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Embedding the Relationship between Law and Governance

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I. Introduction

As with any other phenomenon, the relationship between law and governance can be subject to different perspectives of inquiry. From a *doctrinal* perspective, the relationship between law and governance can be understood as a normative basis for lawmaking and adjudication. From a *historical* perspective, the relationship can be viewed in its time-dependent changing dimension and as a part of human history in general. From a *sociological* perspective, the relationship between law and governance can be looked upon as an actual social fact or as a relation in relation to other social facts or institutions, like the relationship of law to politics or to the economy.

What, then, can be a *philosophical* perspective on the relationship between law and governance?

II. The Perspective of Legal Philosophy on the Relationship between Law and Governance

The answer to the question for a philosophical perspective on the relationship between law and governance obviously depends firstly on our understanding of philosophy in general and secondly on our understanding of legal philosophy. Therefore, one must first ask what distinguishes philosophy from other scientific and academic inquiries like legal dogmatics, history or sociology.[1]

Every search for knowledge requires at least three elements: (1) an *object*,[2] (2) an *aim*, (3) and some *means* to attain this aim: a *method*. For example, biology has as its object living beings, as its aim, a description and explanation of these living beings, and, as its method, empirical research, experiment, induction, the establishment of hypotheses, the formulation of theories and the like. What, then, can be considered as the object, aim and method of philosophy?

Within the confines of the present paper, this question can be treated only briefly. Three insights are crucial. (1) Philosophy does not have a particular type of thing or fact as its general object like physics (energy and matter), biology (living beings), sociology (society) and linguistics (language). (2) Accordingly, since the particular types of things or facts are assigned to the singular sciences and humanities, the formal object of philosophy must be something else. (3) At the same time, philosophy (as a type of inquiry) cannot dispense with any sort of object, nor limit itself only to one aim and/or one method.[3] In general, human agency can be understood in terms of its aims and means. However, the particular kind of activity that is represented by the search for knowledge is, by conceptual necessity, a search for knowledge *of something*. It is always relational or, more precisely, intentionally directed towards an object.

What can this object of philosophical inquiry be? If the singular things and facts are occupied as objects of inquiry by the various sciences and humanities, the only object of inquiry left for philosophy seems to be the following: it can only be the *connection of all*

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[1] See for this introductory part of this article: Dietmar von der Pfordten, Suche nach Einsicht, Hamburg 2010; English Translation: Search for Insight, forthcoming 2012.

[2] „Object" is understood here in a wide, epistemological sense. It comprises not only things and facts but also abstract and constructed objects like numbers in mathematics.

[3] Some authors suggest that philosophy can be defined by reference to a method alone. Cf., e.g., Jay Rosenberg, *Philosophieren*, 2nd edn. Frankfurt a. M. 1989, p. 17; Alf Ross, *On Law and Justice*, 25: "It [Philosophy] is no theory at all, but a method. This method is logical analysis. Philosophy is the logic of science, and its subject the language of science." The quote shows that it is impossible not to take into account an object of philosophy as well. Contradicting himself, Ross begins with the claim that philosophy is only a method, but then goes on to propose that the object of philosophy is the language of science.

singular things and facts – otherwise put: the *world as a whole*, understood not in the sense of simply summing up the knowledge of the singular sciences, but in some abstract, non-empirical sense.

Philosophical inquiries try to understand particular objects like law, language, knowledge or the human being, as part of this connection of all singular things and objects; or, from a complementary perspective, they try to understand these connections between single things and facts.[4] This means that the single objects are not dealt with in isolation, as, for example, a "general theory of law" or in a "pure theory of law" or in "jurisprudence";[5] nor are they considered in relation to other single objects, as when, for example, single objects such as law, politics, or economy are investigated only in relation to society in the social sciences.[6]

The *aim* of philosophy depends on its object. If the object of philosophy is the connection of everything with everything, its aim can only be an *encompassing view* of this connection of everything with everything. A particular view would not take as its object the world as a whole; rather, it would look to particular facts or things in isolation (or in relation to other particular facts or things). "Encompassing" in this respect should not be understood as a sort of addition. Even though any particular knowledge may be relevant for philosophy, the mere addition of all knowledge of all singular sciences cannot be its aim. Philosophy is no encyclopaedia. Rather, it aims at a comprehensive and abstract view of the world, a frame of all singular knowledge. However, as pointed out above, this abstract, philosophical perspective on particular objects such as law is *only one* possible perspective among other, equally legitimate perspectives.

If the object of philosophy is the connection of everything with everything and the aim is an encompassing view of this totality of connections, then there seems to be no reason to restrict the means to attain this aim. The *method* of philosophy, then, *comprises all possible*

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[4] See Plato, *Laches* 199d4-e5, *Politeia* 504d7-505a4; Arthur Schopenhauer, Die Welt als Wille und Vorstellung, *Sämtliche Werke*, vols. 1 and 2, Darmstadt 1961; Ludwig Wittgenstein, Tractatus logico-philsophicus, *Werkausgabe,* vol. 1, 10th edn. Frankfurt a. M. 1995, p. 11: „1. Die Welt ist alles, was der Fall ist"; Rudolf Carnap, *Der logische Aufbau der Welt*, Hamburg 1998.

[5] Hans Kelsen, Reine Rechtslehre, 2nd edn. Wien 1960, 1. John Austin, The Province of Jurisprudence Determined, 1995, p. 11, 18, 288. See for another understanding of 'jurisprudence' as a second-order inquiry into the study of law: Alf Ross, On Law and Justice, London 1959, p. 25-26. For an understanding in the sense of the question "What is law?": Brian Bix, *Jurisprudence*, 4th edn., London 2006, p. 9.

[6] See the writings by Niklas Luhmann: *Das Recht der Gesellschaft*, Frankfurt a. M. 1993; *Die Politik der Gesellschaft*, Frankfurt a. M. 2000; *Die Wissenschaft der Gesellschaft*, Frankfurt a. M. 1990.

methods of all other singular inquiries. There can be no narrowing down to mere deduction (as in mathematics and logic), or to empirical inquiry (as in the natural and social sciences), or to description (as in a pure theory of law) - every method can be used to reach the aim of an encompassing view.

What are the consequences of this task of general philosophy for the *philosophy of law* and the *philosophical perspective on the relationship between law and governance*?[7] The philosophy of law has to inquire into law and the relationship between law and governance, not for the specific purposes of adjudication (unlike a doctrinal perspective) nor as changing historical institution (as investigated by the history of law), nor in its specific relation to society (as investigated by sociology), but first and foremost in its possible and actual connection with all other objects and relations. It aims at an encompassing perspective on law in general and more concretely on the relationship of law and governance, and to that end it may make use of all kinds of methods.

III. Embedding the Relationship between Law and Governance: An Encompassing Perspective

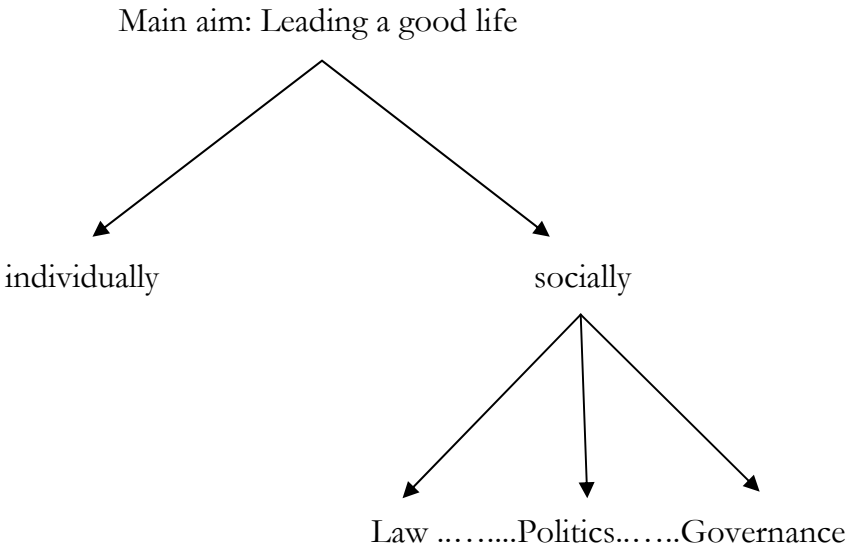
Setting aside divine and natural law the phenomena of law and governance have some very important property in common: they are both *human made phenomena or facts*. Therefore, as for all other human made facts, we have to ask: What is the *aim* we have made these facts or phenomena for? What is the end we want to reach by using these human made facts or phenomena as *means*?

[7] For a first formulation of the task of a philosophy of law: Dietmar von der Pfordten, Was ist und Wozu Rechtsphilosophie?, *Juristenzeitung* 59 (2004), p. 157-166.

The overarching aim of all human strivings is to *lead a good life* (whatever this is).[8] In relationship to this overarching *aim* to lead a good life all other facts or phenomena which we create are only *means*. This is also true for *law*, *governance* and even *politics*.

Because *humans* are *individuals* but also *social creatures* we can divide the overarching aim to lead a good life into a more *individual* and into a more *social* aim or endeavour. So we strive *individually* and *socially*, that is in communities, for a good life. One has to admit that this distinction is a bit idealistic and theoretical, because some aims have an individualistic aspect as well as a social aspect. And these aspects cannot always be separated easily. However, the distinction has some point and is useful because many aims are mainly or at least to a greater extent either individually or socially. E.g. hearing in one's own apartment Beethoven instead of Wagner is a clearly individualistic aim and endeavour while playing together with other musicians in a philharmonic orchestra is a clearly social aim and endeavour.

The striving for a social aim is a striving in communities, of whatever sort. Law and governance are definitely part of this group of social strivings for a good life. The same holds for politics. Therefore we get the following picture of aim/mean-relations:



[8] In my view the good life cannot be reduced to a life with some more specific properties, e. g. a happy, pleasurable, self-determined, capable, autonomous etc. life.

So in relationship to the *overarching aim* to lead a good life, especially in a community, law, politics and governance are only *means*. That does not hinder that, if one looks more closely at these phenomena, their overarching character as means to lead a good life turns quasi into a more specific, in-build aim. They realize as means the overarching aim to live a good life and by the way transform it within their limited sphere into an own aim. And to accomplish this limited own aim, they are able to use own limited means.

In what follows the more concrete and specific aims and means of law, politics and governance shall be characterized. This is necessary to understand the relationship between law and governance. I will give the characterizations I found to be the best without discussing alternative proposals. There is of course no unanimity but a huge debate on these concepts.

IV. The More Specific Aims and Means of Law, Politics and Governance

1. Law

In order to live a good life in a community the aim of law is *the mediation between possibly contrary, conflicting concerns*.[9] But also morals and other social norms have a similar aim. So law has to be distinguished from morals and these other social norms by its specific means. The specific means of law are (1) its *categorical character*, (2) its *externality*, (3) its *formality* and – if law and religion are separated like in many modern societies – (4) its *immanence*:

(1) Law comprises not only voluntary norms, but also at least some categorical obligations, that is, obligations which do not have the concrete agreement of those obligated as a necessary condition (which does not mean that all norms of the law are categorical). So it is – like morals – distinguished from pure conventions by its partially

[9] Cf. Dietmar von der Pfordten, What is Law? Aims and Means, in: Archiv für Rechts- und Sozialphilosophie, forthcoming in the next issue; German: Was ist Recht? Ziele und Mittel, in: Juristenzeitung, 2008, p. 641-652.

categorical character.[10] Their categorical character also distinguishes judgements from mere mediation.

(2) Law has, in all its various manifestations, only *external sources and means* (judging, agreeing, issuing, ordering, voting) but no purely internal source, such as human conscience, which is one necessary source of morals.[11] So the distinctive feature of law, in comparison with morals, is its *externality* in all singular instantiations.

(3) Law, in all its manifestations, is marked by a certain *formality* in its making, promulgation, or application, which simple political acts, for example, a decision in foreign politics, even in the form of a rule like the Monroe Doctrine or the Breschnew Doctrine, do not have.[12] So the distinctive feature of law in comparison to politics is its *formality* in all its singular instantiations. This formality lends support to legal certainty. In its final realisation, the requirement of formality also holds for common law that has to find its form in parliamentary, judicial, or administrative proceedings.

(4) Even as 'divine' or 'natural' law, law refers to immanent states of affairs within human life and agency. By contrast, religion, as the practice of a faith, also refers to a transcendental goal – the goal, say, of beatitude, reincarnation, or eternal peace of the soul. Accordingly, the distinctive feature of law in comparison to religion is its *immanence* in all its singular instantiations. This holds at least under the condition that law and religion are separated in reality and are not more or less interwoven, as in Jewish or Islamic law.

2. Politics

The aim of politics is to generate *communal decisions to lead a good life*. These communal decisions have to have two properties to be political: they have to *formally represent all*

[10] Note that categorical character has to be distinguished carefully from coercion.

[11] This was already stated by Immanuel Kant, *Metaphysics of Morals*, Metaphysical Foundations of the Theory of Law, Introduction.

[12] See for a comprehensive study of the formality of law: Robert Summers, *Form and Function in a Legal System*, Cambridge 2006. Summer's concept of formality is in many respects wider than would be necessary in order to distinguish law from politics.

citizens/members of a political community and they have to be *ultimate that is they have to claim to be the last decision on an issue.*[13] A *state* typically claims the ultimate decision on all or at least the most important or many decisions.

3. Governance

The aim of governance is also to generate *communal decisions to lead a good life*, but these decisions *don't have to be political that is they don't have to formally represent all citizens and they don't have to claim to be ultimate that is to be the last decision on an issue.*[14] Also all communal but non-political and all non-state decisions are governance decisions. So the concept of governance is broader that is more abstract than the concept of politics. The term was first used 1989 by the World Bank in a report on the situation in Africa to assess also non-political facts and institutions in countries which needed or wanted financial support. In this report a "crisis in governance" was stated.[15]

Governance implies communal aims (policies), but leaves the content of these communal aims or policies open. So one can assume that governance includes necessarily some sort of communal interests or a common good (res publica, Gemeinwohl).[16] But the content of these communal interests or the common good cannot be determined by only referring to the form of governance. One needs to add some further considerations about the content of the good life and about ethics which lie beyond the concept of governance. They answer to the additional question about "good governance".

Like all other human-made means governance is quite open and flexible to fulfil our overarching aim to lead a good life and the many sub-aims of this overarching aim, that is living a good life in our families, at our workplace, in our economy, in our religious

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[13] Cf. Dietmar von der Pfordten, Politik und Recht als Repräsentation, in: Jan C. Joerden und Roland Wittmann (Hg.), Recht und Politik, Stuttgart 2004, p. 51-73.

[14] See for the history of the concept of governance: Julia von Blumenthal, Governance – eine kritische Zwischenbilanz, in: Zeitschrift für Politikwissenschaft 15 (2005), Heft 4, p. 1149-1180. See also the following editions: Gunnar Folke Schuppert (ed.) Governance-Forschung. Vergewisserung über Stand und Entwicklungslinien, Baden-Baden 2005; Arthur Benz (ed.), Governance – Regieren in komplexen Regelsystemen. Eine Einführung, Wiesbaden 2004.

[15] Anthony Pagden, The genesis of „governance" and Enlightenment conceptions of the cosmopolitan world order, in: International Social Science Journal 50, p. 7-15.

[16] See Dietmar von der Pfordten, Über den Begriff des Gemeinwohls, in: Gemeinwohl und politische Parteien, ed. by Martin Morlock, Baden-Baden 2008, S. 22-37.

community, in our leisure time etc. Governance is no natural entity which stands before us like a rock or a tree, but it is a form of human actions in communities, which can be shaped according to our aims and interests. Therefore there is no reason to restrict the concept of governance any further. It cannot be denied that the mean and form of governance is used in more restricted circumstances.[17] But these uses don't imply necessary conceptual conditions for the general concept of governance.

V. The Relationship between Law and Governance

Now we come to the final and decisive question: How can we characterize the relationship between law and governance?

In order to characterize this relationship it seems necessary to ask: Why is governance now such a big issue? Why had this form to lead a good life in community such a great uprising in the last decades? Is governance a new invention or an old form or mean to lead a good life?

To start with the last question: In history we had all times governance structures that is forms of governance. For example the Catholic Church as the oldest ongoing institution in the history of humankind must be characterized as having such a governance structure. The same holds certainly true for all protestant churches or other religious or nonreligious communities, be the latter economical, social or do they have another aim.

So governance is a form of communal action to lead a good life in communities which had ever existed in the history of mankind. But why have governance and/or the concept of governance become in the last decades such an important instrument to analyze our way to lead a good life in the community? In order to answer this question an analogy might help:

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[17] See for the identification of six more specific uses of the term governance: R. A. W. Rhodes, The New Governance: Governing without Government, Political Studies XLIV (1996), S. 652-667.

In chemistry one can find the phenomenon that, when brought together, a molecule in which different atoms are linked can be broken up by another atom or molecule. So the link between two atoms within a molecule is broken up by a third and/or fourth atom so that the substances establish new links or are set free.

Johann Wolfgang v. Goethe has taken up this natural phenomenon and transferred it to human relationships between couples. In his novel "Die Wahlverwandtschaften" two couples meet and they break up and link themselves again as different couples. This takes place because the mutual attraction between the different members of the different couples is so great, much greater than the attraction between the members of the existing couples. Many soap operas have taken up this familiar plot. And much jealousy and quarrel has been the result.

Now my thesis is that the purpose or function of the concept and phenomenon of governance as one mean among other means to live a good life in the community is exactly similar to an external, third atom in relation to an existing link between atoms or a third external person in relation to an existing link between two members of a couple: to break up the existing link between the atoms or the couple.

Governance has – this is my main theses – the purpose or function to break up the close – and by many now considered too close – relationship between law and politics. Or to formulate it a little more drastically: Governance has the purpose or function to free law from politics and perhaps also to a certain extent to free politics from law.

In order to understand this one has to look at the history of the development of the relationship between law and politics. The Western history is also a history of an ever closer relationship between law and politics. This didn't happen without counter-movements, but as a whole one can describe the development like this. Here are some hints: While the classical roman lawyers like Gaius acted in many ways independently, the Roman Emperor Justinian decided politically to collect many scholars opinions in the Pandects and provide them with some sort of political validity. Or another example: While the "Sachsenspiegel" was originally collected and drafted by Eike von Repgow, a lawyer, in the middle ages, in the age of absolutism the sovereign kings, dukes and princes tried to acquire the power and legitimization to issue all sorts of law by themselves. This process was going on and reached a peak in the area of codification, which always also

meant to justify the politicisation of the law and therefore the dependence of the law on the political body, see e. g. the ALR, the Code Civil, the ABGB and then in 1900 the BGB. The law of the lawyers and the law of customs was ruled out or at least reduced by the law of kings, dukes, princes and then in the area of democratization and constitutionalization the law of the parliamentary legislative and the executive.

On the other hand we see also the juridification of political decisions by setting up constitutions, by ruling the acts of the administration via administrative law etc. The concept of the "Rechtsstaat" is a concept which shows this juridification of the political.

In reality this process of the identification of law and politics never succeeded to be complete. There has always remained some law without politics e. g. the law of religious communities, the individual contracts and agreements, the law of non-political clubs and societies, the lex mercatoria etc. There is also new law which is independent from politics, e. g. the law of internet domains. And there remained always some politics without law, e. g. political processes and administrative actions which didn't take place in the form of law and weren't controlled by the law, e. g. the giving of subventions by political bodies to private persons and enterprises. Or the political doctrines like the Breschnew Doctrine and the Monroe Doctrin. But in theory law and politics came near to a form of identification. Hans Kelsen was perhaps the most prominent theorist who defended the theses that law and the state/the political are quasi-identical. He claimed that there is no law without the state and no state without law. State and law are identical.[18] This was never true, neither factually nor normatively, but the fact that Kelsen's assumption was – and still is by some – considered as a sound theory, shows how close the connection between law and politics has become in the 19. century and the first half of the 20. century.

Now my thesis is that the rise of the phenomenon and concept of governance has the purpose to break up this close connection of law and politics or state factually, normatively and conceptually. Why does this take place? The answer seems to be this one:

The close relationship between law and politics had and has many advantages in the use of both of these human means to organize a good life within a community. E. g. law is

[18] Hans Kelsen, Reine Rechtslehre, 2. ed. Wien 1960, p. 289ff.

justified at least formally by all members of the community, it is universal, and it acquires some reliability and certainty in its application via this backing by politics. In return politics becomes at least formally more just, equal and reliable by being backed by a constitution and exercised in legal form.

But the close relationship between law and politics had and has also some grave disadvantages for both of these means to lead a good life in communities: e. g. the suppression of private interests and private initiative, bureaucracy, formalization, the politicization of private relationships and communities, unchangeable last-word decisions without first experimenting on new issues, the inflexibility of law because of no-winner-situations in politics. To evade these disadvantages in some circumstances it can be better to break up the close relationship between law and politics and tie law to governance instead – like the chemical reaction between atoms and the human reaction between the members of couples sometimes does.

But as in chemistry and in human affairs it is not possible to determine abstractly, that is by philosophy of law, legal theory or legal ethics, in which more concrete cases such a change of relationships is justified. So this has to be decided by the specialists in law for their specific fields, applying a more case-oriented, empirical and bottom-up method than the method of legal philosophy.