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Requirements for the Study of Time and Action in Polo's Notion of Law... and in Jurisprudence

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ABSTRACT: Polian legal thought cannot be explained purely and simply by holding that titularity would be the gracious concession of the legislator, expressed in a law or in objective law, from which the subjective law is derived, consisting in a faculty or *potestas* for the achievement of a social purpose. This is due to the fact that a good part of the *current understanding of notions* such as titularity, faculty, system, etc., are born from a determined *primary organization* and a gnoseological load that is very specific, outside of which they do not function. The theory of knowledge of Polo, together with his anthropology, is incompatible with the philosophical foundations on which a good part of the current understandings of law are based. This reinforces the necessity of understanding the basic Polian legal notions as they function in history.

KEYWORDS: Philosophy of Law, History of Law, Leonardo Polo Legal Thought, Juridical Rationality

Leonardo Polo has stated that "the law undergoes historical variations but perhaps *its function remains the same across history*. What happens is that this function, in the systems of law in force *in each moment*, has not been fulfilled in the same way." With this simple sentence Polo shows that *the just action of the human being is penetrated by time*; that is, *it is historical*.

Polo proposes that law is a system of potestative or facultative titularities (rights or titles granting the power to exercise certain faculties) for the solution of conflicts, and which work towards the attaining of social order. Nevertheless, Polian legal thought cannot be explained purely and simply by holding that titularity would be the gracious concession of the legislator, expressed in a law or in objective law, from which the subjective law is derived, consisting in a faculty or *potestas* for the achievement of a social purpose that the legislator is served by at a determined moment of time. This is due to the fact that a good part of the *current understanding of basic legal notions* such as titularity, faculty, system, etc.[1], are born from a determined *primary organization* and a gnoseological load that is very specific, outside of which they do not function. The theory of knowledge of Polo, together with his anthropology, is incompatible with the philosophical foundations on which a good part of the current understandings of law are based. This reinforces the necessity of *understanding the basic Polian legal notions as they function in history*. For these reasons this article is principally directed to those who seek to study the notion of law in Polo.

Based on what has been stated until now, a broadly important question arises in the history of law, which is that of the difference between law and jurisprudence, paralleling the distinction between

1 E. GARCÍA MAYNEZ is *one of the high points of philosophy of law in the 20th century*, (Cfr., Fernández Suárez, J. A., *La filosofía jurídica de E. GARCÍA MAYNEZ*, Servicio de publicaciones de la Universidad de Oviedo, 1991, 9) and one of the *undeniable contributors to the legal mentality in a great part of the Hispanic world*. In his work and especially in his *Introducción al estudio del derecho* (*Porrúa*, México) which has gone through 64 editions, he defines *certain basic legal notions*, such as objective law, subjective law, faculty, system, legal title, etc. This understanding *is precisely what the basic notions of Polian philosophy of law cannot be traced back to in a pure and simple manner*.

lex and *ius* and also between *directum* and *iustum*[2]. In the development of this historical investigation I seek to follow the order established by these basic concepts, trying to locate within this schema the essential notes on which rest the Polian notion of law and its meaning. On this basis, the role of temporal human action in the conception of law held by the jurist and philosopher Leonardo Polo will become clear, and also in jurisprudence, about which he does not speak directly *but for which he establishes the bases for re-visioning them radically*.

In order to understand law according to Leonardo Polo, and thereby the role of temporal human (juridical) action, it is necessary to specify the reality to which terms like law, right, just and their derivatives refer. This analysis is fundamental, since the lack of distinction in the reality of that to which these words remit (that is, certain layers or "geological-semantic" substrates that have been left behind by civilizations, and therefore by temporal human action) would lead to inventing chimeras.

Therefore, this article does not seek to develop a theory of law, nor does it seek for the time being to begin a conversation with current scholarship in the philosophy of law. Rather, it seeks to clarify the basic notions of Polian philosophy of law, fundamentally via the use of the history of law and to a lesser degree via the mention of diverse legal aspects of present-day reality. Nor is it a study of the methodology of legal or judicial rationality, although it does seek to establish the bases for so doing, which is why I have had to put to one side the *iusphilosophical* discussion about principles and rules and about weighing between principles. Moreover, it is not an article on the history of law, but rather employs certain achievements attained over the course of that history it is impossible to use them all in order to understand what juridical reality is that of the remote past, at least and which might help to explain the Polian philosophy of law. This will open the door to allowing the legal reality of the near past and of the present to also help to explain this philosophy. It should be noted finally that with the term *legal reality* reference is being made to the

2 A philological and etymological approach to these terms can be found in HERNÁNDEZ, J. A., and D. CASTAÑEDA, *Curso de filosofía del derecho*, México, Oxford University Press, 2009, especially 49-59 y 88-92.

significance of law in every historical moment[3], that is to say, what law is; consequently, the aspects related to the history of legal institutions, of the sources of the law, the social history of law, etc. are left to one side.

1. THE LAW IN THE WORKS OF POLO

In order to trace the outline of the notion of law in Polo's thought, I will refer to a small number of works. Firstly, the interview of Octavio Vinces Zegarra with Polo: "Una sociedad poco juridificada inhibe la actividad humana" ["A poorly juridified society inhibits human activity"].[4] Secondly, the article entitled *Las organizaciones primarias y las empresas* ["Primary organizations and businesses"],[5] where he does not deal specifically with law, but dedicates a short section to the topic, locating it in its political, economic, social and cultural contexts; *locating it within human organization*. In addition, an indirect source is the work of Salvador Rus, "La filosofía jurídica de Leonardo Polo" ["The legal philosophy of Leonardo Polo"], which, despite not being written by Polo himself, is nevertheless the result of a dialogue between the author (Rus) and Polo, the former having had "the occasion of speaking many times with him about topics related to the world of law."[6] Finally, in other writings Polo deals with the law in the context of culture and of human creation,[7] as well as in an ethical context.[8]

Polo devoted many years to the study of law. Four years for a licentiate degree followed by a doctorate[9], attained in the mid-50s, in

3 "En este sentido, toda filosofía jurídica es también resultado de una experiencia, por cuanto supone un propio esfuerzo de comprensión de la realidad jurídica histórica y actual", D'ORS, A., "Principios para una teoría realista del derecho", *Anuario de filosofía del derecho*, (1953), 1, 301.

4 POLO, L, "Una sociedad poco juridificada inhibe la actividad humana", *Ius*, (1991), 2, 22-4.

5 POLO, L., *Las organizaciones primarias y las empresas*, Pamplona, Servicio de publicaciones de la Universidad de Navarra, 2007.

6 RUS, S., "La filosofía jurídica de Leonardo Polo", *Anuario Filosófico*, (1992), 25, 1, note 1.

7 *Quién es el hombre. Un espíritu en el mundo*, Madrid, Rialp, 2ª. ed., 177-80.

8 *Lecciones de ética*, Madrid, Rialp, 2013.

9 Unfortunately he never defended his thesis, but his work on that program is the basis of his first books; cf. J.M. POSADA ("Abstracción y realidad. Un estudio desde la teoría del conocimiento de Leonardo Polo", *Excerpta e dissertationibus in*

addition to a research stay in Rome at the *Istituto Giuridico Spagnolo.* Despite his extensive legal education, Polo never wrote any works dedicated to the history of law, and when he deals with the issue the lack of a critical apparatus impedes a reconstruction of his studies on the history of law. Nevertheless, his knowledge of the discipline, and his understanding of extra-mental and human reality, permitted him to develop the acuity to see the pieces that were lacking in the *puzzle*. In particular, one should note that the more than probable influence on Polo left by his stay at the *Istituto Giuridico Spagnolo* during which time its director was Álvaro d'Ors.[10]

It is important to seek to discover the meaning that Polo gives to law, since his thought could be—insufficiently—interpreted through the lens of the so-called subjective law and of modern dogmatics. It is only in the light of his philosophical work that one can interpret the meaning that he gives to law in accordance with the Romanist tradition as well as the knowledge of extra-mental reality, and not to a mere system and the application of norms inferred from it. Therefore, in the final analysis it is possible to hold that law, for Polo, is located within the *judicialist* tradition,[11] and as a result it is not possible to locate him within the *ordenancist* tradition or that of subjective law.[12] Nonetheless, he is clear about the role of laws and their rela-

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philosophia, 8, (1998), 27, n.10) that "*El acceso al ser* y en un artículo titulado *La cuestión de la esencia extramental* (…) recogen escritos cuya redacción original proviene de los primeros años de la década de los 50". M.J, FRANQUET ("Semblanza bio-bibliográfica", *Anuario Filosófico*, (1992) 25, 1, 15) holds for his part that "su dedicación a la filosofía tiene lugar a comienzos de los cincuenta, después de terminar la carrera de Derecho (...) A estos años pertenece su tesis doctoral sobre la distinción real y unos gruesos manuscritos, redactados entre 1952-58, que vieron la luz una década más tarde: *Evidencia y realidad en Descartes* (Premio Menéndez Pelayo del CSIC, 1963), *El acceso al ser* (1964) y *El Ser I* (1966)". It would thus appear that the abandonment of the limit is a consequence of the search for the solution to a challenge raised by the law, i.e. the already-mentioned existential character of natural law. In this sense it could be said that law is the locomotive of the philosophical work of Polo.

10 A. GUZMÁN BRITO, "Álvaro D'ORS (1915-2004)," *Revista de estudios histórico-jurídicos*, (2004), 26, 730.

11 For a deeper analysis of these terms, see D'ORS, A., "Ordenancistas y judicialistas," *Escritos Varios sobre el Derecho en crisis*, Cuadernos del Instituto Jurídico Español, Roma–Madrid, 1973, 35-43.

12 J.J MEGÍAS, "El derecho subjetivo en el derecho romano (Un estado de la cuestión)", *Revista de estudio histórico-jurídicos*, (2003) XXV, 35-54; idem, "La consolidación del derecho subjetivo en el periodo postclásico romano", *Anuario de*

tionship with *ius*. His understanding of human organization, of the knowability of extra-mental reality, and of history (i.e. of time), prevents his understanding of law from being given a legalist-systemic character that would only require a generalist logic in order to be elaborated and a certain practical knowledge in order to put the law into practice. Here *the necessity is clear of keeping in mind the meaning of the rest of Polo's philosophical works* in order to understand his conception of law, since there is a risk of developing a simplistic interpretation that is incompatible with his anthropology and theory of knowledge, such as assimilating titularity and faculty to objective and subjective law.

The synthesis of the notion of law in Polo will involve the review of the three issues that motivate the research of Rus, that is: what does Polo understand law to be, what is its ground or its essential notes, and what is its function in the life of human beings from the anthropological and sociological perspective.

Polo holds that the function of law has been the same throughout history, although that function has not been fulfilled in the same way by all legal systems. If the function of law is the same over the course of history, the one that he proposes will also be part of that historical tradition, and can even *lead back to that tradition*.

A first "definition" would understand law as a system (artistic dimension) for the solution of conflicts (third essential note) between facultative titularities (first and second essential notes) in order to bring order to society (social function). Thus Polo indicates that law is a system of norms that rests, on the one hand, on *titularity*, and on the other hand, on *capacitation or potestas*. That is, it is a system of titles and faculties with a determined function.

a) First essential note

The first or essential note on which the normativity of law rests is that of titularity. Titularity grants the right-holder an increase in his or her natural capacity by way of *protecting it* and *of treating it as a faculty*. It would seem that on this point Polo has recourse to the

filosofía del derecho, (2003), 20, 189-206; Various authors, *El derecho subjetivo en su historia*, Servicio de publicaciones de la Universidad de Cádiz, 2003.

tradition of subjective law, since in various places he holds that law is a system of titularities.[13] Nevertheless, his theory of knowledge and his anthropology remove him completely from this tradition, since it (subjective law) has proven origins in the prenominalist circles of the 12th century, continued in the canonistic circles of the 13th century and taken up again strongly by the nominalism and scholasticism of the 14th century.[14]

Titularity, according to Polo's understanding, capacitates for an appeal to limitations, which confer a particular kind of power. These limitations are usually accepted *motu proprio* by the litigants; unfortunately, however, they sometimes have to be imposed with the aid of law enforcement.

In order to understand the explanation I offer an example by way of the *mode of acquisition of property* entitled *fluvial accession by avulsion*. This mode of acquisition comes into play when the force of a river carries away part of a plot of land located upriver and deposits it on another piece of property downstream. For legal specialists, the owner of the property that suffered the separation conserves the ownership of the piece transported by the current, and may lay a claim to it, but the owner of the land to which the transported piece becomes permanently united extends his or her holdings to it. The criterion in order to know whether the union of property becomes permanent is whether or not the vegetation on the transported piece of land sends roots towards the plot to which it becomes incorporated. If this occurs, the jurists hold that the union between plots becomes permanent.[15] In this case the owner of the piece of land to which the moved land becomes definitively incorporated has in his or her favor a number of jurisdictional resources in order to limit the activity of third parties and of the owner of the land that suffered separation. These jurisdictional resources confer the specific kind of power that Polo talks about: the power to take possession of the fruits

13 POLO, L., *Antropología trascendental, II La esencia de la persona humana*, Pamplona, Eunsa, 2003, 258.

14 GUZMÁN BRITO, A.; "Breve relación histórica sobre la formación y el desarrollo de la noción de derecho definido como facultad, o potestad (derecho subjetivo), *Ars iuris salamanticensis*, (2103), 1, 77ff; idem., "Historia de la denominación del derecho-facultad como 'subjetivo'", *Revista de estudios histórico-jurídicos*, (2003), 25, 410ff.

15 A. GUZMÁN BRITO, *Derecho privado romano*, t. I, Editorial Jurídica de Chile, Santiago de Chile, 1992, 558.

of the plants that sent roots into the land, making the union permanent. In the case that the union is not permanent, the jurisdictional resources would be in the possession of the owner of the plot that suffered the separation. The exercise of this right permits the owner to express his or her dignity by way of assuring him or herself an inviolable domain of activity for the purposes of its use and of ulterior human ends.

This results in law being a procedure for extracting the human being from isolation, which means that law is intrinsically social. When titularity is defended against other persons, a precise web of relations comes into play. The human interest that the law serves is, thus, of many kinds. From the case in question one can extract various interests. First, the physical survival, by means of the consumption of the fruit obtained, of the owner of the plot of land to which the land washed downriver is incorporated. Later a precedent is established before society for future similar cases; societal peace is established among those who were litigants in the case, etc.

b) Second essential note

It consists in the increase of the capacity, faculty or power that appeals to an anthropological destination of law, which would indicate that it is at the service of the growth of human essence, an issue that the tradition of subjective law is far from ever having engaged with. Law grants power in order to increase the capacities of the rightholder. Law is, in the final analysis, at the service of the unrestricted growth of the essence, which only grows to the degree that human action does. This is what is behind Polo's statement that "the poorly legalized society inhibits human activity," or that societies that have few norms impede persons from carrying out, via the exercise of faculties, actions that make them grow in their essence, as well as contributing to the configuration of the social order, which also occurs through the resolution of conflicts. Law, for Polo, is rooted in anthropology; contributing to the growth of the human being is its ultimate purpose. It must be made clear that norms cannot be understood plainly and simply as laws.

c) Artistic dimension

Polo holds that law is the most subtle art, indicating that it is a practical activity, with the result that *ius* must be worked out, in the final analysis, by practical reason. This does not exclude that various elements necessary for working out *ius* be known by other faculties and by the habits, since they too are a theoretical and practical knowledge derived from acts and habits, and are necessary for the configuration of *ius* by the practical reason.

Salvador Rus emphasizes the artistic character, holding that law, for Polo, is the work of the configuring capacity of the human being, which gives rise to external products; it is a cultural product in which the continuation of nature is clearly seen, since it is a capacity for creating norms.[16] Nevertheless, this continuation of nature requires knowing it in order to extend it. Otherwise, *ius* would not fulfill its function, or would even be negative. Thus, we understand the importance of knowledge of the extra-mental as a source for working out *ius*. Only on the basis of this prior knowledge can we understand that for Rus this power is an increase over what was naturally given to human beings, with the result that their natural weakness is assisted by law, meaning that human beings are strengthened by artifice or "artistic norm." *Ius* in the final analysis is the fruit of the exercise of the entirety of human knowledge.

d) Third essential note

Polo speaks of a third essential note: the norm presupposes human conflictivity[17] and law concerns the arbitration or solution of conflicts between owners[18]. This is the task that jurisprudence has charged itself with carrying out during more than 20 centuries[19].

16 RUS RUFINO, S., "La filosofía jurídica de Leonardo Polo", *Anuario Filosófico*, (1992), 25, 1, 218.

17 RUS RUFINO, S., "La filosofía jurídica de Leonardo Polo", *Anuario Filosófico*, (1992), 25, 1, 224-5

18 "In addition, law concerns itself with two issues: rights-holding (titularities), that is, institutionalized juridical capacities, and the arbitration or solution of conflicts between rights-holders", POLO, L., *Antropología trascendental, I La persona humana*, Pamplona, Eunsa, 1998, 177.

19 *iuris prudentia*: Dig. 1.1.10.2; which refers to the exclusive competency of experts in *ius*, Glare, P. G. W., *Oxford Latin Dictionary*, 2nd ed., Oxford, Oxford University

Polo holds that law consists in the *encounter and formulation* of limitations on the exercise of immediate powers.[20] This capacity for limitation of powers is ascribed to the holder of the right by the judge who determines the *ius*, but it also can be contained in the laws that constitute *ius* only through the *iudex*.

e) Social function

The function of the law in the life of humans and *the manner in which law fits within the human being* is by way of *its assimilation*. That is to say, the law does not only provide external benefits or harms (benefit of things by way of insuring them), but in addition capacitates the human being for the coming of his or her future. This is the link or manner in which the increase of capacity that is the gift of the law is assimilated to the increase in biological-natural capacities.

Since law is inspired in human nature in order to extend or continue it, the actuation of the verbal and active character of the norm requires that it correspond with human nature, *which reproduces itself in the form of habit*. This is why the norm presupposes the growth of habits, and also why it capacitates the human being for the coming of a future that belongs to him or her. Only by obeying the law *does one acquire virtues*. The "inspiration in human nature" that Rus speaks of refers to the fact that knowledge of the "nature of things"—and its correlative way of taking advantage of them—permits the development of the law, which is oriented towards the growth of human nature. Therefore, human nature does not, cognitively, contribute anything to things themselves, but rather the use of things provides the benefit—and with that the habit and the vital foundation—to human nature.

In sum, law fosters the acquisition of virtue, which in turn fosters the fullness of life or the perfection of nature. In his *Antropología trascendental* Polo adds a kind of synthesis of the issue, affirming that subjecting things to norms, which is what is proper to law, adds a

Press, 2012. *Iuris scientia*: Dig. 1.2.2.35; Dig. 1.2.2.40; 45.1.91.3. *Ars iuris*: Dig. 1.1.1pr.

20 POLO, L., *Las organizaciones primarias y las empresas*, Pamplona, Servicio de publicaciones de la Universidad de Navarra, 2007, 107-9.

value that contingent reality does not have, and it is precisely this added value that shapes the realm of the social: this is positive, or "imposed," law. Positive law is the law that is effective, the law that in fact shapes the realm of the social. This occurs, of course, by way of generating virtue, which guides tendencies. This normativity is far from being *simple regulation.*[21] In addition, as an element that shapes the social, the norm places human beings into relationships with one another, forming society and shaping the typical connections of society.[22] Thus, law is not merely a matter of negative relations, as one might believe in the light of prohibition; instead, it is *a fostering of coordination and order:* of peace.

2. CLASSICAL ROMAN JURISPRUDENCE: *IUS* AND *LEX*

By way of this sketch of the Polian notion of law, one can extract the wealth of its meaning by contrasting it with historical legal reality. This will allow for understanding that, despite the historical variations of law *its function is the same over the course of history*, but also that this function has not been fulfilled in every moment of history in the same way. This means that this aspect of Polian philosophy can explain reality, which in the case of law means the legal systems of today and of the past. It is thus that the knowledge and ordering of the relations between persons that are derived from the employment or usage of things—in the Western world and in accordance with its Roman legal tradition—has been exercised by judges from time immemorial.

The term *ius*—from its most ancient uses up through the postclassical Roman world[23]—cannot be simply and easily translated as *right* or *directum*, much less as *lex.* Even in the Middle Ages some jurists and philosophers such as Thomas Aquinas did not assimilate the terms.[24] It was only in late Latinity that *directum* was used in parallel with *ius* and ended up displacing it. Thus, during the preclassical and

21 POLO, L., *Antropología trascendental, II La esencia de la persona humana*, Pamplona, Eunsa, 2003, 267-8.
22 *Sobre la existencia cristiana*, Pamplona, Eunsa, 1996, 2 parte, III y V.
23 Cf., A: GUZMÁN BRITO, *Derecho privado romano*, t. I, Editorial Jurídica de Chile, Santiago de Chile, 1992, 84.
24 ST IIª-IIae q. 57 a. 1 co.; IIª-IIae q. 57 a. 1 ad 2.

classical periods (some eight centuries) *ius* referred to something distinct from and irreducible to what *directum* and *lex* referred to.

a) The differences

Ius and *lex* have moments and circumstances where they are elaborated differently and have different proximate ends, even if the remote end is the same: the maintenance of society and the survival of the human being in it. In addition, each of them is developed by different persons or structures, which exercised diverse competencies; that of *potestas* and that of *auctoritas*, as d'Ors would say. These differences depend on human actions and decisions supported by knowledge that is exercised in determinate moments, and as a result they do not correspond to a non-existent *essence of the juridical* or *substance of the law*. These differences are the manifestation of *human temporal activity* although they are exercised by certain cognitive dimensions and supported by an anthropological structure.

a.1) The end

Ius and *lex* are similar in regards to their ends, since they derive from a normative action that seeks to regulate social order in a given moment, with a view to its preservation or subsistence. It is accepted by the Western legal tradition that holds that the end or purpose of jurisprudence is the attainment of *corrective justice*, as Aristotle terms it, or *commutative justice* as Aquinas calls it. The necessity of the exercise of this subjective part of justice arises when there is an imbalance in the relation of equality among persons, resulting from the employment or usage of goods. The re-establishing of equality would mean that the person who won at the cost of the other must reject this gain in accordance with the measure of the loss by the first person. This allows an understanding of why Aristotle holds that corrective justice is calculated according to *geometric equality*. The exercise of this subjective aspect of justice is, therefore, that which gets the act (action) right, and it is the object of this exercise that rectifies or remediates the inequalities that arise as a result of the

συναλλαγματα[25] between persons, that is, of *simple human interaction*.

The employment or usage of the goods communicated by the human tendency to sociability should not necessarily be understood as something strictly economic, measurable and quantifiable, but rather as *something real understandable by the human person*.

Despite the fact that the tradition has held that corrective justice is that which is proper to judges, the judges have to deal with the other subjective part of justice: *distributive justice*. In this way the *iudices* can also initiate and direct processes when there has been a violation of the relations of distributive justice. Although normally it is not within the jurisdiction of judges to establish laws and rules for the appropriate employment or usage of the common good, nor of privately owned goods, they do correct imbalances affecting the employment of these goods. Therefore, distributive justice cannot be understood only as norms, or as limits to employment contained in the regulations, nor as laws and rules that protect the common good, that is, as simple statements. Rather, distributive justice is the act of the subjective part of the virtue of justice, whose object is the action or proportional use of the common good[26]; this action restores the imbalance in the use of a common good.

This precision permits understanding better that the spheres of legal order and those of the juridical order are not the same, although they are coordinated. It is worth adding that the same person or structure may perform both functions, legal and judicial, including the governmental power, while the acts by which these functions are exercised are formally excised. Nevertheless, there will never be an identification of the rule of conduct that orients the action towards the future, of the conduct that resolves imbalances caused by actions

25 This can be understood as "any matter agreed on between persons, proceeding from a contract or not," H.T. PECK, *Harpers Dictionary of Classical Antiquities*, New York. Harper and Brothers, 1898; that is to say, "that which proceeds from agreements or contracts between persons," H.G LIDDELL AND R. SCOTT, *Greek-English Lexicon*, Oxford, Clarendon Press, 1996, entry συναλλαγμα. These *transactions* require a very broad meaning to be attributed to them, cf. FINNIS, J., *Natural law and natural rights*, Oxford, Clarendon Press, 1980, 177-9.

26 "Shared possession with respect to a medial, consolidated plexus in which the human person participates actively without forming part of it nor being confused with it" in FRANQUET, M. J. "Sobre el hacer humano. La posibilidad factiva", *Anuario filosófico*, (1993) 26, 2,429. Finally in STh, I-II, q. 90, a. 2, ad. 3.

of the past; nor will the *imperative declaration of potestas* be identified with the *prudential criterion of authority* of the experts. This is why it is appropriate to use different terms in order to designate one or the other. In addition, one can make out with more clarity what the role of time is in *lex* and in *ius* and also what the role is of the action of the person, of an *esse* that exercises—by means of its *essentia*—habits, virtues and acts in order to achieve fullness of being for the person's *essentia*.

a.2) Persons-structures

Lex is developed by the person who is in charge of the community, which, throughout history, has been the political-governing *potestas*.[27] It is the result of the exercise of the *potestas*, that is, of *the exercise of power*, the expression of a will, but a will that, of necessity, must be *socially recognized*. This is why it is an *imperative declaration* on the part of the person exercising political power; however, in order to exercise this power the acceptance of society is necessary. The power that is exercised is the "personal possession of the means necessary for configuring the co-existence of a social group," which one can possess only by way of social recognition.[28] This would thus be the true sense of the Latin *lex*[29].

Ius, in contrast, is the resolution of a controversy between persons that is derived from the employment of things. This resolutive labor has been given to specialists, who sometimes have jointly exercised *potestas* as well, and thereby the governing and legislative power as well. But *ius* has always been a mechanism of correction or an instrument of rectifying imbalances or disproportions in social relations by means of the establishment of a *position of force* according to the prudential criterion of these experts, made concrete *in each case* in the form of prediction or of the opinion of the *iudex*.[30] It dif-

27 D'ORS, A., "La ley romana, acto de magistrado", *Emérita*, 1969, 138-9. Bruns, C. G., *Fontes iuris romani antiqui*, Tubinga, Mohr, 1909.

28 DOMINGO, R., *Teoría de la «auctoritas»*, Pamplona, Eunsa, 1987, 227ff.

29 "An active force"; "an enactment of a sovereign power"; "a rule made by any authority", GLARE, P. G. W., *Oxford Latin Dictionary*, 2nd ed., Oxford, Oxford University Press, 2012.

30 D'ORS, A., *Parerga histórica*, Pamplona, Eunsa, 1997, 122.

fers from *lex* because it is the fruit of a *knowledge* that is socially recognized, and not an act of *potestas*.

This approach leads, in the final analysis, to knowing the core or essence of the problem, finding grounds for the exercise both of *potestas* as well as that of authority; These grounds, ultimately, are nothing other than social recognition. This makes it clear that these structures-persons that develop both *ius* as well as *lex* have as an essential element the fact of social acceptance, which, one might say, is something cultural. Stated in another way, social organization is a fact in a determined moment, in a specific time. The various political regimes are imposed by the recognition that a community offers to these structures, structures which must be established in persons and in their actions. When the community recognizes that the political structure possesses *imperium*, its commands will be laws, and when that structure is recognized as having *authority* its decision will be *ius*. This is the living society in which the sources of normativity proliferate.

Up to here we can see that the distinction between *ius* and *lex* cannot be established completely by merely paying attention to its sources of creation or elaboration, since both are norms deriving from *sources of normativity*, although one comes from *auctoritas* and the other from *potestas*. Certainly this criterion involves a difference: that *ius* and *lex* are developed by specific sources of normativity (exercised by specific persons) for each of them, and are irreducible to one another. They are similar in that both seek to resolve concrete social problems, located spatiotemporally. This opens the door to the exploration of another criterion in order to give more detail to their difference.

a.3) Moments of development

Another criterion for differentiating *ius* and *lex* derives from paying attention to the distinct moments and circumstances of their development. Therefore judges, in the resolution of processes—both resulting from commutations as well as from distribution of goods—make use of legal tools, i.e. laws and the rules that emanate from the *potestas* of the plurality of the sources of normativity. Certainly, it is not just these sources that provide judges with inspiration in order to establish the *medium rei* or *ius*. Jurisprudence *has never rejected the*

employment of all the understandable data in order to re-establish order in the relations between persons, ultimately for the purpose of the employment of goods. Thus, the thought-content of the laws and of the rules emanating from the *distinct sources of normativity* permit the judge to know and shape, by means of the act of the virtues of justice and prudence, the object which, on being carried out in practice, will restore order in the relations of usage of private and commonly-held goods. This is due to the fact that *the laws and rules* (emanated from the sources of normativity) are *a source of criteria* for the determination of *ius* or the determination of what is just in a concrete instance. This is despite the fact that at other times, perhaps most often, the judges organize, administer and plan.

It is worth reiterating that these laws and rules *are not ius* itself, nor are they *medium rei*, but rather they are a *certain reason* of them[31]. This is so, *because the judge*, despite what the doctrines in vogue might say, *does not merely apply norms*[32]. The judge, at least, must understand the laws by way of the exercise of interpretation, and if it is advisable for the rectification of social relations he will use them completely or partially, just as he uses *the other sources of ius*. The judge can even decide not to take into account the norms contained in the laws, and thus must develop a new norm. This is precisely *aequus* or *aequitas*—but not *epieikeia*—which involves the correction of the sense of the norms in order to broaden or restrict their meaning. Thus the judge is also constituted, by his own actions, into one of the sources of normativity.

In order to locate the moments of development it is necessary to establish the relationship of *lex* and *ius* with the common good. First-

31 ST IIª-IIae q. 57 a. 1 ad 2.

32 Certain contemporary authors go so far as to hold that one of the positivist dogmas is that the judge "does not merely apply norms". Nevertheless, this is not true for all positivist schools; the well-known citations of Julien Bonnecase of the authors of the School of Exegesis seem to support the idea that the dogma is precisely the opposite: *the judge merely applies norms* (*L'ecole de l'exegese en droit civil: Les traits distinctifs de sa doctrine et de ses methodes d'apres la profession de foi de ses plus illustres representants*, Paris, De Boccard, 1924). This is despite the defense that Antonio Manuel Hespanha makes of this school ("Tomando la historia en serio. Los exégetas según ellos mismos", *Revista Forum*, (2012) 2, 3, 13-51). It also seems to be the ideal of certain national leaders. George W. Bush, on pondering the virtues of Judge John Roberts, stated that "He will strictly apply the Constitution and laws, not legislate from the bench", *Selected Speeches of President George W. Bush. 2001-2008*, Pennyhill Press, 2013, 310.

ly, *lex*, whatever its source may be, has as its end the subjection to norm of the relationships of employment of goods among persons, not just of some people with others, but rather of the people who make use of a common good, an action that constitutes them into communities. The legal system has regulated relations between persons in order to subject to norms the usage of goods derived from the *synallagma* or agreement; these are the poorly-named *private relations*. This usage is not that of a common good. Nevertheless, because of the connection and coexistence of goods in human society *it is appropriate that the relations derived from the commutation of goods be resolved*. That is, this maintenance of the order of private relations would in fact constitute a common good, or, stated in another way, it would contribute to the common good by resolving controversies between persons. It is for this reason that the legal system has also regulated private relations, since in order to safeguard the common good, the one who is in charge of the community must be diligent in creating mechanisms and structures that restore the relations derived from commutations.

In second place, the *lex* has regulated relations, in addition to those deriving from *synallagma*, those that are established between persons as a result of the usage of common goods. These goods are not employable thanks to their commutation with other persons; rather, they are employable when one belongs to a certain community, because one has the title for using them. Therefore, these goods *are used in common proportionally*, it is worth noting that these goods are not just material goods. This proportionality is the guarantee of not transgressing limits to the benefit gained, and also guarantees that the other members of the community can also use them in a proportional manner. Conflict between persons, which in a strict sense would be between the community of persons and the transgressor due to the usage of these goods, arises when they are not used in a proportional manner or according to *arithmetic proportion*; this is what causes deterioration in the measure of use of this good by other persons.

These descriptions permit locating the moment of *ius* and that of *lex*. *Ius* would be posterior to the arising of the conflict which is its origin. In contrast, *lex*, which provides norms and rules for ordering society and avoiding conflict, is prior to the conflict. In addition, *lex* can be posterior to *ius*, if it is the result of the development of the *ius*, but is created in view of imposing norms upon future social relations

in order to avoid conflicts. *Lex*, therefore, is promulgated in view of promoting patterns of conduct that avoid conflict and preserve the common good. It is of little importance that in order to impose norms on the behavior of a community *lex* is developed, as legal doctrine holds, *in general and abstract terms*. Or that it is developed in order to impose norms on a specific relation, that is, a relation between concrete persons in determined times. The history of law gives examples of this, and thus the *essence* of the law would not have its roots—as some might believe—in its general and abstract enunciation, while that of *ius* would be rooted in its particular and concrete enunciation.

Finally, it should be said that these lines have been able to superficially establish the difference between the meaning of *lex* and that of *ius*. Nonetheless, in regards to the epistemic grounds of the development of *ius* and that of *lex*, there is no difference. By means of the exercise of his or her cognitive dimensions, the human person is able to discover both the criterion of geometric equality that is attributed to commutation, as well as the criterion of arithmetic equality which is appropriate for situations of distribution, and apply them to texts emanated from structures which society recognizes as having authority or *potestas*. If society does not recognize this, *ius* will be a mere scientific or doctrinal opinion and *lex* will be merely the expression of power. But it is not a question of having the criterion of commutative equality determine *ius* and the criterion of proportionality determine *lex*, since in recent times *lex* has sought to determine both; rather, *the measure of the good used or employed is not calculated in the same way, and as a result the one who corrects the imbalance in this usage or employment attends to diverse elements in order to adjust the relations*.

b) Nature of *ius*

Álvaro d'Ors has come to the conclusion that the best way to understand the meaning of *ius* is by use of the word *position*. The diverse meanings of the term "position" can be summarized in the attitude or manner of thinking, working or directing oneself in regards

to a certain thing[33]; according to this, *ius* would make reference to a *decision*, *position* or *positioning* established by the wise, but which gives rise to a certain action or form of behavior.

This action of *establishing a position* or of *positioning* can affect any issue that demands to be *positioned*, established or decided. This presupposes the existence of some disorder, or simply somebody's lack of *position*, which makes it necessary to *position* for the first time. The concrete manner or behavior which will result in *positioning* will take place by way of the undertaking of certain behaviors or actions, since a situation of disorder or lack of position is brought about through the usage of goods by people, with the result that they locate themselves in relation to one another. When one takes advantage of a good in solitude there is no possibility of interference, and thus neither is there a possibility of a conflict that would demand the declaration of *ius*. An exception must be recognized in the case of natural phenomena, for much of the disorder in human society is a simple product of natural occurrences or *physis*, such as climate or water.

Therefore, in a first approach to *ius* in itself, it could be understood as the declaration of the judges in regards to an action, or even more specifically, in regards to the object of action, which brings with it determined benefits, which tend towards causing the equalization of a relation between persons that is derived from the usage or employment of things. It might seem that *position* would be something static; nevertheless, it is in fact *a certain manner of acting*, that is, it refers to something dynamic. That which is decided or *fixed* by the judges translates into something that is a *dynamism*. Of course *lex* is not what has been established or declared, nor even the written sentence whose text encloses the *ius*. What is truly important is the establishment or declaration of *the position of the persons involved in an issue*, which (the position) demands of the persons involved in the positioning that they undertake actions that tend to produce the benefits in question, which in turn restores equality. This is why St. Thomas frequently reiterated his position that *ius* is behavior. Nevertheless, it is not a mere behavior without content, but rather it

33 Real Academia Española, *Diccionario de la lengua española*, 23ª ed., Madrid, Espasa Calpe, 2014.

has an object that is translatable into benefits because of the arising of an issue, thing or *res*.

This perhaps indicates that justice unfolds in two moments. On the one hand there is the decision of the judge who *arbitrates* or *solves*, which would be the fixed or static part that makes reference to the knowledge or the recognition of the *officium* or *titularity*, which is expressed in writing in the document called the *sentence*. On the other hand, there is the action or dynamic that would be the jurisdiction of the parts derived from this *officium* that would give them *potestas* or the *faculty* in order to exercise the behavior of the handing over of *socially demandable personal benefits*. The result is the restoration of equality or of proportionality, depending on whether one is dealing with the usage of goods due to the *synallagmata* or of the usage of common goods due to *distribution*.

As I already indicated, the declaration of this position or *ius* is intimately linked to equity. In legal historiography there is a strong and extended tradition concerned with *equity* and the relationship it has with *ius*. Apparently, in a certain moment in the Middle Ages it was believed that equity or *aequitas* consisted in the correction of legal precepts due to the insufficiency of their *universal and abstract expression*. This correction of the law was rooted in interpreting the text in order to extend or narrow the semantics of the terms in order that their meaning might "fit" a greater quantity of concrete cases than would be the case if their terms meant what the legislator wanted in reality. This understanding of things had the effect, in later centuries, and even until today, of provoking a confusion between *aequitas*, *ius*, and *epieikeia*.

Originally *ius* and *aequus* were the same, both were decisions or declarations of positions by the wise. There was only a subtle difference, which consisted in speaking of *ius* when there existed formalized or *positivized* sources, in the sense in which the term is currently used, as something that is in force and socially recognized, and on which a judicial decision or act of positioning could be based. In contrast, when there existed no formalized sources on which to rely, and one had to decide or *position* some thorny case, jurists appealed to the term *aequus*, indicating thereby that the solution handed down

was not based on a socially accepted source of *ius*.[34] Through Cicero's influence the term *aequitas* was used as equivalent to *aequus*.[35]

D'Ors en "*Aspectos objetivos y subjetivos del concepto de «ius»*"[36] carried out a study of the term in jurisprudential sources. He shows that the term has an *elastic meaning*, which can extend from what today we understand as an objective concept of law to a subjective concept. It also makes it clear that *the Romans never distinguished the two concepts in a rigid manner*. This permits inferring that this understanding embraces everything from the norm or mandate to the notion of faculty, passing by way of a series of meanings such as the place where justice is done, the act of enunciating the just decision, or the art with which one discerns the just. D'Ors indicates that *ius* can be understood as signifying either objective aspects or at times subjective aspects, where these extremes cannot be seen as core meanings, but rather that *ius* presents itself as *integrating both aspects*. He makes it clear that a division among senses or meanings would not be faithful to the Roman mentality.[37] In Roman texts, the word *ius* at times gives the impression of signifying an ordering (or *system* in Polo's words) and at other times it appears to indicate the title that undergirds the faculty, that is, it has a dynamic meaning; in the end, it bears neither the one nor the other meaning in exclusion of the other. *Ius* instead is constituted within a *complex of concrete realities* that present an intermediate concept between both extremes.[38]

This corroborates what was expressed above concerning the juridical as *that which is imposed by judges*, and in particular to

34 A. GUZMÁN BRITO, *Historia de la interpretación de las normas en el derecho romano*, Santiago de Chile, Ediciones del Instituto de Historia del Derecho Juan de Solórzano y Pereyra, 2000, 231ff.

35 A. GUZMÁN BRITO, *Historia de la interpretación de las normas en el derecho romano*, Santiago de Chile, Ediciones del Instituto de Historia del Derecho Juan de Solórzano y Pereyra, 2000, 243ff.

36 D'ORS, Á., "Aspectos objetivos y subjetivos del concepto de «ius»", *Studi in memoria di Emilio Albertario*, II, Milano, Giuffrè, 1953, 277-299.

37 A. GUZMÁN BRITO, "Historia de la denominación del derecho–facultad como *subjetivo*", *Revista de estudio histórico-jurídicos*, XXV (2003), 407ff. He makes it clear that in Rome there were expressions in use such as *potest licet*, *facultas*, *potestas*, but there was no source that says that *ius* signified this *potestas* or *facultas* of persons.

38 D'ORS, A., "Aspectos objetivos y subjetivos del *ius*", *Nuevos papeles del oficio universitario*, Madrid, Rialp, 1980, 280-285.

reveal the capacity or quality that enables them to define and establish (arbitrate or solve, in Polo's words) what the place or *position* is that corresponds to persons with regard to goods, that is, to carry out an action of placing. This position or *officium* (titularity in Polo's words), which persons have in regards to things, and therefore in regards to other persons, demands certain behaviors or competencies (potestas-faculties in Polo's words), which are not empty, but rather they contain an object (of action) which is translated into benefits (those which are socially demandable), by way of which the relation is corrected or adjusted. That is, geometric equality is restored by commutation and arithmetic equality is restored through distribution (here we have a part of the social function that Polo speaks of). This embraces the complex of concrete realities that extend from those which are subjective to those which are objective. It also explains why the place where justice is determined can be called *ius*, applying the name of what is done to the place where it is done; it would also explain why one can apply the name *ius* to the act of *stating the just decision*, the art with which one can discern what is just, and even *aequus* (for Polo there exists here an art or system and arbitration or solution of conflicts among rights-holders), with some of these questions having been formulated by the jurisconsult Julius Paulus.[39]

It must be noted that the position as such is a fiction. Polo frequently speaks of the norm as a fiction, and thus that *ius*, qua position established by the judge, is also fictitious; this allows undertaking conduct in view of achieving an end, in this case the restoration of justice. The norm or *ius* feigns, but it has its basis in the web of circumstances that surrounds it spatiotemporally.

Ius, then, is the result of human production, but not in a pejorative sense, but rather as a continuation of nature. Some authors speak of the unreal object or else the unreal being[40] of the object, in this case the practical object, which is the exemplar, form, archetype, model, project or plan for the making-real of artificial things. In certain passages Polo speaks about the fiction as being a continuation of nature in order to achieve "the opening of an ambit, which, not being strictly real in the way that physical nature is, is instead made up of a

39 *D.* 1.1.11.
40 MILLÁN PUELLES, A., *Teoría del objeto puro*, Rialp, Madrid, 1990.

set of meaningful references, which are added like something *that is woven in.*"[41]

Finally, it can be said that the position or *ius* of the Classical period indicated that *an act does not do harm to another person*, which confers upon it *a reach that is limited to the concrete case in question*. This non-harming act was licit and socially binding, and as a result had normative value. It signified action and was determined [in its character] via decisions. *Ius* was developed always in contact with reality, far from what is currently understood as abstraction and generalization. It was, then, *the art of performing justice*, and not a *set of norms to be immediately applied*. The *ars boni et aequi* of Celsus indicates that law in his time was an art of performing justice, of in each case making concrete the precepts deduced from it: it was a manner of dealing with juridical problems that produced norms, rather than a set of norms already developed. Because it is an art, *the Romans were not ruled by ius*, but instead *they employed it*. *Ius* did not rule as did the laws or customs; rather, it was used or it was established: *constituit*. The technical character of *ius* was manifested in the definitions of the various sources, which were characterized by the various modes of being established. This is why in Rome there was *iura* and not only *ius*: *ius civile*, *ius gentium*, *ius naturale*, *ius honorarium*, etc. *Ius* is thus a manner of formulating norms. This is why *ius* is both the *honorarium*, the *civile*, as well as that which was established by employing the *leges*[42].

These conclusions permit taking the *position* or *ius romanum* as one of the historical models with which the Polian notion of law can be reconnected. Advancing the conclusions, one can say that the notion of *ius* as *position* is able to help understand why the function of law has been the same throughout history, and why it is coherent with Polian anthropology and theory of knowledge. This philosophy can, in a coherent manner and without contradictions or aporias, explain *iurisprudentia* as human action, integrated into human time, an action in which the cognitive and volitive dimensions of the human *essentia* intervene.

41 *Quién es el hombre. Un espíritu en el mundo*, Madrid, Rialp, 2nd ed., 172.
42 GARCÍA GALLO, A., "*Ius* y derecho", *Anuario de historia del derecho español*, (1960), 30, 29-33.

c) Nature of *lex*

In ancient times, *lex* was something distinct from and irreducible to *ius*; however, it is also not correct to see it as the equivalent of *directum*, since this latter signified a *ius-lex* only beginning in the 5th and 6th centuries, that is, a *ius* that was codified primarily in *leges* and applied (while re-working it, at least partially) by the tribunals.

Lex is the result of a normative action for regulating the social order with the purpose of preserving it or enhancing its capacity for survival; it is a regulation that permits the people integrated into these societies to attain their plenitude. It would be a certain *rule of behavior that orients action towards the future* and which is the result of an *imperative declaration of the potestas* and which governs society, whether the *potestas* is executive or legislative. It is, in the end, the result of temporal human action.

As has been said, *lex* is set out by the person(s) in charge of the community, which over the course of history has been the political-governing *potestas*; it is, therefore, the result of the exercise of the *potestas*, that is, the *exercise of power*, the expression of a will, but which must necessarily be *socially recognized*; therefore it is an *imperative declaration* on the part of the one who exercises the political power, however, in order to exercise this power one must have the acceptance of society. The power which is exercised is the "disposición personal de los medios necesarios para configurar la convivencia de un grupo social", which is only attained through social recognition.[43] This, then, would be the *genuine* sense of the Latin word *lex*.

Lex, therefore, would be a norm, similar to that of *ius*, since it seeks to resolve social problems, but it *is not the same as ius* or *medium rei*, but rather is a *certain aspect* of it. *Lex* does not resolve present-day problems that arise from human actions in the past; rather, it establishes the exemplars or archetypes (practical objects) for the resolution of problems in the future. As a result the judge is not a mere *applier* of norms; rather, he interprets them (understands and re-elaborates the practical objects that they contain) and if they are appropriate for correcting relations he will use them entirely or in part, just as he does with *the other sources of ius*. The judge may even

43 DOMINGO, R., *Teoría de la «auctoritas»*, Pamplona, Eunsa, 1987, 227ff.

decide not to take into account the norms contained in the laws, and as a result may have to develop a new norm, which will express a new solution that has no precedent in prior norms.

Lex is related to the common good, since it has as its purpose not only the subjection to norms of the relationships of private usage of goods but also the relations between the persons who employ a common good, a fact that constitutes such persons as communities. The laws also regulate organically the powers of the state and its actions, that is, they organize the political society. For Polo these would not properly be norms, but rather the result of organization, administration and planning.

The employment of the good within the relation of private usage has two faces: on the one hand it is something that employs each and every one of those who take part in the commutation, but on the other hand, it is a common good that this relation of employment or use is geometrically equal; in some way the rest of the persons participate arithmetically or proportionally in that good. This is why the legal system has also regulated private relations. The labeling of these relations as private, between concrete persons, or public, i.e. that affecting the whole of society, is a very broad topic that I will sidestep here. In addition, the *lex* has also regulated the relations that are established between persons with the purpose of the employment or usage of common goods.

This description permits locating the moment of the *lex*: thinking ahead towards rules and norms for ordering society and avoiding conflict is prior to the conflict itself. In addition, the *lex* can be posterior to *ius*, such that it will be the result of working out the *ius*, but it is done in order to subject future social relations to norms so as to avoid conflicts. *Lex* therefore is promulgated in order to promote patterns of behavior that avoid conflict and preserve the common good. It is of little importance that in order to subject the behavior of a community to a norm one works out the *lex*, as contemporary juridical doctrine holds, *in general and abstract terms*; or that it is designed in order to subject a specific relation to a norm, that is, to a relation between concrete persons in determined times. It is not innate to *lex* to be described in general and abstract terms. From the point of view of the Polian theory of knowledge this would be absurd, since if the law is to be something that *contains practical objects*, the result of knowledge of reality in order to promote action, it cannot be

an enunciation that results from an inchoative operation and the path of generalization.

d) *ius* and *lex* in late antique jurisprudence

Specialists point to a multitude of facts that halted the development of jurisprudential literature, i.e. of the most scientific nucleus of juridical thought, whose content comprised resolutions to problems between persons concerning the employment of things.

Beginning in the 19th century this historical period has been denominated *postclassical*, which has been closely related to the idea of a legal system in decadence. Nevertheless, a considerable number of authors[44] have reacted against the impoverished vision others have had of the legal system of those times, and have coined the term *late antique law* as a symbol of its re-evaluation. These authors distinguish three great epochs of the postclassical or late antique period of Roman jurisprudence: the Diocletian, from 230 AD. to 330; the Constantinian, from 330 to 430; and the Theodosian, which extends up through 520 and includes the Justinian Compilation.

In the Diocletian stage the study of classic sources was maintained. Their great interest in systematization, influenced by the study of rhetoric and grammar, led the new jurists to *understand the sources from a dogmatic perspective*, which gave rise to certain *fixed formalisms*. At the same time, the activity of the jurists became more vulgar. This means that it did not make use, with such specialization and refinement, of the concepts and norms elaborated by the classical authors, particularly in the domain of contracts. A similar situation occurred with the procedural law of the classical period. In a word, the ancient legal system was substituted by simpler conceptions, poorer conceptions, destined to be used in the tribunals and hence in the solution of cases.

Beginning in the Constantinian era, and with definitive clarity in the Theodosian, one can perceive that these vulgar—or rather, less clear and precise—legal concepts have begun to dominate; this is obvious in imperial legislation, and equally so in juridical literature.

44 SCHULTZ, FRITZ, *History of Roman Law Science*, Oxford, Clarendon Press, 1967, 262ff.

This constitutes the framework for the transformation of *ius* into *situation*.

In this period there was underway a transformation of the understanding of *ius*, ceasing to be that of *position* and becoming instead *situation*. This transformation goes hand in hand with the monopolization of the sources of *ius* by the emperor. In broad strokes, this monopoly consisted in the reduction of sources to one alone, the law, although it is expressed in a typology with several variants.

In the ambit of jurisprudence this transformation takes its starting point from the establishment of *ius publice respondendi*, which had the result of changing the work of the judges into something public and official. Their activity consisted in developing the *responsa ex auctoritate principis*, which, since it is a public and official activity, granted to these *responsa* the character of *ius publicum*; that is, *iurisprudentia* became a source of *ius publicum*. This would slowly shape the legal system towards having a public character, since even the results of an agreement between (particular) persons *will consist in setting into motion a series of effects contemplated in the laws*.

The norm *described in the text of the law will describe a behavior that, when someone performs it, will produce determined effects that are also described in the same law*. Therefore, particular persons only *have to situate themselves in the conditions described in the laws in order that their effects might apply*. This means that there no longer is an elaboration of that *ius* which is able to recognize *officia* from which one can demand the exercise of competencies. Now, it was a matter of seeking to attain the desired legal result by means of performing the acts (situating oneself) described in the law. In this consists the transition from understanding *ius* as *position* to that of a legal system that establishes *situations* described in the norms; from *ius* as *position* to *ius* as *situation*. Private *ius* is changed in that moment to a "*ius publicum* which is directed towards regulating the activity of private autonomy, given that this autonomy does not produce *ius*, but rather the latter, *ius privatum*, is produced by public norms that canalize private autonomy."[45] The *ius privatum* will consist in the "dispositive norms that individuals can adjust according to their preferences, according to what is helpful for them, that is,

45 D'ORS, A., "De la *privata lex* al derecho privado y al derecho civil", *Papeles del oficio universitario*, Madrid, Rialp, 1961, 252.

according to their particular *utilitas*."[46] Here the *ius* situation is no longer an *ars inveniendi* or a technique for an invention or discovery based on sources, but instead it is the application or declaration of what the *lex* resolves.

The term "situation"[47] currently signifies an accident of things by means of which they occupy a determined place, the manner of someone or something's being in any aspect,[48] the constitutive state of things and persons,[49] and the action and effect of situating or being situated. D'Ors, when dealing with this issue, does not make a distinction as he did for the case of the term *position*, where he expressly uses the term to designate the spirit of *ius* in the classical period. For the case of the term *situation* he makes a vague reference to it, but this effectively serves to demonstrate the new spirit that *ius* is provided with.

This new spirit can be expressed as "action and effect of situating," that is, "placing," "put in a place," "put oneself within," "putting oneself in the interior of," "putting oneself at a lower place," "putting oneself underneath." This indicates that the person, through his own will, no longer locates himself in relationship with something, but rather he is within or beneath something. Therefore, this "something" under which or within which something is located, would be what is principal, would be the reality in function of which human action is carried out. In a certain sense it could be said that human beings would relate to each other, thanks to the employment or usage of things, but that relation would be in some way mediated by the juridical order. It would appear, with this, that the order was already developed and it only remained to put it into action, which introduces an idea of non-temporality or anhistoricity into *ius*. In *ius* as position, the relation between persons due to the employment of things is assumed, and the jurist determines the position and the behaviors that are correlative to that position. In contrast, in the new understanding of *ius*, situations are described in the texts and persons

46 D'ORS, A., "De la *privata lex* al derecho privado y al derecho civil", *Papeles del oficio universitario*, Madrid, Rialp, 1961, 253.
47 Concerning its origins see COROMINAS, J., AND J. PASCUAL, *Diccionario crítico etimológico castellano e hispánico,* Madrid, Gredos, 1991.
48 MOLINER, M., *Diccionario de uso del español,* 2nd ed., Madrid, Gredos, 1998.
49 REAL ACADEMIA ESPAÑOLA, *Diccionario de la lengua española*, 23rd ed., Madrid, Espasa Calpe, 2014.

protect themselves with these juridical garments, producing the effect established in the texts themselves. Here the text of the *lex* is immediately normative, which is why *ius* and *lex* began to be identified with each other.

In addition the reference to the "occupation of a determined place," and to the "way of being situated of someone or something, in any aspect," permits describing the new spirit of *ius*. This is due to the fact that "a determined place" refers to the same reality, in function of which somebody locates or situates himself. One perceives that *ius* is no longer a dynamic reality as in the case of *position*, but it continues to maintain a voluntary character, that is, that of the free act, which tends to locate itself in function of something, and that this something, because of its own power or virtue, operates and produces effects.

Situation instead means a locating within something that has clear limits, limits which cannot be transgressed, a certain corseting that occurs only in one way, which has fatal results where there is no possibility of nuancing the results according to utility or necessity. This is very probably the cause due to which, during the late antique period, a notable part of imperial legislation, the *rescripta*—that is, casuistic responses of the emperor—had the function of *conceding a favor*, that is, *setting aside the general discipline of the law*, in Constantine's period this provoked a war, not against this source of *ius*, but rather against the extensive analogical application of its effects to similar cases, in an "authorized" manner.[50]

The new *ius* involves *categorizing according to the guidelines of a structure* foreign to one's own will; it is, rather, a way of covering the actions for their protection or control, even if in the end it is not clear whether it is able to protect and control effectively. This coverage will be, in the end, that which is unfolded in the so-called objective law, or the objective meaning of *ius*, the same meaning which gives origin to its subjective counterpart, qua the faculty or right to act, and thus fulfills the direction or guidance signaled by the normative meaning.

50 MANTOVANI, D., "Il diritto da Augusto al Theodosianus", *Introduzione alla storia di Roma*, Milano, LED, 1999, 517.

e) A function not fulfilled in the same manner

In order to explain titularity (the holding of a right or title) Polo gives the example of the sign that says "No Trespassing" at the entrance to a piece of land. This titularity allows for explaining both models of *ius*. First, there is the ius of the *position* elaborated through the *auctoritas* of the (practically) wise by means of the employment of the *ars iuris;* and later there is the *ius* of a *situation* expressed in the legislation that is then imposed by the imperial *potestas*. This situation, developed through the work of lesser intellectual quality—according to the dominant historiography—on the part of the "wise" who have suffered bureaucratization, is no longer the result of an *ars*, but rather it is a *direct* subjection to the norms of the legal text, and of an applicative and practical interpretation on the part of the tribunal. Despite all this, there is room for an *ars*, albeit interpretative, rudimentary and perhaps of a low intellectual level: the mere *application of norms*.

In the case of the classical *ius*, the work of the praetor would grant the corresponding action (civil or honorary) if he understands that the facts are plausible and if they involve an economic imbalance. With this action, the case is passed to the judge in order that, if the facts are shown to be true, those facts demand from the transgressor the behavior of compensation of the damage done. This model is, therefore, resolutive, since it permits resolving the controversy, which represents a social function: the parts are no longer in conflict and it is assured that this social cell cannot contaminate others. In addition, action obedient to the determinations of the judge is action that will permit the acquisition of virtues. In order to verify the artistic dimension of this jurisprudential model, one need only glance at *Historia de la interpretación de las normas en el derecho romano* of Alejandro Guzmán[51]. This jurisprudential task is longer, and supports itself less through sources with social recognition, since they *are under construction*, especially dogmatics. Rather, it supports itself more on the cognitive capacity of persons to know reality; this makes it a very exact model in regards to knowledge of the imbalance of relations and of the mechanisms of rebalancing.

51 Santiago de Chile, Ediciones del Instituto de Historia del Derecho Juan de Solórzano y Pereyra, 2000; México, Suprema corte de justicia de la nación, 2013.

The second case, that of late antique law, is a process that is very similar to that found in modern procedural law systems; in general this process showed less creativity in the area of dogma. It did not produce the quantity of figures and institutions that the classical period did: it was, more than anything else, applicative.[52] It did not create new legal concepts for the resolution of conflicts, such as avulsion, but it did *make use of the classical concepts in order to resolve the problems surrounding employment or usage of things*. What is novel is not the process but rather the understanding of *ius*, not as *directum*, but as a situation. That is, one leaves to one side an understanding of *ius* as the exercise of a position established by the judge by means of an *ars* with a basis in a plurality of sources; instead, *ius* comes to be understood as a situation described in a legal document that has immediate force. This *ius* now *does* have a clear subjective sense, with the result that the split between the norm and the titularity comes to pass. *Ius* is established in legislation, which derives from a single source, with the result that the *ius* constituted by this source is a norm, i.e., modern objective law. It needs to be noted that in this epoch classical judicial literature is not law, but the legal system itself admits it as a *ius* that remains in force.

Via this process one proves that one is in a determined situation addressed by the legal system in order that the consequences collected in the system itself are made operative. Here a subjectivity is made manifest, one which will later be understood as subjective law, to the point of understanding a given *ius* as something *transmissible*.[53]

This model of jurisprudence did not turn out to be as exact as the previous one, since it is no longer a free expression of the cognitive faculties on the part of the juridical actors, principally the praetor and the judge, who used whatever source of knowledge that might permit them to find a solution to the case. This new model of jurisprudence uses the solutions invented by the classical authors as institutionalized mechanisms that already have a solution for the problem posed. In other words, this model of jurisprudence consists in finding the solution within a system, and no longer in reality, which is why it cannot be as exact. Along these lines, the *aequus* or *aequitas* of this

52 Cfr., MANTOVANI, D., "Il diritto da Augusto al Theodosianus", *Introduzione alla storia di Roma*, Milano, LED, 1999, 508 and 519ff.

53 D'ORS, A., "Aspectos objetivos y subjetivos del *ius*", *Studi in memoria di Emilio Albertario*, II, Milano, Giuffrè, 1953, 297-9.

epoch is already charged with a new conception about the role of the legislator, such as that of granting clemency, mitigating the rigor of the old laws, favoring the moralization of the empire's subjects; closer, therefore, to the current sense of *epieikeia* as corrector of the meaning of the legal text.[54]

In this jurisprudence the essential notes proposed by Polo are present, since what the plaintiff seeks to prove is the existence of a titularity in order to make use of the faculty that it confers. This ordering is systematic, and develops artistic solutions for the purpose of the resolution of conflicts in order to achieve a social function: the peace of the realm. This confirms that law had already experienced a historical variation, that its function is the same *but has not been fulfilled in the same manner*: very probably with less quality.

f). The origin of the *directum* and the key for its Polian renewal

The systematic construction *in which immediately-in-force solutions to the problems of social reality are found* is the ideal breeding ground that will permit the arising of *directum*. The late antique period laid the groundwork for the development of a *system with pretensions to hermeneutic completeness*, *in which one can find every possible solution to real problems*. This means, in very broad strokes, that one begins to see reality being left behind as a source of *ius*, so that instead the source would be the system itself. This is the key characteristic of *directum*.

Even while the work of jurisprudential elaboration endures, with the passage of time the understanding of the just as a situation formed a mentality amongst the people whereby *ius* and *lex* were

54 "The critical function, at that time recognized as equity, advanced in sync with the emperor's progressive taking-over of the power to interpret, and of the narrowing of the faculties legitimately exercised by the judge thanks to the referral to the legislator, which culminated with Justinian, who was able to proclaim, as a principle, that 'the emperor alone should be considered as both author and interpreter of the laws' (...) With the power of interpreting and the power of legislating mixed together in this way in the person of the prince, the employment of equity as a critical-interpretative tool did not imply the exercise of a legislative power by someone who lacks it, since, by definition, equity, when playing that function, implies legislating." A. Guzmán Brito, *Historia de la interpretación de las normas en el derecho romano*, Santiago de Chile, Ediciones del Instituto de Historia del Derecho Juan de Solórzano y Pereyra, 2000, § 47.

synonymous. Together with this semantic translation, *ius* as the integrator of senses broke down: on the one hand there would be the legal text, or "law" properly so-called, and on the other hand, the faculty, the law-faculty or subjective law.

In order to understand the transformation of *ius* into *directum* and the assimilation of this latter to *lex* we will have to bring into play a hypothesis proposed by Alfonso García-Gallo,[55] which allows understanding the transformation of *ius* into *directum*. We may then continue on this basis with the confirmation of the historical variation of law, and understanding that its function would be the same but not carried out in the same manner. This *will contribute directly to carrying out a philosophical reflection on the law*.

García Gallo holds that the arising of the term *directum* and of *the reality that this term designates* is a phenomenon of the Romanesque or Romance period. It is based on the fact that *ius* and law, at that time, in fact signified the same thing. He emphasizes that the term *ius* does not pass to Spanish, unlike its derivatives "juzgar" (to judge), "justo" (just), "jurisdicción" (jurisdiction), "juicio" (judgment), etc. On the contrary, there are no derivatives from the term "right" that express these derivatives of *ius*.

Ius appears in archaic Latin and remains up to the present without morphological variants, while on the other hand *directum* does enter the Romance languages as a functioning root for other terms. It was used in the classical period as a participle of *dirigere* as well as in adjectival form, but it does not appear as a noun in that epoch. On the other hand, in the classical era and in the Middle Ages *directum* is never written in the place of *ius*. Nor in Romance languages did anyone seek to adapt *ius*, but rather all writers used derivatives of *directum*. *Directum* as the designation of a certain juridical order was used in vulgar Latin or low Latin, and does not appear in the Roman literature. In order to understand why and how *directum* acquired the juridical meaning in speech and ended up by displacing *ius* it is necessary to look at the popular spheres.

García Gallo holds that the term *directum* signified *norm of conduct*. This has its origin in the influence of Christianity in the Roman

55 GARCÍA GALLO, A., "*Ius* y derecho" *Anuario de historia del derecho español*, (1960), 30, 5-47.

Empire, where the Christian law would be the right and just path. The principal peculiarity of the law conceived of as path or way is that it *guides or directs*. In this way, path and law are identified on occasion, since the Christian law is understood as a guide, a path or a *directio* (not yet *directum*); that is to say, guidance or direction presupposes norms or laws.

The axis of the hypothesis of García Gallo is rooted in the fact that the word *directio* expressed the action and effect of directing, but not *that which directs*, which is the nature of the law. Nevertheless, *this morphology also was transformed into a noun, "that which directs." This process of transformation of the participle into a noun is very frequent in Latin*, where the law or path as *a set of norms of conduct* became designated by the noun *directum*. At the end of the 4th century this idea was already in general circulation, such that the noun *directum* had as one of its meanings *lex* or *set of directive norms for following a path*.[56]

In addition, *lex* came to be understood as the ordinary form of elaborating norms; that is, *ius* became assimilated to *lex*. In parallel, the word *directum* became *secularized in order to express the Roman juridical order outside of circles of religious cult*, where it displaced *ius* as what denominates a legal system. This primarily indicates that by way of Christian influence the understanding of the norms that guided along the path qua law, *directum*, changed to designate *ius romanum* and second, that after the triumph of the *lex-directum* mentality, the term *ius* was supplanted. This indicates that *directum* expressed better than *ius* what this reality was in the postclassical era. *Directum* expressed the ordering that directs, more than the rectitude of what is "ordered" in this way; it thus expresses precepts that indicate to people what the path or behavior to observe are.

And further, in addition to the *ius romanum* of the late antique or postclassical world described, during the low Empire there developed another legal system termed "vulgar" law, which was essentially consuetudinary. This legal system presupposed the regulation of social life, but this regulation was not the result of art, as was the *ius romanum*. In these norms of vulgar law is where the society of the low Empire found the norms of conduct for guiding itself. Probably

56 Ibidem, 22.

for this reason, this legal system—which had little to do, in terms of its content, with the *ius romanum*, and which had been more influenced by Christianity than by the jurists—was called *directum*. The common people probably called the living legal system *directum*.

García Gallo holds that the *lack of expressiveness* of *ius* was the cause of its falling into disuse, since what is designated by *ius* is not what the common people saw in the real world. *Ius* designated an active process of the formulation or exposition of norms; *directum expressed the directive character of the norm*. The people appreciated the ordering character of *directum*, so that, as happened with Christian law, *postclassical Roman law, in parallel with vulgar law, was a legal system that the people found to be pre-given and collected in books in the way of something already crystallized, that is, a system of already-constituted norms by which one must guide oneself in life*. The people had lost sight of *ius* as being a prudential technique for the resolution of problems, but they had something more useful and which would rule their lives directly without the necessity for arts and techniques: the *directum*.

Thus *ius* and *directum* designate two different legal systems that coexisted until the 7th and 8th centuries, with this coexistence supported by the study of books about *ius romanum*, which remained a source of inspiration for legislation. When these books were no longer studied, *ius* was forgotten about. This is the moment of triumph for *directum*, which resulted in the oral meaning of this term passing into writing.

Ius gained new life with the rebirth of Roman law, but it was translated using the Romanesque terms derived from *directum*, which meant that its difference from this latter term disappeared. Not only the word *directum* but also the mentality and the aspiration to systematic order that society had, meant that society interpreted *ius* and the science of *ius* as being a *directum*. That is, the *interpretative load that was dominant in the imagination of society* made the people of that era see in that science of the Glossators and Commentators something that *ruled conduct immediately*, and not only as a technique that developed solutions to problems. In the end, *not only did the word directum triumph, but also what it expressed*. The *ius* of Celsus, the technique of jurisprudential elaboration, and the distinction between *leges* and *iura* were forgotten. From that point on, *directum* came to signify *the legal system as such* without any consider-

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ation of its origin, the manner of its formulation and the application of a solution, which meant that the term *directum* did not come to cover these aspects. As a result, the adaptation of the legal system to justice continued to be *iustum* or *rectum* and not, for instance, the Spanish *derechurero*, which is why today the law is termed just.

This explanation of the transformation of the classical *ars iuris* into *Romance law* permits a clear understanding of the fact that *it is not just the name that varies*, but rather it is *above all and fundamentally the content*, that is, *the manner of understanding the discipline and living in society*. This new understanding survives up to the present day.

As was stated at the beginning, the meaning of the rest of Polo's philosophical works impeded a direct identification between the elements of the definition of law in Polo (the *basic notions of law*, such as its social function, artistic dimension and essential notes) with these same notions in their dogmatic modern version. It also impeded the identification with the notions extracted from the legal systems of the remote past (classical jurisprudence and that of late antiquity). This is due to the fact that all these basic legal notions, ancient and modern, have their basis in anthropological coordinates and gnoseological bases that are different from those of Polo. It must be reiterated, then, that one cannot understand Polo in a simplistic manner; rather, one must keep present the historical burden of each term (the layers or "geological-semantic" substrates). Otherwise, one will construct a frame whose structure is difficult to elaborate.

Understanding the original meaning of concepts such as *ius*, *lex* and *directum* permits understanding the anthropological and gnoseological coordinates in which the *basic legal notions* are contextualized and prevents the Polian notions from being assimilated to them in a promiscuous manner. The fact that the function of law is the same over the course of history does not authorize one to employ the notions without distinction. Titularity, for example, understood as *officium* among the classical authors, is the result of a *position* established by the *iudex* by way of the *ars iuris*. This titularity is different from that described in the late-antique *lex*, for which the "title" means *situating oneself* in a type that is described in the *lex* that has immediate force, i.e. as *directum*. The same can be said of titularity in

modern dogmatics, which is hidden behind the *legal hypothesis* as a *constitutive fact or efficient cause of a right*[57]. Concerning the faculty, it can be said that the competence derived from an *officium* given by the *iudex* by means of *ars iuris*, is not the same as the *facultas* derived from being located within a mandate or prohibition of the *lex*, which has clear limits that cannot be surpassed and which are in force immediately as a *directum*. The faculty is also different from the modern dogmatics derived from the legal norm associated with subjective law and with a possibility whose realization is legally permitted[58]. The artistic dimension of the *ars iuris* is as a set of cognitive methods that combine sense knowledge with logic, principally the dialectic and the analytic, and also with elements of rhetoric and oratory, all these destined to know the position or *ius* that the juridical actors hold and from which the *officium* and the competencies are derived. In late antique jurisprudence, according to what certain specialists tell us, this set of tools is left aside in order to make a place for a more pragmatic way of thinking ordered to the *direct* application of the *situations* described in the *lex*. Finally, under the modern doctrine one has available for use a varied and well-developed logical "toolbox" which is aided by techniques of interpretation, exegesis and the integration of legal precepts for their application[59]; in addition there is help from sense-knowledge, since the proofs—witnesses, documentary evidence, ocular inspection, etc.—are eminently sensory, and are able to invalidate the logical tools. For Polo this artistic dimension cannot base itself solely on sense knowledge and on the unification of the *logos*, and even less so on the verification of the logical by the sensory; rather, one must open oneself to the rational path, to practical knowledge and especially to the higher cognitive dimensions, especially the habits. I hope this brief approach to these notions will be sufficient as an example; for a more in-depth development it would be necessary to notably exceed the number of pages permitted by the editors.

57 E. GARCÍA MAYNEZ, *Introducción al estudio del derecho*, *Porrúa*, México, 53rd ed., 2002, 171-2.
58 Ibidem, 16-7.
59 Ibidem, 317-387.

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3. TIME AND ACTION IN LEGISLATION... AND IN JURISPRUDENCE

After this descriptive historical exercise one realizes that it is unnecessary to dedicate a specific section to dealing with the role of temporal human action in the drafting of legislation and in jurisprudence. This description *is in itself the way of dealing with human temporal actions*. Prescinding from human temporal action would make it impossible to speak of legislation, of jurisprudence and of justice. This permits an understanding that *jurisprudence and legislation dissolve themselves into temporal human action* (or simply *human actions*, since there is no such thing as a non-temporal human action). It has also permitted one to see that the essential notes of the Polian notion of law have been present in the different ways that law has concretized itself throughout history: a system for the solution of conflicts between facultative titularities. The same occurs in regards to the function of law in the life of human beings.

This succinct traversal of some of the historical phases of *ius*, of *lex* and of *directum* has made manifest their temporal character as well as their "active nature," i.e., their character as being *human actions*, *layered one atop another as with geological strata*. These strata-actions have precise meanings, which, if they are misunderstood, raise the risk of *confusing* or *mixing together* certain strata with others, with the result that philosophical reflection is supported not by reality, but rather by an amalgam of anachronisms and unreal mixtures.

It has been important to make this historical traversal in order to understand how law is traversed primarily by the theory of knowledge, that is, the different levels of cognitive acts that permit knowing the reality in which the human person lives and makes his essence grow. In second place, in order to understand that law is penetrated through by the topics that are known through the exercise of cognitive acts. Not just physical, extra-mental reality, which is what is immediate and whose employment or use is what causes the conflict to break out, but the other topics are present as well. On the one hand, the habitual knowledge of what the human being is (*essentia* and *esse*), since physical realities are aimed or directed towards it: they are external goods and the goods of the body. On the other hand, this habitual knowledge of what the human being is opens the door to the knowledge, also habitual, of that which coexists with the

human being. This signifies that knowing *rationally* the *just solution* or the just *position* of the persons in a concrete conflictive relation of employment of goods, implies both knowing physical reality *sensibly* as well as *habitually knowing* Being, being, causality and the *esse hominis*, since that concrete case is inscribed into the *co-existence* that all of these form. This is the origin of *ius naturale*, a term coined by Roman jurists; not, however, of *lex naturalis*, which was also used by the jurists, but only in three fragments.

The theory of knowledge of Modernity (which in law dates from the 12th and 13th centuries), based principally in generalization and restricted to this side of the mental limit, fragmented the unity of *ius* (*directum*), such that only certain aspects of the latter are taken into account. The result is that the law becomes *conflictivist* and in addition, the cognitive capacity for knowing reality that is exercised by the praetor is set aside, together with the praetor himself, in order to make way for an omnicomprehensive and complete system of juridical hypotheses, such that mechanisms like honorary actions and *aequus* are no longer necessary, since the legal system now contains everything: *it is hermeneutically complete.*. It even establishes mechanisms of composition of norms in accordance with the generalizing canons of the system itself.

This obscuring of the cognitive capacity also affects the judge-functionary, who is now the only agent of imparting justice. This functionary is limited to *applying, by means of legal mechanisms* (procedural law), the juridical consequences designated in the legal system (substantive law); both of these laws are immediately in force for regulating conduct. This adjectivization of the noun is based on a scale of probative values also established by the legal system, since even then there was a lack of confidence in the capacity of the judge to evaluate these consequences in a "healthy yet critical" manner.

Even though the key juridical concepts that Polo sketches out should be interpreted historically, using the history of law in order to make explicit the content found in Polo's declarations, the juridical tradition nonetheless turns out to be insufficient. This means that the reality of the *ius-lex-directum* over the course of the centuries and across territories *does not exhaust the content* of the Polian philosophy of law. And this should not be any other way, since his understanding of law is penetrated by the potency of anthropology, the theory of knowledge, and by all the topics known once one has aban-

doned the mental limit. This is so because the different historical systems have been developed with a basis in the contemporary (to them) philosophical currents, which work on this side of the mental limit, and as a result it is impossible that they could have a reach that would permit its abandonment. Here, once again, *the necessity becomes patent of keeping present the meaning of the rest of the philosophical work of Polo.*

Despite this, the appeal to time and to history, to time and the action of the persons in it, is not anything vain; rather, it is necessary, since one must build on the basis of something given, of a real experience, in order to rework it.

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