in them, to be an emanation of them, overlooking the work accomplished in constituting this artefact.

For want of having elucidated his own approach in this way, Husserl has often been criticised for depleting, by eidetic reduction, the realities of the world, which are reduced to abstract, purified and sterilised entities, so to speak.[10] This criticism becomes meaningless when the search for the *eidos* or type structure of things is taken to be what it truly is, an investigation of our conceptual schemas. At the same time, by making the essence or type structure of things an a priori entity offering itself to us naturally, Husserl ends up blocking out the pragmatic character and the very historicity of this gridwork to which this essence or type structure is bound and which is inspired by social needs localised in a certain context, by certain 'lifeforms' (by the lifeworld – *Lebenswelt* – Husserl refers to in his mature writings); as if these systematic inventories of the furniture of the world did not vary with the actual needs they meet, according to places and times. Hans-Georg Gadamer speaks suggestively of this: 'There is said to be an African language that has two hundred different words for camel, according to the camel's particular circumstances and relationships to the desert dwellers'.[11] Umberto Eco gives us this other heuristic example: 'For our one word "snow", the Eskimos have four terms. Not that their language is richer in synonyms: in fact, they do not know this single entity called "snow" but four different things, depending on the practical use they make of the basic element'.[12] Our classifications and concepts are not tools given over in their

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[7] *The Tao of Physics* (Boulder, Shambhala, 1975) p. 161.

[8] *Ideas Pertaining to a Pure Phenomenology and to a Phenomenological Philosophy.* Trans. F. Kersten (The Hague, Martinus Nijhoff, [1950] 1983) p. 21 ff.

[9] *Remarks on the Foundations of Mathematics*, 3rd edn (Oxford, Wiley-Blackwell, 1981) p. 64 [73]. See also J. Bouveresse, *La force de la règle. Wittgenstein et l'invention de la nécessité* (Paris, Editions de Minuit, 1987) p. 66.

[10] See J. Garelli, *Introduction au logos esthétique* (Paris, Beauchesne, 2000) p. 162 ff.

[11] *Truth and Method*, 2nd revised edn, (London and New York, Continuum [1975] 2004) p. 434.

[12] *Le signe*, French trans. Jean-Marie Klinkenberg (Brussels, Labor, 1988) p. 167. Our translation.

principle to being universal and eternal; in the same way as Karl Popper highlighted for those other tools, scientific laws, they may in practice come to be challenged, old classifications may be superseded by new ones of greater utility value and better able to serve. Contrary to Plato's conception, Ideas are part of the world of the 'cave' just as much as the things we relate to them and like those things are subject to the wear and tear of time.

This clarification does not detract in any way from the practical interest of the eidetic reduction Husserl advocates: when he proposes to come back to a 'vision of essences', he is to be understood, in fact, as inviting us to clarify our schematisations and typologies, to re-do for ourselves the original experience of our conceptualisation of things, to bring it back to mind by rediscovering, with our own eyes as it were, the common features that belong – or should belong – to all the things and exclusively to the things we are accustomed to placing in a certain class with a certain label. This investigation is not, as Husserl thought, like simply analysing what things present to our consciousness; it rests necessarily on socio-empirical foundations. If the classifications in use in our social life are discretionary, if they vary with the chosen classifying rationale, this rationale in principle commands the pigeonholing operations to be performed. The job will be to work back up to that rationale and to find the common and distinguishing features defining a class through studying how we actually go about this classification, by seeking out and re-examining the individual things which in everyday life we place in that class – under the concept – in question and those we exclude from it and place in neighbouring but separate classes.

This invitation to reactivate our conceptual toolkit, to 'fill it' with straightforward, obvious intuitions in contact with the things themselves which it concerns is of crucial value especially for legal theory. We fall short of always having a clear view of the classifications we use, or even of having always had a clear view of the classifications we set up: we can classify things more or less intuitively, without being explicit about or looking into the criteria for classification implemented by our minds. This partly blind, somnambulistic classifying practice is the source of many problems. In this respect, eidetic reduction seems to me to be a promising antidote to three complementary ills that singularly afflict our thinking about law: psittacism, which is parroting words and reasoning about them without having in mind the actual ideas they express, having in mind empty shells in guise of concepts; syncretism, which is a conceptual disorder consisting in confusing in part one type of thing with another type, in altering the identity of things we evoke under the label of one concept by lending to them features belonging to some other concept; and lastly reductionism, which consists in oversimplifying and so mutilating the type structure of the things being spoken of, and having and taking a truncated, caricatured approach to them that fails to match the specific identity of the things intended.

B

The product of a transcendental illusion, the reality of essences has constituted in some sense the original sin of phenomenology, a sin which then propagated and worsened in its applications to the domain of ethics and law. This is what arises from the general axiological phenomenology put into circulation by Husserl or, in a rather particular variant, from the phenomenology of legal forms or essences developed by Adolf Reinach.

– The founder of phenomenology tried himself to make use of it in the domain of ethics: he laid the foundations of a 'phenomenology of values', which was taken up and furthered by other philosophers of ethics, in particular Max Scheler and Nicolaï Hartmann. His ideas led to developments in the province of law, first in German-speaking countries, from which they subsequently swarmed forth.

This axiological phenomenology which Husserl outlined was contaminated and vitiated in its very conception by the original sin of the hypostasis of essences. It is based on the postulate that the 'values' we recognise things to have (especially human actions or facts) are not, although it would seem so in all of our evaluation operations, a product of our minds, a relationship established by the mind between one thing and another taken as a standard of reference: values are, here again, presented as transcendent realities, as an external objective given that things supposedly put before our consciousness through the medium of our affective experiences, which is supposedly part of their nature and so associated with their essence or type structure, although Husserl conceived of it as forming a specific 'axiological object' adding itself in our consciousness to the essence or structure of things. It might in any case be apprehended by intuition – an 'intuition of values' (*Wertschau*) which thus concords with the 'intuition of essences'. Faced with some reality, the subject purportedly becomes more or less conscious, through an emotional experience, of its 'value' and it is this 'value' that he expresses in stating an ethical rule: this rule is supposedly merely a statement of fact (an 'objectivising' judgement in Husserl's terminology) describing a state of things seen by the subject and that may be said to be true or false. 'One ought to do this' is supposedly the equivalent of 'It is a good thing to do this', 'Doing this is an action naturally endowed with a positive value that can be grasped by the intuition'; 'Thou shalt not kill' would be tantamount to recognising that murder is a bad action, intrinsically endowed with a negative value; or to take up an example given by Husserl, the norm 'A soldier should be brave' is the same as the theoretical proposition objectively observing a value 'A brave soldier is a good soldier'.[13] The rules thus would have no reality of their own, no relief of specific things: they would merely be a form of expression, interchangeable logos.

> Husserl and the phenomenological school have proved clearly that a norm is no mystical being but simply the special grammatical form of a judgement. What is formulated in a normative form may be expressed with even greater force and reason in theoretical truths. The norm 'love thy neighbour' ultimately means 'it is good to love your neighbour', 'love of one's neighbour is a positive value'.[14]

It must be pointed out already how incongruous this addition of 'values' is to the nature or essence of things compared with the analysis thereof developed by Husserl. A strange ontological dichotomy is thus introduced; besides the unchanging characteristic elements common to all things of the same type and without which one would no longer be in the presence of the same type of things, there would still be another unchanging element to be taken into account given to our consciousness by the same type of things: their value, a sort of cherry on the cake. As if the same type of things had a double register of identity or a two-sided identity; Husserl speaks in this sense of a 'world of mere things' and of a 'world of objects with values', of the 'mere thing' and of the 'valuable thing', and again of 'simply consciousness of a thing' and 'a further consciousness in which "a position is taken" with respect to the thing'.[15] It must also be observed how unrealistic it seems to a jurist in touch with legal practice for one thing to reduce all values and all rules in use to affective experiences and for another to situate values ahead of rules as a matter of principle whereas in ordinary legal experience it is obvious that values and value judgements derive, on the contrary, from the legal norms one applies. Not to speak of the logically implied reduction of permissive legal rules – permitting to do or not do things – to a lack of or a zero degree of

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[13] *Logical Investigations*, vol. 1 (London and New York, Routledge, new edition 2001), p. 34.

[14] N. Alexiev, 'L'acte juridique créateur comme source primaire du droit' in *Le problème des sources du droit positif*, *Annuaire de l'Institut International de Philosophie du Droit et de Sociologie Juridique* (Paris, Sirey, 1934) p. 194.

[15] *Ideas Pertaining to a Pure Phenomenology*, pp. 53 [50] and 77 [67].

value of the actions at issue (for Husserl, there are three fundamental modalities of value: positive value, negative value and zero or indifferent value).[16] Such an implication is hardly concordant, to take just this example, with the crucial importance now attached to the legal sector of civil liberties and fundamental rights.

It is from all of this background of preconceived ideas, already considered and adopted from the outset as obvious, that it is then claimed, very artificially, to appeal to the phenomenological method to help take a clearer view of those values contained in things, a view ridded of all impurities: the Husserlian directive of getting 'back to the things themselves' would make it possible, thanks to a naive observation of things and the restoring of their authentic given to consciousness, to rediscover the values in them and of which we have only a confused intuition in our ordinary experience.

On the strength of these theoretical a prioris, the following conclusion can be drawn in the field of law: legal norms posited by the authorities, which apparently constitute in practice what is called law, are merely theoretical statements about legal values contained in the nature of things, 'legal values' which, in truth, it is hard to understand exactly what they are; by application of phenomenological directives, it is important that the jurist wanting to gain a correct understanding of law should turn his attention away from these legal norms laid down by those who govern and should turn it to the things themselves, so as to rediscover an original intuition of their specific legal values. From that point on, the phenomenologist jurist will formulate authentic legal norms describing very precisely – far more precisely than the authorities, who do not necessarily share the same concerns, nor the same disinterestedness – the objectively grasped legal values. The phenomenological theory of law is thus described as a discipline that 'procures norms'.[17]

In other words, instead of seeking to seriously elucidate what in reality gives itself as being law, that is, the legal norms issued in human political societies by the authorities, phenomenologists of law invite us to pay no heed to it! Instead of working on the law itself, of setting about restoring its original structure, these authors, with insufferable bias, claim to work on some would-be legal given that is supposedly in things, that is, on chimeras. Commentators have rightly spoken on this matter of a 'pointless game of the imagination'[18] and wondered 'where is the law in all that?'.[19]

However, one can easily explain the success these themes have had with a number of philosophers of law: their kinship with the metaphysical themes traditionally developed by the school of natural law is patent. That positive law formulated by the authorities is an imperfect law, that on the margin of this positive law one can find an authentic law independent of human volition, these are familiar old tunes. Indeed, it is as a return to natural law that this 'phenomenology of values' was received and used by legal theorists, mostly in German legal thinking after the Second World War (especially in the work of Coing and Fechner). Far from contributing to a renewal of the philosophy of law, phenomenology was more a continuation of its ancient aberrations.

– It is also an opening onto transcendent pseudo-realities that is at work with Adolf Reinach's theory of legal forms or essences, taken up from other phenomenologists like Fritz Schreier. In his famous book *The Apriori Foundations of the Civil Law*,[20] Reinach argued that legal institutions and more generally social institutions (which he called 'social acts') all showed

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[16] *Lectures on Ethics and Value Theory (1908-14)*.

[17] See e.g. Carlos Cossio, 'La norme et l'impératif chez Husserl', in *Mélanges Roubier*, tome 1 (Paris, Dalloz, 1961) p. 153.

[18] Haesaert, *Théorie générale du droit*, p. 65.

[19] A. Brimo, *Les grands courants de la philosophie du droit et de l'Etat* (Paris, Pedone, 1978) p. 424.

[20] Trans. J. Crosby [1913], Aletheia (Irving, The International Academy of Philosophy Press, 1983).

themselves to us as an a priori typical normative form or structure, like a natural matrix, independent of us and from which one could derive ethical rules that were logically coordinated with each other and especially legal rules; these supposedly constituted a sort of pure law, giving itself to us decked with an absolute, universal and timeless value outside of its recognition by the human mind or its consecration by the legislator – in the same way, he emphasised, as the equality $2 \times 2 = 4$. That is what the 'vision of essences' was in the legal domain: unlike the phenomenology of values of Husserl and Max Scheler, it was no longer a matter of situating at this level the moral value of things, human actions, but the ethical rules themselves.

Through the highly complicated and hermetic exposition of his ideas, Reinach no longer realised that legal institutions, like more broadly the social institutions that held his attention, were classes or concepts of *statuses*: they schematise regimes or contents of regulations forming coherent wholes, articulating as normative mechanisms or systems. These concepts and the typologies they fit in with are common currency in the field of law. To take an example in the domain of constitutional law, the legal institution labelled 'parliamentary regime' represents a type of legal regulation by which, beyond all the possible variants, the authorities are organised in accordance with a certain general scheme, allowing for cooperation and balance between the parliament and the executive, with the parliament able to overturn the executive and the executive having a right to dissolve the parliament. This type of regime differs in this from the 'presidential regime' which implies a different general scheme of separation of powers. In this way, one can form types of legal regimes in all branches of law, for example in civil law the typical regimes of third-party beneficiaries, of limitations or compensation of debts, or also the various types of marriage settlements with or without prenuptial agreements. One can, for that matter, reduce to type-contents, not just the legal regulations in force at any given time in any given country but also the regulations laid down at other times and in other places, or even possible legal regulations that may possibly be set forth. This elaboration of typologies is one of the fundamental steps in dogmatic legal theory in its task of didactically presenting the rules of law it studies.

The would-be a priori eidetic forms or structures Reinach speaks of are nothing other than these normative systems or typical regimes forming the understanding of classes or concepts forged by our own minds. They represent not observed transcendent realities but the product of a creative – artisanal – work of schematisation. One can see, besides and above all, the paralogism which has been rightly denounced in the thinking of Reinach who believes he deduces, with regard to the legislator, a number of a priori legal rules from the analysis of the concept of 'promise', as if this concept did not correspond to the typical regime that he thus claims to 'deduce' from it! Nicos Poulantzas speaks of this as an 'enormous Lapalissade', a statement of the glaringly obvious.[21]

II – THE PERSPECTIVE OF A PHENOMENOLOGY OF LAW AND ETHICS RIDDED OF THESE ABERRATIONS

A phenomenology of law – and through it of ethics – without metaphysical divagations, ridded by resort to Ockham's razor of any transcendent fictive entity, has long seemed to me a highly promising pathway. It should be a 'down to earth' line of research, bearing on the concept of law socially in use and aiming to clarify it and revive it to our consciousness, by again putting our classificatory practice to the test of things themselves, by trying to find, in the individual things we commonly arrange or refuse to arrange in the class of and under the

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[21] 'Notes sur la phénoménologie et l'existentialisme juridiques', *Archives de philosophie du droit*, 1963–8, p. 269.

label 'law', the shared distinctive features that form the content of that concept, which alone provide – or should provide – access to this category and which constitute the essence or *eidos* of law, its type structure. It is this enquiry I undertook in my above mentioned book using – with the provisos formulated previously – the Husserlian method of reduction, resting upon the process of imaginary variations, and taking my inspiration more generally from all of Husserl's methodological recommendations, especially his invitation to reactivate the original intuitions buried in the etymologies and metaphors of ordinary language. I propose here to give a brief glimpse of the results I arrived at.

The features forming the *eidos* or type structure of things in a certain class are logically arranged in a certain way in our minds, namely from the generic to the particular or singular. Some of these characters are not specific to the things of this class, but shared with other things within the framework of the more general class of the typology of which it is a part. They therefore appear to be *generic* elements, defining the genus of object of which the things in question are a part. Other characters added progressively to the former correspond in the same way to intermediary classes. These are *specific* elements, defining increasingly circumscribed species of objects of which the things in question are part. Finally we arrive at the ultimate characters possessed only by the things of the class in question, which belong to them exclusively and which distinguish them from things in the class immediately above and, when all is said and done, from all other things. These are *particular* or *singular* elements, which particularise or singularise their type structure and which, in the terminology of phenomenology are called their 'eidetic singularity or particularity'. It is this logical hierarchy of classes within our classification that Husserl describes:

> Each essence… has its place … in a hierarchy of *generality* and *specificity*. Descending we arrive at the *infimae species* or, as we also say, the *eidetic singularities*; ascending through the specific and generic essences, we arrive at a *highest genus*. Eidetic singularities are essences which necessarily have over them "more universal" essences as their genera, but do not have under them any particularizations.[22]

In the case in point, my phenomenological enquiry has led me to make out, in the type structure of things classified under the concept of law, these three major series of constituent components:

– generic elements: the things in question present to our consciousness, in their most fundamental given, the features typical of *rules*, these are things belonging to the general class of rules;

– specific elements: the rules that make up the law give us to see more specifically the characteristic features of *rules of conduct* or *ethical rules*, these are things belonging to this class;

– particular or singular elements: they correspond to the ultimate typical features which, within the class of ethical rules, belong to legal rules alone and set them apart from other ethical rules and, more generally, from all other rules. This eidetic particularity or singularity of rules of law is that they relate to public guidance of conduct.

To accede to full elucidation of law to our consciousness, it is not enough for the jurist to stop at this final series of elements. He must also set about, upstream, a meticulous description of other elements, of which we have only a very confused vision and on which legal theory cannot constructively rest. In truth, he is not the worst placed for this task, because legal practice is of all the sectors of ethics the one offering the greatest 'visibility' both through its macrocosmic dimension and through the notably well developed formalistic explanation of the operations performed.

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[22] *Ideas Pertaining to a Pure Phenomenology*, p. 25 [25].

A. The Generic Constitution of Law into *Rules*

The most immediate given of law to our consciousness is that of rule or norm. We speak indifferently of the law or of rules of law, of legal regulation. In the domain of law, the key words are statute, order, code, referring to the laying down or codification of rules. It is indeed in collections of written rules that one usually looks for the law. The terms in Indo-European languages of *right*, *droit*, *diritto*, *derecho*, *recht*, like the low Latin *directum* also evoke the idea of a rule.

But what exactly is a rule? When one pays sustained attention to it, one soon notices in all the things we label 'rules', of whatever sort they may be and beyond the variable manifestations they relay to our consciousness, an irreducible invariant that presents itself as the most fundamental element of their essence: we find we are dealing with *tools*. Rules are part of the vast array of tools of all kinds constructed and used by humans – by *Homo faber* as Bergson called him. This is what is reflected even in the commonly used terminology, notably in legal experience. We speak of 'practising' or 'applying' rules, of the 'practice', 'use' or 'implementation' of rules, which indeed refer to the ideas of tools and their use. It is also commonly said that law is a 'technique', a 'technique of constraint' according to Kelsen and the positivist strands, or a 'technique' of 'social control' or 'social engineering' for the sociological school in US law. Here again etymology is edifying: the Latin terms *norma* (from the Greek *gnômon*) and *regula* initially designated actual physical tools for making or checking right angles or drawing straight lines. The word rule has, besides, retained its concrete meaning, alongside the abstract one which is derived from it, while keeping the same instrumental connotation.

Rules are mental tools. The material they are made of is an 'ideal' material, a content of thought, a representation, that is, something that can only be present in our minds, which has no palpable, external reality. This thought content can, of course, be communicated from one individual to another by means of signs detectable by the senses, for example written signs, but the rule is not to be conflated with the signs themselves. The rule is the signified and not the signifier. It is made of what the signs mean, of the thought content they convey encoded within them and which they are tasked with transmitting into the minds of others after those minds have perceived and mentally decoded the signs. Entities of the intelligible world, it is only in our inner worlds that rules reside and circulate, it is there where they work and are to remain for ever, with no hope of coming out and facing us among the realities of the outside world – which as a matter of principle condemns all the naturalistic and objectivist conceptions of law and ethics.

This tool-like nature – thickness – of rules, with all it implies, is practically absent from moral theory and legal theory. This is because, through a largely superficial approach, rules have very generally been reduced until now to the substance they are made of and treated as simple sequences of discursive thought (*logos*) containing in themselves their characteristics as rules. It is as if one were to reduce ashtrays and umbrellas to their apparent material composition alone. This failing, which I call 'logicism', has led in particular to the claim that legal and ethical rules can be subjected to the principles of formal logic, especially to the principles of non-contradiction and of inference. Rules are not simply segments of thought, but things (*res* or realities) constituted with thought, tools constructed with the intelligible. Conflicts of rules having opposing contents are real oppositions or antinomies and not logical oppositions, which are a concertinaing of contrary thoughts that annihilate each other and give rise to nonsense. Similarly, one cannot deduce rules from other rules by a purely logical process, no more than one can by such a process give rise – as if by

enchantment – to new realities of the sensible world. One must not confuse the exegesis of a rule, that is, the in-depth exploration of its content, with an operation of deduction of one rule from another.

By Heidegger's formula, every tool is a *tool for*: it is something that *serves to*, to which an underlying human intention has imparted some particular instrumental vocation. It is the *what it is for*, its utility (its 'utensility' [*outilité*]) which forms the essence of the tool, which allows us to identify a thing as a tool of a certain type. For instance, an ashtray is a tool for collecting ash from smokers, an umbrella is a tool for protecting us from the rain, and so on. In the same way, rules are finalised segments of thought, tasked with rendering certain services, to which some external and foundational human intention has historically assigned a utility of a certain type. It is this utility that must be elucidated if we are to define exactly what rule-things are.

In the case in point, they appear to be situated in the field of metrology. Their general function is to serve as measures (in legal experience we speak equally of 'adopting rules' and 'taking measures'). More specifically, they are reference tools giving the measure of what is possible, indicating the margin or degree of possibility of things taking place. In this respect, we find at work in all rules, of whichever sort they may be, the three major degrees of the bipolar scale of the possible: the maximum degree of possibility (100%, which is at the same time the 0 degree of impossibility), it is the obligation or absolute necessity of occurrence; the minimum degree (0%, which is also the degree of 100% impossibility), it is the absolute non-possibility of occurrence; the intermediate degree, which is the possibility of occurring or not occurring (this margin is itself quantified in the case of what are called probabilistic rules which indicate percentages of possibility of occurring of between 0% and 100%). Thus there are mathematics in every rule and not only in scientific laws as is suggested, in keeping with Plato's thought, by Galileo's celebrated words 'the world is a book written in mathematical language'.

It is these margins or degrees calibrating the possibilities of things occurring, which are christened modal categories, and more specifically deontic modalities about ethical or legal rules. Contrary to very widespread opinion in the logic of norms and in philosophy of language, these categories are not intrinsic elements of statements, which supposedly confer on them their nature of rules and act as 'normative functors'. In reality, as legal regulation attests, rules do not necessarily bring out expressly, in the actual texture of their statement, the ideas of *may* or *cannot* or *must*. Vice versa, expressions of the type 'X *must* or *may* do such or such' may figure in purely descriptive statements – for example to describe X's plans or the material or physical resources X has. The modal categories are not coupled to the statement of rules but to their function. Rules are thought contents, not stated in a certain manner, but to which the function of setting the measure of possibility has been attributed and which must consequently be used, whatever the lexical or syntactic configuration in which they are formulated, to extract from them by interpretation the may, cannot or must. The nature of rule that a statement is recognised as having automatically directs its users, even before they are aware of its wording, to a certain mode of interpretation, which is the very way to make use of it. It is this mode that one endeavours to translate through the shadowy idea of *ought* or *sollen* employed in moral philosophy since Hume and Kant (being an indicator of the possible, it would be more accurate to evoke the idea of *may be*, as is suggested besides in French by the term '*droit*' designating both 'law' and 'right', legal possibility).

B. The Specific Constitution of Law as *Rules of Conduct*

There is sometimes a tendency, especially in legal theory, to liken the ethical nature of a norm to a certain type of content of that norm. An ethical norm is said to be a norm aimed at human facts or behaviours, social facts or inter-subjective behaviours. It is in this very general sense that legal norms supposedly constitute ethical norms. This is a very imperfect vision of the reality of things. True, ethical norms do indeed have the alleged human content. But that is not the essence of them. It suffices quite simply to think of the rules formulated by the various human sciences, psychological and sociological laws. These scientific laws, too, concern in their content the accomplishment of human events. They set margins of possibility for the occurrence of human things. But for all that they do not give themselves to our consciousness as rules of conduct.

This approximation with the laws of human sciences highlights the essence of ethical norms. That essence resides not in their content but in their utilitarian function, in their function as tools. Rules of conduct are rules that are assigned, in the extension of their generic instrumental vocation, a more specialised instrumental vocation of a certain type. It is because legal norms, for example, and scientific rules do not render the same types of service, because they have different specific instrumental purposes, that some perform as ethical norms and not others.

– The linkage of the 'ethical' characterisation of rules to a certain specialisation of their function appears in the terminology itself. Ethics, in its most fundamental sense, is *the art of guiding human conduct*. Ethical norms – rules of conduct – have as their specific vocation to serve to guide the conduct of those to whom they are addressed and who are called on to use them. It is, for that matter, to express this ethical calling of legal norms that theorists of law commonly define law as an 'order of human conduct'.

But just what do we mean in saying that ethical rules or norms have a guiding function, a function for steering human conduct? This means that these rules or norms are instruments in the service of the creative, 'fabricatory' action of people, in exactly the same way as material gauge-type tools, rulers and set squares, with which they have a 'family resemblance' at the origin of their metaphorical approximation – they are physical gauges the basic function of which is to enable their users to draw straight lines or construct right angles, to act as standard supports guiding their hands in drawing those lines. One can likewise draw a parallel with patterns or templates used by tailors, milliners or shoemakers. Rules of conduct have a comparable instrumental purpose, except that they constitute supports – benchmarks – to guide the action of people in creating themselves, in tailoring (in cutting out, so to speak) their own history, in the fabrication of their actions, of their deeds and acts. Rules of conduct tell them what they may, cannot or must do (permission, prohibition, obligation). It is part of their vocation that the user to whom they are addressed adjusts his acts to them, to the margins of possibility they set out. They act for him as leeway or latitude within the bounds of which his acts must be contained. What characterises ethical rules within the general category of rules is that they are rules 'to be followed', 'to be observed' by their addressees in what they do. Their function is to frame human volition in its determinations, in the acts it initiates, it decides on and then sets about executing. Beneath the expression *rule of conduct* lies hidden a double and illuminating metaphor. First is the image of 'human conduct' with man naively represented (to evoke his capacity for self-determination) as a being *who conducts himself*, steering the vehicle of his own person. Second is the image of the *rule(r)* given to man so he keeps his lines of conduct within bounds, for the purpose of treading the straight and narrow path.

– As practical rules of action, ethical rules stand apart from scientific laws or theoretical rules for understanding. Very generally, it is true, it is not usual to include such laws within the

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category of rules. One claims to see in them mere asserted sequences of thought, sorts of 'general' assertions relative to the totality of the appearances in the world of such or such a phenomenon. It is this dominant conception Hans Kelsen relays in constantly opposing in his writings ethical rules of the type 'if A is, B ought to be' and scientific laws which are supposedly of the type 'if A is, B is'. This view of things is quite wrong. Scientific laws do give themselves to our consciousness and are indeed used in practice as indicators of possibilities of things occurring, much like ethical rules. They differ from ethical rules in the more specific instrumental vocation assigned to them, namely, to indicate for our guidance, to enable us to find our way amid the tangle of productions of the real, the margins of possibility for phenomena of a certain type arising in accordance with circumstantial givens: 'in such circumstances, such and such a type of phenomenon must, cannot or may occur – or in the case of probabilistic laws has so much chance of occurring'.

No more than any other sort of tools and like practical rules, scientific rules cannot be said to be true or false. Contrary to Karl Popper's ideas, they can no more be 'falsified' than they can be verified. They are merely good or bad tools depending on the quality of the services they actually render. It is their pragmatic value that may be the subject of experimental verification, not their would-be truth value, as maintained by strands of logical empiricism arising from the Vienna Circle and wrongly making scientific laws the emblematic figure of descriptive statements. These laws do not describe the world, but set it up as a system; they model it. The categories of the possible around which they are articulated are, as Aristotle had pointed out, purely logical categories that our mind superimposes for its needs on the world, but which have no referents in the world. Or if preferred, it is the predictions made on the basis of such laws and not the laws used themselves that may or may not prove true.

If one is reluctant to classify them among rules, it is because ethical rules were conceived from the outset as occupying themselves alone the whole slot for rules. It was not imagined that rules could be anything other than ethical, just as it was long thought that all rules were general. Species was – and still is – confused with genus. Scientific laws were thus initially likened, in the earliest animist and anthropomorphic times, to rules of conduct (to legal rules of sorts, as attested by the very name of 'laws', of 'laws of nature') laid down by divine powers and 'governing' the world, which nature was to 'obey', like human political societies. Then with the advent of positivism and the absolute dogma of experimentation, all transcendence was driven out of the realm of science. However, instead of clearing the way at last for the concept of theoretical rules alongside practical rules, positivist ideas led to the claim that they now officially present scientific laws as descriptions. But the faint and irreducible resonance in our consciousness of their normative nature has maintained conceptions of the past in our minds. We continue (including in scientific circles) to use for them, without fully realising as much, the language game of ethics, to call them 'laws of nature' and to think of them insidiously as laws that are simply 'discovered' by scientists, seen behind the veil in their observations, existing independently and outside of them, laws not for people, in their service, but for nature, working away behind nature in enigmatic backrooms, seeking to 'govern' its 'facts' or 'behaviours' and which nature was implacably bound to 'obey'. From there comes the symbolic representation of the scientist in the figure of Prometheus stealing hidden things for man's benefit, things that were not intended for him. The software thus obscurely running in our heads explains that modern science remains always open to metaphysical and religious horizons, constantly tempted to descry behind the laws it sets out the shadow of some supreme lawmaker of the universe.

C. The Particular Constitution of Law as *Rules of Public Guidance of Conduct*

What are the ultimate residual features which, added to the characters possessed by rules of conduct in general, allow admittance to the category of the rules of law and so constitute the eidetic singularity or particularity of law, its 'juridicality' (*juridicité*) in a sense? More often than not, jurists direct their research 'by examining the content of the various bodies of positive law'.[23] Legal rules are supposedly ethical rules with a type of content peculiar to them. Some commentators concentrate on the subject matter and claim, for example, that legal rules have as their distinguishing feature that their prescriptions are accompanied by sanctions, more concretely by acts of constraint, or alternatively that they are aimed only at the outer forum, the outward behaviour of people. Others believe they can find the mark of what law is in the formal structure of the contents of legal rules. This structure supposedly has a hypothetical or conditional structure of the type 'if … then …', 'such and such a condition holding, such and such a consequence must follow', or a dualist structure articulating the duties incumbent on some and correlatively the rights enjoyed by others.

This line of research is quite plainly barking up the wrong tree. If legal character did lie at this level of the subject matter or form of the content of rules, at the level of the *logos* of which they are made, that would mean they could be identified by some purely logical criterion. Consequently, one would have to automatically consider to be legal, in a purely abstract and a priori manner, any norm formulated or merely imagined by anyone (by me, say) from the moment it displayed the claimed characteristics of content. This leads to a conception of law that is not unrelated to traditional conceptions of natural law. It is significant, for that matter, to see the theorists in question argue that the rules set forth by the legislator are not 'true law' unless they display the characteristics of content that they allege.

Husserl had the opportunity to caution against such aberrations:

> One must sharply distinguish the relationships belonging to generalization and specialization from the essentially heterogeneous relationship belonging, one the one hand, to the *universalization of something materially filled into the formal in the sense of pure logic* and, on the other hand, to the converse: the *materialization* of something logically formal. In other words: generalization is something totally different from that *formalization* which plays such a large role in, e.g., mathematical analysis; and specialization is something totally different from *de-formalization*, from "filling out" and empty logico-mathematical form or a formal truth.[24]

To elucidate the eidetic singularity of legal rules, one should not try to reach some generalisation about the material or fabric of thought they are made of but to move to a formal or categorical specialisation within the classification of rules. The class of ethical rules includes all the rules that serve to set the bounds of possibility on human action and so guide conduct. A lower class of rules must be defined by a sharper instrumental vocation peculiar to certain ethical rules and not others. In making distinctions according to the content of ethical rules, we remain within the class of ethical rules, at a material level. What must be sought is the particular or singular directive function which is assigned, in empirical social practice, to what are labelled 'legal' rules of conduct. This is the direction our investigation must take.

Close scrutiny soon reveals a fundamental unchanging element in the rules of conduct which we recognise as 'law'. These rules all present themselves to our consciousness as emanating from the public power (*pouvoirs publics*), public leaders or public authorities. One cannot think of law without having at least implicitly in mind the idea of public power. Besides, if I myself formulate rules in imagining I am a public authority, I will be aware of

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[23] H. Kelsen, *Théorie pure du droit*, French trans. H. Thévenaz (Neufcatel, La Baconnière, 1953) p. 62). Our translation.
[24] *Ideas*, p. 26 [26].

formulating law, true as a simple game (law 'for a lark'), but I will still have the impression of playing at law-making.

Just what does this mean? What exactly do the concepts of 'public powers' or 'public authorities' cover? The term 'public' evokes essentially, in its most original meaning, the idea of the people (the Latin term *publicus* was the adjective from *populus*). What is 'public' is what relates to a human population, what concerns the members of a human people. It is in this sense that we speak of 'public affairs' (*res publica*), 'public safety', 'public interest', and so on. The public powers, public authorities or governors are bodies set at the head of a human population to direct the conduct of its members, of all those who live together within its bosom. It is to designate this power of command with regard to a people that we speak of 'public authority'. Legal norms perform precisely as measures issued by the authorities tasked with the conduct of peoples.

Yet this given of consciousness must be further refined. When one thinks of law as a set of rules of conduct emanating from the authorities, one does not imply in reality that any and every rule issued by a person holding public office is a legal rule. It must still have been issued by that person acting in an official capacity, in the exercise of his function as a director of the conduct of a human people. All rules he lays down outside of his official function of public command, outside of the use of his public authority, in his 'private life', do not appear to constitute law in any way. This is the case, for example, of an order of the President of the Republic to his son to do his homework, 'internal' instructions to his secretarial staff or domestic staff, orders he gives in restaurants, and so forth. Which comes down to saying that 'juridicality' is not related to the person of public leaders but to the public function of which they are organs. It corresponds, in the final analysis, to a certain particular instrumental vocation of legal rules. Law is composed of rules of conduct pertaining to the exercise of public authority and serving to govern peoples. Or, if preferred, the typical feature that sets legal rules apart within the class of ethical rules is that they are tools for the public guidance of human conduct. Law is a technique of public guidance of conduct.

When all is said and done, it can be seen that it is not at all impossible to define law, to give something other than a purely 'stipulative' definition of it. It corresponds, most exactly and quite plainly, to the demarcation of spaces of the possibility of action – spaces of freedom – of everyone within the polity. Such was the original meaning of *ius* and *iura* in Latin.[25] It is also what was expressed in the emblematic formula of Justinian's *Institutes*, '*suum cuique tribuere*' (to give to each his own).

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[25] See G. Dumézil, *Idées romaines* (Paris, Gallimard, 1980) p. 41 ff.

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