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LAW AND SOCIAL CONFLICT

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I.

Social conflicts can be solved by help of various means: by different forms of force, by means of compromises or via the mediation of a third party. Today, professional ("learned") jurists - lawyers or judges - are frequently consulted on such matters, whereupon they then try to solve social conflicts through recourse to the "law". I shall speak here about the different functions which in this context are incumbent on the laws produced by act of legislation and thus about the different tasks with which the members of our legal organizations are confronted in their different " locations" and about the differences in working methods and working means which result therefrom. To begin, I should like to briefly outline the prepositions from which I shall proc eed:

1) I am speaking to you as an"academic" jurist who by profession is engaged in deciding conflicts of law between fellow-citizens, and who personally is concerned, in particular, with preparing such decisions. These decisions always refer to disputes in which I am not personally involved. I am consulted because it is expected that I, as a learned jurist have access to the findings and means of a science which can determine what is "right". So, I proceed on the assumtion that jurisprudence is a science of "right social decisions", meaning that it is an empirical science.

2) This leads us to the question as to what is the "object" of this science and from where do the means come which enable one to take "right social decisions". Don't think that I am now going to tell you what "law" is or what are the sources of law. You have all got to know very varied definitions and descriptions of the law which originate from different philosophical, sociological, and other ideologies. In my opinion it is easy to prove that a lawyer cannot, in his professional activities, rely on any such definitions or descriptions. The general binding force of juridic decisions omits to justify them with reference to one of the different philosophies or to the opinion of a scientific school. Kant's statement that lawyers are still looking for a definition of their perception of law is still valid today. Like Dieter Suhr, I

proceed from the fact that there is nothing on which a lawyer my safely rely. "We may at least rely on our experience that nothing may be relied on. And that's the point from which we must proceed in practice." To put this in a more positive light: I proceed from the assumption that there is a field of jurisprudential questioning and cognition: because philosophy (or the philosophers), sociology (or the sociologists) etc. do not answer the questions as to what is "law" in a manner that decisions could be based thereon. And for this reason there is a need for a specific (and autonomous) science of law.

3) However, if we proceed from an "autonomy" of jurisprudence in this way, there remains from a methodical point of view, only the possibility to suppose that there really are such things as "law" and "right social decisions". And hence among this law all that needs to be reckoned which pretends to be just and right - namely all that which our legal organizations practise and administrate as "law". Now, one can and even must investigate how far and for what reason all this appears to be "right" and adequate. What I am now going to tell you results from an analysis of the juridical means accepted and employed today.

II.

1) The conceptual-technical means which lawyers refer to in their activities may be summarized in three groups: "laws", "decisions" (precedents), and "dogmatic theories". I shall confine myself here to stating the results obtained from an analysis of the "statute law" as a juridical means. Today, as you will see, this tool serves several purposes. Yet prior to outlining the various functions of the statute law I should like to briefly state the reasons which appear to us as being meaningful (right, adequate) to refer to "laws" (rules or legal rules) when deciding social conflicts. In this context, keywords such as "will of the people" and "democratic legitimation" are those which immediately come to mind , or there are other expressions like "self-determination or participation of the citizens", and above all "political shaping". Yet these are "later" reasons which are not yet at issue. Because to make such arguments understandable it is important to know what "laws" or, more generally what kind of "rules" are referred to, whether "statute laws" or private records such as e.g. the "Sachsenspiegel" of Eike von Repkow. This record was handled as a code of law in various regions of Germany for centuries. Similar records are today

e.g. the "scientific" codification of the international commercial law etc. First in my lecture I shall deal with the general normative or legal character of the law which is no longer theoretically queried, though - in practice - this fact is often not taken into account. We all proceed on the assumtion that justice (legal adequacy or rightness) is "normatively" determined and hence follow a certain understanding of the general legal idea according to which equal things are to be treated equal or - more precisely - essentially equal things are to be treated equal and essentially unequal things need to be treated differently. This makes the difference of our and all other European legal systems and of legal systems influenced by Europe from other legal cultures. Such the older oriental or Chinese legal cultures were based on kadi-justice for which among others, the judgement of Salomon is an excellent exemple - meaning an example for a just yet non-reproducible judgement. Kadi-justice offers justice in consideration of all circumstances - such as we try to practise on our children. Normative justice wears an eye patch, it considers only the "circumstances relevant in law".

2) We have hence adopted the tradition of the Greek philosophy and the Jewish theology and have decided for equal treatment of,so to speak, abstract persons and not - as the kadi-justice which has no eye patch and considers the heart - for equal treatment of personalities. And from this decision results a line of consequences for our juridical "methods" and "means" which I can only roughly outline here. So, among others, the obligation to form a system or at least the obligation to use "systematic notions" is based on this decision: because of natural inequality, equality always needs to be established by means of "basic or preliminary decisions" through an act of abstraction. Hence equal treatment presupposes at all times a series of preliminary decisions, whereby a great number of such preliminary decisions are always at hand.

In this context, it is of particular importance that the decision in favour of equal treatment implies, in the long run, to take into legal considerations the effects of the legal organization, since factual equal treatment is obtained with the help of organizations only. And when law shall be realized in the form of equal treatment and shall be effective as such, judges must take into consideration how other judges have decided and still decide in similar cases. Deviating decisions which other judges will probably not follow, are "wrong" (unjust) because they do not even lead to equal treatment. And even though equal treatment may not be the

only measure for justice, it is nevertheless for us an indispensable prerequisite for tight (just) decisions. From our decision in favour of the principle of equal treatment there results likewise, the organized separation of issues of law and fact, just like the trend towards justification of decisions which I am unable to deal with in more detail here. However, it is definitely clear that "normative justice" which neglects natural inequalities, may only be realized after having stated what essentially equal facts.

3) In the course of juristic discussions these statements have gradually been generally accepted in our cultural complex. They do, however, not yet point to the phenomena of state-legislation which today largely determines our legal life. They suggest in fact authoritative records of the existing legal rules such as were offered,for example, by the "Land- und Stadtrechtsreformationen" - German codes of the early modern times, i.e., records from which we know that partly contained innovations. "Normative justice" too, is designed for being modified. It follows progress or, better, the change of knowledge. However, history of the law underlines quite clearly that the idea of law being generated or realized with the help of volitive decisions, is comparatively new. And in my opinion, we are not yet quite clear about what this new "source" of law, meaning state-legislation, has in common with the tratidional ideas of law and justice.

This has practical consequences: for example, apart from such branches where the rules of the legislator prevail, there are branches of law where decisions are largely determined through precedents. English law is a good example where common law and statutes exist side by side. And we represent these factual situations partly in theories which (similarly to the English law) differentiate strictly between the application of legal rules and "free" (law-producing) decisions and hence finally abandon the unity of law and the principle of equal treatment. Or we refer to theories which, as an intrinsic source of law, constitute a system of "values" which stands behind laws and decisions, and for the proof of which (finally subjektive) "confessions" and similar need be refered to, whereby, however, the general character of law gets lost. For the rest, all these "theories" and representations consider the products of state-legislation as an uniform phenomenon. Depending on the various theories, the judges are bound either to a"strict" application of the law (meaning all laws) or they are bound only "within certains limits". In practice, however, one continues to experience that in

numerous cases the legal rules may comparatively easily be bypassed whereas in other cases there is a "strict" commitment to the laws even where they appear to be wrong or absurd. Hence, a realistic theory of statute law or of state-legislation must apparently consider this fact from the very beginning as a differentiated phenomenon. It must reveal why in one instance the laws may be bypassed and why they are strictly to be observed in another. We shall hence investigate in the following why it appears to be advisable (adequate, right) to refer to the statute law when deciding social conflicts; or, to put it another way, why these laws appear as a means to obtain "right" (just) decisions.

III.

1) It is striking that in many cases statue laws are still today considered as being an adequate means to establish "right" (just) social decisions because they warrant equal treatment. In this context, I should like to remind you of the above mentioned "Land- und Stadtrechtsreformationen" and of other "authoritative records". Especially in those cases where differing "theories" are represented and defended, and where therefore "right" decisions are controversial, factual equal treatment may obviously be better ensured when the courts are offered a clear and generally accessille basis for their decisions, up to settlement of the conflict, that is to say up to the general propagation of the "right finding". In case of doubt, i.e. as long as the dispute about the right decision continues, the judges will observe, and be obliged to observe, these guidelines when they are interested in ensuring equal treatment. This phenomenon may be designated as the "normative function" of the laws. And this function leads to a "dogmatic" committment" to the laws meaning that the judges are bound to applicate such a law unless it turns out to be "wrong": as "contradictory vis-à-vis the legal cognition" which is oriented towards equal treatment. So if we state e.g. that the new amendment to the code of civil procedure, which tries to accelerate procedures, possibly hinders the "poor party" from defending against an action (because an attorney-at-law required as per para. 276, II of the code of civil procedure, is not always assigned within two weeks, the respective rule will be corrected with reference to art. 3 of our Fundamental Law (GG) in the course of "interpretation conforming with the constitution". Such examples might be continued at discretion, and not only in German decision-making. It is certain that (but for a few exceptions which shall be dealt with later) the state laws are always

also considered and understood as a means to warrant equal treatment and that we correct "errors" which the legislator makes in this respect.

2) Yet (today) when we speak of laws and their binding force, this is mostly with another function of the law in mind, meaning a function which at the first glance is in contradiction to that outlined above and which the law has (for this reason ?) adopted only at a later date. New statutes are often considered as a means of amending the law - and hence a means which enables us to treat the persons concerned differently than up to now, namely unequally. The fact, however, that in future all decisions need be taken in accordance with the new law, underlines that this is only an apparent contradiction. For the new legal rule is referred to as a means of amending existing law so as to adjust it to the progress (or change) occurring in extralegal and metalegal circumstances and findings. Hence, an amendment to the law through new statutes aims at reaching an "improved equal treatment": that is it aims at reaching an improvement in the law which is possible and hence necessary due to new findings (because "right" social decisions are at issue), or to "only" obtain an amendment of the law which takes changed living conditions into account.

Such changes in the living conditions or progresses in knowledge habe, indeed, always existed. And as we know from the history of law, the law has always taken this fact into account, even in times where the statute laws were not yet employed as a means to amend the law or to adjust it to new circumstances. However, in former times such "new" findings or new conditions led to such an adjustment only when they had become self-evident, meaning when they had been generally accepted. If we now have decided to entrust state legislation with adjustments, this shows that we are convinced that it is better, "more right", and hence "more just" to adjust the law to changed circumstances and to the progress of extra-legal findings and to thus improve it already at a stage when these findings have not yet been generally accepted. Today, this conviction is generally accepted: e.g. we do no longer wish to settle the problems of nuclear energy until there is general consent as to how to behave "correctly" in this respect.

So the statute law has for us besides the "normative function" also a function of amendment and improvement. This function leads to a strict binding to the legals rules, i.e. to a binding force which even existes when in our extralegal view these rules seem to be "wrong". So, if we

state e.g. that a law intending to accelerate procedures does not yield the desired effect, we are not allowed to correct this law. The courts may and must, in fact, correct the statute laws when they are in contradiction to the "legal cognition" meaning when they do not lead to equal treatment of essentially equal things. However, if a law is in contradiction with extralegal findings "only", it must be applied even in those cases where the fault of the law is "evident". It is hence the task of the courts to realize recognized and accepted findings of what is essentially equal. The courts need to direct their efforts to factually enforcing the already reached degree of equal treatment. On the other hand, the legislator is entrusted with improving the principle of equal treatment on basis of more recent findings.

In view of this "strict binding" even to unsatisfactory laws, it is today often difficult to understand jurisprudence as an empirical science of right social decisions. This "strict binding" to the statute law can be considered as a "means to improve the law" only when the state legislator is attributed a (qualitatively) higher understanding than is expected from the individual judge. And the quality of many laws seems to argue against it. Hence the law and binding to the law are today mostly associated with volitive phenomena only. The laws are understood as the "will of the people", political legitimation of the legislator is referred to, etc. And though nobody contests that the laws are also political, ideological phenomena etc.; this characterization is, in my view, not sufficient to cover the legal dimension of the laws. The legal aspect of the laws will become visible only when asking in how far it is in fact adequate or "right", to adjust the law with the help of new statutes to the changed situation and progress of knowledge instead of with other means such as through committing the judges to the findings of "scientific experts".

This question immediately points to the risks which a commitment of the courts to - different - experts would entail for the principle of equal treatment. The judges never habe access to the findings of the science yet only to the statements of individual representatives of individual sciences which are often in contradiction. However, the search for other possible forms of adjustment shows quite clearly that commitment to the findings of the science is not all a means to promise "right sociel decisions", because the science exists only as a continuity of discussions which comprises numerous controversial findings. So, when today we think it correct to adjust the law to changed situations and to the progress in knowledge at

a stage where we have not yet entailed definite and generally accepted findings, there is a need for a means which enables such clear and definite findings. And in our view, our procedure of legislation is such a "means" to establish "right findings": Because it includes steps and measures which seem to be suited to compensate the "uncertainty" (or openess) of the general finding process. If the law is to be adjusted to the chaged situation and progress in knowledge at a stage where "safe" findings are not yet available, it seems to be adequate (and right) to rely, in doing so, on those findings which are accepted by the majority: not because the majority or the consent renders "rightness" more probable or warrants it, but because such a procedure entails less unjustice. If errors or faults turn out at a later date, less people can plead that in their view these decisions have always been wrong: volenti non fit iniuria. Hence, the judges are bound to the state law also in those cases where these are "wrong" according to their own extralegal findings, because relying on own findings (i.e. extralegal findings which they consider correct) does not ensure "legal" decisions - decisions, which are generally right.

Hence, the procedure of legislation appears as an adequate (right) means to adjust the law to the progress of knowledge etc. because it combines two very different aspects - and only when these aspects are permanently combined: can it ensure on the one hand consideration of the new findings and changed situations through preliminary work realized by administration, through hearings, experts committees, etc. and warrant on the other hand - through the participation of politicians - that a consent is reached which in turn reduces the number of "unjust decisions". And as the new laws regulate issues and problems with which but a few citizens have so far been concerned, the politicians often have to produce a consent. Hence, our legislation procedure takes place in a number of well-matched steps and ensures thus the contribution on the part of different "experts", meaning from representatives of interests, jurists, administration experts, and politicians. Thus all these experts contribute to the later law and perform in this way most varied efforts which must be accomplished to make the law become a suited (and appropiate, right) means to take right social decisions.

Hence, we may and even must, proceed from the statement that (seen from the side of the lay) also the <u>politicians have their task in the process of legal cognition</u> meaning the task to reach or to produce a consent about

which means is today the right one, because this consent leads to less "injustice". On the other hand, we may and must realize that the law, as the product of this legislation procedure, is not (alone) the result of this activity performed by the politicians (though they may "vote" for the law - this will be dealt with later). The statute law is a legal law namely: a means to obtain right social decisions, only because it is the product of the activities of politicians and "scientists" or other "experts". In this context, I should like to underline that we have always taken this fact into account: so it has always been stressed that the records of parliament debates only have an unimportant part for the court as well as for argumentation of jurists who aim to interpret the law, and - in doing so - have reference to so called "materials". In this context, the professionally and materially more comprehensive preliminary work of experts is of higher practical importance so that e.g. the motives for the 1st draft of the BGB which as such has never become a law, have gained a greater importance than the "Reichstagsprotokolle" to the BGB. If laws were primarily "political decisions" (i.e. the products of the work of politicians), the above mentioned parliament records would have to constitute the decisive "materials". So, it may be recorded that the statute law appears as the "right" (and adequate) means of adjusting the respective law to a progress and change in findings and situations because it considers on the one hand the findings of science (of the experts) and because it compensates on the other hand the openess of the findings through the (political) statement and production of consent. From this point of view the statute law is a means of cognition of law, and not a political means of shaping. To avoid misunderstandings, I should like to stress that this refers only to the legal or jurisprudential perspective of the law. Sociologically (i.e. analyzed from a sociological point of view and with the help of conceptual-technical means of sociology etc.) the laws appear as something totally different: as a means of power etc. - and with good reason.

From a general point of view, however, the sociologico-political analysis of "legislation" may be attributed a higher cognitive value. The members of the legislative organs will probably feel themselves to be "politicians" (and this often means : organizers) rather than collaborators in legal cognition. Accordingly, the parliament records have practically less importance for the interpretation of the law than the reports made ba expert committees: because the politicians in

their debates are oriented primarily (and justly) to their own - political - task which consist in reaching a consent. And when accomplishing this task, they will use other conceptual-technical aids than are required in the framework of legal argumentations. For example they use terms and notions which can be understood by everyone (and which point for example, to the liberal and social character of a law), because a general consent may only be reached in this way. However, it is worth-while mentioning that the activities of politicians are of central importance to legal cognition as well and that they contribute something to legal cognition which a jurist cannot do by himself. In our view, legal cognition today is the task of a system which is based on division of labour.

3) There is still another function of our current statute law which has so far not been dealt with. In the framework of our law the famous judgements of the "Reichsgericht" regarding theft of electric power, constitute a first reference to this function. A first judgement in 1896 refused to punish "power thieves" because at that time only the removal of "things" was prosecuted. In our context, it is of interest that all arguments which were in favour of punishment for coal thieves, were likewise applicable to theft of electric power. In accordance with the principle of equal treatment, this would have lead to both coal and electric power thieves being equally punished or remaining unpunished. According to the principle "nulla poena sine lege" which characterizes our criminal law, the courts were bound to treat both forms of theft differently, and this was only because the legislator had decided so. In other words: The "nulla poena principle" excluded, and still excludes, recourse to the principle of equal treatment for the application of the criminal law (unlike for the former mentioned cases). It requires decisions without consideration of the legal findings and this means decisions which lead to a certain "unequal treatment".

This kind of decision exists, however, not only in the criminal law. The problem coming up in this context may perhaps be best illustrated with the help of an example which was discussed in 1971 on occasion of the International Congress of the Association on Philosophy of Law and Social Science in Brussels. At that time, the jurists from all countries agreed in that a law which prohibits the taking along of dogs in tramways likewise applies to cats and small bears, whereas a law which requires the payment of a dog tax does not allow the taxation of cats

and bears. So, let's think over why the wording of a law may be corrected in the first case by recourse to the principle of equal treatment (which means to legal findings) whereas in the second case the same is excluded.

a) In the beginning, one will be disposed to explain and to "justify" these differences in the decisions by pointing to the fact that tax laws and criminal lawy interfere with the legal sphere of the individual citizens and need hence be interpreted in a strict sense whereas the prohibition to take animals in tramways does not interfere with special rights of citizens. In earlier - and differently structured - legal systems, this explanation would have been sufficient. So e.g. in the early modern times, police regulations which restricted "luxury" and often also criminal laws were not considered as rules which restricted the citizens' rights because nobody could have a right to - sinful - luxury or to "bad" acts. On the other hand, tax laws required "naturally" the consent of the Diet, etc. Today we proceed, however, from the assumtion that all legal rules potentially interfere with the rights of the citizens, meaning in those cases where they are not supported by sufficient legitimation. And with this in mind, the prohibition to take animals in tramways just like the levy of "taxes" is to bee seen as a "restriction" of the general freedom of action through the state, and it is still unclear why this restriction may on the one hand be extended by means of legal findings and why it is impossible in another case.

b) The main point of this question will perhaps become clearer when comparing our present legal organization with former ones. And in this context it may be of help to compare the present representation of separation of powers with the description which Montesquieu gave in his "L'Esprit de Loi". Montesquieu too, distinguished between legislative, executive, and judicial powers. However, in his view judicial power is merely a special branche of the executive power, because it is the executiv power with a view to matters which depend on the civil law. Due to this power, the sovereign (or the state) punishes the criminals or settles disputes between private persons. And for this reason Montesquieu calls it judicial power. Accordingly, the proper executive power refers to matters which depend on the law of nations, meaning to matters of foreign policy, in particular of war and peace. In the framework of this system, the sovereign appears as the "means" to attribute new findings to the law. For this reason, the sovereign needed to be absulute, i.e. unbound, he was sovereign "by the grace of God". Protection of the citizens was ensured because he could not

interfere in their rights. The levy of taxes needed the consent of the Diet, and they were then collected just like other "private" debts. Criminal and commercial laws formulated merely the "good order" without being "interferences".

This (legal) system which we call "absolutism" or later "moderate absolutism" was finally surpassed by two developments: on the one hand, the number of measures considered necessary increased which according to the former opinion constituted "interferences" and which needed hence the general consent: above all expropriations. This development lead to those organizations which we consider today as the executive power in its true sense: interior administration. On the other hand at the same time, it was generally recognized that all rules or laws restrict the rigths of the citizens (and this possibly unjustly), i.e. also commercial laws, criminal laws ets. Due to the general development of cognition and philosophy the law was no longer considered as the "existing order" but as a "means" to limit the spaces of freedom; because - after the Cartesian revolution of thinking people no longer tried to substantiate cognition (and legal findings as well) on basis of the (present) objects alone, but on basis of the subject. So, the law necessarily presupposed "freedom of will" because "rules" can only be important for people who have freedom of will.

This led to the organization which we call "democratic" and which is characterized by the idea of the sovereignty of the people. This is because the sovereign (or another individual) could be understood as the "right" means to improve the law as long as his "errors" (which cannot be avoided in case of problematic innovations) were considered by the people as a consequence of the unfathomable will of God who had instituted the "sovereign by the grace of God" as governor of the people. Without this understanding, new (and hence possibly "erroneous" or wrong) laws can only be accepted when these errors may be attributes to the citizwns themselves: volenti non fiat iniuria. For this reason, the legislator, and his products, the statutes, had to be used as a means to introduce new findings in the law, and not as until war the executive power: because by means of the statute law, all state actions can be traced back to the mandate of the people; among others, an expression of this thought is the modern doctrine of the reservation of the law. This does, however, not mean that all amendments and innovations are materially produced by the sovereign (the people) or by the legislator (members of parliament). The laws are as before drafted by the government or by

experts. However, the decisive factor is that "rightness" (legality) of findings is now insured by the politicians as well who provide for stating or obtaining the consent so as to minimize the number of possible injustices - and which keeps their number at a low level as long as the citizens (the people) can understand and do understand the members of parliament as "their representatives".

c) In this context, it is important to know that we have established two basically different forms of social acting and decision making by committing every action of the state to the "order of the people" set up in law. So, public acting and decision making takes place as an action of the government which is based on the "legal order", which means legally and in accordance with the rules. Besides there is a space left for private actions which orient ates on personal preliminary judgements and which is hence generally considered as "incidental". The model for acting is no longer, as it was before, only the "bonus vir" (the faithfull, christian father) and neither, as in planning systems, only the administrator of the goods of the people who acts according to an overall plan. We have a rather organized side-by-side existence of different "models" of acting and deciding: the "servant of the people" may act in accordance with his findings. He has a "discretionary power" and does not need to obey "blindly". However, he must (or is expected to) act, other than the citizen, legally (in accordance with the rules) and must not decide once this way and then another way. Such a side-by side existence of different forms of action obviously can only lead to unity when it is organized on a division of labour basis. We were bound to set up and have in fact established different areas of responsibility with the help of a series of competence regulations and have tried to prevent the different courses of actions from interfering with one another. In these areas, the individual officials or citizens persorm their own tasks in accordance with their orders or in accordance with their personal aims.

As any other division of labour, this organization of a "social division of labour" entails numerous consequences. So the competence or organizational rules with the help of which the different areas of responsibility have been established, have to be configurated "formally" (positivistically). These rules must not and cannot be interpreted "directly" (materially, rationally, according to ones own legal findings): because there is no "overlapping" responsibility, and neither are there

material of labour is rather oriented towards "indirect steering" (planning). Division of labour is planned (determined) through splitting up of competences the interplay of which shall lead to what is right. The various sub-systems then work according to their own rules whereby the activities of the "neighbours" are sometimes considered as interfering wrong, unreasonable, etc. The "overall achievement" will then result from the interplay of the individual part systems. It is not the product of an individual or of an individual office - because this would abolish "freedom".

Hence, our system which is based on division of labour is oriented towards an "indirect rationality" in different respects. Each range of responsibility (every department) is organized so as to act reasonably by itself, confined to its aims and its area of responsibility. Which means that no individual and no individual department is directly responsible for "the society as a whole". Overall responsibility is born jointly by all persons responsible. From this results on the one hand that in systems based on the division of labour it may always be proved that (generally, with a view to the whole) much, which is considered, unreasonable (wrong etc.) takes place. "If I had to decide ...". It is, of course, possible to try to minimize such consequences of division of labour. Yet such consequences can only be excluded by abolishing the division of labour which would, however, result in a deterioration with respect to the capacity of the entire system. Hence, systems (including legal systems) based on division of labour may be considered as being "justified" (appropriate and right) through their total result for which no individual alone is fully responsible. The individual subsystems act and work in accordance with their own aims and rules, which in many cases seems to be "unreasonable" for the individual because their efficiency will often only result from the total result of the system which the individual is often unable to "see through". Systems based on division of labour including legal systems often demand (too ?) much comprehension from the persons involved who must be particulary well informed to be able to comprehend legal systems as reasonable.

In many cases, the state law has today the special function of (indirect) planning. This planning function or better: constitutional function thus- to the normative and improvement functions. It is connected with the rules which organize division of legal activities and it leads to a formal commitment which means to a commitment without respect to legal

findings and hence to (at least temporarily) unequal treatment - as illustrated by the examples of electric power and coal thefts. All competence rules have (such) a "constitutional character" or "planning character" this applies to all laws which delimit state (public) and "private" activities, and also to private status rules, regulations of legal capacity (status) and similar. The tram driver of our above example is hence free to refuse the transport of cats and bears on basis of the prohibition of dogs, because he is responsible for the internal organization of the tramway. He may and must hence refer to the general legal finding to ensure equal treatment. The tax official is not free to extend the dog tax to cats and bears because he is not competent for assessment of the social consequences of such a measure.

IV.

To conclude I should like to add some remarks to individual conclusions which may be drawn from the above considerations about functions of the law with respect to the actual jurisprudential and legal policy discussion.

1) The first conclusion is that politics and political considerations areare without importance for the lawyer (as lawyer), as opposed to opinions which are often put forward. The reason for this is that reference to "political considerations" would increase the dispute in case of "unclear" (controversial) cases and not solve it. The jurists could be helped bey "political" considerations and arguments only when politics or political science could promise "more clear" (more difinite, which means finally "more simple") findings than the law or the science of law do, yet nothing points to this. The jurist is able to decide issues about which policicians are disputing - with good reasons - because the legal finding may refer to criteria which are <u>not</u> available to politics (political science or sociology) which is the principle of equal treatment. Legal decisions are meant to realize the degree of equality and justice already reached. And therefore the organization available offers <u>legitime criterias</u>. Politics, however, are oriented towards "improvement" meaning to an equality which is still to be realized. They - and not the lawyers - are ableto change the organizations. So politics do not (yet) lead to findings (judgements) but only to decisions. Today's appeal to the jurists to decide "politically" or at any rate "politics-oriented" means, hence no improvement of decisions, may yet lead to the jurist abandoning means which are in fact likely to help him find right social decisions.

2) The Distinction between the different functions of the law and the considerations dealing with the division of labour of our legal organization demonstrate moreover in which way "political" decisions and findings are decisive for our law. For they do not only pass into legal dicisions (judgements) via the "law" the political statements of which need then be completed by the own political "valuations" of the judges; as you can often hear. Political or other "evaluations" determine moreover also the statements of facts which I am going to demonstrate in brief on the basis of an example from the constitutional law procedure; for the rest, administrative jurisdiction and other procedures supply still further examples.

The Federal Constitutional Court had recently to decide the issue of sessional expense allowance of the members of parliament. The result was that members of parliament, unlike before, are allowed to receive "equal" expense allowances only because they are no longer able, or more precisely: they must no longer perform their activities on a "part-time basis". Because a "non-uniform remuneration" of members of parliament, as was provided for by former laws, was only "right" (just) as such payments could be understood as compensation for the private working time which the members of parliament sacrificed for the general public. In this way, the "value" of the residual working time which differs for every case, could be considered as a measure for the importance of this "sacrifice" which the individual member of parliament made for the general public. From that moment on, however, where members of parliament could and should only be occupied by parlamentary and party's activities, this measure was no longer applicable. Now, the sessional expense allowance is only a state allowance which shall enable the members of parliament to do their work for the general public. And with this in mind, such allowances need necessarily be uniform ("equal"), because in the eyes of the general public all members of parliament are equally entitled "representatives of the people". It is now of interest for us how the Federal Constitutional Court came to the statement that the members of parliament can or shall perform this activity, other than formerly, no longer on a part-time basis. Then when we reflect, that the particular Court had to decide about the complaint of a member of the State Diet of the Saarland, we would like to say, that in this case the Court could quite well proceed from the fact that a part-time antivity was fully sufficient. When examining why the Federal Constitutional Court nevertheless proceeded from the assumtion that all members of

parliament (and hence also the member of parliament from the Saar) cannot (and shall not) perform their activities on a "part-time-basis", you will state this issue had already been "pre-decided" by the statement of the competent legislator whose predecisions were binding upon the Court in the framework of establishing the issue of fact. For there were in the Federation and in all other Federal states legal rules for which this was a prerequisite such as regulations of pension etc. So, the Federal Constitutional Court had to proceed from the fact that the activities of a member of parliament could no longer be performed on a part-time basis because it was unable to amend the "facts" established by the legislator. And the decision of the political issue as to whether the members of parliament shall perform their activities on a full-time or part-time basis belongs to the competence of the legislator, and not to that of the Federal Constitutional Court. The latter may in fact state that a law which prescribes an activity to be done on a part-time basis, needs not be observed when the members of parliament are unable to fulfill their tasks with which they are entrusted by the law on a part-time basis. However, the Court has to examine the framework of establishing the issue of fact the "trueness" (seriousness) of legal rules. For the rest, it has "only" to decide which conclusions may be drwan from one or another "rule" regarding the issue of sessional expense allowances. And hence the only thing left was reference to equal treatment, because the former justification of different remunerations had become inapplicable, meaning for spending their (private) working time.

In a similar way constitutional and administrative courts need to accept "political" pre-decisions of the politically controlled administration when establishing the facts. For if a law allows different possible interpretations, the politically controlled administration has to decide on one or the other "policy" which will then be covered by the law. In the framework of establishing the issue of fact the courts are then only able to examine whether administration performs a policy which is oriented towards equal treatment or whether it is deciding in different ways ("arbitrarily") and hence "contrary to law". They are, however, unable to order in the course of interpretation which of the policies seeing allowed by law the administration should perform.

3) The distinction between the different functions of the law imposes for the rest to precisely think over in every case which method of working is adequate for a specific case. If "internal" conflicts within

an individual area of responsibility are at issue, such as e.g. disputes among citizens or disputes within the differentiated state organizations, then "materially right" decisions need be taken. In such a case, the jurist can and even must refer to the legal findings. If, however, delimitation of the different areas of responsibility is at issue, only "formal" decisions can be taken which refer to indirect rationality. So the Federal Social Court has e.g. justly decided (and with the approval of the Federal Constitutional Court) that honorary judges need be consultet in case of a decision about a complaint of non-admission in the same way as they are consulted in case of decisions about revisions. As to this issue, the court could refer to the "legal-finding" and could order equal treatment of the materially equal cases "revision" and "complaint of non-admission" because here the question of a right "intrastate organization" was at issue. Contrary to this decision, the first Senate of the Federal Constitutional Court decided justly in the case of a constitutional complaint against the amendment of the procedure on review, that the question as to when the Federal Court may refuse a revision, needs be "formally" (and without consideration of the legal finding) regulated because in this case delimination of the rights of the citizens as against the state organizations are at issue, meaning competences which determine the special kind of our social system based on division of labour.

V.

To conclude, I should like to state that in my view there are today increasing signs which cause doubt as to whether we are able to continue to maintain this "legal system based on division of labour" which refers to normative justice and hence to equal treatment. The public reaction to the Majdanek procedure and the Holocaust TV series demonstrated in my view particularly clearly that there is an increasing urge for a kadi-judge who decides in considereation of all circumstances which means a want for a justice which has no longer an eye patch. Decisions are asked and taken which are in opposition to the generally accepted principles and requirements of legal and criminal policy the "rightness" (justice) of which may only be understood with a view to the special circumstances. This corresponds thatorientation towards "persons" gains an increase in importance. Here, it es worthwhile pointing (e.g.) to the position of Ted Kennedy in American political life which may probably be explained only through his family relationship. This

orientation towards "persons" and not towards (normative) factual issues promises evidently for many people a greater transparency of the world which is then arranged and understandable through human relations (" relations of loyality"). Factually, here an orientation towards "images" is at issue which the TV propagates of such persons, meaning towards images which are "made" by publicity agencies. So one has to realize that such an orientation towards an "image" leads to another justice than orientation towards the "word" (meaning rules). Yet this is a large field which may perhaps be dealt with in the discussion in more detail. In my view, it seems, however, necessary to think over this alternative.

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